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ENVIRONMENTAL JUSTICE AS CIVIL RIGHTS

*Wyatt G. Sassman*\*

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*Environmental justice litigation using the Equal Protection Clause and civil rights statutes has largely failed. This article explains that failure as a result of a general shift by federal courts to limit the scope of civil rights law rather than an improper characterization of environmental justice as a civil rights issue. This explanation is important to both encourage and caution environmental justice advocates and scholars as they approach claims under Title VIII. I suggest that Title VIII's ability to bridge property and dignity may still present a powerful and much-needed tool for bringing equality to environmental law, but that, based on recent treatment of civil rights in the courts, those concepts should be bridged outside of the civil rights context first. Thus, I recommend that environmental justice scholars and advocates shift their focus from litigating civil rights claims to building the conceptual and doctrinal connection between environmental quality, property, and personal dignity through the administrative process, tort suits, and other means before making the leap to Title VIII.*

#### INTRODUCTION

The purpose of this article is to offer a narrative explanation of the environmental justice movement's general failure to use civil rights law as a means of remedying existing inequalities in environmental regulation. Discussing this issue in its narrative context contributes an important lesson: the environmental justice movement's failure to harness civil rights laws is no specific fault of its own. Rather, environmental justice is one of many progressive approaches to civil rights foreclosed by the Supreme Court's continually narrowing view of statutory and constitutional protections of minorities.

Scholars and advocates need to hear this lesson. It is a source of both optimism for the future of environmental justice claims under civil rights law and healthy caution about how to proceed—specifically with regard to Title VIII of the Civil Rights Act of 1968. Title VIII has immense potential not only as a remedial tool, but also as a near-perfect vehicle for explaining, in a legally relevant way, the relationship between environmental quality, property, and personal dignity. However, this connection requires a doctrinal step that characterizes environmental protection as a “service” incident to owning or renting a dwelling. Given the current tenor of federal civil rights law, this step is almost guaranteed to fail before the courts.

Rather than importing environmental values directly into civil rights doctrine, the better strategy is to assist the growing entanglement of environmental quality and property rights, and, ultimately, rely on the conceptual relationship between property rights and personal dignity embodied in Title

VIII to connect environmental justice values with civil rights doctrine. This bottom-up approach is consistent with the evolution and tradition of each connected doctrine—environmental law, property law, and civil rights law—and is a good way to continue pursuing environmental justice without risking Title VIII claims before hostile courts.

This article is laid out in three parts. Part I summarizes why environmental justice is properly characterized as racism and within the ken of civil rights law. Part II explains that civil rights claims pursuing environmental justice have nevertheless failed because of a general retreat in the scope of civil rights laws. In Part III, I encourage environmental justice advocates to learn from this lesson and focus on building the conceptual and doctrinal connection between environmental protection, property, and personal dignity before trying the Title VIII claim.

#### PART I.

In an essential 1993 article on the subject, Professor Richard Lazarus explains that environmental justice is a distributional problem: its advocates seek to address the inequitable distribution of the costs and benefits of environmental protection.<sup>1</sup> The benefits of environmental regulation include reduced pollution and the increased quality of life that comes from living in a clean, sustainable environment.<sup>2</sup> The costs include the monetary cost of compliance, the inability to access protected areas, and the burden of living close to environmental risks deemed acceptable, which precludes individuals from enjoying their fair share of the reduced pollution promised by the law.<sup>3</sup> While many laws result in unequal distribution of costs and benefits, the real problem is when those laws distribute costs unequally based on characteristics that are protected by our understanding of fairness in applying the law.

Early advocates and writers detected that poor and minority communities disproportionately bear the physical costs of environmental protection (such as living next to waste facilities or lacking access to parks and environmental services) at least partly because of structural problems in the administrative process.<sup>4</sup> Writers across various disciplines have long recognized that

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<sup>1</sup> Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 792-96 (1993) [hereinafter Lazarus, *Pursuing*] (discussing the problem of environmental justice).

<sup>2</sup> *See id.* at 793.

<sup>3</sup> *Id.* at 793-94.

<sup>4</sup> *Id.* at 807-11.

poor and minority communities face difficulties in accessing the decision-making processes of government. These barriers include both difficulties organizing at the community level to engage in relevant administration of government services, as well as underrepresentation at higher levels of policymaking and advocacy groups that determine the outcomes of the administrative process.<sup>5</sup> Generally, these communities cannot leverage political power sufficient to resist siting of undesirable land uses in their neighborhoods, and so undesirable costs follow the path of least resistance into underrepresented communities.<sup>6</sup> This is the paramount concern of environmental justice.

This underrepresentation is a characterization of many different factors—poverty, race, and geography simply to name a few—and, as a result, the environmental justice community continues to battle over its identity. Is this about poverty, race, or something else? Is this environmental equity, environmental racism, or just an unavoidable fact of modern regulation?

The short answer is that it is racism, as far as we can tell. Notably, the environmental justice movement coevolved (although not necessarily at the same rate) in both law and sociology. A lawyer named Linda Bullard brought what is considered the “first” environmental justice case in Houston, Texas, representing an African-American neighborhood that claimed the siting of a dump in their neighborhood was a result of racial discrimination.<sup>7</sup> Her husband, Robert Bullard, was then an Assistant Professor of Sociology at Texas Southern University; he is now the Dean of its Barbara Jordan-Mickey Leland School of Public Affairs and considered the “Father of Environmental Justice.”<sup>8</sup> If Linda started the fire, Robert fueled it in the subsequent decades by contributing sociological research supporting the idea that environmental costs were inequitably distributed based on race.<sup>9</sup> This example, among others, helps explain the earliest framing of the environmental justice issue as one about race rather than equity or impersonal market forces. Though challenged, that characterization has thus far stood the test of time.

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<sup>5</sup> See, e.g., *id.* at 810–12.

<sup>6</sup> Lazarus, *Pursuing*, *supra* note 1, at 810–12.

<sup>7</sup> *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979); see also Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 *FORDHAM URB. L. J.* 523, 523 (1993) (discussing Linda Bullard's influence).

<sup>8</sup> Robert Bullard, *Dr. Robert Bullard: Father of Environmental Justice*, <http://drrobertbullard.com> (last visited Dec. 2, 2014); Gregory Dicum, *Meet Robert Bullard, the Father of Environmental Justice*, *GRIST* (Mar. 15, 2006), <http://grist.org/article/dicum/>.

<sup>9</sup> Robert D. Bullard, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (3d ed. 2000); see also Lazarus, *Pursuing*, *supra* note 1, at 791 n.15 (collecting foundational environmental justice studies).

High-profile statistical testing of the race-based environmental justice claims traces its roots back to another well-cited origin of the environmental justice movement: the 1980s protests against the siting of a dump in an African-American community in Warren County, North Carolina.<sup>10</sup> Among the many reverberations of that event was the arrest of civil rights leader and United States Representative Walter E. Foutroy, then the House delegate from Washington D.C., who had been publicly protesting against the dump.<sup>11</sup> Representative Foutroy formally requested that the Government Accountability Office study the effects of race and wealth on the distribution of hazardous waste landfills in the South.<sup>12</sup> The GAO completed its study in 1983, finding that “[B]lack make up the majority of the population in three of the four communities where the landfills are located,” and that “[a]t least 26 percent of the population in all four communities have income below the poverty level and most of this population is Black.”<sup>13</sup>

Pressure mounted when United Church of Christ Commission for Racial Justice published a study in 1987, which corroborated the findings of discrimination based on race and expanded the scope nationwide.<sup>14</sup> During that time Dr. Bullard and other sociologists were producing work that was getting notable acclaim focusing the issue as one of race.<sup>15</sup> The studies fomented legal academics, some of whom, the story goes, met with EPA administrator William K. Reilly after a conference in Michigan and convinced the him to start an “Environmental Equity” working group to address the problem.<sup>16</sup> The EPA working group released its report in 1992.<sup>17</sup> More rigorous than the prior studies, the EPA’s study concluded that “minorities have disproportionately greater ‘observed and potential exposure’ to environmental pollutants.”<sup>18</sup> The study identified numerous causes of this distributional

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<sup>10</sup> Lazarus, *Pursuing*, *supra* note 1, at 801 n.49.

<sup>11</sup> Lazarus, *Pursuing*, *supra* note 1, at 801 n.49.

<sup>12</sup> Lazarus, *Pursuing*, *supra* note 1, at 801.

<sup>13</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).

<sup>14</sup> COMM’N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES xi–xv (1987).

<sup>15</sup> See, e.g., Robert D. Bullard, *Environmental Racism and ‘Invisible’ Communities*, 96 W. VA. L. REV. 1037, 1037 (1994) (“It is a new experience speaking to lawyers about environmental justice, environmental racism, and the impact on unequal protection. Environmental racism did not fall out of the sky in 1990. It has been around from the very beginning.”).

<sup>16</sup> Lazarus, *Pursuing*, *supra* note 1, at 803–04.

<sup>17</sup> ENVTL. EQUITY WORKGROUP, EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (June 1992) [hereinafter EPA EQUITY STUDY].

<sup>18</sup> *Id.* at 12; see also Lazarus, *Pursuing*, *supra* note 1, at 804 (commenting on the rigorosity of the EPA study).

problem. First, generally, that minority populations tended to concentrate in urban areas where pollution was most significant.<sup>19</sup> Second, more specifically, minority populations lived closer to hazardous waste sites, consumed more environmentally contaminated food, and made up a greater proportion of farmworkers exposed to pesticides.<sup>20</sup> Additionally, the EPA report identified that certain subgroups of minority populations may be more vulnerable to harmful effects of pollution, particularly air pollution in urban centers.<sup>21</sup>

Even with these findings, many were not satisfied. Representative Henry Waxman of California held a press conference to criticize the EPA study as inadequate and unrepresentative, thus beginning the near constant criticism of the EPA's environmental justice efforts over the last several decades.<sup>22</sup> Representative Waxman produced "copies of internal agency memoranda in which agency officials had similarly criticized the draft report for lack of candor regarding the 'meagerness of [EPA] efforts'" and "a copy of a dissenting opinion that certain EPA employees sought to have appended to the draft report, but which agency officials ultimately declined to include."<sup>23</sup> Both the study and its public condemnation increased interest in the environmental justice issue as an issue of race.<sup>24</sup>

But every academic movement has an equal and opposite response, and in the mid-1990s Professor Vicki Been, along with other sociologists, presented an influential, market-based critique of the racism-based environmental justice narrative.<sup>25</sup> Developed over a number of articles, the crux of Been's critique is that environmental justice advocates fail to account for changes in demographics over time.<sup>26</sup> Specifically, she argued that the evidence (both the advocates' and her own) did not contradict a finding that minority communities *moved to* the undesirable land use as a result of lower

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<sup>19</sup> EPA EQUITY STUDY, *supra* note 17, at 13.

<sup>20</sup> EPA EQUITY STUDY, *supra* note 17, at 14–16.

<sup>21</sup> EPA EQUITY STUDY, *supra* note 17, at 22.

<sup>22</sup> Lazarus, *Pursuing*, *supra* note 1, at 804 n.64; *see also* Daria E. Neal, *Recent Developments in Federal Implementation of Executive Order 12,898 and Title VI of the Civil Rights Act of 1964*, 57 HOW. L.J. 941, 942–44 (2014) (describing criticisms of EPA's civil rights office).

<sup>23</sup> Lazarus, *Pursuing*, *supra* note 1, at 804 n.64.

<sup>24</sup> Lazarus, *Pursuing*, *supra* note 1, at 804 n.64.

<sup>25</sup> *See* Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993) (looking at the content of the goal of environmental justice); Vicki Been, *Locally Undesirable Land Uses In Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384–87 (1994) (addressing gaps in research by environmental justice advocates); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1 (1997) [hereinafter Been, *Barrios*] (cautioning policy changes based on research by environmental justice advocates and analyzing demographics of host communities).

<sup>26</sup> *See* Been, *Barrios*, *supra* note 25, at 33–35.

cost of living and other market conditions caused *by* the siting of that undesirable land use.<sup>27</sup> While Professor Been doesn't attack the *de facto* distribution problem identified by environmental justice advocates, she does attack its rhetorical centerpiece: what if this effect is not motivated by racism? What if it's a natural and largely innocent result of having to place undesirable land uses somewhere? Professor Been's ultimate point is that, by setting aside the animus, we can work towards effective, market-oriented solutions to the distributional problem.<sup>28</sup>

Such critiques of environmental justice's focus on race and discrimination are powerful because they reframe the issue as one of societal cost rather than insular discrimination; a recast from animus to accident of progress. Conclusions in the literature like "[i]t appears, then, that environmental inequity is economically efficient" because it "could be viewed as a preference inherent in utilitarianism" take the wind out of the sails of the environmental justice movement and reflect a fundamental tension in applying civil rights law.<sup>29</sup> This idea that claims to inequality must be trumped by social preference or we just can not get on with modern life is, as I discuss with more detail in Part II, a problem for environmental justice doctrinally as well as conceptually.

Professor Lazarus provides another moment of clarity on this point. In a short article, he defended the characterization of the environmental justice movement as being focused on racism.<sup>30</sup> Without engaging the statistical literature, Lazarus argued that the 1987 declaration by NAACP director Rev. Dr. Benjamin Chavis' that environmental policy embodied "environmental racism" was an important shot in the arm that helped keep environmental justice alive.<sup>31</sup> The existing evidence of disproportionate impacts was sufficient to identify the problem, and the claims of racism created the public gravitas necessary to raise policymakers' concern and bring everyone to the negotiating table.<sup>32</sup> It was the rhetorical force of the movement that was getting things done, not the statistics. Along those lines, Lazarus' assessment reflects the reports of advocates that the movement's most ef-

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<sup>27</sup> Been, *Barrios*, *supra* note 25, at 35.

<sup>28</sup> See Vicki Been, *Compensated Siting Proposals: Is it Time to Pay Attention?*, 21 *FORDHAM URB. L.J.* 787, 788-91 (1994).

<sup>29</sup> Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 *STAN. ENVTL. L.J.* 3, 41 (1998).

<sup>30</sup> Richard J. Lazarus, "Environmental Racism! That's What It Is.," 2000 *U. ILL. L. REV.* 255, 257 (2000).

<sup>31</sup> *Id.* at 259-63.

<sup>32</sup> *Id.*

fective tools are publicity and awareness— tools undoubtedly made more effective by the high profile claims of discrimination.<sup>33</sup>

The distinction between statistics, truth, and the validity of a discrimination claim is important in confronting the damoclean balance between legal claims to equal treatment and societal welfare. There is a key dissimilarity between the proof required to support a legal claim of fair treatment and a statistically significant showing of fair treatment, and this distinction is largely lost in the environmental justice literature.<sup>34</sup> The sociological fight over evidence of inequitable distribution at times feels like a fight about the *truth* of environmental racism claims in relation to societal welfare. However, a legal claim of discrimination is a different kind of value judgment based on a different context. For example, a plaintiff need not necessarily prove a statistically rigorous pattern of discrimination to prove discrimination in the judgment of the law.<sup>35</sup> Even when relying on a pattern or practice of discrimination, a court may well find that pattern exists with less than statistically significant evidence if the individual plaintiff's or class representative's personal experience supports the claim.<sup>36</sup>

This distinction between how much evidence is sufficient for statistics and social science versus a legal finding makes sense because discrimination is a fluid and value-laden determination based upon subjective experience. The concept of systematic discrimination is an overlapping but not wholly coterminous idea with the individual discrimination prohibited by the United States' constitutional and legislated commitment to civil rights. As the Senate put it, “[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.”<sup>37</sup> Claims that this is not racism in a statistical sense do not preclude this from being racism for purposes of the law or social discourse about civil rights.

Further, the statistical case against the race narrative is not particularly strong. Even Professor Been's study acknowledged that the predominance

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<sup>33</sup> See Cole, *supra* note 7, at 524; *id.* at 258.

<sup>34</sup> But see Roliff Purrington & Michael Wynne, *Environmental Racism: Is A Nascent Social Science Concept a Sound Basis for Legal Relief?*, 35 HOUS. LAW. 34 (1998) (“But because environmental racism is still a developing social science concept, its use as a basis for legal relief presents several procedural and evidentiary problems that, if not carefully addressed, create much confusion.”).

<sup>35</sup> Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 317, 319 (1997).

<sup>36</sup> See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

<sup>37</sup> S. REP. NO. 88-872, at 16 (1964); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (citing S. REP. NO. 88-872).

of Hispanic members in a community was a statistically significant factor in receiving undesirable land uses.<sup>38</sup> Similarly, the market-based critique has come under fire for both its legal and demographic methodology.<sup>39</sup> What that leaves is proof of *de facto* inequality where the most significantly factor in explaining that inequality is race. Those who study urban populations have readily included environmental inequalities into the long and growing list of education, housing, and other municipal services that are inequitably distributed among minority populations.<sup>40</sup> It seems only natural that environmental justice advocates, like advocates in these other fields, would turn to constitutional and statutory protections of the civil rights laws to combat the discrimination.

## PART II.

The strategy of harnessing civil rights to solve environmental justice problems has largely failed, and plenty of articles detail this failure step by step.<sup>41</sup> In this section, I take a broad approach to suggest that this failure is the result of an overall limiting of civil rights remedies across American law rather than the inadequacy of the environmental justice claims as civil rights claims. This is an important point for advocates to realize, in order

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<sup>38</sup> Been, *Barrios*, *supra* note 25, at 34 (“the study reveals that it is Hispanics, rather than African Americans, who are most at risk from the siting processes.”). It is important to contextualize this turn in environmental justice literature within the growth of the Hispanic communities in the United States. Census data reports that the population of Hispanic more than doubled between 1970’s and 1990’s, approaching the point of overtaking African-Americans in the 2000’s as the largest, self-identified minority group in the United States. See *Census of Population and Housing*, U.S. CENSUS BUREAU, <https://www.census.gov/prod/www/decennial.html> (last revised Jan. 16, 2015). Although the concepts of Hispanic and African-American self-identification are very complex in themselves, suffice to say that the concept of unequal distributions of environmental costs among minority populations necessarily includes the growing impact of that idea on Hispanic communities. Been, *Barrios*, *supra* note 25, at 33–34. This is reflected in advocacy at the time, especially in California where the environmental justice movement overlapped with farm and migrant labor advocacy in largely Hispanic communities. CAL. ENVTL. PROT. AGENCY, ENVIRONMENTAL JUSTICE PROGRAM UPDATE 4 (Feb. 2014), <http://www.calepa.ca.gov/publications/reports/2014/ejupdate.rpt.pdf>. As Professor Been’s article illustrates, this change is reflected in the sociological side of the movement too. Been, *Barrios*, *supra* note 25, at 12.

<sup>39</sup> See, e.g., Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1038 (2003) (arguing that the market-based critique “does not work,” because “[e]conomic and political markets do not function to meet community preferences equally”); Paul Mohai & Robin Saha, *Reassessing Racial and Socioeconomic Disparities in Environmental Justice Research*, 43 DEMOGRAPHY 383, 384 (2006), available at [http://webhost.bridgew.edu/ramey/www/g333pdf/mohai\\_GIS.pdf](http://webhost.bridgew.edu/ramey/www/g333pdf/mohai_GIS.pdf) (arguing “that much of the source of . . . uncertainties [in the distribution of environmental costs] is related to the failure of the most widely used methodology in environmental inequality research to adequately account for the proximity between environmentally hazardous sites and nearby residential populations”).

<sup>40</sup> See, e.g., Kaswan, *supra* note 39, at 1037.

<sup>41</sup> See, e.g., Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27 (2004).

for the movement to remain both optimistic and cautious in developing the remaining civil rights remedies available to address environmental inequalities.

When approaching the successes and failures of environmental justice legal strategies, it is helpful to parse out the movement's dual goals. One goal is prospective or distributive; seeking to include minority communities in the decision making process to provide an equal say in the distribution of undesirable land uses and prevent the initial siting of such land uses in a discriminatory manner.<sup>42</sup> The second goal is remedial or redistributive; seeking to alleviate the existing higher risk of exposure and pollution among minority communities and redistribute environmental costs in a more fair way.<sup>43</sup> The first goal has had some success, but the second has not.

Progress towards the first goal may be attributed to reforms in administrative procedures and advocacy before administrative agencies rather than courts. Regulations and executive orders have formally integrated environmental justice principles into the environmental review process under the National Environmental Policy Act and other agency decision-making processes.<sup>44</sup> Likewise, EPA and other agencies have invested substantially in their civil rights programs - even making environmental justice an explicit priority during the Obama administration.<sup>45</sup> The Department of Justice has made similar commitments to enforce environmental justice principles.<sup>46</sup> While the effect of these commitments remains to be seen, it is notable that environmental justice has become a tangible part of the administrative process.

Meanwhile, the failure of remedial civil rights claims before the courts can be tied to two doctrinal developments of equal protection law: the need to show intentional discrimination rather than evidence of discrimination through "disparate impact," and the lack of a private right of action. Where either of these conditions exist, environmental justice claims have found little traction. Unfortunately, both of these doctrinal developments took root during the formative years of the environmental justice movement, and they

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<sup>42</sup> See Kaswan, *supra* note 39, at 1043–44.

<sup>43</sup> See Lazarus, *supra* note 1, at 796.

<sup>44</sup> See Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994); *see also* Neal, *supra* note 22, at 942–44 (describing various federal environmental justice programs).

<sup>45</sup> See Neal, *supra* note 22, at 952–61.

<sup>46</sup> See U.S. Dep't of Justice, *2013 Implementation Progress Report on Environmental Justice* 10–11 (2013), [http://www.justice.gov/sites/default/files/ej/legacy/2014/02/11/env\\_enforcement-2427806-v2-ej\\_doj\\_annual\\_report\\_fy2013.pdf](http://www.justice.gov/sites/default/files/ej/legacy/2014/02/11/env_enforcement-2427806-v2-ej_doj_annual_report_fy2013.pdf).

have closed off nearly all civil rights remedies to environmental justice advocates.

For example, environmental justice advocates have all but abandoned two potential claims because of their requirement to show intentional discrimination: equal protection claims under the Fourteenth and Fifth Amendments to the United States Constitution, and claims under Section 601 of Title VI of the Civil Rights Act of 1964.<sup>47</sup> Beyond the well-documented difficulty in proving discriminatory intent in any case,<sup>48</sup> proving such intent is especially hard in a remedial environmental justice case because, in most circumstances, there probably was not discriminatory intent. This is a manifestation of the same damoclean balance between societal welfare and individual civil rights I alluded to earlier, only the sword has fallen here. Claimants must prove with great precision that they are complaining of discriminatory animus and not their unfortunate experience with an otherwise efficient distribution of welfare. This understanding is generally incompatible with environmental justice; even though siting of certain undesirable land uses may be an opportunity for discretion and thus discrimination, it is exceptionally difficult to prove intent during the regular and ongoing operation of environmental law as it was written and designed. Thus, many advocates have given up trying under the international discrimination standard.

However, it is no less discrimination when the law acts to systematically expose people to increased pollution based on race, as embodied in the infamous “disparate impact” standard. Introduced in the Title VI context by the case *Lau v. Nichols*, this standard permits a plaintiff to show discrimination “even though no purposeful design is present” by showing an action’s disparate and adverse impact on persons of a suspect class.<sup>49</sup> This is a more natural fit for environmental justice claims, and advocates quickly targeted areas of equal protection law that still maintained the “disparate impact”

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<sup>47</sup> See Cole, *supra* note 7, at 540 (“All the subsequent equal protection suits which have been decided by the courts have encountered the same problem of proving intentional discrimination: after *Washington v. Davis* [426 U.S. 229 (1976)] and *Arlington Heights* [429 U.S. 252 (1977)], the equal protection clause is no longer a viable cause of action in most cases.”); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (“In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”).

<sup>48</sup> Doug Linder, Exploring Constitutional Conflicts, *Proving Unconstitutional Discrimination, The Issue: How Does One Prove That a State Action or Policy Violates the Equal Protection Clause?*, EXPLORING CONSTITUTIONAL LAW, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/provingdiscrim.htm> (last visited Dec. 4, 2014).

<sup>49</sup> *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

standard to show discrimination; specifically, Section 602 of Title VI of the Civil Rights Act of 1964.<sup>50</sup>

Section 602 was attractive to environmental justice scholars and advocates for a number of reasons. Generally, Title VI guarantees that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>51</sup> Environmental law is generally structured using “cooperative federalism,” meaning that the federal government generally funds a portion of state programs that administer environmental laws. This structure gave environmental justice advocates an especially long reach through Section 602, offering a single civil rights claim for nearly all environmental programs.<sup>52</sup> Likewise, the Supreme Court had affirmed that discriminatory intent is not required where the agency endorsed a disparate impact style analysis in its regulations implementing the requirements of Title VI,<sup>53</sup> and EPA’s Title VI regulations endorsed disparate impact analysis.<sup>54</sup> Further, the Supreme Court suggested that Section 602 included a private right of action to enforce an agency’s Title VI regulations—in this case, the disparate impact of environmental programs on racial minorities.<sup>55</sup> Finally, the Court’s cases suggested that Title VI offered classic remedial remedies: equitable injunctions and damages.<sup>56</sup>

But, in 2001, the Supreme Court closed the Title VI door by removing the implied private right of action in Section 602.<sup>57</sup> In that case, *Alexander v. Sandoval*, the Supreme Court considered Alabama’s decision to declare English as its official state language.<sup>58</sup> Individuals filed a class action against the Alabama Department of Transportation seeking to enforce the Department of Justice’s disparate impact Title VI regulations.<sup>59</sup> The plaintiffs argued that Alabama’s English-only policy had the effect of discriminating against people on the basis of their national origin.<sup>60</sup> The Court used the case to clarify the scope of Title VI enforcement, and held that Section

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<sup>50</sup> See, e.g., Lazarus, *supra* note 1, at 834–39.

<sup>51</sup> 42 U.S.C. § 2000d (2012).

<sup>52</sup> See Lazarus, *supra* note 1, at 835–36.

<sup>53</sup> *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 584 & n.2 (1983).

<sup>54</sup> See 40 C.F.R. § 7.35 (1991).

<sup>55</sup> See *Guardians Ass’n*, 463 U.S. at 593–95.

<sup>56</sup> See, e.g., Lazarus, *supra* note 1, at 836.

<sup>57</sup> *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001).

<sup>58</sup> *Id.* at 278–79.

<sup>59</sup> *Id.* at 275.

<sup>60</sup> *Id.* at 279.

602 does not include a private right of action to enforce disparate impact regulations.<sup>61</sup> Section 601 does still include a private right of action, but plaintiffs under that claim must prove intentional discrimination rather than disparate impact.<sup>62</sup>

The *Sandoval* decision left two important issues undecided. First, the Court's endorsement of the intentional discrimination standard under Section 601 of Title VI drew into question whether the disparate impact standard is still valid in agency regulations implementing Title VI.<sup>63</sup> Second, Justice Stevens' dissent suggested that a private individual may still use Section 1983 of the Civil Rights Act of 1871 to enforce disparate impact regulations, even though Section 602 was closed.<sup>64</sup> These uncertainties notwithstanding, the *Sandoval* case caused much teeth-gnashing in the literature, prompting articles with titles like "Abandon All Hope Ye That Enter" the world of environmental justice litigation, and "Title VI or Bust?" suggesting that things were indeed bust.<sup>65</sup>

Things are not bust, and there is still some hope for successful environmental justice advocacy. To be sure, *Sandoval* was a setback; but it is also an important teaching moment for all interested in the development of environmental justice as civil rights. That lesson has two parts. The first is that the Supreme Court is not interested in making new doctrinal steps to expand the scope of civil rights laws. A number of scholars have emphasized the Supreme Court's shift towards limiting rights and remedies available under the equal protection doctrine and civil rights laws.<sup>66</sup> This scholarship explains the shift as a reaction to "pluralism anxiety," or the fear that rapid expansion of rights and protections to minority groups threatens to fracture the political balance and destabilize American society.<sup>67</sup> Judges with this

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<sup>61</sup> *Id.* at 288–89.

<sup>62</sup> *Alexander*, 532 U.S. at 288–89.

<sup>63</sup> *Id.* at 282 (stating that Title VI disparate impacts regulations "are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination, but petitioners have not challenged the regulations here.") (citation omitted).

<sup>64</sup> *Id.* at 301 (Stevens, J., dissenting) ("In summary, there is clear precedent of this Court for the proposition that the plaintiffs in this case can seek injunctive relief either through an implied right of action or through § 1983.")

<sup>65</sup> See generally Scott Michael Edson, *Title VI or Bust? A Practical Evaluation of Title VI of the 1964 Civil Rights Act As an Environmental Justice Remedy*, 16 FORDHAM ENVTL. L. REV. 141 (2004) (assessing the effectiveness of Title VI as used by environmental justice advocates); Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51 (2009) (discussing attempts to use Civil Rights law to address racial bias in environmental decision making).

<sup>66</sup> See Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1141–43 (2002); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–48 (2011).

<sup>67</sup> See Yoshino, *supra* note 66, at 747–48; Rubenfeld, *supra* note 66, at 1143.

anxiety prefer to push progressive movements out of the courts and into the legislature, thereby promoting compromise and a coming-together of people that better reflects our societal aspirations.<sup>68</sup> As I read it, this is not necessarily a pernicious view; doctrinal development along these lines does not have to roll-back existing protections for minority groups, although it might. The important difference here is that this view staunchly resists the expansion of existing remedies to account for new approaches to minority rights and discrimination. This is bad news for environmental justice, and unfortunately seems to be the view of a majority of the Supreme Court.

The second part of the lesson is that civil rights doctrinal development is mostly a top-down enterprise, meaning that lower courts are hesitant to embrace new approaches to civil rights doctrine without favorable decisions from the Supreme Court. The epilogue to *Sandoval*, testing disparate impact claim under the Section 1983, provides a good example of this effect. As noted above, Justice Stevens' dissent suggested that advocates could still potentially use Section 1983 as a private right of action to enforce Title VI disparate impact regulations.<sup>69</sup> It did not take long for someone to try and fail. Most commenters look to a case in the Third Circuit, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, as the carrion call.<sup>70</sup> *South Camden* was an outright environmental justice case brought by citizens claiming that the New Jersey agency's decision to permit a steel-grinding cement facility in a minority community was discriminatory.<sup>71</sup> The original case proceeded under Section 602 but, after *Sandoval*, was amended to rely on Section 1983.<sup>72</sup> The plaintiffs succeeded in sufficiently showing a disparate impact under Title VI regulations and the district court enjoined the plant pursuant Section 1983.<sup>73</sup> The plant appealed.<sup>74</sup>

The Third Circuit reversed based upon its reading of *Sandoval*.<sup>75</sup> Their reasoning started with the point that Section 1983 does not create an en-

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<sup>68</sup> See Yoshino, *supra* note 66, at 747–48; Rubinfeld, *supra* note 66, at 1143.

<sup>69</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 300 (2001) (Stevens, J., dissenting) (“Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of re-challenging Alabama's English-only policy in a complaint that invokes § 1983 even after today's decision.”); *e.g.*, *supra* text accompanying note 64.

<sup>70</sup> *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d Cir. 2001).

<sup>71</sup> *Id.* at 774–76.

<sup>72</sup> *Id.* at 776.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 774, 776.

<sup>75</sup> *S. Camden Citizens in Action*, 274 F.3d 771 at 790–91.

forceable right itself.<sup>76</sup> That right must come from somewhere else. The plaintiffs relied on Section 602 and EPA's Title VI regulations.<sup>77</sup> The Court in *Sandoval* held that Section 602 does not create a right itself, and the Third Circuit interpreted that holding to say that the Section cannot then create regulations that in turn create a private right of action.<sup>78</sup> *Sandoval* was a breeze to the house of cards: because Section 602 does not create a right, the EPA regulations do not create a right; because those regulations do not create a right, Section 1983 has no right to enforce. The Third Circuit had to all-but-explicitly overrule a prior decision permitting enforcement of Title VI regulations through Section 1983 to satisfy its view of *Sandoval*.<sup>79</sup> Thus, *South Camden* is a good example of how the Court's rights-limited approach limits the ability of lower courts to take the doctrinal steps needed to make environmental justice claims viable under civil rights law.

Drawing out *Sandoval* and *South Camden* helps explain that the failure of environmental justice claims to gain traction in civil rights laws is a failure of civil rights doctrine generally to remain flexible, not a problem with framing environmental inequalities as a civil rights issue. It is a minor victory to point out, but it should be a cause for optimism among environmental justice advocates and a cause for caution in approaching environmental justice claims under Title VIII—the last of the civil rights claims identified by environmental justice advocates.

### PART III.

Title VIII of the Civil Rights Act of 1968 prohibits “discriminat[ion] against any person in the . . . sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin.” It is attractive to environmental justice advocates for many of the same reasons that Title VI was attractive. It offers a private right of action and access to remedies like injunctions and damages.<sup>80</sup> Even better than Title VI, Title VIII claims are enforceable against private parties, rather than just government entities.<sup>81</sup> And, for now,

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<sup>76</sup> *Id.* at 781.

<sup>77</sup> *Id.* at 780.

<sup>78</sup> *Id.* at 790.

<sup>79</sup> *Id.* at 784–85.

<sup>80</sup> Alice L. Brown & Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act)*, 14 VA. ENVTL. L.J. 741, 743–44 (1995).

<sup>81</sup> *Id.* at 742, 744.

Title VIII permits disparate impact analysis well suited to environmental justice claims.<sup>82</sup>

Title VIII is important because it presents an opportunity to highlight the connection between civil rights, dignity, and the property roots of environmental law. The purpose of providing civil rights is to safeguard every person's equal claim to dignity.<sup>83</sup> Dignity before other people, the state, and the marketplace is crucial to asserting a person's identity within their personal and civic sphere. Property also plays a role in a person's dignity. Ever since Margaret Jane Radin's famous article, the law has recognized and developed the special ability of property to establish and sustain a person's identity within their personal and political community.<sup>84</sup> Property, in capturing the difference between a house and a home, is equally important in establishing and supporting a person's dignity. Title VIII captures the nexus between these two ideas, recognizing that limited access to owning property and the dismantling of stable homes and neighborhoods through inadequate provision of services was a classic and effective aspect of racial discrimination. These practices, though focused on property, tore down the dignity of those discriminated against. Incorporating environmental inequities into this interaction between place and personhood gets to the very root of the environmental justice movement—more so even than Title VI—and offers a chance to cast light on the much-needed realization that environmental law is as much about creating safe and sustainable communities as it is about internalizing externalities of the industrial economy.

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<sup>82</sup> The state of disparate impact analysis in Title VIII is worth drawing out, as I think it is another example of the Court's rights-limited influence on civil rights doctrine. The Fourth Circuit first endorsed disparate impact analysis in Title VIII in 1984. *See Betsey v. Turtle Creek Ass'n*, 736 F.2d 983, 986 (1984). Since then, every other circuit adopted the disparate impacts test for Title VIII, offering perhaps one of the closest brushes with certainty civil rights advocates had experienced. Yet despite unanimity in the circuits, the Supreme Court has granted *certiorari* on the issue three times since 2012. Few dispute that the Court intends to end disparate impact analysis in Title VIII and perhaps eliminate the doctrine altogether. *See, e.g.,* Cornelius J. Murray IV, *Promoting "Inclusive Communities": A Modified Approach to Disparate Impact Under the Fair Housing Act*, 75 LA. L. REV. 213, 232, 234, 236 (2014). But the first two cases settled before arguments, preserving the doctrine through a fascinating combination of luck and intrigue—many contend that the Civil Rights Division of the Department of Justice, through then-Assistant Attorney General now-Secretary of Labor Tom Perez, intervened to broker these settlements in an effort to avoid Court review. *See, e.g.,* UNITED STATES CONGRESS, JOINT STAFF REPORT, DOJ'S *QUID PRO QUO* WITH ST. PAUL: HOW ASSISTANT ATTORNEY GENERAL THOMAS PEREZ MANIPULATED JUSTICE AND IGNORED THE LAW 1 (2013). But the last case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, Case No. 13-1371, has been argued and will soon yield a decision. Only time will tell if disparate impact will remain an element of Title VIII litigation.

<sup>83</sup> *See* International Covenant on Civil and Political Rights, Oct. 5, 1977, 999 U.N.T.S. 171.

<sup>84</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); *see also* Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J. L. & POL'Y 93, 94 (2011).

However, this connection requires a doctrinal step: the characterization of environmental protection as “the provision of services or facilities in connection” with the “sale and rental of a dwelling.” Conceptualizing environmental protection as a “service” related to owning and maintaining a home is certainly doable and is even reasonable.<sup>85</sup> But it takes an admittedly broad reading of Title VIII’s concept of “services” beyond the acquisition of housing.<sup>86</sup>

The post-*Sandoval* lesson, that the Court’s rights-limited approach constrains the development of civil rights remedies in the lower courts, suggests that now is not the appropriate time to take that doctrinal step. And most everyone agrees on this point, even the lower courts. Courts have narrowly construed Title VIII’s guarantees around the idea of access to housing rather than a broader conception of services or quality of life.<sup>87</sup> Lower courts have resisted classic environmental justice issues like the siting of a polluting facility or lack of access to transportation infrastructure out of concerns with expanding the boundaries of Title VIII farther than the Supreme Court would want.<sup>88</sup> For example, the Fourth Circuit reasoned: “The Supreme Court has cautioned against transforming into positive guarantees the language prohibiting discrimination in the Fourteenth Amendment . . . . We see no reason why this oft-repeated constitutional lesson should not apply to statutory construction [of Title VIII] as well.”<sup>89</sup>

Title VIII is not quite ready for environmental justice, and advocates should recognize that. I think it is important, at this stage in the development of civil rights laws, to avoid Title VIII in environmental justice cases. This is not, as I have related above, because environmental justice issues are not proper civil rights issues. This article aims to lay out a number of strong reasons why they are. But the risk is too great that Title VIII will suffer the same fate as Title VI and this potentially useful tool could be closed off. Instead, advocates would benefit more by laying the groundwork that connects environmental quality to property, property to dignity, and dignity to civil rights. In this project, time is on environmental justice’s side.

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<sup>85</sup> See Brown & Lyskowski, *supra* note 80, at 748–55 (1995) (describing the doctrinal boundaries of “service” under Title VIII); see also Benjamin Rajotte, *Environmental Justice in New Orleans: A New Lease on Life for Title VIII?*, 21 TUL. ENVTL. L. J. 51, 70–74 (2007) (updating with more recent cases).

<sup>86</sup> Brown & Lyskowski, *supra* note 80, at 755 (“There is no silver bullet for environmental justice plaintiffs.”).

<sup>87</sup> See Swati Prakash, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CALIF. L. REV. 1437, 1475–83 (2013).

<sup>88</sup> *Id.* at 1476.

<sup>89</sup> *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 192–93 (4th Cir. 1999).

There are at least three reasons why, although the arc of time is long, it bends towards environmental justice.

*First*, the trend is towards both more and more rigorous evidence that the existing distribution of environmental costs has a disparate and adverse impact on racial minorities. Despite the distinguishable difference between statistical showings and the fact of legal discrimination, the continuing weight and exploration of the issue suggests only stronger and more voluminous evidence to support Title VIII claims. Beyond helping future litigation, general proof and acceptance of racial disparities in environmental services will help ease the conceptual shift in what it means to protect property as an element of a person's dignity.

*Second*, the trend is towards a better understanding of how area or neighborhood-wide environmental harm directly impacts the services and incidences of private property ownership. For example, greater understanding of how wetlands provide valuable ecosystems services to the surrounding properties and communities has gained enough traction that scholars, advocates, and even some courts have framed the destruction of wetlands as a cognizable nuisance that damages nearby property owners.<sup>90</sup> Similar overlaps in the traditional environmental laws and property will evolve over time as the sources and impacts of various kinds of pollution are better understood.

*Third*, the trend is towards a more concise and rhetorically powerful understanding that property ownership is related to the dignity of the individual, the neighborhood, and the community. Prominent scholars of property and environmental law have continued to advance concepts of property, regulation, and ethics that intertwine property with personhood and dignity.<sup>91</sup> Likewise, scholars of race and poverty have drawn connections between property, race, segregation and community.<sup>92</sup> These academic refinements can help narrow the issue for advocates to present.

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<sup>90</sup> See, e.g., J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE W. RES. L. REV. 753, 762–63 (2008) (discussing *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*3, \*5 (R.I. Super. Ct. July 5, 2005)).

<sup>91</sup> See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 860 (2009); Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857, 871–74 (2013).

<sup>92</sup> See, e.g., John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1290 (1993); Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L. J. 1667, 1671 (2013).

## CONCLUSION

It is difficult to ask any rights-based movement to wait. The personal impacts of environmental inequities will not wait as lawyers refine the proper cause of action. Yet identifying and building the connections needed to sustain the Title VIII claim has the ancillary benefit of continuing progress in other legal fora as well. Two approaches in particular seem fruitful.

First, executive agencies appear interested in fleshing out the connection between environmental quality and civil rights through the administrative process. In light of the recent government-wide commitments to reforming civil rights programs, agencies could be important allies in developing the doctrinal connection between environmental quality and an individual's civil rights.<sup>93</sup> In particular, the Department of Housing and Urban Development's commitment to disparate impact analysis is a light among the rocks of Title VIII doctrine.<sup>94</sup> Pointed and constructive engagement in developing HUD's Title VIII doctrine, as well as EPA's and other agency's Title VI complaint programs, with an eye toward property, environmental quality, and dignity can help settle a doctrinal foundation that can be imported, or at least presented, to the courts.

Second, tort suits are well-suited to connecting environmental quality with property-based concepts of individual rights. Advocates and scholars have long recognized the value of tort suits in siting cases.<sup>95</sup> Tort suits can also be used with an eye toward connecting the nature of the property damage to the regulation of pollution as an incident of property ownership, thereby building a doctrinal foundation for Title VIII outside of the civil rights context. These are the next projects of the environmental justice lawyer.

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<sup>93</sup> See Neal, *supra* note 22, at 942–45.

<sup>94</sup> Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) (“Through this final rule, HUD formalizes its long-held recognition of discriminatory effects liability under the Act and, for purposes of providing consistency nationwide, formalizes a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the Act.”); see also Michael G. Allen et al., *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 158 (2014).

<sup>95</sup> See Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 492–93 (1997); see also Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 223, 226 (1995).

