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**LENGTH:** 16854 wordsComment: **Discrimination by Any Other Name:** Alternatives to Proving Deliberate Intent in Environmental Racism Cases**NAME:** Dora **Acherman****SUMMARY:**

... Although not exactly a ruling on § 602 of Title VI, the Court specifically cited Title VI legislation as the kind of regulation affected by the decision, thus foreclosing the alternative of using § 1983 to enforce § 602 regulations. ... The Third Circuit distinguished between the omissions committed in the deliberate indifference cases under Title IX and the policy targeted by plaintiffs under Title VI, and refused to "conflate" the deliberate indifference test with purposeful discrimination, finding the purposeful discrimination requirement from *Sandoval* to be stricter than a showing that the recipient was deliberately indifferent to the discriminatory impact of a facially neutral policy. ... NEPA contains provisions for public participation that can be useful in empowering communities by providing a forum for communities to educate the government on the disparate impacts that proposed actions may have on the communities. ... The Supreme Court of Connecticut, for example, has followed this narrow approach in a recent housing discrimination case pursued under Title VIII: An agency's obligation under 42 U.S.C.S. § 3608(d) affirmatively to further the purposes of the fair housing statutes does not create an unambiguous right vested in individual plaintiffs. ... Unlike civil rights laws in the United States, the language of international human rights laws can not be interpreted as being limited to proscribing only intentional discrimination.

**HIGHLIGHT:**

The law and the administration of justice should be the primary forces in combating the causes and effects of racism. Yet justice systems all too often fail in this purpose and instead mirror the prejudices of the society they serve. The problem is therefore twofold: it is vital that we work towards ensuring that every justice system has procedures and safeguards to prevent discrimination, including laws that prohibit and punish discrimination, and mechanisms to check and rectify patterns of discrimination. It is also necessary to ensure that discriminatory mechanisms and practices in the systems of the administration of justice themselves are eliminated.

Sergio Vieira de Mello <sup>n1</sup>**TEXT:**

[\*256]

## I. Introduction

Compared to other rights covered by the civil rights movement, the right to be free from disproportionate impact of environmental decision-making, or environmental justice, is a late comer to the civil rights vocabulary. The movement came to national attention in 1982, after protests against the siting of a PCB (polychlorinated biphenyls) landfill in a predominantly African-American community in Warren County led to hundreds of arrests. <sup>n2</sup> As a result of the protests, the U.S. General Accounting Office (GAO) held an investigation and published a report, <sup>n3</sup> which in turn triggered a comprehensive national study directed by the United Church of Christ Commission for Racial Justice (CRJ) <sup>n4</sup> looking into demographic patterns associated with the location of hazardous waste sites. The study concluded that the relationship between race and the location of hazardous waste facilities was stronger than any other relationship, including income. <sup>n5</sup> A second study conducted by the National Law Journal confirmed the findings of the CRJ study, and also found that the harmful effect of the disproportionate siting was compounded by the differential application of enforcement and remediation measures. <sup>n6</sup>

Environmental justice is considered a civil right, which is violated by environmental inequity. Environmental inequity is the actual or potential exposure of poor or minority communities to a disproportionate share of [\*257] environmental risk.<sup>n7</sup> Environmental racism has also been defined as a "breach of the human rights norm against discrimination."<sup>n8</sup> Since the beginning of the environmental justice movement, the effectiveness of civil rights legislation in addressing environmental inequities has been severely curtailed.<sup>n9</sup> Part II of this paper presents a brief history of the development of civil rights jurisprudence and its decreasing usefulness in dealing with environmental justice issues. Part III evaluates whether recent case law can validate some of the proposed alternative litigation approaches to reliance on civil rights legislation in environmental justice cases. Part IV examines the alternative of legislative reform, and Part V discusses international environmental laws and whether they can help alleviate some of the problems faced by environmental justice plaintiffs in United States courts.

## II. Environmental Justice Claims Based on Civil Rights Legislation

The most appropriate jurisprudential framework for claims alleging disproportionate exposure to environmental hazards is generally found in the Equal Protection Clauses of the Fifth and Fourteenth amendments of the Constitution. Equality jurisprudence created the framework that has been used to address inequality and prevent racially discriminatory actions in education, voting, housing, and employment contexts. The same framework should be appropriate for dealing with environmental racism.<sup>n10</sup>

Civil rights law has been described as a rights-maximizing approach to solving conflicts, as opposed to an interest-balancing approach.<sup>n11</sup> In the rights-maximizing approach of civil rights laws, a finding that a violation of a legally recognized right has occurred leads to attempts to vindicate the right, regardless of the cost to the wrongdoer or others. In contrast, environmental laws are seen as an "interest-balancing approach to resolving [\*258] conflicts."<sup>n12</sup> In an interest-balancing context, the decision makers consider factors such as economic costs and benefits, technological feasibility, or the reasonableness of the measure.<sup>n13</sup> Under an interest-balancing approach, there is always the possibility that another interest may justify the violation of the right.<sup>n14</sup> From the point of view of available remedies, there is a clear advantage to the remedies offered under the civil rights approach over remedies offered under an interest-balancing approach. However, the intent requirement under Equal Protection and Title VI legislation poses huge obstacles for those attempting to fight environmental injustice under a civil rights approach.

### A. The Intent Requirement In Equal Protection And Title VI

By the time environmental justice claims attempted to use equality jurisprudence, certain restrictions in the application of the Equal Protection Clause had already been put in place, severely limiting plaintiffs' chances of success. The first significant restriction was created by *Washington v. Davis*,<sup>n15</sup> where the Supreme Court held that in causes of action alleging violation of an Equal Protection Clause, proof of discriminatory intent was required. Evidence of discriminatory impact alone, the Court said, without proof of discriminatory purpose, is insufficient to establish a violation of the Fifth or Fourteenth amendments. In *Washington v. Davis*, the plaintiffs complained that the use of a test for hiring decisions had a disparate impact by race, excluding a disproportionate numbers of minorities from employment. The plaintiffs in *Washington v. Davis* did not state a claim under Title VII standards because, at the time the claim was filed, Title VII had not been extended to reach government employees.<sup>n16</sup>

In dicta, however, the Court admitted that under Title VII Congress had eliminated the requirement that plaintiffs prove the existence of discriminatory intent when hiring and promotion practices disqualified a disproportionate number of black candidates.<sup>n17</sup> The Court acknowledged that under Title VII it would be necessary for the defendants to actually validate the use of the test by demonstrating that it was a valid predictor of job performance, but refused to apply this "rigorous" standard to the Fifth and Fourteenth amendment analysis. The Court arrived at this disposition by relying on the principle that, on its own, the disparate impact of state action [\*259] did not constitute intentional discrimination.<sup>n18</sup> The Court resurrected this principle from some cases dating back over 100 years relating to jury selection and the exclusion of minorities from certain final juries. The *Davis* Court did not see any problems with applying the principle in the context of the standardized testing for purposes of employment, despite the obvious differences between the process of selecting a specific jury from a jury pool and the decision to use a test for purposes of decision-making in hiring.<sup>n19</sup>

Between the 1970s and 1980s, the Supreme Court acknowledged the difficulties inherent in proving the intent to discriminate, suggesting that statistical evidence of disproportionate impact was neither irrelevant nor "the sole touchstone of an invidious racial discrimination forbidden by the Constitution."<sup>n20</sup> Evidence of disparate impact was one of the factors that, viewed in the totality of all relevant factors, permitted an inference of invidious discriminatory purpose from circumstantial evidence. The Court refused to adopt a per se rule that a law that is "neutral on its face and serving

ends otherwise within the power of the government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."<sup>n21</sup> Under *Washington v. Davis*, however, although disparate impact on its own could not serve as a proxy for intent, it could be used as a starting point for an analysis of whether discriminatory intent was present, particularly if the policy could not be justified as serving other legitimate purposes. Thus, evidence of disparate impact served to shift the burden to the government. Through the years, however, this approach has gradually evolved and morphed into something quite different from what was suggested in *Washington v. Davis*.

A few months after *Washington v. Davis*, the Supreme Court decided *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>n22</sup> a case where a non-profit organization alleged that the Board's denial of a re-zoning to allow for building of low and middle income racially integrated housing was racially motivated. The Court acknowledged the difficulties associated with establishing discriminatory intent, and supported the idea that invidious discriminatory purpose can be inferred when a "clear [\*260] pattern, unexplained on grounds other than race" appears even though the legislation appears to be "neutral on its face."<sup>n23</sup> When no such clear pattern exists, "the Court must look to other evidence."<sup>n24</sup>

In *Arlington Heights*, the Court expanded on the factors to be examined in order to infer discriminatory intent that the Court had alluded to in *Washington v. Davis*. The *Arlington Heights* Court suggested a non-exhaustive list of five factors: the discriminatory impact; the historical background of the decision; the specific sequence of events leading to the challenged decision; departures from the normal procedure sequence; and the legislative or administrative history. Despite finding that some opponents to the project who spoke at various Board hearings might have been motivated by opposition to minority groups, and that the buffer policy used by the village as the main reason for refusing the building permit had not been uniformly enforced, the Court concluded that plaintiffs had failed to carry their burden of proof.

In fact, despite the list from *Arlington Heights* and the admission that sometimes the disparate impact is sufficient to establish intent, the current burden of proof for showing discriminatory intent could be described as requiring a "smoking gun." The level of proof required is illustrated by *Miller v. City of Dallas*,<sup>n25</sup> one of the rare cases where plaintiffs were successful in alleging discriminatory intent. The case was settled for an undisclosed amount once the court dismissed the defendants' motion for summary judgment, finding genuine issues of fact concerning whether the city of Dallas intentionally discriminated against the plaintiffs.<sup>n26</sup> In *Miller*, the evidence included a long and documented history that designated the neighborhood in question as a "Negro district" in the 1940s, followed by the construction of a levee project where the city was aware that it was not only excluding minority neighborhoods but the project would increase flooding problems in those neighborhoods. In addition to the refusal to provide adequate flood protection, the city had also refused to enforce laws regulating pollution in minority neighborhoods while enforcing the same regulations in white neighborhoods. In sum, the *Miller* decision indicates that "absent a history of racial segregation and documented government policy promoting discriminatory practices--both typically rare in environmental justice cases--claims of intentional discrimination will not succeed."<sup>n27</sup> The Court chose to use the *Yick Wo*<sup>n28</sup> standard as a threshold. In [\*261] *Yick Wo*, no Chinese person was granted a license to operate a laundry from the permitting agency, while no white person was denied a license, in a situation where there was a perfect correlation<sup>n29</sup> between race and denial of a privilege. There, the court found that the disparate impact alone was an indicator of intent. The *Miller* Court's choice of *Yick Wo*'s perfect correlation standard as the minimum for a showing of discriminatory intent created an extremely high, impossible-to-satisfy standard for finding intentional discrimination.<sup>n30</sup>

The intent requirement for equal protection claims is a judicial creation.<sup>n31</sup> The Supreme Court's justification for the intent requirement was based neither on the plain language of the Equal Protection Clause, nor on legislative intent, nor even on any serious public policy argument. The reasoning behind the intent requirement was based on expediency:<sup>n32</sup> the Court worried that a rule requiring compelling justification for a statute that had a discriminatory impact despite being facially neutral might "perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."<sup>n33</sup> The development of the intent requirement is a clear example of the creation of discriminatory mechanisms and practices within the system of the administration of justice.<sup>n34</sup> In the case of the dominant interpretations of the intent requirement, these discriminatory mechanisms and practices completely undermine statutes proscribing racial discrimination.

#### B. Claims Of Disparate Impact Under Section 602 Of Title VI

In light of the continuously growing burden posed by the intent requirement, plaintiffs attempting to enjoin state or federal actions resulting in discriminatory environmental impacts turned to § 602 of Title VI. Section 602 prohibits funding recipients from action that has a discriminatory impact regardless of intent and, until the Supreme Court's deci-

sion in *Alexander v. Sandoval*,<sup>n35</sup> was interpreted by courts as creating an implied right [\*262] of action. This tradition of implying a right of action under Title VI dates from *Lau v. Nichols*,<sup>n36</sup> a case involving Chinese children who had been refused English instruction in public schools. In *Lau*, the court found a violation of Health, Education and Welfare Department (HEW) regulations that stated:

Discrimination is barred which has that effect even though no purposeful design is present: a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing the accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."<sup>n37</sup>

Even though there was no evidence of discriminatory intent, the Court found for the plaintiff, implying a right of action under § S 602.<sup>n38</sup> If the courts continued to rely on the principle used in *Lau* when examining claims brought under environmental regulations created in response to § S 602 of Title VI, plaintiffs would be able to avoid the high burden created by the increasingly stricter application-of-intent requirement.

In the thirty years since the *Lau* decision, however, the Supreme Court has gradually moved away from allowing plaintiffs a right of action under § S 602. This move culminated with the decision in *Alexander v. Sandoval*.<sup>n39</sup> That decision made official what Justice O'Connor's concurrence in *Guardians Ass'n v. Civil Service Commission of City of New York*<sup>n40</sup> hinted at twenty years earlier. Justice O'Connor characterized the Court's ruling in *Guardians* as in effect overruling *Lau*'s approval of liability for conduct having a discriminatory impact in the absence of a showing of discriminatory intent.<sup>n41</sup> Justice Marshall, dissenting, noted that although § S 601 may be read as requiring proof of discriminatory intent in the same measure as the Equal Protection Clause was in *Washington v. Davis*, it specifically permitted administrative regulations proscribing discriminatory impact, and therefore these were valid regulations that created a right of action on their own.<sup>n42</sup> In *Guardians*, such regulations existed, they followed the language suggested by the Justice Department, and they prohibited "criteria or methods of administration which have the effect of subjecting individuals to discrimination."<sup>n43</sup> The Supreme Court, in denying a right of action under [\*263] regulations created under § S 602, has ignored its own standards regarding deference to reasonable administrative construction of statutes.<sup>n44</sup>

In *Sandoval*, a case involving an English-only policy for driver's licenses exams in Alabama, the Court found that § S 602 did not include the "rights creating" language required for private right of action. For a short period after *Sandoval*, it appeared that plaintiffs interested in pursuing an environmental justice claim based on disparate impact could still rely on 42 U.S.C. § S 1983 to obtain a right of action.<sup>n45</sup> Circuit courts were split on the issue, with some finding that § S 1983 provided such a right of action<sup>n46</sup> while other circuits disagreed.<sup>n47</sup>

Even in the circuits where the § S 1983 approach was successful, however, the option did not remain available for long. A year after *Sandoval*, the Court's opinion in *Gonzaga University v. Doe*<sup>n48</sup> indicated that § S 1983 also did not create a right of action to enforce provisions created in response to the Family Educational Rights and Privacy Act of 1974 (FERPA). Although not exactly a ruling on § S 602 of Title VI, the Court specifically cited Title VI legislation as the kind of regulation affected by the decision,<sup>n49</sup> thus foreclosing the alternative of using § S 1983 to enforce § S 602 regulations.<sup>n50</sup>

The seemingly insurmountable obstacles posed by the intent requirement under Equal Protection Clause and § S 601 of Title VI, and the denial of a right of action under either section 602 of Title VI or 42 U.S.C. 1983, have pushed advocates into a search for alternative options, either through litigation or other means. [\*264]

### C. The Future Of Environmental Claims Under Civil Rights Legislation

In theory, the principle that statistical evidence alone may be sufficient to establish a discriminatory intent is well established.<sup>n51</sup> In practice, however, the Supreme Court has held evidence of disparate impact as sufficient to infer discriminatory intent only twice.<sup>n52</sup> Generally, federal courts have inferred discriminatory intent from discriminatory impact data in only three cases.<sup>n53</sup> All three of these cases dealt with wrongful misallocation of municipal services.<sup>n54</sup> In all five cases, the government was not able to show any rational purpose for the discriminatory impact caused by their action.<sup>n55</sup> Cases dealing with the siting of hazardous facilities, or other locally undesirable land uses (LULUs), are different from cases dealing with the allocation of resources, because the number of existing facilities is not amenable to producing the same kind of clear-cut statistical data.<sup>n56</sup> In addition, siting decisions involve more complex, multi-factor decisions. Additionally, the remedy for inadequate allocation of resources is a court order to provide equal services, while the remedy for siting decisions involves finding an alternative location, merely "pushing the problem onto another community."<sup>n57</sup>

The problem of when evidence of impact can be used as evidence of intent might be improved by better statistical data in litigation.<sup>n58</sup> Data on discriminatory impact that better controls for alternative explanations for the impact, such as market forces,<sup>n59</sup> may help change the way courts view evidence of impact.

Another option for litigants is making an argument based on the concept of "aversive racism."<sup>n60</sup> Aversive racism refers to the unconscious use of racist attitudes acquired early on in life in information processing and decision making.<sup>n61</sup> The aversive racism argument is based on critical race [\*265] theory; as summarized by Edward Patrick Boyle, it stands for the proposition that "unmanifested unconscious racist feelings do not go away when rejected; rather, they are reformulated, disguised, and adorned with trappings of logic and reason, in order to survive the scrutiny of the conscious mind."<sup>n62</sup> The aversive theory argument is supported by empirical data, which, to date, strongly supports the idea that no decision is, in fact, racially neutral,<sup>n63</sup> and that a court's presumption that race-neutrality exists when the decision-maker is aware of the disparate impact at the time of the decision making is, in and of itself, evidence of aversive racism. In failing to recognize the racism underneath the "facially neutral" decision, the court is engaging in exactly the same denial mechanisms as those used by the decision-makers. Bringing strong empirical evidence of how racism manifests itself in these non-obvious ways at the governmental decision-making level may help persuade a court to give more weight to evidence of disparate impact.

### III. Alternative Litigation Approaches to Civil Rights Based Litigation

#### A. Deliberate Indifference Theory

The use of deliberate indifference theory is not truly an alternative to litigation under civil rights laws; it is actually a strategy used to overcome the extremely high burden of showing discriminatory intent under the Supreme Court's doctrinal approach to the Equal Protection Clause.<sup>n64</sup> In *Gebser v. Lago Vista Independent School District*,<sup>n65</sup> the Supreme Court recognized a "deliberate indifference" standard that makes a federally funded entity liable for gender discrimination under Title IX. Deliberate indifference can be found when an official in a federally funded program or activity and who has the authority to address the alleged discrimination and institute corrective measures, has actual or constructive knowledge of the discriminatory conduct, but fails to respond adequately.<sup>n66</sup> In a later case, the Court [\*266] further clarified the doctrine of deliberate indifference by explaining that the funding recipient's liability arises out of its failure to remedy the discriminatory problem when it has control over the discriminatory conduct and is on notice of the problem.<sup>n67</sup>

Some courts have viewed satisfaction of the deliberate indifference standard as sufficient evidence of discriminatory intent for claims brought under Title IX of the Education Amendments of 1972.<sup>n68</sup> Attempts to use the standard under Title VI, however, have proven unsuccessful, both in an educational context and in the environmental justice context. In *Pryor v. NCAA*,<sup>n69</sup> the Third Circuit refused to apply the deliberate indifference theory to a Title VI purposeful discrimination case. In *Pryor*, plaintiffs opposed the NCAA's adoption of a policy increasing academic requirements for freshman athletes' scholarships, which resulted in disparate impact for black student athletes.<sup>n70</sup> Plaintiffs in *Pryor* alleged that the NCAA was deliberately indifferent to the disparate impact on black students, and that indifference, in light of the NCAA's knowledge of the disparate impact, amounted to discriminatory intent under Title VI.<sup>n71</sup> The Third Circuit distinguished between the omissions committed in the deliberate indifference cases under Title IX and the policy targeted by plaintiffs under Title VI, and refused to "conflate" the deliberate indifference test with purposeful discrimination,<sup>n72</sup> finding the purposeful discrimination requirement from *Sandoval* to be stricter than a showing that the recipient was deliberately indifferent to the discriminatory impact of a facially neutral policy.<sup>n73</sup>

The Third Circuit's decision in *Pryor* indicates that deliberate indifference can not succeed as an independent theory that can substitute for a showing of intentional discrimination under Title VI claims.<sup>n74</sup> It did not, however, rule out the utilization of the theory as "an evidentiary piece of a larger puzzle."<sup>n75</sup> The court also noted that under Title IX, the theory is generally used in claims for damages, while Title VI actions in environmental justice more often seek injunctive relief.<sup>n76</sup> [\*267]

An attempt to utilize the theory of deliberate indifference as a piece of the puzzle to show discriminatory intent in an environmental justice case however, has not proven successful. The most recent decision in the *South Camden Citizens in Action v. N.J. Dep't. of Environmental Protection*<sup>n77</sup> case is illustrative of the obstacles facing environmental justice plaintiffs in post-*Sandoval* jurisprudence. The case had initially been decided by the District Court a few days before *Sandoval*, where the judge had concluded that the "New Jersey Department of Environmental Protection (NJDEP) and Commissioner Shinn had violated Title VI of the Civil Rights Act by failing to consider the potential adverse, disparate impact of the SLC facility's operation on individuals based on their race, color, or national origin, as part of the

NJDEP's decision to permit SLC's proposed facility." <sup>n78</sup> Implicit in that initial decision was the idea that plaintiffs had a right of action under section 602 of Title VI.

After the Sandoval decision denying a right of action under section 602, the case was remanded to the District Court to determine inter alia, whether there was evidence of discriminatory intent that could constitute a violation of section 601. The Court followed Pryor in finding that "deliberate indifference is not enough to justify relief under Title VI," <sup>n79</sup> and also in rejecting the notion that the disregard shown by defendants towards plaintiffs' rights might constitute a piece of evidence that in combination with other evidence, could support a finding of intentional discrimination. Plaintiffs in South Camden had argued that the NJDEP had deliberately ignored several indicators of disparate impact that had been specifically pointed to the Department; that it had chosen not to implement newer, stricter air quality standards despite evidence that the older standards had been shown to not provide sufficient protection; and that it had also failed to enforce regulations when the permittee violated the conditions of the permit.

The South Camden plaintiffs also showed that the state had just created the Advisory Council on Environmental Equity. The Council was charged with establishing "a permanent source of advice and counsel in recognition of state and federal concerns that minority and low-income populations may be experiencing a greater impact from pollution than other communities," and with "making recommendations to the Commissioner for strategies to promote environmental equity in New Jersey and for building partnerships and trust with the many diverse communities within [\*268] [New Jersey]." <sup>n80</sup> Furthermore, the Advisory Council was "to provide assistance during the implementation of the Environmental Equity policy and thereafter serve as [NJDEP's] principal advisory resource" for handling environmental equity concerns. One result of the establishment of the Council was the development of a screening model to test the hypothesis that "there was a difference in level of exposures to environmental hazards and air pollutants among different ethnic groups in New Jersey." <sup>n81</sup> The model would allegedly be incorporated into NJDEP's equity policy. The expert who developed the model testified that statewide, minorities had more than the average exposure to pollutants than whites. Plaintiffs in South Camden also argued that new standards for air quality had been promulgated by the EPA in 1999, but were not implemented because they were being litigated. However, the existence of the new standards should have been considered as putting the DEP on notice that the previous standards did not adequately protect the affected population.

Despite the fact that the plaintiffs in South Camden had evidence of the deliberate indifference of the agency towards its own goals of addressing environmental equity issues, the Court granted summary judgment to defendants. The court allegedly conducted an analysis under the Arlington Heights standards and dismissed each one of the plaintiffs' arguments by finding that "even assuming that plaintiffs' arguments were accurate" each one of them individually did not amount to evidence of discriminatory intent. The court, however, never addressed the question of whether all the evidence presented by plaintiffs combined, if accurate, could amount to evidence of discriminatory intent. The decision in South Camden seems to indicate that there is no limit to how heavy the burden of proving discriminatory intent can be. In the thirty years since *Washington v. Davis*' intent requirement, the burden on plaintiffs in the environmental justice context has become virtually insurmountable, <sup>n82</sup> negating the impact of both the Equal Protection Clause and Title VI.

One post-Sandoval case may have given some hope to proponents of deliberate indifference theory as a useful tool in overcoming the intent requirement. In *Cooley v. Pennsylvania DEP*, the Pennsylvania Environmental Hearing Board denied a motion to dismiss a case alleging a section 601 violation based on allegations that the Pennsylvania Department of Environmental Protection had failed to investigate whether the project, a waste-to-energy facility in Harrisburg, would have a disparate impact, despite being required to conduct such investigation. The Board's opinion suggested that the issuing of a permit without any investigation as to possible [\*269] ble disparate impacts may constitute evidence of intentional discrimination by the department. <sup>n83</sup> Unfortunately, the Board later granted summary judgment for the defendants based on a procedural issue, without addressing the merits of the intentional discrimination claim. <sup>n84</sup> Although the Board's initial opinion on the case did not mention deliberate indifference, the opinion hinted at the possibility of a theory of intentional discrimination based on a deliberate failure to follow required procedures intended to prevent disparate impact:

The allegation that the Department issued the permit without making any investigation regarding the Civil Rights Act can be taken, and we do so take it for the purposes of a motion to dismiss, as an allegation that the Department's failure to perform the investigation was intentional and that intentional racial discrimination motivated the decline to perform any investigation. <sup>n85</sup>

Neither the plaintiffs nor the Board in the Cooley case mentioned deliberate indifference, but the opinion seems to rely on a similar concept as that used by proponents of deliberate indifference.

Although the Supreme Court's use of the Arlington Heights factors seemed to indicate that discriminatory intent could be proven by circumstantial evidence, more recent cases like South Camden III point to the contrary. The Third Circuit's decision in South Camden as well as the Pennsylvania Board's in Cooley dampen the hopes of success for approaches based on circumstantial evidence of intent, such as deliberate indifference, in the Title VI environmental justice context.

## B. Use Of State Constitution And Environmental Laws

### 1. NEPA and SEPA's

The National Environmental Policy Act (NEPA)<sup>n86</sup> does not prohibit racially disparate impacts per se; the Act requires only the preparation of an Environmental Impact Statement for any "major Federal Action significantly affecting the quality of the human environment."<sup>n87</sup> Because NEPA does not impose any substantive requirements regardless of the existence of adverse impacts of government action, its ability to reduce disparate im [\*270] pacts is limited. Nevertheless, even the strictly procedural requirements of NEPA can be useful for communities attempting to prevent the siting of hazardous facilities or other major projects that may unfairly increase environmental risks for a community. NEPA contains provisions for public participation that can be useful in empowering communities by providing a forum for communities to educate the government on the disparate impacts that proposed actions may have on the communities.<sup>n88</sup> Communities can use the opportunity for organization and public involvement in decision making.<sup>n89</sup> Specifically in the environmental justice context, the Supreme Court's broad interpretation of "environmental impact" as including health impacts caused by changes to the physical environment<sup>n90</sup> indicates that NEPA environmental impact statements should also be required to include secondary health effects and other socio-economic impacts at the environmental assessment stage.<sup>n91</sup>

In addition to NEPA, individual states have their own policy acts (collectively referred to as SEPA's by commentators),<sup>n92</sup> which may require consideration of a broader scope of impacts than NEPA. Some SEPA's even go as far as requiring consideration of environmental justice issues;<sup>n93</sup> others impose substantive requirements on state or local decision-makers.<sup>n94</sup> Even the most demanding SEPA's, however, are limited by the fact that they apply only to state or local action, and not to federal actions resulting in disparate impact.<sup>n95</sup> Despite these limitations, SEPA's have been found to be useful for communities struggling against proposed noxious land uses.<sup>n96</sup>

One important limitation of NEPA's application in environmental justice cases is that due to the statute's language, many actions by the federal government are not subject to NEPA's review procedures. The permitting of hazardous waste facilities, an action that often results in disparate impacts, has been excluded from NEPA requirements because the Eleventh Circuit found that the EPA's process for issuing the permit was a "func [\*271] tional equivalent" of NEPA review requirements.<sup>n97</sup> The court ignored significant differences between NEPA requirements and the requirements under the Resource Conservation and Recovery Act (RCRA). Unlike NEPA, RCRA requires neither consideration of socio-economic impacts nor consideration of alternatives to issuing the permit.<sup>n98</sup> Furthermore, RCRA public participation requirements are not as extensive as those under NEPA.<sup>n99</sup> Similar exemptions on the basis of "functional equivalency" are used when the EPA or other government agencies establish environmental standards, even though the process by which the environmental standards are created is substantially different from an environmental impact statement under NEPA.<sup>n100</sup>

Yet another limitation of NEPA as a tool for environmental justice is the fact that when states issue permits pursuant to delegated programs in lieu of the EPA under the Clean Water Act, the Clean Air Act, or RCRA, the states are exempt from preparing an impact statement under NEPA.<sup>n101</sup> This is often the case with permits for industrial facilities emitting large amounts of toxic waste into the communities in which they are sited.<sup>n102</sup>

Despite these limitations, courts have upheld suits for violations of NEPA's procedural requirements.<sup>n103</sup> Although the ability to bring suit under NEPA may not provide the same clear and ultimate result as litigation under a civil rights statute would, the provisions may be used to delay projects and constitute a bargaining chip in negotiations with agencies and private parties that want to avoid litigation. In the absence of a right of action under section 602 of Title VI, without the threat of a suit under NEPA, these agencies and private parties might otherwise lose the incentive to negotiate with the communities.<sup>n104</sup>

Furthermore, public participation provisions can be useful in environmental justice campaigns.<sup>n105</sup> By providing opportunities for public participation, environmental statutes create opportunities for community action that is not cen-

tered on the need for a lawyer. Public hearings in connection with the preparation of environmental impact reports present opportunities [\*272] for a community to educate itself on an issue, with the help of lawyers or other technical consultants.<sup>n106</sup>

## 2. Citizen suit provisions

Because environmental laws are interest-balancing and not rights-maximizing, the remedies offered under environmental laws do not hold the same promise of vindication as civil rights legislation.<sup>n107</sup> Nevertheless, several environmental laws contain citizen suit provisions<sup>n108</sup> that provide avenues for plaintiffs where a private right of action under civil rights law has been foreclosed. These citizen suit provisions may, as mentioned above, undermine claims that an agency failed to comply with NEPA requirements under the functional equivalent principle.

Citizen suit provisions may, on the other hand, provide plaintiffs with the ability to delay projects while communities pressure agencies for enforcement of their own procedural rules. These delays and the threat of prolonged litigation may, to some extent, provide the same kind of bargaining chip for communities that litigation under civil rights legislation can, with the additional advantage that chances of a favorable ruling, although small, may still be better than in civil rights litigation.<sup>n109</sup>

Citizen suit provisions confer "private attorney general" status to citizens<sup>n110</sup> providing authority to either prosecute the regulated entity for violation of an environmental law requirement or sue the public official for failure to perform nondiscretionary duties associated with that violation.<sup>n111</sup> Environmental law citizen suit provisions grant citizens the ability to sue on behalf of the community at large and obtain injunctive or declaratory relief. In contrast, non-environmental citizen suit provisions usually are actions by individuals, and relief is often in the form of damages.<sup>n112</sup> Citizen suits, [\*273] because they are often "fueled by the altruism of the citizen enforcer,"<sup>n113</sup> suffer from lack of resources. Depending on the statute at issue, and whether the suit is against the violating entity itself or the regulatory agency that failed to enforce a nondiscretionary duty, different substantive and procedural limitations apply.<sup>n114</sup>

## C. Administrative Suits and Federal Agency Review

In addition to reaching for the judiciary, environmental justice plaintiffs often have the option of filing administrative complaints, either with the EPA or with state environmental protection agencies.<sup>n115</sup> The EPA did virtually nothing to enforce the regulations promulgated by the EPA under section 602 of Title VI until the early 1990's.<sup>n116</sup> However, after the signing of Executive Order 12898<sup>n117</sup> requiring federal agencies to incorporate environmental justice to their missions, and requiring the Office of Civil Rights (OCR) to investigate and respond to Title VI complaints.<sup>n118</sup> Commentators have been unanimous in arguing that the EPA's OCR forum, despite the Executive Order's promise to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations,"<sup>n119</sup> does not provide any meaningful relief for complainants in Title VI administrative actions.<sup>n120</sup>

Filing a complaint with the EPA is relatively easy, does not require a lawyer, and is free.<sup>n121</sup> In some cases, the filing of the complaint may serve as indication of future protracted litigation and convince a private party to relocate despite having obtained a permit.<sup>n122</sup> When filing a complaint is not successful in convincing a private party to withdraw an application for a permit, administrative suits or agency reviews provide little relief. The [\*274] process is not an adversarial one; complainants have no right to participate in the investigation, are not allowed to present any evidence, and have no right to information on the status of the case.<sup>n123</sup> Historically, only a small percentage of complaints filed are accepted for investigation, and of those, an even smaller proportion is actually decided on the merits, with the results almost always siding with the defendant.<sup>n124</sup>

The EPA's Title VI Draft Revised Guidance<sup>n125</sup> suffers from several debilitating limitations:

Ultimately, the Guidance sets up a mechanism for EPA to respond to specific complaints of disparate impacts connected to a specific permit. Its understanding of the problem is derived through the lens of the permit criteria and limited by the specific permit. . . . It is an approach that does not easily accommodate larger contexts of inequities and historical discrimination. Yet, perniciously, it effectively allows discrimination and inequities to be blamed on such larger patterns of historical and societal discrimination while avoiding the tough actions that would need to be taken to solve them.<sup>n126</sup>

These limitations make it unlikely that environmental justice plaintiffs will find relief in the process.

## D. Third Party Beneficiary Rule



Most jurisdictions have adopted a rule whereby a third party to a contract, who had no obligations under it, can nevertheless enforce it, if the contract expresses the parties' intention that the benefit of the promised performance be conferred upon that third party.<sup>n127</sup> The third party beneficiary theory applied to environmental plaintiffs is based on the idea that federal-state funding agreements are, in the words of Justice Scalia "in the nature of a contract."<sup>n128</sup> To qualify for federal assistance from the EPA, a prospective funding recipient (usually a state or local agency) must fill out an application and also provide assurances that it will comply with the requirements of government regulations.<sup>n129</sup> [\*275]

Proponents of the third party beneficiary rule as an avenue for environmental justice litigators rely on the fact that the EPA regulations clearly identify minorities and people of color as the intended beneficiaries of the regulation that is made part of the consideration in the agreement between the recipient and the EPA.<sup>n130</sup> Under the doctrine of third party beneficiary, the rights of an intended third party beneficiary are "as enforceable as though it were a party to the original contract."<sup>n131</sup> Parties receiving federal funding from the EPA have agreed to comply with EPA's regulations, including those regulations created under section 602 of Title VI prohibiting the implementation of programs that have discriminatory effects, even if lacking discriminatory intent. Thus, if the regulations are violated, and facilities are not being sited in locations that avoid discriminatory impact, third party beneficiaries of the regulation acquire a legal right to enforce the contract.

Long before Sandoval, Justice Scalia had advocated a categorical refusal to imply federal private rights of action unless Congress had explicitly indicated its intent to create such a right.<sup>n132</sup> Interestingly, it was the same Justice Scalia who also expressed a willingness to entertain the possibility of a third party beneficiary action in the context of federal-state contracts.<sup>n133</sup>

Proponents of the use of the third party beneficiary rule in environmental justice cases see advantages for litigators in that under the rule, plaintiffs should be entitled to the full range of contract remedies, including specific performance or injunctive relief, expectation damages, reliance damages, and restitution.<sup>n134</sup> Writing in 2004, one commentator suggested that litigants in cases such as South Camden and Chester<sup>n135</sup> might have been more successful suing as third party beneficiaries of the agreements between EPA and the permitting agencies.<sup>n136</sup>

The Federal Circuit in *Dewakuku v. Martinez*<sup>n137</sup> suggests how a court might answer the question whether anyone can be a third party beneficiary of an agreement between a government agency and another party that is entered to pursuant to a statute. In *Dewakuku*, a Native American woman bought a house built by the Hopi Indian Housing Authority, an agency created by the Housing and Urban Development (HUD) under the Indian Housing Act of 1988.<sup>n138</sup> HUD never contested that *Dewakuku's* house was not "decent, safe and sanitary" as required by the Housing Act,<sup>n139</sup> but argued that *Dewakuku* had no right of action against HUD. One of *Dewakuku's* arguments in support of a right of action against HUD was that she was a third party beneficiary of the Annual Contributions Contract (ACC) between HUD and the Hopi Indian Housing Authority (IHA).<sup>n140</sup> Although not exactly an environmental justice case, the case provides insight into how a court might analyze similar cases in environmental law.

The Federal Circuit looked at whether the contract reflected an expressly stated or an implicit intent by the parties to benefit a third party.<sup>n141</sup> The court examined the language of the ACC and concluded that it did indicate the parties to the contract intended to benefit the homeowners.<sup>n142</sup> However, the contract also contained language rejecting third party beneficiary rights to the intended beneficiaries of the contract<sup>n143</sup> and the Court rejected *Dewakuku's* claim under the third party beneficiary rule.<sup>n144</sup>

In a typical environmental justice case involving permitting of a hazardous facility, it is improbable that the permit itself (the contract between the agency and the facility) will contain any indication of the intended beneficiary of the permitting process. The third party beneficiary rule applies to the contract itself, so that even if the statute requiring the granting of the permit indicates intent to benefit the population, the permit itself probably will not. Thus, although an interesting idea, the theory may not provide much help to environmental justice plaintiffs.

#### E. Addressing Residential Segregation

Residential segregation by race has been shown to be independently associated with negative health impacts, regardless of whether the neighborhood also suffers from disparate environmental impacts.<sup>n145</sup> The concentration of poverty and political powerlessness increases the probability that a community will house LULUs (locally undesirable land uses),<sup>n146</sup> because decision-making groups often follow the path of least resistance. Thus, the existence of racially segregated neighborhoods increases the probability of environmentally racist decisions.

Unlike Title VI section 602, the federal Fair Housing Act, also known as Title VIII of the Civil Rights Act of 1968 (FHA), creates private rights of action for disparate impact claims. The FHA made it illegal to discriminate in the sale

or rental of housing on the basis of race, color, nationality or religion. The federal FHA imposes an obligation on agencies dealing with housing to affirmatively further fair housing, including reducing racial residential segregation.<sup>n147</sup> Reducing residential segregation could help prevent environmental racism merely by preventing minorities from being the majority in any given area, decreasing the probability of intentionally discriminatory placement of hazardous and undesirable facilities. Integration should also decrease the probability that the community as a whole will suffer from political powerlessness, as tends to be the case in racially segregated areas.

In deciding whether to find a private right of action under FHA, even in the absence of evidence of discriminatory intent, courts have found that

The language of the Fair Housing Act is "broad and inclusive," subject to "generous construction," and "complaints by private persons are the primary method of obtaining compliance with the Act." Generally, and particularly in a fair housing situation, the existence of a federal

**[\*278]**

statutory right implies the existence of all measures necessary and appropriate to protect federal rights and implement federal policies.<sup>n148</sup>

The 7th Circuit in *Arlington Heights* argued that although the Supreme Court had taken a narrow view of the Equal Protection in *Washington v. Davis*, it had left open the possibility of a right of action under other statutes.<sup>n149</sup>

The promise of the Seventh Circuit's decision in *Arlington Heights*, however, has not necessarily materialized in other jurisdictions. It appears that courts may be choosing to follow Justice Scalia's parsimonious approach to implied rights in *Sandoval*, despite the Supreme Court's own admission in *Washington v. Davis* that other statutes may permit a right of action in the absence of proof of intentional discrimination. The Supreme Court of Connecticut, for example, has followed this narrow approach in a recent housing discrimination case pursued under Title VIII:

An agency's obligation under 42 U.S.C.S. § 3608(d) affirmatively to further the purposes of the fair housing statutes does not create an unambiguous right vested in individual plaintiffs. The statutory language is not a directive to benefit the public generally with respect to a specific right, as in "all persons shall have the right to fair housing," nor is it a prohibition on certain acts against the public, as in "no person shall be denied access to fair housing by housing agencies." Rather, § 3608(d) is directed at executive departments and agencies regarding the administration of their programs and activities. This administrative focus is two steps removed from the interests of individual plaintiffs and, therefore, does not confer the sort of individual entitlement that is enforceable under 42 U.S.C.S. § 1983.<sup>n150</sup>

Furthermore, Title VIII is very specifically tied to housing law and claims must be connected to housing concerns.<sup>n151</sup> Since Title VIII "is designed to work when actual harm can be shown to a particular piece of property" making the success of a claim dependent of the existence of a full record showing damage to a particular property, the Fair Housing Act can not provide the tool that environmental justice advocates need. **[\*279]**

#### IV. Legislative Reform

Another alternative is legislative reform; Congress could amend civil rights statutes and explicitly provide for a private right of action for federally funded action that is shown to have a racially discriminatory impact, regardless of intent. The inability of civil rights litigation to achieve its goal in courts may be a strong indication that Congressional action to include "rights-creating language"<sup>n152</sup> in Civil Rights legislation is sorely needed.<sup>n153</sup> The Seventh Circuit's analysis of the impact of the intent requirement in the context the federal Fair Housing Act underscores the inconsistency between the denial of a right of action absent proof of intent, and the broad goals of civil rights legislation:

Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment "to replace the ghettos 'by truly integrated and balanced living patterns.'" . . . Moreover, a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy. "Intent, motive, and purpose are elusive subjective concepts," and attempts to discern the intent of an entity such as a municipality are at best problematic. A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.<sup>n154</sup>

What the Seventh Circuit recognized is that more often than not, the impact is the only concrete evidence of intent. While it is theoretically possible that a policy or siting decision unintentionally results in disparate impact, in reality there is a very strong probability that the decision contained an intentional element that was hidden, or rationalized, under a host of technical information.<sup>n155</sup> There are strong reasons to submerge the discriminatory intent, not the least of them the long-standing constitutional proscription of intentional discrimination. The court's reaction to the circumstantial evidence of intent in *South Camden III*<sup>n156</sup> indicates that the current standard of proof for discriminatory intent hovers around "beyond a reasonable doubt."<sup>n157</sup> The absence of evidence of discriminatory intent--other than the impact itself--should not be taken as evidence of the absence of such intent.<sup>n158</sup> Rather, in light of the complexity of the regulatory process, and the fact that the "actor" is an institution to which an attribution of intent is problematic,<sup>n159</sup> evidence of impact should be, if not equated with intent, at least considered an important factor under consideration.

The dichotomy between statutes where the language focuses on the individual, requiring proof of intentional discrimination, and statutes that focus on the agency is court-created. When the Supreme Court decided *Lau v. Nichols*,<sup>n160</sup> this dichotomy simply did not exist. In *Lau*, decided pursuant to section 602 of Title VI, there was no suggestion that simply because the language referred to the agency instead of to the individual, the statute did not create an enforceable right. The Court understood that the statute made clear who it was meant to benefit.<sup>n161</sup> *Lau* followed traditional canons of statutory interpretation, by considering the statute as a whole. In contrast, decisions based on *Sandoval* look at different sections of the same Act as if they were created for totally unrelated purposes.

If Congress is unwilling to create new rights of action under civil rights legislation, it can, alternatively, shift the burden of proof to the agency. The agency is the party who holds the evidence on the decision-making process. Congress could create a rebuttable presumption that a discriminatory intent was present<sup>n162</sup> where plaintiffs are able to produce statistical evidence of discriminate impact.<sup>n163</sup> Shifting the burden does not eliminate the intent requirement; it merely places the burden on the party controlling the evidence once the moving party brings in evidence of disparate impact. A similar problem occurs under environmental laws, where the burden of proving harm is placed on the community opposing the placement of a facility, instead of on the polluting actor or permitting agency.<sup>n164</sup>

#### V. International Environmental Human Rights Law

The field of environmental human rights law is at the intersection of human rights and environmental law.<sup>n165</sup> Under international human rights laws, it is well established that the right to a safe physical environment is a fundamental human right in equal footing with other fundamental human rights. This principle dates back to the First Principle in the Stockholm Declaration developed at the United Nations Conference on the Human Environment in 1972, which states that

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>n166</sup>

The notion that people have the right to live in an environment that allows them to be healthy and productive was reinforced in 1992 with the Rio Declaration,<sup>n167</sup> and then expanded in the Draft Declaration of Principles on Human Rights and the Environment from 1994, which states that: "all persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment."<sup>n168</sup>

These Declarations drafted in the course of international conferences may, however, be considered precatory or aspirational and not imposing binding obligations on countries attending the conference. On the other hand, international treaties signed and ratified by the United States acknowledging environmental rights as fundamental human rights, can be seen as imposing certain obligations on the country. Unlike civil rights laws in the United States, the language of international human rights laws can not be interpreted as being limited to proscribing only intentional discrimination.<sup>n169</sup> Under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>n170</sup> for instance, state parties are required to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."<sup>n171</sup> Even clearer is the proscription against "all forms" of racial discrimination. One would be hard pressed to find a justification to interpret "all forms of discrimination" as prohibiting only overtly intentional discrimination. Furthermore, the CERD requires "the provision of an impartial forum to address individual claims and provide a responsive remedy when a claim prevails"<sup>n172</sup> clearly indicating the existence of a private right of action.

The United States has signed and ratified the CERD,<sup>n173</sup> and Article VI of the United States Constitution states that ". . . Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."<sup>n174</sup> Thus, de-

nial of a right of action based on lack of proof of discriminatory intent in environmental justice cases and the refusal to accept evidence of discriminatory impact may constitute a violation of international obligations under the CERD. Plaintiffs attempting to state a claim under CERD, however, will probably be denied a right of action because ratification of the CERD--like that of the two other human rights treaties ratified by the United States<sup>n175</sup>--was conditional, subject to "reservations, [\*283] understandings and declarations"<sup>n176</sup> that classify the CERD as non-self-executing.<sup>n177</sup> Furthermore, these reservations include "forced conformity" provisions that restrict the interpretation of key terms in international treaties to their constitutional definition.<sup>n178</sup> In this way, the United States has prevented ratification of international treaties and conventions from imposing any judicial obligations beyond those already provided for in domestic law.<sup>n179</sup>

The Supreme Court has not ruled on whether the CERD can provide a private right of action against state or federal executive agencies. Lower courts, however, have agreed that "the United States . . . clarified that the ICCPR and the CERD did not create a private right of action enforceable in U.S. courts."<sup>n180</sup>

Despite the fact that international treaties containing environmental rights may not, even after ratification, be enforceable in domestic courts, these treaties and the case law created under them in foreign courts may still have an impact in environmental justice cases. The morsel of hope can be found in *Roper v. Simmons*<sup>n181</sup> where the Supreme Court recognized that although not controlling, "the opinion of the world community" can provide "respected and significant confirmation" for the court's conclusion<sup>n182</sup> that a consensus against the juvenile death penalty existed. In *Roper*, the Court relied on state law provisions or interpretations and state practices to interpret the Eighth amendment's proscription against cruel and unusual punishment.<sup>n183</sup>

Based on the Supreme Court's reasoning in *Roper*, litigation of environmental justice cases in states that have adopted strong SEPA's, particularly those that have attempted to incorporate a substantive element to their [\*284] environmental statutes<sup>n184</sup> may help create the kind of "consensus" on environmental justice as a fundamental right that a Supreme Court may one day, combine with international law and rely upon.

## VI. Conclusion

Currently, there are major roadblocks for plaintiffs aiming to prevent environmental injustice through civil rights litigation.<sup>n185</sup> These major difficulties include the obstacles posed by an arbitrary and impossibly high burden of proof for showing intentional discrimination, the Sandoval ban to a private right of action under section 602,<sup>n186</sup> and the denial of a right of action to enforce anti-discriminatory legislation under 42 U.S.C. § S 1983 unless the statute itself explicitly creates the right of action. There seems to be general agreement that Title VI regulations have been effectively stripped of both an implied right of action by Sandoval<sup>n187</sup> and enforceable rights under § S 1983 in South Camden.<sup>n188</sup>

More than in other issues such as housing, employment, education, or voting, the focus on the intent requirement in environmental justice cases has severely undermined the effectiveness of civil rights legislation. The decision-making process in environmental cases, such as siting of hazardous facilities, is more complex than decisions in employment or education, involving a host of variables such as access to the site and other more technical factors that increase the deference courts give to agency decision-makers.

None of the litigation approaches examined above has met with the level of success that civil rights litigation was able to achieve in the courts in other contexts.<sup>n189</sup> Some of the approaches involving more intense grass [\*285] roots community activism may hold more promise than the more traditional "lawyer-centered" approaches.<sup>n190</sup> Community-based approaches such as participatory models and grassroots activism have the additional advantage of empowering communities that may have actually been disempowered by the need to rely on lawyers and other professionals to litigate their cases.<sup>n191</sup> This empowerment and increased participation in public processes may impact the community's ability to deal with other civil rights issues beyond the environmental justice context. It remains to be seen, however, whether the removal of the threat of litigation might undermine the power of community activism, as some commentators suggest.<sup>n192</sup>

Legislative reform could definitely help environmental justice plaintiffs by either changing the standard for a showing of discriminatory intent, or by using a burden shifting approach when discriminatory impact is shown, as is the case under Title IX legislation, for example. Barring Congressional action changing legislation, the search for alternative approaches to civil rights litigation will continue.

There are strong arguments for continuing to pursue civil rights litigation: it has an educational role for the community and others who hear about the litigation, it gives the issue media attention, and it can serve as an obstructive device that may deter parties from building in places where they face strong community objections.<sup>n193</sup> Although litiga-

tion may not appear to be cost-effective on a "win-lose" accountability system, there are other advantages to litigation that may not be so clear-cut. In many cases, it is the "leverage accorded by enhanced access to courts, rather than the actual litigation, that will serve to correct environmental inequities by removing the economic and political incentives that drive environmental hazards to these communities."<sup>n194</sup> Litigation under state environmental laws, particularly in states with substantive elements in their SEPA's should be explored as a way to build "consensus" over environmental issues. Finally, the idea of a strong attack on the intent requirement using empirical data and forcing a questioning of the racist assumptions that permeate the administration of justice may be worth exploring.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Federally Assisted Programs Remedies Constitutional Law Equal Protection Scope of Protection Environmental Law Environmental Justice

### FOOTNOTES:

n1 Sergio Vieira de Mello, High Commissioner for Human Rights, Opening Statement to the Committee on the Elimination of Racial Discrimination, 62d Sess. (March 21, 2003), <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/BFFF5C61BD1195C5C1256CE00048C2C1?opendocument> (last visited Nov. 20, 2006).

n2 See, e.g., Audrey Wright, Unequal Protection Under the Environmental Laws: Reviewing the Evidence on Environmental Racism and the Inequities of Environmental Legislation, 39 WAYNE L. REV. 1725, 1728 (1993).

n3 U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES, GAO-RCED-83-168 (1983), available at <http://archive.gao.gov/d48t13/121648.pdf>.

n4 BENJAMIN F. CHAVIS & CHARLES LEE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

n5 Id. See also Neil Popovic, Pursuing Environmental Justice with International Human Rights and State Constitutions, 15 STAN. ENVTL. L.J. 338, 342 (1996).

n6 See Popovic, supra note 5, at 343.

n7 Rodolfo Mata, Environmental Equity: The Next Generation of Facility Siting Programs, 16 CHICANO-LATINO L. REV. 1 (1995). See also Melissa A. Hoffer, Closing the Door on Private Enforcement of Title VI and EPA's Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After Sandoval and Gonzaga, 38 NEW ENG. L. REV. 971, 974-75 (2004).

n8 See Popovic, supra note 5, at 352.

n9 In the early and mid-1990s, many scholars were already expressing doubts about the effectiveness of Equal Protection and Title VI of the Civil Rights Act in the struggle for environmental justice because of the high burden posed by the intent requirement. See Popovic, supra note 5, at 345.

n10 See generally Peter Reich, Greening the Ghetto: A Theory of Environmental Race Discrimination. 41 U. KAN. L. REV. 271 (1992).

n11 Tseming Yang, Environmental Justice: Mobilizing for the 21st Century: Balancing Interests and Maximizing Results in Environmental Justice, 23 VT. L. REV. 529, 532 (1999). Yang's use of the rights-maximizing versus interest-balancing views is based on Paul Gewirtz's distinction used in the context of school desegregation litigation. See Paul Gewirtz, Remedies and Resistance, 92 YALE L.J. 585, 588-89 (1983).

n12 Yang, *supra* note 11, at 532.

n13 *Id.*

n14 *Id.* at 539.

n15 *Washington v. Davis*, 426 U.S. 229 (1976).

n16 *Id.* at 239, n.2.

n17 *Id.* at 247.

n18 *Id.*

n19 The main difference between choice of a culturally-biased test and bias in jury selection is that the jury is selected each time by different individuals, and intent would have to be individually attributed to each court in each case where a racially-biased jury results. In contrast, in the biased-test context, there is only one actor, the decision making agency, which chooses to use a test that continuously produces biased results each time. The test is designed by specialists who could, if so required, design a test that is not biased. Thus, the analogy between the jury selection context and the biased test context is inapposite. It would make perfect sense to infer intent to discriminate when an agency chooses to use a test knowing that such test has been shown to continuously produce racially-biased results.

n20 426 U.S. at 242.

n21 *Id.*

n22 *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

n23 *Id.* at 266.

n24 *Id.*

n25 *Miller v. City of Dallas*, No. 3:98-CV-2955-D, 2002 U.S. Dist. LEXIS 2341 (N.D. Tex. Feb. 14, 2002).

n26 See Hoffer, *supra* note 7, at 980.

n27 *Id.* at 984.

n28 *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

n29 A perfect correlation is one where the two variables correlate one hundred percent of the time, as was the case in *Yick Wo*. Perfect correlations are rarely or never found in the social world.

n30 Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 243 (2005).

n31 *Id.* at 242. The language of the Equal Protection Clause does not allocate the "equal protection of the laws" based on whether a discernable motive can explain the denial. *Id.* Prior to *Washington v. Davis*, the Supreme Court had ruled that a showing of disproportionate impact could shift the burden to the government, to justify the challenged measure. *Id.* (citing a Title VII employment discrimination case, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

n32 *Id.*

n33 *Washington v. Davis*, 426 U.S. at 248.

n34 See Vieira de Mello, *supra* note 1.

n35 *Alexander v. Sandoval*, 532 U.S. 275 (2001).

n36 *Lau v. Nicols*, 414 U.S. 563 (1974).

n37 *Id.* at 568.

n38 *Id.* at 567.

n39 *Alexander v. Sandoval*, 532 U.S. 275 (2001).

n40 *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983).

n41 *Id.* at 615.

n42 *Id.* at 617-18. (Marshall, J., dissenting).

n43 *Id.* at 618 (citing 45 C.F.R. § 80.3(b)(2) (1964)).

n44 See David Galalis, *Environmental Justice Under Title VI in the Wake of Alexander v. Sandoval: Disparate Impact Regulations Still Valid under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 61 (2004). Galalis notes that, despite *Sandoval*, EPA regulations promulgated under § 602 remain valid law standing on their own under a *Chevron* analysis, which the Supreme Court never conducted. Galalis conducts a two-step analysis of § 602 under *Chevron v. NRDC*, 467 U.S. 837 (1984), and concludes that the language of the statute is ambiguous, and the legislative history indicates that "Congress intentionally placed the resolution of the scope of Title VI in agency hands, to be determined according to the needs of the program administered by each agency." Galalis, *Environmental Justice*, at 95-96. See also, Hoffer, *supra* note 7, at 997.

n45 See Hoffer, *supra* note 7, at 992.

n46 See, e.g., *Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006) (overruling *Loschiavo v. City of Dearborn*, 33 F.3d at 548 (6th Cir. 1994) and holding that the rule from *Loschiavo* that a federal regulation alone may create a right enforceable under § 1983 is no longer viable); *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999). However, *Powell* was questioned by later cases based on the *Alexander v. Sandoval* decision. See, e.g., *Atkinson v. Lafayette College*, 2002 U.S. Dist. LEXIS 1432, at \*32 (D. Pa. January 29, 2002) (concluding that, in light of *Sandoval*, the reasoning that satisfied their test to recognize a private cause of action for discrimination in *Powell* no longer applies).

n47 See, e.g., *Harris v. James*, 127 F.3d 993 (11th Cir. 1997); *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987).

n48 536 U.S. 273 (2002).

n49 *Gonzaga Univ.*, 536 U.S. at 284, n.3.

n50 See, e.g., Hoffer, *supra* note 7, at 998.

n51 See, e.g., *Bean v. Southwest Waste Mgmt. Corp.*, 482 F. Supp. 673, 677 (S.D. Tex. 1979).

n52 Sean-Patrick Wilson, *Fighting the Good Fight: The Role of Environmental Civil Rights Litigators Going Forward and the Need for a Continuance of the Litigation Tool in the Environmental Justice Movement*, 28 W. NEW ENG. L. REV. 293, 305 (2006). The two cases are *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

n53 *Id.* at 306. The three cases are: *Ammons v. Dade City*, 783 F.2d 982, 985 (11th Cir. 1986); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185-86 (11th Cir. 1983); and *Baker v. Kissimmee*, 645 F. Supp. 571, 585-86 (M.D. Fla. 1986).



n54 Id.

n55 Id. at 306-07.

n56 Id. at 309.

n57 Id. at 308.

n58 Id. at 310.

n59 Id.

n60 See Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993).

n61 Id. at 939. See also Barbara Flagg, "Was Blind, But Now I See:" White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 987-89 (1993).

n62 Boyle, *supra* note 60, at 944.

n63 Id. at 939-51 (describing how racism in America has, for political and economic reasons, shifted to an aversive mode).

n64 See Brian Faerstein, *Resurrecting Equal Protection Challenges to Environmental Inequity: A Deliberately Indifferent Optimistic Approach*, 7 U. PA. J. CONST. L. 561, 564 (2004). See also Derek Black, *Picking up the Pieces After Alexander and Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356 (2002) (examining the use of deliberate indifference theory in Title VI claims in the education context).

n65 *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (holding that when sufficient proof of actual or constructive notice of the harassment exist, the school district can be found liable for damages under Title IX, under a deliberate indifference theory, for failure to adequately investigate a female student's allegations of sexual harassment by a teacher).

n66 Id. at 290.

n67 *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (holding a school district liable under the deliberate indifference theory for violation of Title IX requirements for failure to adequately respond to student-on-student harassment when the principal and several teachers were aware of the sexual harassment occurring in the school).

n68 20 U.S.C. § 1681 (2000). Title IX prohibits federally funded program from discriminating on the basis of sex. The statute is modeled after Title VI of the Civil Rights Act and has been interpreted by courts as being parallel to it. See also Faerstein, *supra* note 64, at 579.

n69 *Pryor v. NCAA*, 288 F.3d 548 (3d Cir. 2002).

n70 *Id.* at 552.

n71 *Id.*

n72 *Id.* at 569.

n73 *Id.*

n74 Faerstein, *supra* note 64, at 581.

n75 *Id.*

n76 *Id.* at 582.

n77 *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, No. 01-702, 2006 U.S. Dist. LEXIS 45765 (D.N.J. Mar. 31, 2006).

n78 *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, 145 F. Supp. 2d 446, 481 (D.N.J. 2001).

n79 *S. Camden*, 2006 U.S. Dist. LEXIS 45765, at \*69.

n80 *New Jersey Dep't. of Env'tl. Prot.*, Administrative Order 1998-15.

n81 *S. Camden*, 2006 U.S. Dist. LEXIS 45765, at \*25.

n82 Rachel Paras, *Relief at the End of the Winding Road: Using Third Party Beneficiary Rule and Alternative Avenues to Achieve Environmental Justice*, 77 ST. JOHN'S L. REV. 157 (2003).

n83 *Cooley v. Pennsylvania Dep't. of Env'tl. Prot.*, 2004 E.H.B. 554 (2004). Opinion and Order Granting Joint Motion for Summary Judgment issued September 15, 2005, available at <http://ehb.courtapps.com/corpus/50050252003246.pdf> (the Board ruled in favor of defendants based on the fact that the authority had submitted a second plan, which the DEP had explicitly defined as a new application, thus rendering the complaint regarding the first application submitted by plaintiffs moot).

n84 *Id.*

n85 Cooley, 2004 E.H.B., at 26.

n86 42 U.S.C.A. § 4321-4370.

n87 *Id.*

n88 See Stephen Johnson, NEPA and SEPA in the Quest for Environmental Justice, 30 *LOY. L.A. L. REV.* 565, 571 (1997).

n89 See, e.g., Luke W. Cole, Community Initiatives: Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy, 14 *VA. ENVTL. L. J.* 687 (1995) (suggesting that one way to affect the decision making process is to use the reporting requirement to get an organized community to run a campaign around an environmental impact report, educate itself about the project and mount an organized campaign to oppose the project).

n90 See, e.g., *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

n91 See Johnson, *supra* note 88, at 584.

n92 *Id.* at 566 n.6.

n93 *Id.* at 567-68.

n94 *Id.* at 597-98.

n95 *Id.* at 568.

n96 Cole, *supra* note 89, at 690.

n97 See Johnson, *supra* note 88 (quoting *Alabama ex rel. Siegelman*, 911 F. 2d 499 (11th Cir. 1990) (holding that permit issuance process under RCRA was a functional equivalent to the review required under NEPA and therefore NEPA assessment was not required)).

n98 Johnson, *supra* note 88, at 590.

n99 *Id.*

n100 *Id.* at 593.

n101 *Id.* at 594-95.

n102 *Id.* at 594.

n103 For a recent example, see, e.g., *Native Ecosystems Council v. United States Forest Serv.*, 418 F.3d 953, 965 (9th Cir. 2005) (finding the EIS inadequate to satisfy NEPA requirements, and that Forest Service failed to take a "hard look" at project's true effect).

n104 " The availability of a legal remedy, even when ultimately it is not pursued . . . increases the bargaining power of environmental justice advocates." Hoffer, *supra* note 7, at 1008.

n105 *Cole*, *supra* note 89, at 690.

n106 *Cole*, *supra* note 89 at 695-96.

n107 See generally *Yang*, *supra* note 11, at 532.

n108 See, e.g., Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972; Emergency Planning and Community Right to Know Act (EPCRA) 42 U.S.C. § 11046; Clean Air Act 42 U.S.C. § 7604; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9659; Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. § 1365; Noise Control Act, 42 U.S.C. § 4911 and the Toxic Substances Control Act, 15 U.S.C. § 2619.

n109 See, e.g., *Wilson*, *supra* note 52, at 293 (describing how the low success rates of environmental justice cases in the courts combined with the huge amount of resources communities have poured into litigation have led to a trend of proposals of a moratorium on litigation of environmental civil rights cases. *Wilson* calls the proponents of the moratorium the "abandonment camp."). See also Suzanne Smith, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 B.U. PUB. INT. L.J. 223, 250 (2002).

n110 *Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972).

n111 See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 40-41 (1995).

n112 *Id.* at 42-43.

n113 *Id.* at 43.

n114 See *id.* (analysis of the limitations to citizen suits under the Clean Water Act, the Clean Air Act, CERCLA and RCRA).

n115 Paras, *supra* note 82, at 167-68.

n116 See Julie H. Hurwitz & E. Quita Sullivan, Using Civil Rights Laws to Challenge Environmental Racism, 2 J. L. SOC'Y 5, 47 (2001).

n117 Exec. Order No. 12,898, 3 C.F.R. § 859 (1994), reprinted in 42 U.S.C. § 4321, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, signed by President Clinton on February 11, 1994, 59 Fed. Reg. 7629 (1994).

n118 See Hurwitz & Sullivan, *supra* note 116, at 47-48.

n119 Exec. Order No. 12,898, 3 C.F.R. § 859, *supra* note 114, at § 1-101.

n120 See Hurwitz and Sullivan, *supra* note 116, at 53. See also, Paras, *supra* note 82, at 168; Tseming Yang, The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation, 29 B.C. ENVTL. AFF. L. REV. 143, 200-01 (2002); and Hoffer, *supra* note 7, at 1004.

n121 Paras, *supra* note 82, at 167.

n122 *Id.*

n123 *Id.* at 167-68.

n124 Hoffer, *supra* note 7, at 1004.

n125 Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed. Reg. 39 (June 27, 2000).

n126 Yang, *supra* note 120, at 200-01.

n127 Paras, *supra* note 82, at 169-70.

n128 *Id.* at 172 (citing Justice Scalia's concurring opinion in *Blessing v. Freestone*, 520 U.S. 329, 349 (1997)).

n129 40 C.F.R. § 7.80(a)(1) (1984) states that:

Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part. Applicants must also submit any other information that the OCR determines is necessary for pre-award review. The applicant's acceptance of EPA assistance is an acceptance of the obligation of this assurance and this part.

Id.

n130 Paras, supra note 82, at 172-73.

n131 Id. at 173 (quoting *Chase Manhattan Bank v. Iridium Africa Corp.*, 197 F. Supp. 2d 120, 139-40 (D. Del. 2002), and the Restatement (Second) of Contracts § 2(1) (1981)).

n132 *Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring).

n133 Paras, supra note 82, at 172 (quoting *Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))).

n134 Id. at 176-83.

n135 *Chester Residents Concerned for Quality Living v. Seif*, 32 F.3d 925 (3d Cir. 1997).

n136 Paras, supra note 82, at 177, 179-80.

n137 *Dewakuku v. Martinez*, 271 F.3d 1031, 1040-42 (Fed. Cir. 2001).

n138 The IHA, 42 U.S.C. §§ 1437aa-1437ff (1994), provided statutory authority for the Mutual Help Homeownership Program (MHH) Program, a program designed to meet the homeownership needs of low-income Indian families on Indian reservations and other Indian areas, to be carried out by HUD. *Dewakuku*, 271 F.3d at 1034. Prior to the 1988 IHA, the MHHP was operated through administrative directives and regulations rather than through any specific statutory provisions. After 1988, pursuant to its statutory authority, the MHHP program was carried out by HUD, and HUD issued implementing regulations for the MHH Program. Id. (citing 24 C.F.R. § 905 (1991)).

n139 42 U.S.C. §§ 1437a(b)(1), 1437aa(a)(1994).

n140 The ACC's objective is "to provide financial assistance for the development, acquisition, operation and improvement of public housing projects." *Dewakuku*, 271 F.3d at 1035 (citing 42 U.S.C. § 1437bb(b) (1994)). HUD would not enter into an ACC unless the tribal ordinance creating the housing authority is submitted to and approved by HUD. 24 C.F.R. § 905.109 (1990). The Indian public housing authorities in turn were to develop, own, and operate the housing projects under HUD's supervision and in accordance with HUD regulations. Id.

n141 Id. at 1041.

n142 " Section 0.2(d) of the ACC provides that the IHA shall at all times develop and operate each Project (1) solely for the purpose of providing decent, safe, and sanitary Homes . . . within the financial reach of Homebuyers . . . (2) in such manner as to promote serviceability, efficiency, economy, and stability, and (3) in such manner as to achieve the economic and social well-being of the Homebuyers. This section of the ACC does appear to express an intent to benefit homebuyers such as Dewakuku directly." Id.

n143 " In fact, the plain language of section 14.6 of the contract is entitled 'NO THIRD PARTY CONTRACT RIGHTS CONFERRED,' and states that 'nothing in the ACC shall be construed as creating or justifying any claim against HUD by any third party.'" Id.

n144 The Federal Circuit, however, remanded the case to the District Court to decide whether Dewakuku had a claim under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because HUD's decision was not in accordance with the law. This claim had not been examined earlier because relief had been granted under the third party beneficiary rule. Id. at 1042.

n145 Myron Orfield, Segregation and Environmental Justice, 7 MINN. J. L. SCI. TECH. 147, 153 (2005).

n146 Id.

n147 The relevant part of the Fair Housing Act (42 U.S.C. 3604(a)) provides in part that "it shall be unlawful . . . to . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin."

n148 Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006, 1011 (7th Cir. 1980) (internal citations omitted).

n149 Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288-89 (7th Cir. 1977).

n150 Asylum Hill Problem Solving and Revitalization Ass'n v. King, 890 A.2d 522, 539 (Conn. 2006).

n151 Wilson, *supra* note 52, at 299.

n152 See, e.g., Alexander v. Sandoval, 532 U.S. 275, 286 (2001); Gonzaga Univ. v. Doe, 536 U.S. 273, 284 n.3 (2002) (quoting Sandoval and expanding it to also preclude a right of action for regulations created through non-rights creating statutes such as Title VI § 602 through 42 U.S.C. § 602).

n153 Prior attempts to amend the Constitution to include the right to a healthy and healthful environment have failed. See Popovic, *supra* note 5, at 346.

n154 Metro. Hous. Dev. Corp., 558 F.2d at 1289-90 (internal citations omitted) (emphasis added).

n155 Yang, *supra* note 11, at 539

n156 S. Camden Citizens in Action v. New Jersey Dep't. of Env'tl. Prot., No. 01-702, 2006 U.S. Dist. LEXIS 45765 (D.N.J. Mar. 31, 2006).

n157 Wilson, *supra* note 52, at 311.

n158 " The Court has spent too much time attempting to trace discriminatory results to specific bigoted actors or specific bigoted acts, without acknowledging the possibility that discriminatory intent may very well be present in the absence of such evidence." *Id.*

n159 Yang, *supra* note 11, at 533.

n160 *Lau v. Nichols*, 414 U.S. 563 (1974).

n161 But see Alexander, *supra* note 149, at 289.

n162 Edward Boyle suggested that once plaintiffs show a significant disparate impact on suspect classes the burden should be shifted to defendants to show that "the interests [of the suspect class] were Boyle, *supra* note 60, at 981. Another burden shifting proposal involves plaintiffs' show of discriminatory impact shifting the burden to defendants having to show the decision is an environmental necessity, then the plaintiff has the burden of showing existence of alternative sites, which shifts the burden back to defendant to show the site chosen was necessary to safely dispose of hazardous wastes. See Rachel Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 416-17 (1991).

n163 Demanding statistically significant evidence can also create an unreasonable burden for plaintiffs. Even if the requirement does not rise to the level of the perfect correlation found in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (where the evidence showed that no Chinese applicant received a laundry permit and every single white applicant received one), in cases of hazardous facilities, more often than not, the numbers will not be large enough to obtain statistically significant correlations between social or racial groups and the location of the facility. See Suzanne Smith, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 B.U. PUB. INT. L.J. 223, 232 (2002).

n164 See Alma Lowry, *Achieving Justice: The Case for Legislative Reform*, 20 T.M. COOLEY L.REV. 335, 353 (2003) (arguing that in environmental law rights are vested in the wrong party, "the system places the burden of proving harm on the community, the party with the least access to information and technical expertise, rather than on the polluting industry").

n165 Most documents on environmental human rights acknowledge the connection between the environment and the ability to enjoy other fundamental human rights: "environmental damage can have potentially negative effects on the enjoyment of some human rights." Comm'n on Human Rights Res. 2003/71, P 2, U.N. Doc. HRC/RES/71 (Apr. 25, 2003). See also Popovic, *supra* note 5, at 348.

n166 Conference on the Human Environment, Stockholm, Sweden, June 5-16, 1972, Final Declaration, Principle 1, U.N. Doc. A/CONF. 48/14/Rev. 1 (June 16, 1973).

n167 Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, Rio Declaration On Environment And Development, U.N. Doc. A/ CONF.151/26 (Aug. 12, 1992).

n168 Draft Declaration of Principles on Human Rights and the Environment, Principle 3, U.N. Doc. E/CN.4.Sub.2/1994/9 (May 16, 1994) (prepared by Fatma Zohra Ksentini).



n169 See Popovic, *supra* note 5, at 353, n.64.

n170 International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 600 U.N.T.S. 195.

n171 *Id.* at Art. 2(1)(c)(emphasis added).

n172 Timothy Kuhner, Human Rights Treaties in U.S. Law: The Status Quo, Its Underlying Bases, And Pathways for Change, 13 DUKE J. COMP. & INT'L L. 419, 425-26 (2003).

n173 The United States signed the CERD on September 28, 1966 and ratified it on October 21, 1994. <http://www2.ohchr.org/english/bodies/ratification/2.htm> (last visited Nov. 18, 2008).

n174 U.S. CONST. Art. VI, § 1, Cl.2: ". . . and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

n175 The United States has ratified only three treaties that have fundamental human rights components: the Convention on Elimination of all Forms of Racial Discrimination (CERD), the International Convention on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). However, "the treaties to which the United States is a party that contain human rights elements either expressly or by implication are not self-executing." Steven M. Schneebaum, Human Rights in the United States Courts: The Role of Lawyers, 55 WASH. & LEE L. REV. 737, 738 (1998). Thus, "the United States, a nation with courts capable of prosecuting government officials for violations of international law, as well as a constitution that makes treaties the law of the land, has intentionally limited the effects of Human Rights Treaties in its territory." Kuhner, *supra* note 172, at 419 (internal citations omitted).

n176 See, e.g., Kuhner, *supra* note 172, at 419. See also U.S. Senate Resolution of Advice and Consent to Ratification of the CERD, U.S. S. RES. 140 Cong. Rec. S7634-02 (June 24, 1994).

n177 The Supreme Court has long ago subscribed to a dualist approach to international treaties dividing international treaties into self-executing and non-self-executing. See, e.g., Curtis Bradley, International Delegations, The Structural Constitution and Non-Self Execution, 55 STAN. L. REV. 1557, 1596 (2003). Under this dualist approach, the legislature must take action, or "execute" a treaty before it becomes binding on a domestic court. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

n178 Forced conformity provisions require that "a given provision or phrase must be interpreted identically to constitutional provisions covering similar topics." Kuhner, *supra* note 172, at 429.

n179 *Id.* at 426.

n180 *United States v. Perez*, No. 3-02, 2004 U.S. Dist. LEXIS 7500, 52-53 (D. Conn. Apr. 29, 2004) (citing *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 163 (2d Cir. 2003)). The same language is quoted in *Hayden v. Pataki*, No. 00-8586, 2004 U.S. Dist. LEXIS 10863, 23-24 (S.D.N.Y. June 14, 2004) and again adopted by the court in *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.C. Cir. 2005).

n181 *Roper v. Simmons*, 543 U.S. 551 (2005).

n182 *Id.* at 578.

n183 U.S. CONST. amend. VIII.

n184 See Johnson, *supra* note 88, n.135 (mentioning which states have stricter requirements than NEPA). See also Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99, 111 (1994)(listing cases where courts have struck down project approvals for government failure to mitigate environmental impacts).

n185 Even before the Sandoval decision, there was already recognition that "the difficulty in proving racial animus, the lack of sufficient statistical analysis to resolve the 'chicken or egg' conundrum, and the multi-faceted nature of factors leading to disproportionate siting practices all but preclude effective use of traditional civil rights statutes to resolve what is, in reality, both a race-influenced and class-influenced dilemma." Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 540.(1997). See also Daniel Madrid, *Can Environmental Justice Movement Survive Without Title VI of the Civil Rights Act?* 14 VILL. ENVTL. L.J. 123, 149 (2003), concluding that political action by a group of citizens sparked by the South Camden litigation may be an alternative avenue to litigation through Title VI.

n186 *Alexander v. Sandoval*, 532 U.S. 275 (2001).

n187 *Id.*

n188 *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, No. 01-702, 2006 U.S. Dist. LEXIS 45765 (D.N.J. Mar. 31, 2006).

n189 Civil rights legislation has not delivered to environmental justice plaintiffs anything comparable to the effect of *Brown v. Board of Education*, 347 U.S. 483 (1954), for example. It is true that even cases considered extremely successful, like *Brown*, can not claim to have changed the reality of educational segregation on the ground as much as they have changed the politics of education.

n190 *Cole*, *supra* note 89, at 710.

n191 *Id.*

n192 See, e.g., Hoffer, *supra* note 7, at 1008 (arguing that "the availability of a legal remedy--even when it ultimately is not pursued--has without doubt, increased the bargaining power of environmental justice advocates").

n193 *Wilson*, *supra* note 52 at 320-21.

n194 *Gauna*, *supra* note 111, at 87.