Environmental Justice Outline

Fall 2017

# **Table of Contents**

1. Introductions, Theories of Change, Overview of the EJ Movement
2. Evidence and Methodology
3. Causes of Disparate Impacts
4. NOLA and Hurricane Katrina, *Trouble the Water*
5. Federal Environmental Regulation and Federal/State Initiatives
	1. *Grutter v. Bollinger*, 539 U.S. 306 (2003)
6. Risk Assessment and Standard Setting
	1. *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996)
7. Facility Permitting and NEPA
	1. *In re Chemical Waste Management of Indiana, Inc.*, 1995 EPA App. LEXIS 25, 6 E.A.D.66 (June 29, 1995)
	2. *NAACP—Flint Chapter v. Engler*, Genesee (Michigan) County Circuit Court, Transcript of Ruling (May 29, 1997)
	3. *Colonias Development Council v. Rhino Environmental Services, Inc. & New Mexico Department of Environment*, 138 N.M. 133, 117 P.3d 939 (2005)
	4. *In the Matter of Louisiana Energy Services, L.P.*, 45 N.R.C. 367 (1997)
	5. *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184 (2004)
8. The Role of the Lawyer: Private Enforcement, Citizen Suit Provisions & Remedies
9. Constitutional Claims and EPC
	1. *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983)
	2. *Bean v. Southwestern Waste Management Corporation*, 482 F.Supp. 673 (S.D. Texas 1979), affirmed without opinion 780 F.2d 1038 (5th Cir. 1986)
	3. *R.I.S.E. v. Kay*, 768 F.Supp. 1144 (E.D. Va. 1991)
	4. *Miller v. City of Dallas*, 2002 U.S. Dist., LEXIS 2341 (N.D. Tex. 2002)
10. Civil Rights and Title VI
	1. *Rosemere v. EPA*, 581 F.3d 1169 (9th Cir. 2009)
	2. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 145 F.Supp.2d 446 (2001)
	3. *Alexander v. Sandoval*, 532 U.S. 275 (2001)
11. State and Local EJ Issues: Brownfields

**Outline**

# Introductions, Theories of Change, Overview of the EJ Movement

(Chapter one, p. 3-33; supplemental materials)

1. Chapter 1: Overview of the Environmental Justice Movement
	1. Environmental Justice – “. . . the fair treatment, equal protection[,] and meaningful involvement of all people, regardless of race, ethnicity[,] or income, with respect to the development, implementation[,] and enforcement of [environmental] laws, regulations, and policies that affect the communities in which we live, work, play[,] and pray.”
		1. Distribution of benefits and burdens, access to decision making via meaningful participation and self-determination/autonomy, value system and conceptual societal framework
		2. Focus on low income communities of color, aka frontline communities
		3. Challenge to environmental and sustainability frameworks – calling for reprioritization as racism built into present environmental law
		4. Class-based vs. race-based discrimination – matters for EPC and Title VI claims (poor is not a protected class, so no heightened scrutiny (strict scrutiny)), matters in advocacy because affects who you’re appealing to
		5. Intentional vs. unintentional racism (aka conscious vs. unconscious racism) – matters because race-based discrimination presently only actionable if intentional, however, whether or not intentional does not matter to the person(s) impacted; tension between disparate impact and disparate intent
	2. Introduction: History of the Movement
		1. 1980s Warren County, North Carolina – PCB landfills sited in poor, black community
		2. “Environmental racism” – precursor to “EJ,” EJ/ER protests were legacy of the civil rights movement, civil disobedience
			1. Reactions to ER – we’re not racist, we never thought of race (i.e. denying intent)
		3. “EJ” – compromise by movement because gov’t reaction ^ was harsh denial of racism, defensive because implicating a bad actor and victim, but gov’t/public able to recognize existing environmental inequity pushing blame to society (i.e. life’s not fair)
			1. Dangerous frame to use because no one’s accountable to inequity
			2. Term came about in early 1990s, EJ movement’s leaders rallied behind the compromise and Clinton administration “codified” the term in EO 12898
	3. Fairness and Justice Considered
		1. “A Taxonomy of Environmental Justice,” Robert R. Kuehn –
			1. (1) EJ as Distributive Justice – “the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given”
				1. Resonates in theory not in practice
			2. (2) EJ as Procedural Justice – “the right to treatment as an equal. That is the right, not to an equal distribution of some good or opportunity, but to equal concern and respect in the political decision about how these goods and opportunities are to be distributed”
				1. Resonates in theory not in practice
				2. Procedural access legitimizes the end result
				3. EPA defines procedural justice/meaningful participation – (1) access to information, (2) technical capacity to use information, (3) opportunity to influence the outcome – e.g. under NEPA, opportunity to issue comments, public may expect agency to do more, (4) decision makers seeking out perspectives of those most impacted

Tokenism

* + - 1. (3) EJ as Corrective/Compensatory Justice – fairness in the way punishments for lawbreaking are assigned and damages inflicted on individuals and communities are addressed, involves not only the just administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible
				1. Presupposes bad actor
			2. (4) EJ as Social Justice – “that branch of the virtue of justice that moves us to use our best efforts to bring about a more just ordering of society—one in which people’s needs are more fully met.”
				1. Demands of social justice – (1) that the members of every class have enough resources and enough power to live as befits human beings and (2) that the privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages
				2. Foundation of basic human decency and respect that all people accountable for each other, socialist concept
				3. Umbrella term encompassing other three – distributive, procedural, and corrective/compensatory
			3. No hierarchy/order to types of justice
		1. “What’s Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses,” Vicki Been
			1. In thinking about distributive justice, there’s (1) physical and (2) compensatory schemes
				1. Physical

Cons – distributive impracticability of physical scheme, i.e. some things only make sense in an economy of scale, e.g. waste disposal facilities

* + - * 1. Compensatory

Pros – compensated for taking on, progressive assuming not financially manipulative or coercive, using capitalist/market pressures

Cons – ^ may be financially manipulative or coercive, how to monetize/equate/compare

* + 1. “The Promise and Peril of Environmental Justice,” Christopher H. Foreman, Jr. – EJ critiques that come up often in movement
	1. “We Speak for Ourselves”
		1. First National POC Environmental Leadership Summit in DC in 1992 laid out 17 principles – grounding EJ document but doesn’t find way into political or legal arguments
		2. Group of 10 letter – first-person account from Summit on-the-ground organizer saying we speak for ourselves, you don’t represent us
			1. Response letter – defensive
		3. May be impossible to be objective/neutral/value-free with EJ – EJ embraces a value-oriented approach, eschews objectiveness
		4. Bottom-up vs. top-down – in discussing politically inviable, remember the importance of pushing boundaries of dominant culture control

# Evidence and Methodology

(Chapter two, p. 35-67)

1. Chapter 2: The Evidence
	1. Takeaways –
		1. (1) Able to soften/lessen skepticism with lots of uncontradicted evidence that disparity with burdens and benefits, *but* discussion of nuances
		2. (2) Methodology is important in building a case—litigation or administrative—because EJ cases predicated on showing disparity
	2. Introduction
		1. History and context, i.e. race and place, matter here more than anywhere else
		2. Gross disparities – e.g. Warren County, Government Accountability Office (GAO) report, Bullard’s work in Houston
		3. *Yick Wo* – in rare circumstances degree of disparity so bad that EPC violation without direct/circumstantial evidence of intent; however, usually not sufficient to make a prima facie showing of EPC violation and need direct/circumstantial evidence of intent so deeper analysis → all analyses/reports based on same underlying methodology
	3. Hazardous Waste Facilities

|  |  |  |
| --- | --- | --- |
| **Methodological Inputs** | **UCC** (1987) | **SADRI** (Anderton, 1994) |
| **Unit of Analysis** (“host” v. “nonhost” units, data overlay) | Zip codes from 1980 Census | Census tracts from 1980 Census – 1980 because wanted to debunk UCC study, tracts better because zip codes are larger and the larger the size of the units the more assumptions you have to make, tracts are smaller neighborhood building blocks |
| **Comparison Population** (comparing what to what) | White vs. nonwhite – distinguished by established thresholds | White v. black and hispanic – excluded all other POC, 11% of the population |
| **Scope** (important for context, shouldn’t have strong implication but did here) | National | Host metropolitan regions (MPOs) – meaning already had facility there, researchers made false assumption that all MPOs have waste management facility but actually may have privilege to be outside of MPO, shrinking population which has the net effect of making control population more diverse because removing units from analysis that would tend toward being whiter  |
| **Conclusion** | Race is highest correlative factor – correlation ≠ causation, proven time and again including 20-years later by same researchers | Positive race correlation more negligible, less statistically significant |

* + 1. 1987 United Church of Christ Commission for Racial Justice – originating out of Warren County, North Carolina and Robert Bullard’s work in Houston, compared zip codes where hazardous waste facilities/uncontrolled toxic waste sites
		2. 1994 study to debunk UCC study – just as much interest in proving that race positive correlation as proving no race positive correlation
		3. Census tracts – supposedly more representative of neighborhood identity, have same number of inhabitants for comparison purposes; in reality these vary
		4. Takeaway – only by excluding populations (see scope ^) could study obtain the result that race positive correlation more negligible, less statistically significant, demonstrating the significance of methodological inputs
		5. “Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims,” Vicki Been & Francis Gupta
			1. “Coming to the nuisance” – opposing/anti-EJ frame that changes occur post-facility siting
			2. Conclusion – no evidence of disproportionate siting at time of siting in black neighborhoods, evidence of in Latinx neighborhoods
		6. Poorest neighborhoods (often rural) actually don’t attract facilities because facilities requiring infrastructure, want existing infrastructure, facilities will only invest in basic infrastructure if large economies of scale
		7. Why for some environmental indicators is income positively correlated with pollution levels? E.g. wealthiest live in/near urban environments for increased access to amenities
		8. Nuances in environmental indicators, not black and white constant
	1. Other Industrial Activities and Environmental Harms
		1. Background – public awareness lagging because gatekeepers limiting flow of information, prioritization, implicates privileged quality of life because requires we acknowledge and address
		2. Farmworker Exposure to Pesticides
			1. Intentional exclusion since 1930s of farmworkers, now largely Latinx, from legal protection (e.g. under OSHA, FLSA, and NLRA)
				1. Evidence of is insufficient because of fear of retaliation, “chilling effect”
				2. Cesar Chavez made progress, but hasn’t been solved
			2. E.g. aerial spraying
			3. Racism? Too stark not to be explained by racism, demographics of farmworkers have shifted but still not protected
			4. Why lesser focus by environmental organizations? “Blue-green alliance” – assumption that labor organizations and unions will handle, resultant ineffectual movement
				1. Only recourse for workplace risk is workers’ compensation with few exceptions, e.g. wrongful death
			5. Mainstream environmental movement addressed acute impacts, not long-term chronic exposure (primarily to farm workers)
		3. Exposure to Contaminated Fish – EPA standards don’t typically reflect consumption by indigenous and POC communities, e.g. those communities typically consume more fish because hungry/poor or because their way of life
		4. Cumulative and Multiple Exposures
			1. Air Toxic Exposures – e.g. Cleaner Air Oregon, Governor Brown’s response to glass manufacturing controversy; disparate impact in most urban environments
			2. Multiple Environmental Harms – insufficient data, meaning can’t show disparity
			3. Have seen a “gentrification of lead poisoning” – with gentrification, shifted exposure to those displacing communities so there’s been a lot of rehabilitation and remediation on this issue
				1. With gentrification generally, including racialization of the suburbs, have seen a shift in harms and exposures
		5. Disaster Vulnerability – see NOLA and Hurricane Katrina below
	2. Disparities in Environmental Benefits
		1. Transportation Benefits – MLK did a lot of work for transportation equity, Bullard has been a large voice for transportation equity
			1. Great migration – connection between the end of slavery and POC taking sanitation jobs
		2. Parks and Open Space
		3. Transportation and parks/open space disparity – not merely aesthetic, both also positive determinations of health
		4. Environmental Enforcement and Cleanup
1. “Unit-hazard coincidence” – ^ all based on this theoretical methodological approach
	1. Primary assumption – coincidence of unit, meaning those living in unit, and a hazard or harm, all premised on assumption that unable to test
		1. This is a problem because don’t know pollution migration, location of facility, location/population density of residents
		2. Size of census tracts matter because the smaller the more likely that coincidence is accurate unless residents residing at community fencelines/boundaries
	2. Can easily imagine situation(s) in which unit-hazard coincidence model fails
		1. As advocates, must be aware of and know how to push back, manipulate inputs to benefit the movement
	3. Why unit-hazard coincidence? Because presently the only workable model
	4. Alternative approach? Distance-based approach
		1. Doesn’t solve all problems with unit-hazard coincidence, gets us marginally closer because focus on harm (i.e. facility) rather than community (opposite of unit-hazard coincidence approach where start with demographics data and then overlay harm data)
			1. Approach – plot facility, set boundary of harm based on science of migrating pollution with assumption that pollution migrating equally in all directions (huge assumption), overlay demographics data
		2. Cons – mapping of pollution unrealistic (i.e. boundary divider between dangerous and safe), time/cost intensive, need scientific research but most of this is produced by industry, demographics data still relying on traditional units (i.e. census tracts) so same problems with these as other approach (e.g. if community resides on border of census tract)
		3. When shift from unit-hazard coincidence to distance-based approach more race correlation, reveals more nuanced understanding of racial disparity (meaning other approach masks disparity)
2. Importance of POC Thresholds – largely affect analysis but no law, just best practices
	1. Ostar: Threshold should be no lower than local POC average + 1 (so exceed threshold) (e.g. 30% POC in Multnomah Co., should be 31%)
		1. Argument for using national averages for consistency (but no one else doing), arguments for using state/city averages
	2. Thresholds should be proportional to the activity, meaning regional if regional or local if local
	3. Want thresholds as low as possible because more inclusive and protective
		1. If lower thresholds, vast majority of community would meet the threshold designation, those that wouldn’t would be only nearly all white communities
		2. If higher thresholds, harder to find EJ communities
3. EPA EJ mapping tool – EJSCREEN

# Causes of Disparate Impacts

(Chapter three, p. 73-106; *Cerrell Report* excerpt)

1. Chapter 3: Theories of Causation
	1. Introduction
		1. Natural causes – e.g. the market
		2. Unnatural causes – e.g. racial discrimination
		3. ^ Subsequent discussion dispelled these distinctions, we should not subscribe to these notions of natural and unnatural – “natural” and “unnatural” are used to excuse/explain away disparate impact because if the market is racist then don’t feel compelled to remedy
		4. Root causes of disparate impact – (1) land use practices, (2) the market, (3) politics, social capital, (4) racial discrimination – work in concert, correct labeling unimportant
	2. (1) Land Use Practices, i.e. zoning
		1. Yale Rabin, “expulsive zoning” – zoning used to erect barriers to escape from the concentrated confinement of the inner city and to permit (even promote) the intrusion into black neighborhoods of disruptive incompatible uses that have diminished the quality and undermined the stability of those neighborhoods
		2. Usually buffer industrial zones and residential zones with mixed use/multi-family housing (e.g. tenements, projects)
		3. Gentrification/displacement – can we invest and develop without displacement? Those that already live in gentrified neighborhood should share in development/improvement
		4. State/federal preemption of zoning is unlikely
	3. (2) The Market – primary argument against EJ/racist disparate impact; in class used (1), (3), and (4) to chip away at market dynamics theory
		1. Market Forces in Site Selection – siting as proxy for before and after market forces

|  |
| --- |
| **Disproportionate Siting** (not discriminatory, *but* arguable) |
| **Economic Cost-Benefit Analysis** (market dynamics theory) | **Racism** | **Sociopolitical/Land Use** |
| * Lower real property costs
* Lower public opposition costs
* Lower infrastructure costs – highways, other transit infrastructure, actually one of the biggest costs for these facilities
* Lower labor costs
 | * Racial targeting – targeting path of least resistance (e.g. Cerrell Report – doesn’t say race but clearly race if consider context of race and place)
* Racial assumption that communities prioritize jobs over health and environmental concerns, don’t care about environment at all

→ cuts across  | * Targeting path of least resistance
* Zoning and siting criteria – e.g. local land use restrictions

→ cuts across |

* + 1. Post-Siting Changes – primary argument to disparate impact

|  |
| --- |
| **Post-Siting Demographic Change** (i.e. “coming to the nuisance” argument) |
| **Economic Downgrading** (market dynamics theory) | **Racism** | **Sociopolitical** |
| * Declining quality of life – bad smells, noisy, smokestacks, trucks, carcinogens
* Declining property values
* People with mobility (ability/means to leave) leave, meaning only those unable to don’t
* Poor people move in – numerous factors are restricting their ability to live elsewhere
 | * Redlining – racist lending practice where only getting a loan if willing to rent/buy within a map’s red line boundaries, illegal but now find non-racial reasons to limit loaning (e.g. credit, criminal history)
* Racial steering – realtor shows POC POC neighborhoods
* Housing discrimination
 | * Lack of finances
* Weak social ties to community
* Lack of affordable housing
* Relaxed code enforcement – building codes, neighborhood codes
	+ Because then becomes blighted – to be eligible for urban renewal and tax increment financing (TIF) must be designated as a blighted community
 |

* + 1. “Market” – aggregation of individuals’ consumer preferences
			1. Triggering depreciation in property value is why people leave/the problem, if people stay then no problem
	1. (3) Politics, Social Capital and the Structure of Environmental Laws
		1. Social Capital – tangible resources—money, connections, social bonds, informal social networks—embedded in a social structure and accessed/mobilized for a specific purpose → power
		2. Differences in social capital → differential outcomes
		3. Community turnover → weakening of important social bonds
		4. Community Benefit Agreements (CBA) – if have social capital, able to build coalition to pursue CBA from those siting/building; presumes pre-existing social capital
			1. “Sociopolitical” – recognition that much of social capital is political, political influences
	2. (4) Racial Discrimination
		1. Intent (conscious *and* unconscious) → decision point → impact
		2. Framing as class over race –
			1. Pros – don’t have to overcome strict scrutiny, avoid political backlash, more palatable to lawmakers and advocates, not illegal to discriminate based on income, unfortunately class discrimination preferable to race discrimination in this society
			2. Cons/trade-offs – race suffers more from disparate impact than class (but by how much? By how much matters), less empowering, lumping everyone together, lose whatever limited protections out there because class isn’t protected
			3. Competing/polarizing ideologies – those adamant on race and only about race, same for class; competition arguably distracts from the movement
		3. Racism –
			1. Narrowest definition – intent (knowing and voluntary), malice (even narrower)
			2. Broadest definition – negative thoughts of someone based solely on skin color
		4. Conscious vs. unconscious racism
			1. By requiring intent or malice (conscious racism), essentially permitting/legalizing unconscious racism
			2. Categorization and assimilation as youths – because of evolutionary biology, brains hardwired to identify “other”; key to overcoming is to make oneself aware of hardwiring, more exposure to heterogeneity will weaken the psychological phenomenon by creating a context to operate on and vise versa (i.e. more exposure to homogeneity will confirm categorical choices)
		5. Equality vs. equity
		6. Structural racialization – how race and place intersect to create areas of opportunity and areas of sacrifice, e.g. mother in Akron who lied about residency in order for her children to go to a better school but then was arrested
1. Takeaway: Economic arguments are real but only half/part of the story, other important parts ((1), (3), (4))

# NOLA and Hurricane Katrina, *Trouble the Water*

(Chapter two, p. 68-71; Unnatural Disaster Executive Summary; supplemental articles)

1. Chapter 2: The Evidence
	1. Disparities in Environmental Benefits
		1. Emergency Response
			1. Social vulnerability index – lack of social capital makes someone (re race, place, class) more vulnerable to disaster
				1. E.g. for Hurricane Katrina – lack of public transportation to evacuate

# Federal Environmental Regulation and Federal/State Initiatives

(Chapter five, p. 139-152, 165-170; chapter ten, p. 328-340, 345-353)

1. Chapter 5: Regulation and the Administrative State
	1. Environmental Regulation: The Historical Context
		1. Why do we regulate for environmental protection? Tragedy of the commons via commodification of publicly held natural resources, when everyone is responsible no one is accountable
		2. Why federal regulation? If no/varying minimums then race to the bottom, interstate pollution migration, resource pooling, uniformity/certainty
			1. Few states go beyond federal minimums, tax incentives used to still foster race to the bottom
			2. These reasons for federal regulation don’t translate easily into an EJ context, i.e. who pays?
		3. EPA’s role – to protect human health and the environment
		4. Agency capture theory, three types –
			1. (1) Revolving door – tendency of agencies to ally themselves overtime with the community they regulate, meaning more reluctant to be aggressive
				1. Argument from the left
			2. (2) Self capture – tendency of agency personnel to bargain away environmental values as part of the political process, agency as negotiator
			3. (3) Over regulation – those who fear the agency’s capture by its own bureaucracy, not any/enough attention to other considerations
				1. Argument from the right
			4. Advocates also engage in agency capture, e.g. self-bargaining, compromise by advocate; EJ advocate can only do if not from community itself (see below, if from community unable to do because it’s their life/health on the line), so inherent risk to self-capture
				1. Person/community impacted by EJ – unable to do so as their currency is their life/health
	2. “Stakeholder” Approaches to Decision-Making – know conceptual models and EJ outcomes
		1. Paradigm paradox, three approaches –
			1. (1) Expertise and traditional administrative system – for EJ, no public input, science may not lead to equitable distribution, qualitative data may be necessary
				1. Initial approach for administrative agencies, devolved into (2) below
			2. (2) Pluralism and the modern administrative system – agency as neutral party and different stakeholders/special interests offer input, seeking compromise
				1. Everyone is a special interest under this approach; open to EJ practitioners *and* corporate influence, only way EJ can win with a lot of people rallying behind them
			3. (3) Modern civic republicanism and the proposed administrative system – advancing the public interest, e.g. human health and wellbeing, but for who?
				1. Can’t agree on who for, which is why hasn’t been implemented
			4. (1) & (2) are political reality, (3) good in theory but difficult in practice
		2. Collaborative governance – agency as problem solver (vs. neutral in pluralist model), facilitator, capacity-building as in stakeholders need capacity to fully engage, goal is fostering trust, consensus meaning that everyone is brought in, everyone is positive, and everyone mutually benefits
		3. Expert and civic republicanism – agency autonomy
		4. Pluralism and collaborative governance – outside influence
			1. In pluralism, EJ is a special interest (Ostar: But it shouldn’t be)
2. Chapter 10: Governmental Initiatives to Address Environmental Justice
	1. Federal Initiatives
		1. The Executive Order on Environmental Justice, EO 12898
			1. EJ EO authority – discretion rests with the President
			2. Created Interagency Working Group (IWG) to address disproportionately “high” and “adverse” impacts – common for practitioners/movement to ignore “high” qualifier, no guidance as to what means
			3. Emphasis on research, data, analysis, and public participation
			4. § 6-609 Judicial Review provision – doesn’t create any new rights or laws
				1. “This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or non-compliance of the United States, its agencies, its officers, or any other person with this order.”
			5. Enforcement depends on to what extent the Executive wants to enforce it and directs the cabinet to do so—top-down enforcement
				1. Agency continuum – some simply repackaged existing programs and activities as EJ, some implemented comprehensive review of all programs with EJ outcomes built into program design and implementation, in reality most agencies in the middle of two extremities

E.g. EPA – integrated EJ into programs post hoc, which often doesn’t work because not built into the design of the programs

* + - 1. Why is there still an EJ EO? Fear of political uproar/backlash if rid of, easier to put on the backburner because it has no teeth and is easily forgotten
				1. Bush II – instead of rescinding rebranded as environmental protection for all, minimizing/marginalizing actual EJ harms; ranked list of EJ priorities expecting too much from EJ communities and antithetical to EJ’s mission but in making ranking may actually make some progress
				2. “Paper tiger” – meaning EO has a lot of bite in its language but largely ignored or pointed to as a distraction/diversion

|  |  |
| --- | --- |
| **Pros of EO** | **Cons of EO** |
| * Calls out EJ specifically
* Emphasis on scientific research, data, and public participation
* Created Interagency Working Group (IWG) – removed by Bush II and reinstated by Obama, *but* better on paper than in practice as nothing has really materialized from reinstatement, still good in that requiring agencies to do something
 | * Discretion with President but if President silent then agencies impliedly have discretion because no definite direction from Executive
* Not a law, meaning doesn’t create enforceable rights, immunities, or privileges (§ 6-609)
* Narrow definition of EJ – *but* qualifiers in practice have not been much of a limitation as practitioners/movement intentionally glosses over
 |

* + - 1. What can agencies do today? In pros ^; nuance of EJ to tease out what those pros actually mean in practice, segues into next section on risk assessment and standard setting
		1. Limitations on Governmental Initiatives
			1. *Grutter v. Bollinger*, 539 U.S. 306 (2003) – applied strict scrutiny for racial disparate impact requiring compelling gov’t interest and that it be narrowly tailored

**F:** Part of a dual case, one for the undergraduate’s Affirmative Action program and the other for the law school’s; Michigan Law School’s Affirmative Action program requiring individual consideration of each application but ensuring a critical mass of minority students are admitted

**Rule:** Strict scrutiny, compelling gov’t interest = diversity, which positively affects white students (notice majority bias, has been called into question, likely not long until need a new basis for overcoming strict scrutiny)

**H:** Upheld

**D:** (Not in EJ book) Critical mass is barely distinguishable from a quota and therefore is not narrowly tailored

* + - 1. “Remedial affirmative action” – narrow exemption in strict scrutiny framework, may practice to some extent
			2. How to properly address racial disparities without racial classification? Very difficult if not impossible, unimaginable with current conservative bench
			3. Strict Scrutiny (if suspect category like race)
				1. Whether disparate impact?

Racial Discrimination – a statute otherwise neutral on its face must not be applied so invidiously as to discriminate on the basis of race. If does (disparate impact), apply SS. If it does not, apply RR (see below).

* + - * 1. If yes, is there a compelling government interest? If no, unconstitutional.
				2. If yes, is the law narrowly tailored? If yes, Constitutional. If no, unconstitutional.

Agency would have to show that no race-neutral alternative is available to achieve compelling interest. EPA generally has race-neutral alternatives for achieving its compelling gov’tal interests.

Narrow tailoring requires good faith consideration of workable race-neutral alternatives

* + - 1. Default Rational Relationship (“Gums Test”)
				1. Whether gov’t has legitimate goal? If no, unconstitutional.
				2. If yes, is there a rational relationship between the means (law) and ends (goal)? If yes, Constitutional. If no, unconstitutional.

Rational relationship – whether there is a plausible reason, whether there is any reasonably conceivable state of facts that could provide a rational basis for the classification? (*Armour*)

* + - 1. *Grutter* is outdated, more recent Affirmative Action cases –
				1. *Fisher v. University of Texas* (S. Ct., 2016) (*Fisher II*) – upheld UT’s top ten percent plan plus achievement index, which includes “special circumstances” which includes race—a subcategory of a subcategory
	1. State Initiatives
		1. Few states have adopted comprehensive EJ legislation or changed their permitting, standard setting, or enforcement policies
		2. Most popular responses by states seem to be creating EJ advisory committees or EJ policies and enhancing public participation programs

# Risk Assessment and Standard Setting

(Chapter six, p. 175-187, 195-207; chapter seven, p. 213-237)

1. Chapter 6: Risk and Health
	1. Quantitative Risk Assessment (QRA) – foundation of permits, rulemaking, general policy
		1. QRA → standards with the force of law → permits, rulemaking, general policy
		2. Takeaway – appreciation that some sort of QRA must exist and its role
		3. An Introductory Note on Quantitative Risk Assessment
			1. QRA – the probability (aka risk number, risk characterization) of risk to an individual from exposure to a specific pollutant
			2. Process –
				1. (1) Identify the hazard – identify pollutant and known impacts

Significant that limited to one hazard at one time, i.e. issues of multiplicity and cumulative exposure

Impacts = science, pollutants identified = policy

* + - * 1. (2) Exposure assessment

“Average” is misnomer, “typical” is better; “average” is based on a policy decision

Conservative QRA by Justice Stephen Breyer – agencies make conservative assumptions in QRA rendering measuring effects on typical workers or citizens over protective, suggests agency should focus on central estimate of risk

“Lifestyle choices” – racialization by QRA, based on known science of racial migration and pollution exposure

EO 13045 – childhood health risks, known that children are more susceptible to smaller levels of exposure so need separate QRA, doesn’t mention race or class but intersectional with EJ

Driving force to remove lead from fuels; leaded fuels were facially race-neutral but POC disproportionately exposed because commonly reside closer to highways and gas stations

Back when age used as proxy to get at equitable EJ outcomes

Science-policy

* + - * 1. (3) Dose-response assessment – potency, depends on individual

Certain genetic traits more prevalent in POC increase susceptibility to environmental pollutants, *but* compounded by assumptions in process, i.e. susceptibility based on assumed level of exposure limited in reflecting the experiences of POC populations

Implications – screening for genetic traits, designer babies, segregated society based on genetic screening

Science-policy

* + - * 1. (4) Risk characterization – risk number, probability
			1. Goal – to determine acceptable level of risk for regulation
				1. Acceptable level of risk – alike ESA incidental takes, determining what level of harm to accept
				2. Subjective policy, from objective data/science

Scientific precision? Mostly policy, characterized as hybrid of science and policy (“science-policy”)

* + 1. Criticisms of Quantitative Risk Assessment
			1. “The Environmental Justice Implications of Quantitative Risk Assessment,” Robert R. Kuehn –
				1. Variability in exposure, susceptibility – based on 70 kg white male
				2. Multiplicity – effect of multiple pollutants, limited scientific understanding, types –

Additive – e.g. 1+1=2

Synergistic – result in greater than additive effect

Antagonistic – reductive effect, reduces potency

* + - * 1. Cumulative effects – specific to each individual with different background of exposure, pollutants recombining have different effects; includes prior exposures over time
			1. How to improve QRA? Consider multiple and cumulative effects with demographic distributional analysis by charting, to the extent that have data, the differential ways people are affected by multiple pollutants, cumulative impacts, and differential levels of exposure and susceptibility; would likely help identify whether a QRA is equitable and, if not, which groups of people would likely face disproportionate risk; need transparency and public participation in QRA, presently none
				1. Why not demographic distributional analysis instead of QRA? Very difficult, alternative systems to assess risk not yet robust enough
				2. Why no transparency and public participation – time intensive and costly, begs question of willingness to pay for better QRA
	1. Cumulative Risk Assessment
		1. Introduction to Cumulative Risk Assessment
			1. E.g. Cancer Alley in Louisiana – cumulative risk assessment provides example of levels of inquiry, what looking at in cumulative risk assessment
				1. First four columns (demographics, pollution sources, existing health problems and conditions, unique exposure pathways) common and get at QRA critiques; last two columns (social/cultural conditions, community capacity and infrastructure/social capital) unique to EJ cumulative risk assessment
			2. EPA has been working on a rulemaking for cumulative impact assessment for 30 years but difficult because fact-/case-dependent
			3. Cumulative risk assessment light – health impact assessment, doesn’t carry same weight but EJ movement advocating for supplementing QRA with since slows things down, requires consideration of factors not being considered, provides EJ more leverage
		2. Community-Based Participatory Research (CBPR) – participation is powerful, ability to empower community from within
	2. How public evaluates risk – comparative risk assessment, heuristics, psychological triggers, voluntary vs. involuntary risks
		1. Heuristics – mental shortcuts to simplify complicated issues, most common is the availability heuristic which prioritizes known sources of risk over unknown
		2. Psychological triggers – anything fear inducing leads the average person to not appreciate true risk, also when in control (e.g. driving) don’t appreciate true risk
1. Chapter 7: Standard Setting – risk assessment is predicate for standard setting
	1. Introduction
		1. An Introductory Note on the Taxonomy of Standards
			1. (1) Health-based – based on QRA, not inclusive of everyone’s health
			2. (2) Technology-based – e.g. CAA LAER, based on currently existing technology
			3. (3) Technology-forcing – e.g. CAA rollbacks (attain lower emissions levels by some future date), influenced by/interplay with QRA
	2. The Case of National Ambient Air Quality Standards
		1. EPA sued—by industry or citizen suits—every time it sets a new standard
			1. What’s defensible? Beholden to science at some level, degree to which science evolving informs our policy options because want to point to well-established scientific literature
				1. EPA doesn’t want to erode its credibility or risk being defunded by Congress
		2. Administrative bias (i.e. administrative capture theory)
		3. *Whitman v. American Trucking* (S. Ct. 2001)
			1. **F:** EPA promulgated controversially low NAAQS for PM and ozone
			2. **I:** (1) May EPA consider costs of implementation when setting NAAQS? (2) Violation of nondelegation doctrine?
				1. Nondelegation doctrine – Congress vests legislative powers in the agency by failing to provide an “intelligible principle” to guide agency’s implementation of authority
			3. **H:** (1) No, (2) no
			4. **R:** (1) Statute’s language is clear, Congress was aware of costs of protection and provided cost-mitigating strategies elsewhere in CAA, costs have possibility of canceling all other factors so need to expressly mention (no elephants in mouseholes argument); (2) statute directs EPA to set NAAQS at a level requisite to protect public health for a discrete set of pollutants based on published air quality criteria reflecting latest scientific knowledge, requisite = sufficient and not more than necessary, Congress doesn’t have to specify how much is too much
			5. Resulted in EPA’s 2008 update of NAAQS, in *Whitman* used EJ EO as reason for more protective standards
			6. Administrator has ultimate say in setting standards, must defend standards by providing an intelligible principle (otherwise berated by Scalia, as above)
		4. Two flaws with EPA’s 2008 NAAQS update – (1) in saying “all” people, arguing rising tide lifts all boats which is a distortion of EJ and generally wrong; (2) focus on effectiveness of rule rather than alternative action like establishing more protective standard for more targeted communities
	3. Standards under the Clean Water Act
		1. Water Quality Standards
			1. *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) – upheld tribe’s application of more stringent standards on ABQ, but limited to tribes

**F:** Tribe with more stringent CWA standards downstream of ABQ forcing ABQ to comply with its standards

**H:** Tribe had right to require more stringent standard (EPA had discretionary authority) and water quality criteria adequately protected the tribe’s ceremonial designated use standard

* + - 1. ^ Limited to tribes as tribes have own political sovereignty, communities of color and low income communities do not
			2. Is framing EJ as deviations from an existing norm strategic? Yes
				1. Ramifications of working within a dominant use framework as tribe did here in the context of protecting/framing vulnerable communities in standard setting – increases burden on, diminishes the value of vulnerable communities
				2. Worked for tribe because uniquely situated, less easy for POC and low-income communities because arguing upstream from the start

Alternative? Need-based, meaning take into account all needs starting with outliers

* 1. Outliers in standard setting
		1. On bell curve of population, standard setting draws a vertical line (if exposure on the y-axis and population on the x-axis), remaining population beyond standard is unprotected, i.e. outliers
			1. Outliers not accounted for because of variability in exposure and susceptibility

|  |  |
| --- | --- |
| **Pros of Protecting Outlier Populations** | **Cons of Protecting Outlier Populations** |
| * Moral imperative – who matters because harder to not protect someone when identified (i.e. put face to name), likely not a legal imperative (i.e. consider rationalizations for not protecting outliers like lifestyle choices and genetic susceptibility)
* Technology-forcing standard/margin of safety/precautionary principle – when we protect outliers, we’re creating an imperative or new technology, promoting innovation
 | * Marginal costs/diminishing return on investment – outliers are most expensive to protect
* Taxing for agencies – data collection, research
* Easy out with risk avoidance – less costly to agency than developing robust standards, e.g. putting up signs/sending alerts
 |

* + - 1. Risk avoidance – agency shifts its burden to outliers
				1. Cons – immoral, not always easy for communities to change (e.g. for communities dependent on fish consumption, those who can’t stay inside when air quality is poor)
				2. Pros – cheaper for agencies and regulated industries which is why its common

# Facility Permitting and NEPA

(Chapter eight, p. 249-276; chapter eleven, p. 356-382)

1. Chapter 8: Permits and Public Enforcement – QRA ^ → standards ^ → permits
	1. Facility Permitting
		1. Introduction
			1. Should an applicant’s compliance with health-based standards be sufficient to receive a permit? If permit granted, should applicant’s compliance with standards and the permit shield its business activities?
			2. Most EJ battles at permitting stages – can make up for preceding flaws with more protective permit conditions
		2. The Legal Hook: Potential Federal Sources of Authority to Address Environmental Justice and the Decisions of the EPA’s Environmental Appeals Board
			1. Main issue – does the agency have discretion? Most permitting agencies, especially state agencies, don’t because consistently interpreted not to, adopted dogma constrains permitting agencies, easiest to be required to approve permit without discretion
			2. “Integrating Environmental Justice into EPA Permitting Authority,” Richard J. Lazarus & Stephanie Tai – focus on where permit not protective
			3. In 2000 EPA OGC issued a memo finding significant authority under numerous statutory provisions for addressing EJ in permitting, *but* never finalized because too politically controversial for agency to admit that it has the ability to be more protective but choosing not to be
			4. More EJ claims accepted with passage of EO than prior to passage
			5. Omnibus clauses – best sources of authority for legislative intent at outset of legislation
			6. *In re Chemical Waste Management of Indiana, Inc.*, 1995 EPA App. LEXIS 25, 6 E.A.D.66 (June 29, 1995) – found EPA had discretion in RCRA public participation and omnibus clauses to implement EO, deferred to EPA for how

**F:** Facility applied for modified RCRA permit from EPA Region V to expand, EPA performed disparate impact analysis by looking at one-mile radius of facility, found no disparate impact and approved permit

**RCRA § 3005:** Statute does not authorize permitting decisions be based on public comment so if application meets statute’s requirements on its face, then permit must be granted (i.e. agency must approve permit if standards are met)

* “. . . [I]f a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community . . . .” (emphasis in original) – EAB refuting EJ?

**Standard of Review:** EAB will not review decision unless it is based on clearly erroneous finding of fact or conclusion of law or if it involves an important matter of policy or exercise of discretion that warrants review (i.e. abuse of discretion)

**H:** Two areas in RCRA permitting scheme where EPA has significant discretion to implement the EO (1) public participation and (2) omnibus clause (see below); deference to EPA over technical matters such as methodology (i.e. looking only to one-mile radius)

* Public participation – EPA is not precluded by statute’s public participation procedures from providing other opportunities for public involvement, when the EPA has basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the EPA should, as a matter of policy, exercise its discretion to [ensure] early and ongoing opportunities for public involvement in the permitting process
	+ “[A]t least a superficially plausible plan” – sets a low threshold/bar
* Omnibus clause – if operation of a facility truly poses a threat to the health or environment of a low-income or minority community, the omnibus clause requires the EPA include in the permit whatever terms and conditions are necessary to prevent such impacts
	+ “Each permit issued under this section *shall* contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.” (emphasis added)
		- 1. First EJ claim following passage of the EO
			2. First time administrative review body/court found omnibus discretion (i.e. agency discretion within a statute’s omnibus clause)
			3. Can only include economic impacts/other non-health-based impacts within health and environmental impacts assessment, no discretion to redress impacts unrelated to or only tenuously related to human health and the environment, e.g. disproportionate impacts on economic well-being of a minority or low-income community
			4. Communities need to do own impact analyses → question of whether communities are able to do so
		1. Environmental Justice Claims in State Permit Proceedings
			1. *NAACP—Flint Chapter v. Engler*, Genesee (Michigan) County Circuit Court, Transcript of Ruling (May 29, 1997) – held state has constitutional duty to protect the health, safety, and welfare of its citizens regardless of race, reversed on appeal

**F:** Incinerator siting in predominantly African American community – didn’t perform disparate impact analysis as required by MI CAA, no public participation by affected community, no consideration of cumulative impacts of affected community

**PH:** Filed in state court with focus on CAA claims

**DEQ:** Permit shield, had to approve

**H:** Policies/regulations enforced by state do not go far enough to carry out the duty the state has under its constitution to protect the health, safety, and welfare of its citizens regardless of their race

* + - 1. Reversed on appeal – was a big win (and still an eye-opener), but never carried any precedential weight/value
			2. *Colonias Development Council v. Rhino Environmental Services, Inc. & New Mexico Department of Environment*, 138 N.M. 133, 117 P.3d 939 (2005) – held statute required consideration of public health and welfare impacts and cumulative impacts

**F:** Facility applied forpermit under state RCRA analog to build in low income, minority community, much public opposition but permit granted, hearing officer at public hearing did not consider non-technical testimony or proliferation of permitted facilities causing cumulative impacts

**Permitting regulations:** Built on RCRA’s omnibus clause with “*and* the solid waste facility application demonstrates that neither a hazard to public health, welfare, or the environment nor undue risk to property will result.” (emphasis in original)

**DOE:** Cannot reasonably be expected to weigh sociological concerns

**H:** DOE’s interpretation too narrow, should consider issues relating to public health and welfare not addressed by specific technical regulations, proliferation (“regulations not only allow but require consideration of the cumulative effects”)

**R:** Looks to “*and* . . .” to say legislature meant to extend to public health and welfare impacts (nuanced statutory argument); potential chilling effect of the hearing officer’s errors—court/statute requires community be given a voice and the concerns of the community be considered in the final decision making

* + - 1. Lead to creation of NM DEQ disparate impact factors – culture forcing on agency and other states’ agencies
			2. Pennsylvania – requires that project proponent of a waste disposal facility demonstrate that the project’s benefits, including social and economic benefits, clearly outweigh its burdens, including social and economic harms (“benefits and burdens” test, endorsed by state court in *Eagle Envtl. II, L.P. v. Commonwealth Dept. of Envtl. Protection*)
			3. Minnesota – must conduct cumulative impact assessment, farther reaching but very narrow to communities in/near the Twin Cities
			4. California – decentralized air quality scheme requires some cumulative impact assessment, a similar scheme is being considered for Oregon
			5. State vs. federal? May be more opportunity to find discretion in states that have gone beyond federal minimums
			6. Hard look by courts? Agency simply must be conducting analysis under accepted methodology/practices for disparate impact analysis
				1. No clear answer for when court should not simply defer to the agency – some situations clearly erroneous, but unclear in the middle of the spectrum
				2. Importance of methodology – if no disparate impact analysis, no injury
		1. The Permit Applicant’s Perspective – uncertainty, confusion, delay
			1. Author argues already have Title VI so don’t need EJ, a fringe environmental movement, should instead bring cumulative nuisance claims
				1. Ostar: Offensive, belittling to EJ
			2. Applicants try to mitigate early, in the pre-development stages to avoid public opposition after investment of significant time and money; applicant going to focus on public participation and education
			3. Should *avoid* before *mitigate* – avoid via alternative sites, materials, technologies; (1) avoid disparate impacts, (2) mitigate, (3) deny/compensate (compensation should be last resort)
1. Chapter 11: Land Use Planning, Environmental Review, and Information Disclosure Laws
	1. Planning, Land Use, and Compensated Siting Approaches
		1. Planning and Zoning Changes
			1. “Planning Milagros: Environmental Justice and Land Use Regulation,” Craig Anthony Arnold – “equitable planning” can be incorporated into any local planning process, requires good information about environmental conditions in communities with a relatively high percentage of low-income people or people of color, suggests agencies collect this information by conducting EJ audits that provide demographic, historical, cultural, environmental, land use, and economic information about a local community
		2. Compensated Siting Proposals
			1. Lynn Blais – compensation can be understood as a mechanism for increasing the otherwise limited options faced by poor and minority communities and residents, rather than constituting an immoral buy-off of the residents of a host community, compensation can be used to finance the opportunity to leave the community if one does not agree with the risk/benefit analysis that led to the siting (countering EJ scholars’ mobility argument)
	2. Environmental Review: The National Environmental Policy Act and State Environmental Policy Acts
		1. An Introductory Note on NEPA and SEPAs
			1. Relationship between facility permitting and NEPA = siting
			2. NEPA mandates informed decision, not wisest outcome (procedural, not substantive/protective)
			3. When NEPA potentially applies, consider (1) categorical exemptions; if still applies – (2) EA unless jump straight to EIS, (3) EIS
				1. (2) EA – either FONSI or FOSI (go onto EIS), no public participation in but challengeable under NEPA citizen suit provisions
				2. (3) EIS – scoping, draft EIS (DEIS), final EIS (FEIS)

Scoping – drawing of geographic boundaries and issues, most frequently overlooked to detriment of advocates, if not in scope not analyzed

Must preserve administrative remedies in DEIS/FEIS comments, if don’t, lose administrative remedies and cannot challenge final agency action under the APA

Final agency action = record of decision (ROD), not FEIS; ROD could consider public’s comments in substantive way; agency’s minimal obligation to comments is to say received and considered (acknowledgement only required, not substantive consideration)

* + - * 1. For EA/EIS significant impacts, NEPA requires consideration of ecological, aesthetic, historic, cultural, health, and cumulative impacts, notably does not include economic or sociological consideration

EJ certainly included in health and cumulative factors, but little knowledge of how to litigate since most NEPA claims brought by mainstream environmental groups on the first two/three factors

* + - * 1. Cons of NEPA EJ claims –

Procedural, not substantive

Agency receives deference in challenges

Must preserve administrative remedies and easy to miss public notice

Public notice first goes out after EA completed, usually when EA ROD issued or during EIS scoping when agency is already well into the process; no public notice for much of the process, e.g. anything under a categorical exemption

99% of NEPA = EAs, 1% = EISs – ^ meaning largely no NEPA public comment

Overall, minimally useful depending on strategy, hooks

* + - 1. State NEPA analogs = SEPAs; most well-known is California’s CEQA, Oregon does not have a SEPA
				1. SEPAs can require mitigation if impacts found, just one example of how SEPAs can go beyond the federal minimum
		1. Judicial Review of NEPA
			1. *In the Matter of Louisiana Energy Services, L.P.*, 45 N.R.C. 367 (1997) – FEIS inadequate for failure to consider impacts of closing road, property values

**F:** Administrative review by NRC of building uranium facility between two predominantly African American communities intersected by Parish Road 39

**π:** FEIS failed to address impacts of (1) closing Parish Road 39 (FEIS missed that 31% of households didn’t own cars, mostly pedestrian traffic) and (2) property values (FEIS assumed fluid housing mobility rather than racial discrimination in housing, rather than raise property values construction likely to add racial/socioeconomic barriers)

**H:** FEIS inadequate for failure to consider impacts of closing Parish Road 39 and property values

* + - 1. π also alleged racially discriminatory siting – publicly available information, at each step of the site selection process residential composition in terms of proximity to facility became more and more African American
				1. **H:** Required more complete investigation into consideration of race in site selection process
				2. Reversed on appeal as “NEPA is not a tool for addressing problems of racial discrimination,” law not drafted to deal with those issues – *almost* had really strong precedent
				3. Remember earlier conversation on market-based disparate impact – eliminating communities based on racist zoning so appears facially neutral market but really racial/socioeconomic dynamics at play
			2. Is (2) effect on property values properly reviewable under NEPA, i.e. can it be arbitrary and capricious for an agency to fail to consider effect on property values? Likely no, more likely agency may consider but is not required to
			3. No consensus on “cumulative factors,” may mean aggregation of risks, existing background risks, no clear answer for how agencies and courts supposed to treat
			4. No legal obligation for agencies to engage in sufficient outreach to ensure meaningful opportunity for public participation, merely should as a matter of policy
				1. Test for meaningful participation –

(1) Access to information

(2) Technical capacity to use information

(3) Opportunity to influence the outcome – e.g. under NEPA, opportunity to issue comments, public may expect agency to do more

(4) Decision makers seek out perspectives of those most impacted

* + - * 1. Public hearing under NEPA required only where “controversial,” difficult to trust agency discretion with this
			1. In enacting EO, WH issued two memos to supplement the EO—how agencies should interpret for (1) NEPA and (2) for Title VI—highlighting the statutes most impacted by the EO
			2. EJ EO did not explicitly apply to NRC, but agency voluntarily agreed to, later opted out of application
				1. Does NRC’s opting out matter procedurally? No, EO prompts consideration of existing environmental law through EJ lens, even if opt out EO still exists, procedurally President can’t require agency to follow without amendment of EO
			3. E.g. Columbia River Crossing/Haden Island – updating I-5 crossover to Washington, gov’t recognized that cutting off Haden Island community from Safeway but determined there were alternatives like Target and food delivery—inviable options for low-income communities
				1. EJ clinic and Earthrise challenged separately, tied together and effectively slowed down with other strong opposition; case strategically kept in abeyance rather than denied, presently dead by may come back
				2. EJ clinic not engaged in scoping process as project statement to increase flow of goods and people North-South across the Columbia, as a result project impact area just along highway, Haden Island community and viable alternatives (tracks, tunnel, new crossing) excluded

Because of scoping, alternatives only five iterations of bridge replacements rather than ^ other viable alternatives

If scoping had been completed correctly based on accurate need statement would’ve included Haden Island, manufacturing communities, and nearby tracks

* + 1. Analysis of Social and Economic Impacts
			1. *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184 (2004) – CEQA EIR requires analysis of urban/suburban decay and deterioration

**F:** Challenge development of two retail shopping centers alleging CEQA (CA’s NEPA analog) violations, specifically the Environmental Impact Report (EIR)

**I:** Whether EIR must consider urban decay or deterioration as an indirect environmental effect of a proposed project?

**H:** Yes, caselaw already established that the “omission of analysis on the issue of urban/suburban decay and deterioration render the EIR[] defective”

* + 1. New Approaches: Health Impact Assessments
		2. NEPA win = tying a decision up in court for years, stalling siting to force facility to go elsewhere
		3. NEPA’s translation requirements implies that NEPA requires accessibility
			1. EO 13166 (Clinton) – guidance, i.e. factors, for federal agencies’ determination of when to translate, creates low bar of ~5% or 1000 individuals; still no easy answer for when to translate

# The Role of the Lawyer: Private Enforcement, Citizen Suit Provisions & Remedies

(Chapter thirteen, p. 433-444, 453-467; supplemental reading)

1. Types of EJ legal claims –
	1. (1) Constitutional – Equal Protection Clause (EPC)
	2. (2) Civil Rights – Title VI
	3. (3) Administrative – NEPA ^, APA
	4. (4) Environmental via citizen suit provisions
	5. (5) Common law via toxic torts – a few *big* cases but *very* difficult to bring
2. Chapter 13: Litigation, Citizen Enforcement, and Common Law Remedies
	1. The Role of the Lawyer and Litigation
		1. Environmental Justice Lawyering
			1. Why bring an EJ lawsuit on behalf of a community? Used as a tactical move within a broader strategy, rarely in itself a winning strategy
				1. Consider whether EJ lawyering is really best strategy, should use strategically/tactically to support community in conjunction with other media tactics
			2. Framing – EJ suits likely won’t frame an EJ case as a *racial* case because courts often won’t hear of disparate impacts outside of racial legal bases, i.e. EPC, Title VI
			3. Community engagement – in bringing a legal challenge, lawyers and experts speak rather than community members, community can become unengaged as fight shifts to other proxies, i.e. litigation, must speak in very prescribed manner rather than freely and truthfully and thus likely arguing contrary to how community wants
				1. Does not facilitate building of a cohesive, imaginative, and militant base of people willing to employ various tactics on the opposition
			4. Litigation consumes resources, time (leading to community complacency just as damaging as a court order)
			5. *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, Luke W. Cole
				1. Ostar: Most influential law review article read in law school
				2. Largely about *Kettleman City* case – process is just as important, if not more important, than the outcome; an EJ win often empowers the community as EJ wins are seldom
				3. Before bringing an EJ case, ask –

(1) Will the strategy educate people? – Ostar adds “storytelling” here as a very important/powerful EJ tool; also important to educate yourself as the community’s lawyer (i.e. listen, empathize, validate), not just about educating the community

(2) Will the strategy build the movement/base?

(3) Does the strategy address the cause rather than the symptoms of a problem?

Environmental law often focused on symptoms rather than root causes

Sometimes need to allow legal opportunities to pass where too transactional and/or symptomatic – no test to determine, rather must work with community organizers (i.e. client empowerment according to Cole)

Ostar: If going to take one thing away from this class it’s these questions, they should serve as a lens through which to filter strategic ideas to remember that an EJ win is not what happens to a legal claim but what happens to the community when you’re gone, lawyer must learn to decentralize power and give to clients (bottom-up lawyering, opposite of top-down legal/scientific model of environmental law), law used as means not ends (i.e. legal system may be disempowering ^)

* + - 1. Legal strategies in EJ about increasing leverage to shift policy, must build base with education
			2. Should EJ lawyers’ primary goal be community empowerment?
			3. Public participation in environmental laws’ decision making process, Cole’s two approaches community groups can follow in utilizing in context of land use permitting decision –
				1. (1) “Participatory” model – groups take part in every stage of the administrative process that provides an opportunity for public input, i.e. commenting on draft documents, attending scoping meetings and public hearings, etc.

Risk of not participating in administrative process is a party may be denied the right to pursue an issue that was not raised in earlier administrative proceedings and sometimes may not be able to file a claim for failure to exhaust administrative remedies

* + - * 1. (2) “Power” model – premised on the assumption that participation by community groups in the administrative process almost never helps them change undesirable outcomes and that their sole focus should be on the decision point and in actively trying to reach the actual decision makers
				2. ^ Not mutually exclusive strategies
		1. A Note on Environmental Law Clinics
			1. Strategic Lawsuit Against Public Participation (SLAPP) suits – retaliatory actions filed by private developers or project applicants against organizations or individuals who oppose a project through litigation or other forms of advocacy; reaction to some political action, can easily bankrupt a community or public interest group if successful and can chill public participation; encountered by community groups and clinics representing them
				1. SLAPP litigation increasingly unfavorable to plaintiffs who bring them due to recent legislation that recognizes the antidemocratic nature of such lawsuits
	1. Private Enforcement—Citizen Suits – not written specifically for EJ claims, but provide an opportunity to pursue EJ claims
		1. Legal Requirements for Filing Suit
		2. Practicalities of Private Enforcement
			1. Challenges –
				1. Not all environmental statutes contain citizen suit provisions
				2. Costly, limited access to the legal system
				3. Attorneys fees, cost recovery – must “substantially prevail”/“judicial relief,” meaning must win in court with court order or consent decree; no more catalyst theory; hard to find an attorney to bring claim unless case win is a near certainty, ultimate chilling effect on legal system

Very likely Congress did not intend to make awarding attorneys fees more difficult in CWA than CAA, but that’s how interpreted by the courts

* + - * 1. Remedies – injunctive relief or compliance per *Gwaltney*, can’t be wholly past
				2. “Agency-forcing actions” – citizen suits intended to sue polluter/industry for a permit violation but can only sue agency when it’s required to take an action and has not, limited scope/applicability, prosecutorial discretion per *Heckler v. Cheney*

Citizen suits precluded when agency “diligently prosecuting” claim – does not mean agency doing anything, can simply mean agency has an open file; if shown agency “acting” then sufficient for “diligent prosecution” because citizen suits intend to have citizens acting as attorneys general where agency inaction, meant to spur enforcement by permitting citizens act in agency’s place

Tension on how broadly interpreted

* + - * 1. Knowledge of violation – usually only know of violation per self-reported violations by industry
			1. Most environmental citizen suits are under CWA, likely because sample collection is easier than e.g. air sample collection (i.e. differential ease of monitoring), enforcement varies with environmental media
		1. Building Community Enforcement Capacity
			1. Upwardly Adjusting Attorney’s Fees ^
			2. Technical Assistance to Communities
				1. Superfund’s Technical Assistance Provisions
				2. Community Outreach and Education
				3. Training Communities to Detect Noncompliance
	1. Common Law Remedies –
		1. Toxic torts – primary common law EJ claim
			1. Pros – monetary damages permitted for toxic torts
			2. Cons – establishing standing (limitations of causation science, e.g. scientific evidence, expert witnesses and *Daubert* factors), lawyers take on contingency (requires lots of capital, defense knows and stretches out litigation until plaintiffs lawyers fold)
		2. Public nuisance – not viable for EJ claims
			1. Pros – broad, vague
			2. Cons – not viable because typically only recognized when personal property has been physically invaded, i.e. by ash, not odor

# Constitutional Claims and EPC

(Chapter fourteen, p. 480-491; Miller v. City of Dallas, 2002 U.S. Dist. LEXIS 2341 (N.D. Tex. 2002); supplemental)

1. Chapter 14: Constitutional and Civil Rights Claims – overlap, both claims are often brought together
	1. § 1983 – permits all persons to bring Constitutional EPC claims in court; legacy and lasting importance in application, majority of these claims are employment law
	2. Environmental Justice Framed as Constitutional Claims
		1. The Equal Protection Cases
			1. *Yick Wo v. Hopkins* (S. Ct. 1886) – facially non-discriminatory laws may be unconstitutional if administered so unequally that discriminatory, invoking SS
				1. **H:** Found unconstitutional San Francisco ordinance prohibiting operation of a laundry except where brick or stone building in order to prevent fires and providing opportunity for exception for wooden buildings but almost all white applicants provided exception while zero Chinese applicants provided exception
				2. **R/Rule:** Administered so unequally that discriminatory and unconstitutional, strict scrutiny applied
				3. First case to overturn otherwise facially neutral law on Constitutional grounds
			2. *Washington v. Davis* (S. Ct. 1976) – apply SS where otherwise neutral law is applied so invidiously as to discriminate on the basis of race (disparate impact), where no disparate impact, apply RR
				1. **Rule:** A statute otherwise neutral on its face must not be applied so invidiously as to discriminate on the basis of race, only apply SS when disparate impact, if no disparate impact, apply RR
				2. **App:** RR applied
				3. **H:** Upheld DC police literacy test
				4. **Takeaway:** Evidence of intentional discrimination is essentially what’s required

Defining racism only as intentional is antiquated, arguably should be updated to include modern understanding of unintentional discrimination (i.e. implicit biases)

* + - 1. *Arlington Heights* (S. Ct. 1977)
				1. **Rule:** To determine whether discriminatory intent, look to “*Arlington Heights* factors”

(1) Disparate impact

(2) Historical background to the decision – broad, big picture

(3) History of the decision-making process – narrow, on-the-ground

(4) Departure from normal substantive factors or procedures – sometimes split into two

(5) Legislative/administrative history – sometimes split into two

Sometimes 4, 6, or 7 factors, doesn’t matter; totality test, not exhaustive, don’t need all factors; all courts consider factors differently, hard for courts to find intentional discrimination in so much circumstantial evidence

* + - * 1. **F:** Request to change zoning to allow for multi-family dwellings (usually for people of color, low-income) denied
				2. **H:** Constitutional, no EPC violation
			1. Spectrum of evidence in Constitutional EPC claims
				1. Only disparate impact, on left, required, without don’t have injury for an EPC claim
			2. *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983) – intentional discrimination in the provision of services per *Arlington Heights* factors triggering strict scrutiny

**F:** Filed suit to charge the City, mayor, and four council members with discrimination in the provision of seven municipal services—(1) street paving and maintenance, (2) storm water drainage, (3) street lighting, (4) fire protection, (5) water distribution, (6) sewerage facilities, and (7) park and recreation facilities

**PH:** Intentional discrimination in the provision of (1), (5), and (2) ^ in violation of the 14A, Title VI of the CRA

**Rule:** To trigger 14A strict scrutiny, preliminary findings of disparate impact *and* discriminatory intent are required

* Rule for discriminatory intent – not racially discriminatory motive nor proof that racial discrimination is the sole purpose behind each failure to equalize services but cumulative evidence of action and inaction which objectively manifests discriminatory intent (apply *Arlington Heights* factors); none of factors is necessarily independently conclusive, “totality of the facts” test

**J/(H):** Affirmed

**R:** (1) Substantial evidence—video tapes, photographs, charts, and the testimony of community residents and of qualified experts who made on-site surveys— of a disparity in the provision of (1), (5), and (2); (2) nearly every factor which has been held to be highly probative of discriminatory intent is present

* To (2) – magnitude of disparity (FN3 data), legislative and administrative pattern of decision-making extending back nearly half a century (court addressing foreseeability, uncommon in EPC), continued and systematic relative deprivation of the black community (evidenced by spending nearly all revenue sharing monies received on the white community in preference to the visibly underserviced black community)
* “[E]ngaged in a systematic pattern of cognitive acts and omissions” – unique language, don’t see often by courts in EPC claims
	+ - 1. *Arlington Heights* factors not explicitly referenced but applied
			2. *Bean v. Southwestern Waste Management Corporation*, 482 F.Supp. 673 (S.D. Texas 1979), affirmed without opinion 780 F.2d 1038 (5th Cir. 1986) – evidence insufficient to establish disparate impact

**F:** π seeking to invalidate a decision by the TX Department of Health to grant a permit to Southwestern Waste Management to operate a solid waste facility (siting), seeking preliminary injunction

**Rule:** *Arlington Heights* factors – now explicitly referenced in application; may use statistical evidence to show discriminatory intent

**App:** Court stops at (1) disparate impact hurdle – don’t know if disparate impact so all circumstantial evidence of discriminatory intent doesn’t matter

**H/J:** Statistical evidence insufficient to demonstrate disparate impact here (ultimately a dispute over methodology – unit size (re Ch. 2)), preliminary injunction denied

* + - 1. Court knew TX Department of Health decision bad (“[i]t simply does not make sense,” “decision to grant the permit was both unfortunate and insensitive”), but court stuck on bad methodology
				1. Underscoring importance of good methodology from earlier in course
			2. Early EJ case, undeveloped especially in methodology
			3. Policy considerations – should agencies be held liable for other agencies’ decisions? If so, what is the appropriate standard for holding another agency accountable?
			4. Earlier courts focused on foreseeability (what agencies should have known), *Bean* instead increases the burden on agency consideration and recordkeeping as other agencies may be held liable
				1. Court here emphasizes awareness – unwilling to say agency had responsibility to be aware of what another agency doing absent evidence that knew and ignored
			5. *East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Comm’n* (1989) – suggesting approving body unable to be guilty of discrimination because not actively discriminating, just receiving applications; only private parties submitting applications are guilty
			6. Plaintiffs have had less success with EPC claims in the siting context (re *Bean*) than in the provision of services (re *Dowdell*)
			7. *R.I.S.E. v. Kay*, 768 F.Supp. 1144 (E.D. Va. 1991) – siting Constitutional for insufficient evidence of discriminatory intent per *Arlington Heights*

**F:** Landfill siting in predominantly black area established by freed slaves, looked at alternative site but still predominantly black and determined unsuitable—all in spite of county being 50/50 white/black

**H/R:** Constitutional – (1) disparate impact (historically, *but* does not say *this* landfill will have disparate impact) *but* (2) plaintiffs provided no evidence of discriminatory intent to satisfy *Arlington Heights*

* + - 1. Unlike *Bean*, court didn’t stop at (1)
			2. Did court ignore clear evidence? Rezoned from agricultural zoning just to grant landfill permit (would fall under departure from norms and administrative/legislative history), county administrator used racial slurs (administrative/legislative history, history of decision making, historical background, or, arguably, evidence of clear/direct discriminatory intent not requiring consideration of factors)
			3. Right as EJ taking off – bad miss
			4. EPC does not impose affirmative duty to equalize the impact of official decisions on different racial groups, merely prohibits gov’t officials from intentionally discriminating on basis of race (Ostar – awful but almost 100% true)
			5. *Miller v. City of Dallas*, 2002 U.S. Dist., LEXIS 2341 (N.D. Tex. 2002) – denied SJ for sufficient evidence of discriminatory intent per *Arlington Heights*

**I:** (1) Flood protection, (2) zoning (multiple issues lumped into)

**Rule:** *Arlington Heights* factors

**App:** (1) History and departure from norms – race-based policy making via segregation (legal at time so court looks to as foreseeability, likely insufficient on own though), zoning of floodplain land unfit for residential development as “negro,” denied funding and bond measure; (2) disparate impact, other factors reveal clear, sordid history, departure from norms (re unenforced code via supplemental use permits)

* To (1) – no evidence of administrative/legislative provided but don’t need all, totality of the facts (if bringing case, bring as much as you can, but don’t need to show all if don’t have)

**J/H:** Denied summary judgment – sufficient evidence to survive SJ, quickly settled after (common in litigation to settle after losing SJ, increased EJ negotiating leverage)

* + - 1. Included for clear, mechanical application of the *Arlington Heights* factors
			2. Court had no problem finding disparate impact, similar focus on magnitude as *Yick Wo* but that kept going indicates that following more than *Yick Wo* standard

|  |  |  |
| --- | --- | --- |
| **Case** | **Disparate Impact?** | **Discriminatory Intent** |
| *Apopka* | Yes | Yes |
| *Bean* | No | No |
| *East Bibb* | Some (unclear) | No |
| *R.I.S.E.* | Yes | No |
| *Miller* | Yes | Yes *but* just SJ |

* + 1. Trends (see table below) – courts more willing to find intent when disproportionate municipal services than siting (no successful EPC case for siting, Ostar: Likely because of cost to dominant community)
		2. Book argues for intermediate analysis to better handle issues of institutional, unconscious racism, i.e. implicit bias

# Civil Rights and Title VI

(Chapter fourteen, p. 492-517; Rosemere v. EPA, 581 F.3d 1169 (9th Cir. 2009); supplemental)

1. Chapter 14: Constitutional and Civil Rights Claims
	1. Enforcement of the Civil Rights Act of 1964
		1. Introduction
			1. § 601 – prohibits discrimination based on race, color, and national origin in programs receiving federal funds
				1. Trigger – recipient of federal funding

Need federal funding nexus for prima facie claim, i.e. causation between federal funded activity and the discrimination – need to show that activity in question, whether part of a program or other administrative function, is at least in part funded by federal dollars

* + - * 1. Primary recipients of federal funds = states and local governments
				2. “Discrimination” – *Washington v. Davis* intentional discrimination requiring direct evidence of intentional discrimination or circumstantial evidence via *Arlington Heights* factors
			1. § 602 – grants federal agencies authority to issue regulations prohibiting recipients of federal funds from engaging in activities that have a discriminatory effect, i.e. regulations prohibiting disparate impacts rather than only intentional discrimination
				1. Has been interpreted as giving agencies authority to adopt disparate impact regulations, prohibiting activity that is technically lawful under § 601 → tension/contradiction between § 601 and § 602
				2. § 602 language explicitly references § 601 language, meaning how § 601 interpreted determines interpretation of § 602
				3. Disparate impact regulations: Administrative law in a Civil Rights context
				4. Scalia in *Sandoval* – if trying to avoid redundancy/superfluidity, then wouldn’t § 602 as interpreted by Scalia be superfluous of § 601
			2. Ostar – 14A’s EPC already aimed at direct discrimination, per legislative history/testimony §§ 601–02 aimed at indirect discrimination
			3. Title VI protects all persons in U.S., do not have to be a citizen, same as EPC/DPC
			4. Federal financial assistance/funds – grants, financial awards, non-monetary assistance with financial value (i.e. renting federal land, federal gov’t training, federal subsidies – not exchanging money but forfeiture of gov’t revenue)
		1. Administrative Complaints Grounded upon Disparate Impact Regulations
			1. § 602 disparate impact regulations administered by agencies’ offices of civil rights (OCRs) but agencies, especially environmental agencies, don’t have the resources to fully staff their OCRs
			2. To file complaint – identify self and two triggering elements for prima facie claims—(1) federally funded activity, (2) protected under Title VI (i.e. race, color, or national origin discrimination)
				1. No right to appeal, no opportunity to argue a case (i.e. no discovery), so good to put best case forward
				2. Agency must reject/accept within [20] days – typically misses deadline (alike *Rosemere*’s pattern of missed deadlines)
				3. If agency accepts, must issue preliminary findings within [120/180] days – typically misses deadline (alike *Rosemere*’s pattern of missed deadlines)
			3. *Select Steel* – permit issued, complaint filed, agency identified community affected to determine if *adverse* impact, if no adverse impact then no disparate impact and no claim
				1. Investigative report excerpt – technical evidence that area was in nonattainment for ozone, agency disregarded

Should compliance with existing standards (e.g. NAAQS attainment) be sufficient to establish no adverse impact for Title VI?

Spot zoning – if not ^, every permit would be subject to Title VI challenges, especially as demographics shift, which undermines regulatory certainty needed by industry to operate; if not, would’ve made Title VI an incredibly powerful tool

* + - * 1. EPA enshrined the court’s permit shield holding (permit complies with the health-based standard so must be protective of the population) as its long-lasting precedent

EPA rescinded just before he Obama left office

* + - 1. DOJ vs. EPA?
				1. DOJ – specializes in Civil Rights, investigations, and litigation
				2. EPA – specialized for that agency, agency defensive when with DOJ but not when within agency, may lead to a culture change within agency; where *Select Steel* landed
			2. Between 1993 and 2005, EPA processed 211 Title VI complaints – 19% still pending, 81% closed (60% rejected e.g. for lack of federal funding, failure to file within time frame, or insufficient allegations; 21% dismissed e.g. for informal resolution or voluntary withdrawal)
				1. In only a few cases does EPA determine whether adverse or disparate impacts
				2. In two cases for which EPA made determination, dismissed for lack of *intentional* discrimination – intentional discrimination clearly contrary to agency’s Title VI regulations
			3. *Rosemere v. EPA*, 581 F.3d 1169 (9th Cir. 2009) – sufficient for π to say going to file another complaint, voluntary cessation exception to mootness doctrine

**PH/F:** π filed Title VI claim for city administering funds in discriminatory manner (no nexus given to federally funded activity so dismissed), city revoked neighborhood association chapter, π files retaliation claims (city’s general operating fund, federally funded), OCR doesn’t accept/reject within required timeframe, OCR accepts investigation but requests dismissal for mootness since one-time oversight, 1.5 years later still hasn’t issued investigation finding (required within 6 months), π files APA claim, OCR moves again to dismiss as moot

**π:** Limited discovery under APA permitted π to argue that practice/pattern, which undermines mootness doctrine—voluntary cessation exception to mootness doctrine

**H:** Rejects OCR’s argument, burden on OCR not π, enough for π to say that going to file another complaint

* + - 1. As a result, able to negotiate successful outcome for community, so no big remedies, but negotiating leverage is what community really wanted
				1. Best outcome for an EJ case; practically, however, not much changed as a result – lots of smoke but still idle enforcement
			2. Whether an administrative complaint is worthwhile depends on the agency and agency culture
				1. Strategy considerations – no right to appeal, no discovery in administrative law
		1. Private Right of Action for Claims Grounded upon “Disparate Impact”
			1. Consistency until *Sandoval*, until *Sandoval* courts held that disparate impact is enough for Title VI
			2. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 145 F.Supp.2d 446 (2001) – held there is a private right of action in administrative disparate impact regulations (§ 602), overturned by *Sandoval*

**F:** Challenging NJDEP’s grant of an air permit for a cement facility under SIP in community of color where many residents already suffering from respiratory ailments, liable under Title VI because receiving federal funding (CRA attached through states’ CAA SIPs, nearly every state environmental agency receives federal funding)

**I:** Is there a private right of action to administrative disparate impact regulations?

**π:** § 602 argument – EPA promulgated disparate impact regulations that recipients of money shall not engage in activity that results in disparate impact with respect to race, color, national origin; claiming that disparate impact *and* § 602 violation

**NJDEP:** In granting permit, considered whether facility on its own, i.e. in a vacuum, would exceed NAAQS

**H:** Yes

* + - 1. *South Camden* was a hugeEJ win, but pre-*Sandoval*, *Sandoval* wiped out *South Camden* ruling
			2. *Alexander v. Sandoval*, 532 U.S. 275 (2001) – no private right of action in administrative disparate impact regulations (§ 602), overturned *South Camden*

**F:** Moving through court at same time as *South Camden*; driving test only administered in English, state DMV liable as receiving federal funds from DOT (§ 602 implicated)

* Blatant discrimination against national origin—disparate impact

**H:** § 601 permits a private right of action only where intentional discrimination (direct or circumstantial via *Arlington Heights* factors), high burden; § 602 does not permit a private right of action – Scalia closes the door to private rights of action for alleged violations of administrative regulations

**D** (Stevens): Regardless of whether right or wrong, π should file under § 1983 as private right of action (speaking directly to *South Camden* plaintiffs) – arguing that π will just use § 1983, which hasn’t been used for 30-years due to success of these claims, because although no private right of action here, private right of action permitted in § 1983 (private rights of action provided for “rights” found “in the Constitution and laws” – notably, not all laws contain rights)

* Now question of whether § 1983’s laws includes rights in regulations as private right of action to enforce § 602 regulations

**Result:** Private citizens cannot bring claim based on alleged violation of administrative regulations, overturned *South Camden* within one month of its decision

* + - 1. Behind-the-scenes EJ discussion with *Sandoval* of whether to bring case (i.e. whether good case, right time, etc.)—ultimately lead to very bad precedent
			2. Scalia wanted focus to be on intent, not impact, removing disparate impact cause of action severely limits access
			3. Since *Sandoval*, no cases to enforce Title VI, reluctance to bring for fear of a conservative court decision
			4. Bradford C. Mank on Stevens’ opinion, whether § 1983’s “and laws” includes “rights” within federal agencies’ regulations
				1. Circuit split – majority of circuits say no, e.g. 9th Cir. in *Rainier Valley*, 6th Cir. says yes in certain contexts

*Blessing* test – used to determine whether rights within federal regulations are enforceable; difficult, controversy over how test applied

* + - * 1. Generally, presently seeing a narrowing of private rights of action, e.g. also in education context

# State and Local EJ Issues: Brownfields

(Chapter nine; “EJ in Oregon: It’s the Law”, R.M. & R.W. Collin; ORS 182.545; supplemental)

1. Chapter 9: Contaminated Properties
	1. Introduction
		1. An Introduction to CERCLA Cleanups
			1. CERCLA sites, ranked on the National Priorities List (NPL), are only those most contaminated
				1. NPL is an anachronism because no longer a fund, ranking by staffing resources
			2. “Superfund” – meant to be a fund to clean up sites then suits against potentially responsible parties (PRPs) to refill fund, but Congress defunded during Gingrich’s Contract with America of the 1990s; now beholden to PRPs for funding
			3. National Contingency Plan (NCP) – outlines short term and long term procedures for clean up; clean up must be protective of human health and the environment (minimum written into the statute), but vague, up to interpretation, could simply mean minimizing risk rather than i.e. remediating to allow people to live, work, play, and pray
				1. Short term – contain
				2. Long term – remediation, ideally permanently
			4. Application of Relevant and Appropriate Requirements (ARARs) – standards, agencies have discretion to set standards, pushing for lower standards
			5. CERCLA as EJ? Most sites are in communities of color, most cleanup jobs employ POC
				1. Arguable that CERCLA cleanup implicates EJ regardless of whether evidence of disparate impact
		2. A Note on Relocation
			1. Relocation is the exception, not the norm
		3. I.e. Portland Harbor Superfund site – 11-mile stretch of the Willamette with soil contaminated with heavy metals
			1. EJ?
				1. No history of disparate impact because few residential communities just transient, largely unidentifiable population living and fishing, but outliers; no compelling hook to organize community around
				2. Put a lot of money on the ground e.g. community education, surveys, but qualitative data wasn’t there
				3. Community effort not tight nor focused enough to marshall leverage
			2. Cleanup plan (to start soon) pretty aggressive, ensuring some stable habitat for fish, some recreational uses, certainly more than expected based on outreach
				1. Community unhappy with cleanup because didn’t receive maximum remediation (Ostar – would’ve needed *much* more organizing and a *much* better hook to receive, landed on a place exceeding his expectations)
	2. Brownfields – abandoned or underutilized site unlikely to be redeveloped by a private entity due to contamination or potential contamination (perception of contamination)
		1. Brownfields Background
			1. Perception of contamination – testing for contamination expensive so few do
			2. Why brownfields not bought?
				1. Don’t want to be a PRP – if found to be PRP, must pay for cleanup
				2. Buyers of brownfields looking for “no further action” (NoFA), can’t get without testing; if buy without testing and contaminated, must cleanup
				3. Deterrents – uncertainty of contamination, negotiations with state DEQ for a NoFA, occupational exposure
			3. EJ?
				1. Brownfields → blight → discourages development, attracts crime (i.e. drugs, illegal midnight dumping), exposure to health risks, diminishes housing mobility, community-wide depreciation because little or no tax revenue, general hopelessness and joblessness
				2. Should encourage brownfield remediation to receive benefits from remediating negatives ^ and not ruining greenfields, should subsidize to develop inward

Opposite of a brownfield = greenfield

* + 1. Evaluating Brownfields Redevelopment on the Ground – community driven brownfields remediation
			1. Portland Brownfields Program
				1. Hasn’t actually done anything
				2. Prioritized properties in Alberta and Albina neighbors (Portland’s predominant communities of color) but then diverted money to South Waterfront development

Leveraged communities of color to receive federal grant, then diverted

* + - 1. Dudley Street Neighborhood Initiative in Boston
				1. Community land trust, meaning the land trust owns the property and people buy and sell – easier, accessible, held in trust for perpetuity for the community’s benefit
				2. Land trust model is useful for brownfields as well as displacement
				3. Here, property for model acquired through eminent domain when the mayor/city hall forced the owners to sell – renders Dudley Street unique, not easily replicable
	1. Gentrification
		1. The problem is displacement, *not* gentrification; need focus on anti-displacement, investment in communities without displacement, haven’t figured out how to gentrify without displacement
		2. How to alleviate/mitigate/avoid displacement?
			1. Rent control – band aid, policy prescription
			2. Just cause eviction – band aid, policy prescription
			3. Need land ownership, jobs, good wages – e.g. in Portland we’re making it harder for people of color to acquire land, jobs, and good wages
			4. Tax-Increment Financing (TIF) – financing projects through increments of future tax revenue
				1. Fundamental problem with model – must bring people onto land who are going to improve it/pay more

Urban renewal pays off because of private, individual, speculative investment associated with public works projects, not the public works projects alone

* + - 1. Inclusionary zoning – land-use tool for building new, large unit buildings along light rail lines requiring certain number of units be affordable; incentivize with policy – proven, long standing (e.g. Montgomery County, MD 45 years ago)
		1. E.g. Portland – for a progressive urban planning city, woefully behind with housing; tensions with affordable housing and sustainability and union labor and construction (“open shops” instead of union labor)
	1. O.R.S. § 182.545(1)(a)
		1. Alike a NEPA for EJ in Oregon
		2. *But* interpreted by a court as only relevant to public participation; decision unpublished, likely as a favor by the judge incase a case comes up with better facts; set up for an arbitrary and capricious challenge, hopefully there’ll be a future case to establish positive precedent for the law, for now just idle