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# ENVIRONMENTAL JUSTICE: THE PATH TO A REMEDY THAT HITS THE MARK

*Ora Fred Harris, Jr.\**

## I. INTRODUCTION

For almost three decades, the environmental movement has occupied a prominent position on the American political landscape.<sup>1</sup> Throughout these many years, this movement has spawned a variety of statutes and regulations designed to improve the quality of the air and water, to manage the disposal and cleanup of hazardous wastes, to preserve endangered species, and to conserve natural resources.<sup>2</sup> The principal goal of such environmental policy making generally has been allocational efficiency,<sup>3</sup> namely, to allocate scarce resources for ecological health in an efficient (cost-effective) manner for now and in the future. In this vein, the debate has focused frequently upon whether the cost of environmental regulation exceeds the benefits to be derived therefrom or, stated differently, whether the regulatory regime is truly efficient or cost-effective.<sup>4</sup>

Virtually ignored, however, in these discussions, has been the distributional unfairness of environmental protection because, once again, the prevailing focus has been upon allocational efficiency norms.<sup>5</sup> This

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1. See, e.g., Richard J. Lazarus, *Pursuing Environmental Justice: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 788 (1993) ("1970s marked the heyday of the modern environmental era").

2. See *id.* at 787.

3. See *id.* at 842 (EPA has consistently viewed its obligation as "establishing technically effective, and economically efficient, pollution control standards").

4. See Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271, 286 (1992) ("[e]nvironmental scholars have concerned largely with cost-benefit theory").

5. See Richard J. Lazarus, *Distribution in Environmental Justice: Is There a Middle Ground*, 9 ST. JOHN'S J. LEGAL COMMENT. 481 (1994) ("[e]nvironmental law is thought to be about allocational efficiency, not the distributional unfairness of environmental protection"); Richard J. Lazarus, *Essays on Environmental Justice and the Teaching of Environmental Law*, 96 W. VA. L. REV. 1025 (1994) (commentator draws a dichotomy between allocational efficiency and distributional implications of environmental protection); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 450 (1994) ("few statutes—state or federal—require agency officials to consider the racial or distributional effects of an environmental decision or action"). See also Shutkin Lord, *Essays on Environmental Law, Environmental Justice, and Democracy*, 96 W. VA. L. REV. 1117, 1131 (1994), where the commentators indict the inadequacies of the existing environmental law regime, not only in terms of its indifference to the distributional effects of environmental protection, but also its excessive reliance on science as a cure for our environmental ills and its underestimation of the impact of special interest groups on environmental decisionmaking; Gerald V. Bradley, (Book Review) *Overcoming Posner*, 94 MICH. L. REV. 1898, 1900 (1996), where the commentator contends that Judge Posner's economic analysis of the law is morally bankrupt for a variety of

dismissive attitude for social justice concerns has sparked a nascent field of environmental policy making, and it is variously described as environmental justice, environmental equity, and environmental racism.<sup>6</sup>

The primary theoretical mooring of the environmental justice movement is that the adverse impact of environmental hazards falls disproportionately on poor and minority communities.<sup>7</sup> Several studies reflect a myriad of environmental inequities, namely: (1) the siting of waste facilities;<sup>8</sup> (2) the enforcement of environmental laws and regulations;<sup>9</sup> and (3) the structure of environmental agencies and groups.<sup>10</sup> Of this litany of concerns, the siting of waste facilities has engendered the most environmental justice litigation.<sup>11</sup> Thus, this Article will only examine environmental justice remediation in the waste siting context. This does not diminish the importance of the other distributional inequities spawned by our environmental laws; but it is simply an acknowledgment of the complex and multifaceted issues in this field of

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reasons, including, but not limited to, Posner's concession that "[e]conomics has no theory of distributive justice." See RICHARD A. POSNER, *OVERCOMING LAW* 23 (1995).

6. See, e.g., Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 268 n.1 (1994) (environmental justice is explicated as "a phrase that is aspirational, but not confrontational"). For this reason, the term "environmental justice" will be used in this essay to characterize the distributional inequities emanating from the current environmental regime. See also Linda D. Blank, *Seeking Solutions to Environmental Inequity: The Environmental Justice Act*, 24 ENVTL. L. 1109, 1120 (1994) (refers to the issue as "the environmental civil rights movement"); David Sive, *Environmental Law 25 Years Later: Weaving & Untangling the Web*, 38 RESOURCE L. NOTES 5, 6 (1996), (where the commentator characterizes environmental justice or environmental equity as "one of the most challenging problems that environmental advocates face").

7. 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, 1014 (1993) (commentator does not dispute the existence of "significant evidence of disproportionate siting").

8. See Donald E. Lively, *The Diminishing Relevance of Rights: Racial Disparities in the Distribution of Lead Exposure Risks*, 21 B.C. ENVTL. AFF. L. REV. 309, 311 (1994).

9. See *id.* (besides siting disputes, significant disparities also have been noted in "remedial action, location of clean-up efforts, and the quality of clean-up strategies").

10. See Lazarus, *supra* note 1, at 850 ("[g]overnmental and non-governmental organizations that currently dominate the process need to promote minority participation in the dialogue and, even more fundamentally, they need to educate themselves about minority concerns"); See Reich, *supra* note 4, at 278 ([m]inorities generally do not have entree to decision making through environmental lobbying organizations").

11. See Carol M. Rose, *Environmental Lessons*, 27 LOY. L.A. L. REV. 1023, 1027 (1994) ("the newly emerging topic of environmental racism, now particularly in connection with location of toxic or other wastes in low income areas"); Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523 (1994) ("[s]iting disputes have been the primary context for environmental justice litigation"). But see Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1992 (1992) (posits that disproportionate burdens also exist regarding "air pollution, lead poisoning, pesticide poisoning, and garbage dumps").

environmental policy making, which makes it impossible to address each of them within the narrow confines of a legal essay.

The purpose of this Article is to suggest a plausible approach for the fair and efficient disposition of environmental justice problems arising from the siting of waste facilities in poor and minority communities. Too often, the academic discourse in this area has been largely theoretical and abstract, and thus has been excoriated for lacking a consistent, unified theme.<sup>12</sup> Some detractors have argued that this shortcoming significantly undermines the environmental justice movement.<sup>13</sup> Furthermore, a few pundits contend that the movement primarily persists because of such vague, abstract theories.<sup>14</sup> Whatever the level of skepticism, however, environmental justice remains a vibrant force on the American environmental landscape. Regardless of its harshest critics, it will not disappear from the scene.

The proof of this ascendancy is demonstrated not only by the rapidly growing body of academic scholarship now devoted to environmental justice,<sup>15</sup> but also the currency the subject has gained in governmental regulatory arenas—both legislative and administrative.<sup>16</sup> Indicating, for

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12. See Crawford, *supra* note 6, at 273 (“the legal literature remains highly theoretical”). As a practical matter, vagueness may be advantageous, as “[c]oncreteness only leads to problem after problem after problem”); Been, *supra* note 7, at 1085.

13. See Dr. Michael S. Greve, *Environmental Justice or Political Opportunism?*, 9 ST. JOHN’S J. LEGAL COMMENT. 475 (1994) (where the commentator criticizes the environmental justice movement and seriously questions its major premises). See also Been, *supra* note 7, at 1006 (where the commentator theorizes that the environmental justice movement is now presented in a manner that calls into question “the validity and feasibility of calls for fair siting”).

14. See Been, *supra* note 7, at 1006 (insinuates that environmental justice advocates have cloaked “justice,” “equity,” and “fairness” within a shroud of vagueness simply to advance their agenda).

15. See, e.g., Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329 (1995). See Luke W. Cole, *Foreword: A Jeremiad on Environmental Justice and the Law*, 14 STAN. ENVTL. L.J. 9 (1995); John R. Kyte, *Environmental Justice: The Need for Equal Enforcement and Sound Science*, 11 J. CONTEMP. HEALTH L. AND POL’Y 253 (1994).

16. See Blank, *supra* note 6, at 1116-28 (where the commentator analyzes the pertinent provisions of the Environmental Justice Act of 1992, which was co-sponsored by then-Senator Al Gore and Congressman John Lewis. The Act did not pass either the House or the Senate in 1992; it was reintroduced in 1993, and, to date, has not successfully navigated the rigors of the legislative process. Perhaps this can be described as “harmless error,” given that its provisions mirror the “toothless” features of the National Environmental Policy Act (NEPA)). See Blank, *supra* note 6 at 1121. Interestingly, the comment writer does propose federal legislation as a prophylactic to environmental injustice, notwithstanding the flaws of the Environmental Justice Act. See Blank, *supra* note 6 at 1136. On the administrative side, EPA Administrator Carol Browner has stated “that she would like to increase citizen involvement, starting with Superfund toxic cleanup projects in poor and minority communities and lead removal in low-income areas.” See Blank, *supra* note 6 at 1134 (citing Rita Beamish, *Poor Say They Get ‘Dumped’ On*, DENVER POST, Dec. 20, 1993, at A5).

example, the incipience of environmental justice as a federal policy is President Clinton's Executive Order that requires federal agencies to consider environmental justice concerns while performing their executive missions.<sup>17</sup> While the Executive Order could be assailed as a "paper tiger" substantively, it does establish symbolically that the achievement of social equity in environmental policy making is a matter of national importance.<sup>18</sup> In fact, the Executive Order may serve as a testament that "[f]ew environmental movements have come so far so fast."<sup>19</sup> Nonetheless, "[w]e need creative new strategies that might actually work."<sup>20</sup> This Article will attempt to provide a pathway to the resolution of this daunting task.

## II. BACKGROUND

### A. The Philosophical Debate

Diverse views exist regarding "whether it is the initial siting decision or subsequent events attributable to market dynamics that cause disparities between the risks borne by whites and minorities, or by rich and poor."<sup>21</sup> An understanding of the precise basis for such disparity is crucial to ensure that what remedies, if any, are appropriate in a particular situation.<sup>22</sup>

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17. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

18. In Ironbound, New Jersey, for example, residents were able to block successfully the conversion of a solid-waste transfer station into a \$63 million sewage sludge treatment plant, which the residents believed would spew noxious odors 24 hours a day, because of arguments grounded on President Clinton's Executive Order. See *Ironbound Draws Its Line at the Dump*, N.Y. TIMES, Mar. 29, 1997, at 22, § 1, col. 1 ("[w]hile the order applied only to federal agencies and not to local and state governments, it has given communities 'a strong political tool' to force debates over siting decisions," quoting Lois Gibbs, Executive Director of the Citizens' Clearinghouse for Hazardous Waste).

19. See Kyte, *supra* note 15, at 271.

20. See Cole, *supra* note 15, at 9. See also Crawford, *supra* note 6, at 273 (asserting "an immediate, pressing need for strategies and tactics to both existing and threatened instances of environmental injustice"); Torres, *supra* note 5, at 433 (very little commentary about how "to achieve environmental justice"); Cole, *supra* note 11, at 192 ("[m]ore difficult than merely identifying the problem is coming up with a solution to it").

21. See Mank, *supra* note 15, at 331. The commentator astutely observes that "it is important to understand the causes of such disparities because different remedies may be appropriate." See Mank, *supra* note 15, at 331.

22. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics*, 103 YALE L.J. 138 (1994). The commentator's basic thesis is that, without further research, we run the risk of devising remedies that erroneously focus on race or class, to the exclusion of market dynamics, as the root cause of the disproportionate siting problem. In such circumstances, there is, in the commentator's opinion, the distinct possibility of crafting a remedy that may miss the mark.

There have been varied critiques of the concept of environmental justice on a number of levels.<sup>23</sup> With regard to a "moral claim, the principal attack is that there has not been a clear statement of the meaning of distributive justice within the context of environmental burdens."<sup>24</sup> In this connection, the basic premise is "that since there is no coherent definition of disproportionate impact separate from the racial claims, assertions of such have to be rejected until the causal link is indisputably proven or until a coherent case can be made for the concept that unhinges it from the claims of racial injustice."<sup>25</sup>

With regard to a market perspective, the argument goes, "locally undesirable land uses are attributable largely" to neutral, objective market forces.<sup>26</sup> Therefore, poor people, regardless of color, will be disadvantaged invariably in relation to relatively wealthier people in the acquisition of goods. And "[e]nvironmental quality," in the eyes of market adherents, "is merely a good that also is market-sensitive."<sup>27</sup> Thus, it is not surprising, under this market-based point of view, that "[p]oor people merely choose, and rationally so, to spend their scarce resources on other goods," namely, non-environmental goods.<sup>28</sup>

Finally, with regard to a "coming to the nuisance" argument, a variation of the market-based justification is, here again, advanced. The basic thesis is that the environmental burdens currently railed against "pre-date the current racial composition of the communities" in question.<sup>29</sup> This, to be sure, raises the question of whether waste sites moved to poor people, including poor people of color, or whether poor people, including poor people of color, moved to these sites pursuant to a normal, market-driven change in residential housing patterns.<sup>30</sup>

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23. See, e.g., David L. Feldman & Christopher H. Foreman, Jr., *The Promise and Peril of Environmental Justice*, (The Brookings Institution 1998) 9 LAW & POLITICS BOOK REV. 66-68 (1999) (where the book reviewer, Feldman, notes that "Foreman, a senior fellow at the Brookings Institution, posits that charges of disproportionate impact and 'discriminatory regulatory enforcement' of environmental laws and regulations, while effective political rhetoric, are 'weaker than environmental justice (EJ) advocates usually admit' due to a lack of empirical evidence.").

24. See Gerald Torres, *The Future of Environmental Regulation: Environmental Justice: The Legal Meaning of A Social Movement*, 15 J. L. & COM. 597, 607 (1996).

25. See *id.*

26. See *id.*

27. See *id.*

28. See *id.*

29. See *id.* at 608.

30. See Torres, *supra* note 24, at 608. The commentator astutely observes that such "choice might reflect a number of things. It might reflect the underlying land value and, because we are in a market and class society, it makes sense that poor people live where land is cheaper. However, the disparities might just reflect a desire to spend money on one thing rather than another." Torres, *supra* note 24, at 608.

## B. The Constitutional Debate

It is generally understood that “[s]iting discrimination suits can address only disparities caused by the initial decision.”<sup>31</sup> As a practical matter, however, such suits don’t usually succeed under the United States Constitution, given the United States Supreme Court’s restrictive interpretation of the Equal Protection Clause. In view of the Supreme Court’s reasoning, only conscious or willful conduct implicates equal protection concerns.<sup>32</sup> As a result, the Court has repeatedly required proof of “intent to discriminate” to establish a constitutional violation.<sup>33</sup> In the context of siting decisions, this presents a virtually insuperable barrier for an aggrieved party. Consequently, environmental justice claims based on the equal protection clause have been invariably unsuccessful.<sup>34</sup> This stark reality has sparked some legal scholars to proclaim that the “battle for environmental justice may be better fought in the political, rather than [the] judicial forum.”<sup>35</sup> In fact, a strong sentiment exists that the judicial system is the worst venue to pursue environmental justice claims.<sup>36</sup> Not only must a claimant navigate daunting proof hurdles

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31. See Mank, *supra* note 15, at 331.

32. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). In view of the constitutional “intent to discriminate” standard, the Equal Protection Clause has not provided an optimal remedy for environmental justice claims. See, e.g., *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff’d*, 782 F.2d 1038 (5th Cir. 1986); *East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Comm’n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d*, 896 F.2d 1264 (11th Cir. 1989). *But see* Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 228-31 (1994) (where the commentator severely criticizes the “intent to discriminate” criterion of the 14<sup>th</sup> Amendment in view of its historical genesis, namely, to shield African-Americans from racial injustice). The antithesis frequently ensues whenever this rigorous standard of proof is interposed in waste siting cases. Thus, the commentator advocates the discredited “effects” test for such siting cases because, as in many employment discrimination cases under Title VII, “claimants generally cannot obtain proof of wrongful intent.” See *id.* at 231.

33. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

34. See, e.g., *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff’d*, 782 F.2d 1038 (5th Cir. 1986); *East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning and Zoning Comm’n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d*, 896 F.2d 1264 (11th Cir. 1989).

35. See Torres, *supra* note 5, at 437. See also Cole, *Environmental Justice Litigation*, *supra* note 11, at 523 (“[e]nvironmental justice struggles are at heart political and economic, not legal”).

36. See Cole, *Remedies for Environmental Racism*, *supra* note 11, at 1995. The commentator endorses a political, grass-roots remedial approach. In this vein, he cogently argues that victims of environmental racism are most vulnerable in a courtroom and should seek judicial relief only as a last resort. See Cole, *supra*, note 11, at 1991-97.

posed by the United States Constitution, but the judicial system may provide a distinct advantage to many well-heeled defendants, who might be better able to pursue costly, protracted, and emotionally debilitating litigation.<sup>37</sup> Thus, as a bit of irony, an environmental justice claimant probably is imprudent to "focus on discrimination suits and judicial scrutiny of substantive results."<sup>38</sup>

### III. THE PATH TO AN APPROPRIATE REMEDY

#### A. Shunning the Courts

Because the existing environmental law regime basically ignores the distributional unfairness of environmental protection, the courts are not a safe haven for environmental justice claimants.<sup>39</sup> To be sure, the micro-economic theory's dismissive attitude for social fairness values, coupled with the daunting proof barriers of the United States Constitution,<sup>40</sup> create a formidable hurdle for such claimants. Furthermore, given the high transaction costs ordinarily associated with complex litigation,<sup>41</sup> securing an efficient outcome

37. See Cole, *supra* note 11, at 1996.

38. Cole, *Remedies for Environmental Racism*, *supra* note 11. Some promise, although yet to be squarely addressed by the United States Supreme Court, may exist in a judicial challenge bottomed on Title VI of the Civil Rights Act of 1964. In *Seif v. Chester Residents Concerned for Quality Living*, 132 F.3d 925 (3d Cir. 1997), *dismissed on mootness grounds*, 118 S. Ct. 2296 (1998), some citizens of Chester, Pennsylvania, an economically depressed and predominately African-American town, brought suit in federal district court, contending that Title VI afforded a private right of action to block decisions by an activity receiving federal financial assistance to site waste treatment facilities repeatedly in Chester rather than in the rest of Delaware County (Pennsylvania), which is mostly white. The United States Court of Appeals for the Third Circuit ultimately reversed the rejection of the plaintiffs' suit by the federal trial court and, in turn, held that such a private environmental justice cause of action did come within the purview of Title VI. But the permit for the challenged waste site was revoked by the Title VI activity after the Supreme Court had granted certiorari, and *Seif*, as a result, was dismissed on mootness grounds. The *Seif* decision "brought the 3rd Circuit into step with the majority of federal appeals courts." See Steven Keeva, *Pursuing the Right to Breathe Easy*, A.B.A. JOURNAL Feb. 1999, at 49. As a caveat, however, the commentator noted that "[I]luckily for environmental justice advocates who feared the Court took the case to reverse the 3rd Circuit, something happened on the way to the courthouse." *Id.* See also Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TULANE L. REV. 787 (1999).

39. See Michael O'Neill, *Law and Economics Needs a Dose of Reality*, THE NAT'L L.J., July 15, 1996, at A14. Perhaps this reflects "the desiccated [sic], abstract character of Chicago-style economics and its seeming indifference to history and present reality." *Id.*

40. See *supra* notes 31-38.

41. Transaction costs are defined as those costs necessary to effectuate a market exchange. Such costs typically are search costs, enforcement costs, policing costs, and monitoring costs, etc. Under Ronald H. Coase's thesis, there is a direct correlation between the level of transaction costs and the ability to obtain an efficient outcome. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 15-19 (1960).

by way of litigation is extremely difficult.<sup>42</sup> Hence, the judiciary should be eschewed generally as a venue for the disposition of environmental justice claims.

## B. Avoiding the EPA

The most contentious issue within the administrative realm lies with the implementation of EPA's interim guidelines for processing citizen complaints that pollution permits issued by state and local agencies have discriminatory effects and thus violate Title VI, which forbids state and local agencies that get federal funding from discriminating on the basis of race, color, or national origin.<sup>43</sup> Several governors, state and local government officials, and the U.S. Conference of Mayors have adopted resolutions imploring EPA "to withdraw its controversial interim guidance,"<sup>44</sup> so as to avoid impeding the economic development of those urban areas that sorely need it, namely, poor and minority communities.<sup>45</sup> "In response to these concerns, EPA has already convened a new advisory committee. That group, composed of state and local

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42. See Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at 15A ("[r]egulating U.S. industry through lawsuits isn't the most efficient way of doing the job").

43. See Cheryl Hogue, *EPA Issues: Guidelines for Investigating Claims that State, Local Permits Are Discriminatory*, 66 U.S.L.W. 2504 (1998).

44. See Susan Bruninga, *Western Governors Association Joins Calls for EPA to Withdraw Civil Rights Guidance*, 67 U.S.L.W. 2024 (1998).

45. This dilemma—trading ecological health for economic gains—creates some profound philosophical questions. To be sure, some commentators earnestly contend that it might be morally repugnant to place poor or minority people in a position where they must choose between their health and a cash bounty. See, e.g., Mank, *supra* note 15, at 357. A prime example of such a dilemma is the "environmental racism" case arising from the proposed construction of a polyvinyl chloride plant in the predominantly African-American town of Convent, Louisiana, which is located in the midst of what is popularly known as "the chemical corridor" between Baton Rouge and New Orleans. On two separate occasions, EPA Administrator Carol Browner, trying to adhere to the letter and the spirit of President Clinton's Executive Order, denied the owners of the proposed plant an air permit, which effectively forestalled its construction. The fallout surrounding this decision was thunderous within Convent (gender divisions generally developed within individual households over the prospect of gaining \$45,000 per year jobs versus the environmental health of the town's children), within the political hierarchy of Louisiana, including the Governor and the Louisiana Supreme Court, and the Tulane University Law School, which opposed the construction of the polyvinyl chloride plant. In the wake of this political imbroglio, the Louisiana Supreme Court "issued an order prohibiting law student clinic representation of environmental and other community organizations (unless the organizations are composed of indigents)." Letter from Professor Oliver A. Houck, Tulane Law School, to Professor O. Fred Harris, Jr., University of Illinois College of Law (July 31, 1998). In a similar vein, see DAN MCGOVERN, *THE CAMPO INDIAN LANDFILL WAR* (1995), where the Campo Indians passionately fought for the right to site a commercial landfill on their reservation because of the economic benefits of the enterprise.

environmental regulators, environmental justice advocates, academics, and representatives of business, is to give recommendations to [EPA Administrator] Browner in December [1998]."<sup>46</sup> In a later development, however, "[a]fter a year of turmoil, the Environmental Protection Agency is going back to the drawing board with its controversial effort to protect minorities from excessive pollution."<sup>47</sup> The EPA announced that a new policy for dealing with Title VI pollution permits in connection with the environmental justice program "would be written by summer [1999], this time through an open process of hearings, comments, and committee meetings."<sup>48</sup> However, "[c]ritics of the program, while encouraged by the EPA's willingness to make changes, are still concerned about the program's impact on economic development."<sup>49</sup>

In view of the overall disaffection and uncertainty surrounding EPA's environmental justice policy, to date, under Title VI, future administrative action by EPA—interim or final—does not provide much solace regarding the fair and efficient disposition of environmental justice claims. Thus, an environmental justice claimant should not look to EPA as a feasible source of relief.

### C. An Extrajudicial/Extra-Administrative Remedy Is the Best Policy

In view of the myriad shortcomings of the judicial and administrative processes in dealing effectively with environmental justice concerns, this essay rejects both regimes in favor of a remedial scheme that promotes cooperation, not litigation, along with the political empowerment of those who disproportionately bear the burdens of environmental hazards—poor and minority communities.<sup>50</sup>

With regard to cooperation as the most prudent method of resolving environmental justice claims, one can draw from the professional experiences of lawyers, who deal routinely in practice with problems regarding environ-

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46. Bruninga, *supra* note 44, at 2024.

47. *EPA Revisits Issue of Minorities, Pollution*, ST. LOUIS POST-DISPATCH, Dec. 20, 1998, at B7.

48. *See id.* Ann Goode, the director of the EPA's Office of Civil Rights, was quick to emphasize the agency "is not backing away from a strong program of environmental justice." *See id.*

49. *Id.*

50. *See, e.g.,* Stephanie B. Goldberg, *Let's Make a Deal: Cooperation, Not Litigation Is the Newest Way to Clean Up Urban Wastelands*, A.B.A. J., Mar. 1997, at 42. To be sure, it doesn't take a rocket scientist to appreciate that in any form of litigation involving the exposure to toxic or environmental hazards, settlement generally is the best policy. *See* O. Fred Harris, Jr., *Toxic Substance Litigation: Is Settlement the Better Policy?*, THE CHRONICLE, Spring 1990, at 6.

mentally hazardous conditions both in the public environmental law area<sup>51</sup> and private toxic tort litigation.<sup>52</sup> One of the most celebrated is Jan Schlichtmann, whose experiences in litigating the Woburn, Massachusetts, toxic torts case served as the basis for the classic book (and now movie) *A Civil Action*.<sup>53</sup> After suffering through a traumatic experience where he lost his law firm, his legal career, and his material possessions because of his obsession with one of the seminal toxic torts cases, Schlichtmann has returned to practice, is now happily married, and, in addition, has joined the ranks of fatherhood; as a result, he frequently offers the sagacious advice that "litigation all too often is not conducive to problem-solving"<sup>54</sup> in environmental cases. In this connection, some form of Alternative Dispute Resolution (ADR) is wont to offer a creative remedial paradigm in such cases.<sup>55</sup>

"One type of dispute resolution increasingly employed by government and other groups to address environmental issues is the policy dialogue."<sup>56</sup> "Policy dialogue" broadly refers to those "processes designed to facilitate voluntary, interactive exchange among diverse interests for the purpose of working towards consensus solutions to policy issues."<sup>57</sup> In allowing a face-to-face exchange of ideas in an open forum to promote consensus problem-solving, this alternate dispute resolution mechanism offers the prospect of achieving an appropriate remedy for an environmental justice problem,

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51. Some of the major public environmental statutes are the Federal Clean Water Act and the Federal Clean Air Act, which deal with pollution control, and the Federal Superfund Law or CERCLA and the Federal Resource Conservation and Recovery Act [RCRA], which deal with waste management.

52. In contrast to the public environmental law regime, the private tort regulation of environmental hazards seeks damages and, in some instances, injunctive relief, when damages are an inadequate remedy. See GERALD W. BOSTON & M. STUART MADDEN, *LAW OF ENVIRONMENTAL AND TOXIC TORTS: CASES, MATERIALS AND PROBLEMS* 3-5 (1994).

53. See JONATHAN HARR, *A CIVIL ACTION* (1996).

54. Jan Schlichtmann, *Lawyer Promotes Cooperation Over Lawsuits*, USA TODAY, Feb. 4, 1999, at 15A.

55. Alternative Dispute Resolution (ADR) comes in a variety of forms. The most common variation seems to be mediation, which is a non-binding form of dispute resolution, and arbitration, which is binding. Regardless, the general advantage of ADR is that it is less costly and more expeditious. See Michelle Amber, *Study Shows Most Fortune 1000 Companies Use Alternate Dispute Resolution Processes*, 67 U.S.L.W. 2570 (1999) ("ADR is used mostly for economic reasons"; further, it is used "to preserve relationships; protect confidentiality; and avoid setting legal precedents").

56. Jocelyn Adkins, *The Policy Dialogue: Searching for Environmental Solutions*, ENVTL. L., Summer-Fall 1998, at 13.

57. *Id.* Policy dialogue entails three distinct elements: Assessment; Dialogue, and Implementation. See *id.* A significant advantage of this three-phase approach in the politically divisive environmental justice field is that it could negate the "historically prevalent zero-sum (i.e. win/lose) attitudes with collaborative ones." *Id.*

provided, of course, that adversely affected poor and minority communities are empowered with the full panoply of participatory, political rights.<sup>58</sup>

But, as a practical matter, how do such marginalized citizens become sufficiently empowered so that they are able to engage in face-to-face discussions at arms length politically to reach a consensus on an environmental justice problem peculiarly affecting them? In other words, how can the relevant poor and minority community move, so to speak, from underneath the political table merely eating the crumbs to a place at the political table where they may taste the filet mignon of environmental decision making? This form of political empowerment, to be sure, has its genesis in a grass-roots, community-based effort.<sup>59</sup> Further, such empowerment properly values more strongly the views of people who are geographically close to environmental problems.<sup>60</sup>

#### IV. CONCLUSION

Like most environmental policy concerns, securing an appropriate remedy in environmental justice cases has no single answer for all situations. But the "policy dialogue" dispute resolution mechanism, while protecting the rights of poor and minority communities to engage in a remedial dialogue with other stakeholders of the community about a particular environmental justice problem, should provide the path to a remedy that will hit the mark.

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58. See Lazarus, *supra* note 1, at 851 ("[t]he challenge of opening up existing fora to minority involvement is substantial"). An indispensable element of such political empowerment, however, is the full cooperation and support of mainstream environmental groups, such as the Sierra Club, the Natural Resources Defense Council, and the Environmental Defense Fund, which can provide political and economic capital to the environmental justice movement, while expanding their respective memberships and thus enhancing their political clout in the environmental policy making arena. See Lazarus, *supra* note 1, at 850-57. But see Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGICAL Q.* 1, 22-23 (1995) (noting the past indifference of such mainstream environmental justice concerns).

59. Here again, effective political empowerment hinges largely on a symbiotic relationship between environmental justice advocates and mainstream environmental organizations. See Lazarus, *supra* note 1.

60. See Robert R.M. Verchick, *Critical Space Theory: Keeping Local Geography in American and European Law*, 73 *TULANE L. REV.* 739, 772 (1999) ("the people who will suffer the most from destructive sections will usually be those physically closest to the environmental damage").

