



1999

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## Automated Citation

Tseming Yang, *Balancing Interests and Maximizing Rights in Environmental Law*, 23 VT. L. REV. 529 (1999),  
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# BALANCING INTERESTS AND MAXIMIZING RIGHTS IN ENVIRONMENTAL JUSTICE\*

Tseming Yang\*\*

Environmental justice has gained significant attention as a social movement only since the early 1980's. This attention was prompted in part by highly publicized protests and acts of civil disobedience against the siting of a polychlorinated biphenyl (PCB) disposal facility in a predominately African-American and poor community in Warren County, North Carolina.<sup>1</sup> The activists in the Warren County incident recognized that traditional environmental protection approaches which sought to minimize overall pollution, but failed to adequately consider the distributional consequences of such efforts, could not be relied upon to protect their communities.<sup>2</sup> Several high-profile reports, published in the wake of the Warren County events, studied the racial impacts of siting hazardous waste facilities and seemed to confirm such charges of discrimination against minority groups and the poor.<sup>3</sup>

This realization should not have come as a surprise. Pollution sources such as industrial facilities provide many important economic benefits to society. Accordingly, the approaches to regulating such pollution sources have generally attempted to capture the maximum amount of those benefits by balancing them against the environmental and public health costs of the pollution generated. Unfortunately, the distributional impacts on racial minority and poor communities and the environmental and public health costs imposed by such regulatory decisions have rarely, if at all, entered into governmental decision-making. Poor and minority communities, left without adequate recourse under the environmental regulatory scheme for claims of unfair and inequitable burdens,<sup>4</sup> looked to the strategies and tactics of the civil rights movement as a model for vindicating their grievances, thus leading to the emergence of the modern environmental justice movement.

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\* An earlier version of this essay was presented at the *Vermont Law Review's* Environmental Justice Symposium on October 24, 1998.

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1. See, e.g., Dale Russakoff, *As in the '60s, Protesters Rally; But this Time the Foe is PCB*, WASH. POST, Oct. 11, 1982, at A1.

2. See *id.*

3. See GENERAL ACCOUNTING OFFICE, U.S. DEP'T OF TREASURY, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS ON SURROUNDING COMMUNITIES (1983); COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

4. In fact, some environmental justice activists blame environmental statutes themselves as one of the major causes of environmental injustice. See, e.g., Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 646 (1992).

While environmental justice as a movement is of relatively recent origin, legal academic attention to it, however intense now, is generally of an even more recent vintage.<sup>5</sup> In fact, it is the novelty of the field that has been the impetus for legal scholarship concerning environmental justice. Much of it has focused on the utility, or in many minds the inadequacies, of the civil rights approach to environmental justice problems. Yet, as the intersection of civil rights and environmental law, it is technically not a new area of law, and neither litigation nor development of legal doctrine in this area occurs in a vacuum. The principles of civil rights and environmental law continue to apply, as environmental justice advocates have learned the hard way through their experiences with the first few cases that raised civil rights claims to vindicate grievances.<sup>6</sup>

In this Essay, I would like to offer some thoughts about the differing nature of adjudication and discourse in these two areas of the law. In particular, I will focus on the role that maximizing rights and balancing interests have had in approaches to decision-making about civil rights and our environment. These approaches can be termed in short "rights-maximizing" and "interest-balancing," respectively.<sup>7</sup> This task, I think, is not just of academic interest. A better understanding of these differences will, I hope, give us insights into the law governing environmental justice issues as well as the future of environmental justice litigation. In particular, the mismatch in approaches explains, in part, the lack of success that civil rights claims have encountered in the environmental context. Understanding the rights-maximizing and interest-balancing dichotomy can provide us with insight into why some litigation approaches to environmental justice issues might not be as successful as others, and allow us to make some tentative suggestions about more successful ones.<sup>8</sup> Of course, it cannot answer all questions since much depends on the individual context. However, it can serve as a valuable analytical tool. While I utilize some of the insights gained from understanding this mismatch to criticize some recent EPA actions and to suggest some

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5. See Peter Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 285-87 (1992).

6. See, e.g., *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *R.I.S.E. v. Kay, Inc.*, 768 F. Supp. 1144 (E.D. Va. 1991).

7. These terms are not my own creation but adopted from Paul Gewirtz. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588-89 (1983) (examining school desegregation litigation in the wake of *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954)).

8. There are, of course, other important structural differences between civil rights law and environmental law. See, e.g., Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 739-44 (1993) (contrasting the differing conceptions and approaches to harm). A more comprehensive treatment of this topic will be presented in a paper I am currently preparing.

avenues for improving environmental decision-making to address environmental justice concerns, in particular through explicit consideration of incommensurable values and interests such as autonomy and community preservation, I do not intend to offer a fully formed theory or comprehensive treatment of all potential approaches available to address environmental justice concerns.

Rights-maximizing and interest-balancing are both familiar concepts in the law. In broad terms, rights-maximizing means just that—choosing the most effective means for maximizing the implementation of a right. Paul Gewirtz has described this as an approach to adjudication in which the court, once it has found a violation of a right, orders a remedy that will be most effective at redressing the rights violation, regardless of the cost to the wrongdoer or others.<sup>9</sup> In contrast, interest-balancing considers the costs and burdens that a remedy imposes on others, whether on innocent third-parties or on the wrongdoer himself, to determine whether a remedy is appropriate.<sup>10</sup> While Gewirtz considered these concepts only in the context of judicial adjudication of school desegregation litigation,<sup>11</sup> they can be applied more broadly to situations outside of judicial adjudication, such as governmental decision-making.

In this context, the terms “rights” and “interests” refer to the strength of the protection they afford their holders. Thus, roughly, rights in this context can be thought of as important individual interests that the law has decided are worthy of special attention and protection by the government, and that generally are of much greater importance than other interests.<sup>12</sup> In the case of

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9. See Gewirtz, *supra* note 7, at 591.

10. See *id.*

11. See *id.* at 588.

12. Ronald Dworkin’s formulation, which I think is helpful here, denotes these two concepts as political rights and goals (interests in my terminology), and distinguishes “rights from goals by fixing on the distributional character of claims about rights.” RONALD DWORIN, TAKING RIGHTS SERIOUSLY 91 (1977). Thus,

an individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served. A goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.

*Id.* Of course, the difference between rights and interests is not as stark in practical reality as one may think. Rights are not without limits and may be curtailed by other rights and on occasion even by “mere” interests. See *id.* at 92. For instance, a right may not necessarily be absolute or always override mere interests, denoted “collective goals” in Ronald Dworkin’s framework. However, a right could not “be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency.” *Id.* Thus, a right is superior and of a different kind from a mere interest because “it

civil rights guaranteed by the Constitution, such as rights against self-incrimination or equal protection, the late Supreme Court Justice Hugo L. Black argued that such protections are absolute.<sup>13</sup> However, like Gewirtz, I am less interested here in the fine distinction between rights and interests, or what is exactly protected by a particular right, than in the general conceptual contrasts and the difference in how our legal system and government agencies treat them by either single-mindedly maximizing one in its application or balancing them against each other.<sup>14</sup>

Using these delineations, civil rights law can generally be described by a rights-maximizing approach. Remedies to a rights violation are chosen for their effectiveness in vindicating that right. For example, in the school desegregation context, remedies to racially discriminatory school segregation practices have included mandating affirmative desegregation efforts.<sup>15</sup> This should not come as a surprise since civil rights law is driven in large part by equal protection jurisprudence and the constitutional significance of the issues.<sup>16</sup> In contrast, environmental law can generally be described by an interest-balancing approach to resolving conflicts.<sup>17</sup> This is evidenced by the various considerations and factors that go into environmental decision-making, which usually include economic costs and benefits, technological feasibility, or more generally the "reasonableness" of a measure.<sup>18</sup>

These differences stem in part from the historical backgrounds as well as the intrinsically different nature of the two areas of law. The most obvious and straightforward difference to point out, but probably the least useful for analytical purposes, is the simple fact that both areas of law are governed by different statutory schemes and are affected differently by constitutional

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cannot be outweighed by all social goals." *Id.*

13. See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867, 873 (1960).

14. Of course, rights-maximizing and interest-balancing also do not represent as neat a dichotomy as the terms might suggest. Rather, they may be thought of as representing two ends of a spectrum. In fact, even constitutional rights can be overridden, i.e. "balanced," in certain circumstances. For instance, a compelling state interest may override anti-discrimination protections under the Equal Protection Clause. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (discussing prevalence of balancing in constitutional adjudication).

15. See *Brown v. Board of Educ.* (Brown II), 349 U.S. 294 (1955).

16. In this context, the term civil rights refers generally to anti-discrimination protections primarily provided for by the equal protection clause of the Fourteenth Amendment.

17. Interest-balancing is the dominant mode of governmental decision-making, which needs to consider and is responsible for a multitude of interests. However, the challenge that the environmental justice movement presents to this mode of decision-making is unusual.

18. See, e.g., Clean Water Act § 301(b)(2)(A)(i), 33 U.S.C. § 1311(b)(2)(A)(i) (1994) ("requir[ing] application of the best available technology economically achievable . . . which will result in reasonable further progress"). These characterizations of environmental law and civil rights law are not uniformly true. Nevertheless, I think that they are sufficiently accurate to provide a useful model for the purposes of this Essay.

provisions. More enlightening causes for the dichotomy can be found in the deeper structural differences. While a full discussion of these structural differences is beyond the scope of this Essay, I would like to address five key illustrative factors.

The first factor relates to the differing subject groups of concern. Civil rights laws, and particularly the Fourteenth Amendment Equal Protection Clause, have traditionally concerned themselves with vindicating the rights of racial minorities and other groups that generally have been the subject of discrimination. Thus, civil rights laws protect individuals from the vagaries of majority rule by imposing limits on how members of traditionally excluded or discriminated groups are burdened or disadvantaged by majority decisions. To achieve this purpose, civil rights laws must take a rights-maximizing approach. Otherwise, the majority could always balance away the rights of the minority.

In contrast, environmental law's general focus on market failures and its causes has required an entirely different paradigm. In this context, it was not a minority group that needed to be protected. Rather, it was the interests of society at large, the "majority," that needed protection from the irresponsible and at times unscrupulous actions of individuals and companies destroying the environment. In fact, under Garret Hardin's classic explanation of the "tragedy of the commons" problem, rational economic actors had no incentives to limit their use of or to act responsibly with regard to common resources.<sup>19</sup> Thus, protecting the rights of individuals and small groups was not of paramount concern, and was actually antithetical to the goals of environmental protection laws. Decision-making approaches that relied on balancing the interests of individuals against those of society at large were the natural result.

The second factor relevant to the predominance of interest-balancing in environmental law, unlike in civil rights law, relates to the difficult issues of causation and risk impacts that environmental problems present. When decisions are made utilizing cost-benefit analysis or risk assessment, and the impacts of particular environmental standards or pollution levels are measured in X number of increases in the incidence of cancer, or Y probability of reproductive damage to workers, or Z amounts of dollars lost in future earnings, the people who are affected are represented only by those numbers in a spreadsheet or figures on a notepad. The very disconnect between agency actions and their impacts on the people affected due to the attenuated causation chain and their anonymity in this analysis, weakens any moral outrage that such harm might otherwise generate. It also makes it that much

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19. See Garret Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968).

easier to justify and balance adverse health impacts, such as increases in the rates of cancer or mortality, against the apparent potential benefits of jobs and tax revenue. Therefore, probabilistic causation undercuts rights claims by those affected because of the difficulty of proving a direct causal relationship between actual harm to those rights and the government decision.

A third factor relates back to the historical background of our modern environmental regulatory scheme and our current acceptance of the necessity for pollution. Because we want to maintain our standard of living, it has been our assumption for a long time, and unquestioned by a large majority, that some environmental degradation and pollution are an acceptable and necessary part of life. Thus, the question has traditionally turned away from how we can prevent pollution altogether and instead has focused on how much pollution should be curtailed or controlled. Most strikingly, loss of human life and harm to health was in large part viewed as a cost of business, to be kept within certain limits, but not to be eliminated at all costs. That, of course, has been one of the key complaints by environmental justice activists to traditional approaches to environmental protection.<sup>20</sup> While that assumption is changing slowly, our support and acceptance of the benefits, including jobs and a comfortable life style, of the underlying economic system is in many ways in tension with claims of rights to a healthy and decent environment. After all, so the argument goes, some pollution is the cost of our standard of living. Having thus undercut our ability to use claims of rights to challenge the assumption that pollution and environmental degradation is necessary, government officials, judges, and even communities bearing the brunt of pollution, are frequently left only with arguments about fair balancing of benefits and burdens as credible tools of persuasion.

The fourth factor relevant to the rights-maximizing and interest-balancing dichotomy is the regulatory structure of civil rights and environmental protection. The regulatory structure of civil rights, if one can call it a regulatory structure, consists largely of enforcement through the independent judicial system, where access to the decision-maker and the process is carefully controlled. Of course, there are federal agencies such as the federal Equal Employment Opportunity Commission that provide some administrative avenues to address discrimination. However, in large part, most would agree that such remedies are not as important as the judicial avenues. The many broad congressional delegations of authority over the environment to federal agencies, such as the Environmental Protection Agency (EPA), and the importance and pervasiveness of federal agency efforts in environmental

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20. See, e.g., Robert D. Bullard, *Environmental Justice for All*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 3, 11-12 (Robert D. Bullard ed., 1994); Cole, *supra* note 4, at 644-45.

protection stand in stark contrast. This structure focuses lobbying and political pressure by industry and other special interest groups on the particular agency in an effort to influence its exercise of congressionally delegated authority in one fashion or another. While one certainly cannot describe, for instance, EPA as an agency that is captured by regulated interests, a severe form of regulatory failure,<sup>21</sup> other effects may result such as regulatory paralysis or delay. In the context of legal doctrines that extend a significant amount of judicial deference to an agency's decisions,<sup>22</sup> it should come as no surprise that a rights-maximizing approach would be impossible to implement. The many competing demands, legitimate or not, would simply not allow for a single-interest agency focus—for example, one that puts human health protection above jobs, industrial development, or other desirable and "reasonable" goals. Interest-balancing would be a natural default. The pathological implications of this tension have been discussed in great detail by John Dwyer, in the context of past congressional attempts to pursue health-based approaches, such as to air pollution controls in the Clean Air Act, and the inability of EPA to implement such approaches.<sup>23</sup>

The fifth factor concerns the expertise-driven nature of environmental protection efforts. As Eileen Gauna has elaborated in a recent article, the technical knowledge requirements for understanding and controlling pollution effects disempower ordinary citizens, who usually do not possess the relevant technical background.<sup>24</sup> Yet, in order to maintain an effective legal scheme that is rights-maximizing, broad public knowledge and awareness of individual rights and rights violations are necessary. Otherwise, violations cannot be readily detected and redressed, nor publicized as an important political and moral issue for government officials to address, as was done by the civil rights movement. The broad public vigilance necessary to protect rights and maintain a rights-maximizing approach is not present. This is true despite the important citizen suit provisions in the environmental statutes that are intended to facilitate private citizen concern and involvement.<sup>25</sup>

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21. See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-87 (1975); see also JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A HANDBOOK FOR CITIZEN ACTION* 60-61 (1972). An extreme instance of regulatory capture may be an agency that is systematically controlled by the businesses that it was designed to regulate. See Stewart, *supra* at 1685.

22. See 5 U.S.C. § 706(2)(A), (E), (F) (1994); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

23. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 234-36 (1990) (positing that the inability of EPA to implement such approaches is in part due to industry lobbying and the perceived reasonableness of the conflicting interests).

24. See Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 *STAN. ENVTL. L.J.* 3, 32-36 (1998).

25. Again, this is not an issue that can be dealt with in any satisfactory detail in this short Essay. However, the apparent high proportion of environmental citizen suits brought by environmental groups,



But what is the relevance of this dichotomy? After all, while it might be academically interesting to consider these differences, do they really matter to us in the real world? I would like to believe that they do.

Equal protection litigation illuminates this issue. The failure of equal protection claims in the courtroom has been blamed primarily on the vagaries of the equal protection doctrine, and in particular on the discriminatory intent requirement and the attendant difficulties of proof. This assessment is nothing new and is a lesson well-learned by environmental justice activists by now. Yet, this perspective is also too near-sighted and insufficiently considers the significant influence of the interest-balancing paradigm on environmental decision-making. I would posit that interest-balancing has had a major impact on making the elements of the equal protection doctrine so difficult to satisfy.<sup>26</sup> Because interest-balancing introduces so many different and important factors into the decision-making process, the court's task of isolating and finding a discriminatory intent is made that much more difficult. In its existing form, environmental decision-making usually requires consideration of economic costs, health effects, technological feasibility, and ecological effects. Accordingly, it is easy to see how a court could find non-discriminatory justifications for upholding a governmental decision regardless of the existence of discrimination evidence.<sup>27</sup> Abolishing the discriminatory intent doctrine, as some have suggested as a solution, while very attractive, would not solve this problem.

On the other hand, this analysis also suggests that if we can find claims within environmental law that are more similar to how civil rights claims are dealt with (through a rights-maximizing approach), there may be a greater chance of success. In fact, in spite of the prevalence of interest-balancing within environmental law, there are some claims that generally are not subject to interest-balancing. They include claims for violations of procedural requirements, such as opportunities for public participation arising under the federal Administrative Procedures Act<sup>28</sup> or other procedural statutes, such as the National Environmental Policy Act (NEPA).<sup>29</sup> Generally, such

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who can draw on the necessary expert resources, as opposed to private individuals, ought to be ample illustration.

26. See, e.g., *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *R.I.S.E. v. Kay, Inc.*, 768 F. Supp. 1144 (E.D. Va. 1991).

27. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

28. See, e.g., 5 U.S.C. § 706(2)(D) (1994).

29. See 42 U.S.C. §§ 4321-4370d (1994).

participation rights and procedural requirements must be strictly observed and are thus not subject to interest-balancing.<sup>30</sup>

The use of procedural claims to achieve substantive outcomes is not new in environmental advocacy. Traditional environmental organizations have made use of them for a long time. In California, the Kettleman City community's success in stopping the siting of a hazardous waste incinerator in their midst has proven that such tools can be adopted for use in environmental justice litigation.<sup>31</sup>

But this analysis also allows for other more forward-looking conclusions. Some have looked to EPA's administrative Title VI complaint process as a source of great hope for vindicating environmental justice claims.<sup>32</sup> Title VI of the Civil Rights Act of 1964<sup>33</sup> prohibits discrimination on the basis of race, color, or national origin by programs that receive federal financial assistance.<sup>34</sup> In the EPA context, such recipients are oftentimes state and local governments. Title VI further charges federal agencies with drafting implementing regulations.<sup>35</sup> In the typical context, an EPA Title VI discrimination complaint would allege discriminatory effects resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding.

Under EPA's Title VI administrative regulations no finding of discriminatory intent is required to make a case for disparate impact discrimination.<sup>36</sup> This would appear to resolve complaints about the equal protection doctrine's intent requirement as the barrier to successful civil rights suits. However, the analysis here suggests that hope for EPA's existing Title VI procedures as the solution for environmental justice claims may be

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30. See, e.g., *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1149 (D.C. Cir. 1971). Of course, procedural rights are just that—procedural as opposed to substantive rights. However, traditional environmental organizations have demonstrated how well such procedural rights can be used to achieve substantive environmental outcomes.

31. See Ruling on Submitted Matter, *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, No. 366045 (Super. Ct. Cal. Dec. 30, 1991), reprinted in KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS AND COMMENTARY ON ENVIRONMENTAL LAW AND PRACTICE 150 (1995); see also Cole, *supra* note 4, at 674-79 & n.255.

32. See, e.g., Steven Light & Kathryn Rand, *Is Title VI a Magic Bullet?: Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1, 5 & n.10 (1996).

33. See 42 U.S.C. §§ 2000d-2000d-7 (1994).

34. "No 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." *Id.* § 2000d. Title VI itself has been interpreted by the Supreme Court to prohibit intentional discrimination only. See *Alexander v. Choate*, 469 U.S. 287, 293 (1985). However, the Supreme Court has also ruled that Title VI authorizes federal agencies, including EPA, to adopt implementing regulations that prohibit discriminatory effects, since policies and practices that are neutral on their face can nevertheless have the effect of discriminating. See *id.* at 292-94.

35. See 42 U.S.C. § 2000d-1.

36. See 40 C.F.R. § 7.35(b) (1998).

misplaced. Irrespective of EPA's genuine and good faith efforts in implementing its Title VI administrative process, it seems doubtful to me that it will be able to overcome the pitfalls of the interest-balancing paradigm.<sup>37</sup> Thus, even though the anti-discrimination objectives of Title VI inherently represent a form of rights-maximizing, they nevertheless remain in significant tension with EPA's other interest-balancing duties.<sup>38</sup>

One past example of the force of this tension can be seen in the treatment of the Clean Water Act's original toxics provisions, section 307.<sup>39</sup> Section 307

originally was premised on a harm-based regulatory strategy that required health-based determinations—such as how risky water pollutants are. By the middle 1970s, it became clear that the EPA was not promulgating many toxic water pollutant standards. A [litigation] compromise was reached with the [Natural Resources Defense Council] in which 65 non-regulated toxic substances would be controlled on a technology-based approach: that is, for different categories of industries, what sort of technology was the best available. A few more toxic pollutants were later added to the list so that now there are slightly in excess of 100 regulated on the basis of best-available technology. This technology-based approach was approved by Congress in 1977 when the Clean Water Act was amended. At that time, Congress also specified that more stringent health-based regulations could be enacted for hazardous water pollutants. Unfortunately, over the ensuing thirteen years the EPA has developed no such regulations.<sup>40</sup>

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37. Environmental justice grassroots activists have long been aware of the pervasiveness of the interest-balancing paradigm in the environmental legal structure and how it has co-opted even the thinking of traditional environmental organizations devoted to protecting the environment as their mission. Thus, Mainstream environmental organizations from the Sierra Club to the World Wildlife Fund and the Environmental Defense Fund have become part of "the system" where being "reasonable" is the driving force, and there is little consideration of the impact on people. These organizations are staffed primarily by scientists, lawyers, economists and political lobbyists. Although many of these groups may have an adversarial relationship with agencies such as the EPA their differences are frequently of degree rather than substance, with an emphasis on tightening or enforcing existing laws rather than developing a new approach. Cole, *supra* note 4, at 638 n.60 (quoting Penny Newman).

38. In this respect, my reason for doubting the efficacy of Title VI differs from others who consider environmental justice problems primarily solvable only by political processes. See, e.g., Light & Rand, *supra* note 32, at 6. While I do not disagree with the importance of political activism, I believe that judicial solutions are equally important to resolving environmental justice problems.

39. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 307(a)(1), 86 Stat. 816, 856 (codified as amended at 33 U.S.C. § 1317 (1994)).

40. Howard A. Latin, *Proceedings and Papers of the Conference on Environmental Law: Air Pollution Control in the 1990s—Learning from Past Mistakes*, 1990 ANN. SURV. AM. L. 125, 125; see also

That same difficulty has also exhibited itself in the EPA Title VI Interim Guidance (Interim Guidance) that was released in 1998 for public comment.<sup>41</sup> The Interim Guidance lays out the five-step process that EPA will follow to evaluate an administratively-filed discrimination complaint alleging disparate impacts of a pollution permit.<sup>42</sup> First, EPA identifies the affected population that will suffer the adverse impacts of the activity in question. Second, EPA determines the demographics, i.e. the ethnic and racial composition of the affected population. Third, EPA establishes the universe of facilities and total affected populations for purposes of the analysis. As the fourth step, EPA conducts the disparate impact analysis, which includes a comparison of the racial and ethnic characteristics within the affected population.<sup>43</sup> However, the only types of impacts that the Interim Guidance considers are those that are cognizable under the grant recipient's permitting program.<sup>44</sup> The fifth, and final, step is to determine the significance of the disparity utilizing arithmetical or statistical analyses.<sup>45</sup> Once a finding of disparate impact has been made (the initial finding of non-compliance in EPA's administrative process), the grant recipient at issue may either rebut the disparate impact finding or propose a plan for mitigating the disparate impact.<sup>46</sup> However, the grant recipient may also respond to a disparate impact finding by invoking "a substantial, legitimate interest that justifies the decision to proceed with the permit notwithstanding the disparate impact."<sup>47</sup>

This last provision is probably the most striking aspect of the Interim Guidance—the availability of a justification defense when a regulatory decision is found to have a discriminatory impact. Under this provision, the state or local government agency could raise as a defense for its actions a "substantial, legitimate interest that justifies the decision to proceed . . . notwithstanding the disparate impact."<sup>48</sup> The Interim Guidance states that the sufficiency of the justification necessarily depends on the particular facts.<sup>49</sup> Factors that would be relevant include the seriousness of the

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Christine L. Hall, *The Control of Toxic Pollutants Under the Federal Water Pollution Control Act Amendments of 1972*, 63 IOWA L. REV. 609 (1978).

41. See OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998) (last modified Feb. 13, 1998) <<http://es.epa.gov/oeca/oej/titlevi.html>> [hereinafter INTERIM GUIDANCE].

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *Id.*

48. *Id.*

49. *See id.*

impact, the certainty of the benefits of the permitted facility, and the extent to which benefits of the permitted facility would flow back to the impacted community.<sup>50</sup>

It is apparent from the lack of clarity in the language that EPA is seeking to preserve for itself maximum flexibility in future dealings with justification defense claims, and unfortunately, its exact parameters will remain unknown until EPA applies it. Of course, there can be virtue in leaving difficult issues for resolution at a later time. However, it seems to me that there is so much uncertainty and ambiguity here that the justification defense could be interpreted at its outer boundaries to include jobs, tax dollars, and other economic development goals. Thus, EPA has not explicitly foreclosed the specter of state or local governments seeking to trade the health or lives of a poor or minority community in return for tax dollars or jobs. Simply put, the justification defense spells out an enormous amount of trouble and in many ways threatens to eviscerate the integrity of EPA's Title VI regulations as a means of vindicating environmental justice claims.

Yet, my point here is not to place blame with EPA staff for the way the Interim Guidance turned out. Recognizing that EPA is governed by an interest-balancing paradigm leaves one with the inescapable suspicion that such an outcome was in many ways unavoidable. EPA may be incapable of simply adopting a rights-maximizing approach no matter how faithful and committed it is to setting the protection of public health and the environment as its first priority. In fact, for EPA to have done otherwise, for instance, to expressly limit or omit the availability of such a justification defense, would probably have been politically untenable<sup>51</sup> or prompted legal challenges.<sup>52</sup> Unfortunately, all of this does not provide much comfort for the prospects of the environmental justice movement.

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50. *See id.*

51. Not surprisingly, of course, there has been a considerable amount of opposition not only to EPA's Title VI guidance but also to its environmental justice initiative more generally. *See, e.g.,* Cheryl Hogue, *Permits Challenged in Rights Complaints Remain in Effect, EPA Official Testifies*, 29 *Env't Rep. (BNA)* 798, 799 (Aug. 14, 1998); *Western Governors' Association Joins Calls for EPA to Withdraw Civil Rights Guidance*, 29 *Env't Rep. (BNA)* 570 (July 10, 1998).

52. In fact, a justification defense appears to be required under Title VI case law, though its exact scope is unclear in this context. *See, e.g.,* *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993). However, to explore the extent of the reach of the justification provisions is beyond the scope of this Essay. Suffice it to say that any justification raised to defeat a finding of disparate impact ought to require more than a restatement of the reasons for constructing the facility in the first instance, which usually includes economic considerations. Any rationale raised by a government defendant to take advantage of the justification factor ought to satisfy a closer means-end test. In other words, there must be some closer relationship between the proffered justification and the environmental goals served by the state program—or else, EPA's Title VI administrative regulations would become meaningless.

The likelihood of disappointing environmental justice activists with the Interim Guidance appears to have been confirmed by the recent issuance of EPA's first administrative Title VI decision in the Select Steel complaint.<sup>53</sup> In that administrative complaint, a community church protested the issuance of a Clean Air Act permit for a proposed steel recycling mini-mill in the Michigan township of Genesee, in part because of the permit's alleged discriminatory impact of various air pollutant emissions on minority residents.<sup>54</sup> EPA rejected the complaint on the grounds that none of the impacts examined rose to a level that would make them adverse impacts within the meaning of the Interim Guidance. The rationale was that the emissions resulting from the permit conditions would not violate any EPA minimum standards or other requirements and would be *de minimis* in their incremental impacts.<sup>55</sup>

While it is unclear what the exact extent of the impact of the additional emissions would have been, it seems to me that it was inappropriate to dismiss a Title VI complaint simply because the permit and the additional emissions would not violate EPA's minimum standards. Of course, federal environmental minimum standards are *presumably* set at a level that is sufficient to protect the public and maybe even to provide for a margin of safety. However, for EPA to rely on compliance with such federal minimum standards as an indicator of fairness and equity in environmental protections seems to gut the Title VI administrative regulations of all their vitality and promise as an effective remedy for discrimination. After all, if compliance with federal minimum standards is sufficient, then Title VI would add almost nothing to the protections that the federal environmental statutes and regulations (with citizen suits and all) already provide. In effect, the disparity of burdens would become almost irrelevant. More importantly, this kind of test neither assures fairness nor non-discrimination in the allocation of environmental burdens. This does not mean that thresholds for impacts are not useful or important in judging discrimination claims or that EPA should

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53. See Letter from Ann E. Goode, Director Office of Civil Rights, to Father Phil Schmitter & Sister Joanne Chiverini, Co-Directors, The St. Francis Prayer Center, and Russell Harding, Director, The Michigan Department of Environmental Quality (Oct. 30, 1998) (last modified Nov. 2, 1998) <<http://www.epa.gov/region5/steelcivr.htm>> [hereinafter Goode Letter]; see also Paul Connolly, *EPA Dismisses Complaint on Proposed Steel Plant in Michigan*, 29 Env't Rep. (BNA) 1351 (Nov. 6, 1998).

54. See Goode Letter, *supra* note 53. The demographics of the surrounding neighborhoods also raised a significant question as to whether those communities had a sufficiently high percentage of members of racial minority groups to be characterized as minority communities. See David Mastio, *EPA Ready to Clear Flint Mill: It had Become Top Test of Environmental Justice Policy*, THE DET. NEWS, Oct. 30, 1998, at A1; David Mastio, *Research Backs Pollution Bias: New Study of Proposed Flint Steel Mill Shows Affected Population is Mostly Black*, THE DET. NEWS, Oct. 21, 1998, at B3 [hereinafter Mastio, *Research Backs Pollution Bias*].

55. See Goode Letter, *supra* note 53.

have necessarily decided in favor of the complainants. However, the summary dismissal of the claims by reference to compliance with federal requirements, especially considering the precedential impact of its decision, seems simplistic at best.<sup>56</sup>

This analysis and example confirm a simple truth that traditional civil rights advocates have known for a long time—if there are no special protections for members of groups that have traditionally been under-represented in the political process, such as people of color or the poor, they inevitably lose. In the regulatory process, this means that the cards are stacked against minorities and the poor. Even though interest-balancing is in itself not an illegitimate decision-making tool, it is generally a losing proposition for the politically powerless. They can never truly win in this paradigm; instead, any gains are made only at the grace and mercy of others.

In addition to these criticisms, however, understanding the different paradigms also allows us to make at least one pragmatic suggestion that will further environmental justice goals generally. Rights frequently protect interests and values that are difficult to quantify or otherwise may be incommensurable. It is their incommensurable nature that usually leads to their exclusion from cost-benefit or related interest-balancing analysis. Thus, traditional environmental decision-making that focuses on costs and benefits fails to look at interests such as autonomy, fairness, and equality beyond the minimum legal requirements. These are concerns that pervade constitutional legal theory and scholarship. It is the very failure to look beyond the numbers of cost-benefit analysis to such incommensurable values that is at the root of environmental justice claims. Regardless of whether a rights-based or an interest-balancing approach is the appropriate means of addressing environmental justice claims, incorporating such incommensurable values and interests into environmental regulatory decisions can be a pragmatic way of advancing environmental justice concerns. Of course, such values and interests cannot simply be merged into a mathematical cost-benefit analysis. Instead, incorporating such values and interests needs to occur through the more traditional freestanding, all-inclusive balancing of interests that government officials engage in when using discretionary authority to arrive at a decision that promotes the public interest.

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56. While an attempt to set out a framework for evaluating disparate impact claims under Title VI is outside of the scope of this Essay, I would suggest a more flexible approach which would include considerations, such as autonomy and community preservation, that are traditionally not taken into account in the siting process for polluting facilities. Of course, here, the demographics of the communities surrounding the facility may have been an independent ground for EPA to decide that no Title VI claim existed. See Mastio, *Research Backs Pollution Bias*, *supra* note 54, at B3.

One objection that immediately might be raised is the lack of expertise and competence of technical agencies, such as EPA, to consider incommensurable values and interests. While a detailed response is outside of the scope of this Essay, there is no reason why technical environmental agencies should not begin to develop such expertise or why politically elected and non-technical agency officials should be per se incompetent to weigh such considerations. In fact, agencies managing natural resources frequently deal with incommensurable values, such as aesthetic and extrinsic values, in the context of regulatory decision-making under the Endangered Species Act<sup>57</sup> or even the National Historic Preservation Act.<sup>58</sup> Furthermore, existing statutes, such as the NEPA<sup>59</sup> arguably already require such a comprehensive approach to environmental decision-making.<sup>60</sup> In this sense, requiring traditional political balancing returns governmental decision-making from technocratic control to the responsibility of non-technical policy makers, politicians or career bureaucrats, who oversee most other aspects of government regulation. What this means in practical terms is that politicians and bureaucrats should not, and cannot, be allowed to blindly rely on technocratic judgments or hide behind scientific analysis.<sup>61</sup>

Executive Order 12,898,<sup>62</sup> which requires the general recognition of the importance of environmental justice considerations in federal agency decision-making, is helpful and constitutes a significant step in this direction by alluding to incommensurable factors and by promoting public participation. However, to fully implement the Executive Order's mandates, it is insufficient for federal agencies, such as EPA, to stop at discrimination analysis. Instead, additional steps ought to be taken, such as articulating the incommensurable values and interests relevant in environmental decision-making in specific

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57. See 16 U.S.C. §§ 1531-1544 (1994).

58. See 16 U.S.C. §§ 470-470x-6 (1994).

59. See 42 U.S.C. §§ 4321-4370d.

60. Of course, most of EPA's regulatory actions are not subject to NEPA's requirements by virtue of the functional equivalence doctrine. See, e.g., *Environmental Defense Fund, Inc. v. United States EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973) (finding FIFRA procedures to be the functional equivalent of NEPA); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 359 (3rd Cir. 1972) (explaining that Clean Air Act procedure should be used instead of NEPA). EPA has promulgated guidance for incorporating environmental justice concerns into the NEPA analysis that EPA must engage in for those activities that are not covered by the functional equivalence doctrine. See OFFICE OF FEDERAL ACTIVITIES, U.S. EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS (1998) (last visited March 8, 1999) <<http://es.epa.gov/oeca/ofa/ejepa.html>>. Like Executive Order 12,898, see *infra* note 62 and accompanying text, the guidance is a helpful important step, but not enough to address environmental justice concerns.

61. In this respect, increased public participation by poor and minority communities is an important means of assuring that public officials do not blindly rely on technocratic judgments to make decisions about the environment.

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



regulations and internal agency guidance. Only by formalizing consideration of these interests, ideally by putting them on equal footing with other technical requirements in the decision-making process, can environmental justice concerns be addressed effectively rather than being dealt with as a haphazard afterthought responding to community activism.

Of course, most ideal for the environmental justice movement would be utilization of the rights-maximizing approach, though that is unlikely to happen anytime soon. However, by forcing the recognition of the incommensurable interests and values implicated in environmental decisions, including autonomy, equity and such spiritual values as community ties,<sup>63</sup> decision-making can be improved. It is a pragmatic first step.

As I mentioned at the outset of this Essay, I did not intend to offer any comprehensive solution that will address the problems raised here. However, by focusing on the mismatch between the underlying decision-making paradigms—rights-maximizing and interest-balancing—I hope to provide some important insights into both our understanding of the obstacles that environmental justice advocates have faced in pressing their claims and the resulting prospects of success for future environmental justice litigation. Most importantly, a better understanding of the tensions underlying the approaches to civil rights and environmental law ought to lead to the development of strategies that will vindicate environmental justice goals more effectively in the long run.

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63. See, e.g., A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871 (1992); Reich, *supra* note 5, at 287.