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Equal Rights, Governance, and the Environmental Justice Principles in Corporate Social Responsibility

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Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility

David Monsma

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** In 1990s, the author represented residents in a judicial appeal of a state administrative agency decision to issue a refuse disposal permit to re-open a rubble fill encircling a 150-year-old African Methodist Episcopal Church and cemetery in Gravel Hill, Maryland. The appeal was ultimately lost, although the University of Maryland School of Law spent many years resourcefully defending the neighborhood and the historically significant resting place of African American Civil War veterans. In deference to that and other experiences working with environmental justice activists, this Article contains a number of awkward block quotations, rather than paraphrasing, to reflect the original text and diversity of the multiple voices writing about environmental justice. This style of heavy documentation is also influenced by, although by no means equal to, the writings of Noam Chomsky.
INTRODUCTION

Environmental justice is the prevailing or accepted term for describing the disproportionate impacts that environmental pollution has on the health and well-being of low-income communities and communities of color as compared with other populations. Sociologist Robert Bullard, one of the foremost scholars in the study of environmental justice, who began documenting this occurrence in the early 1980s, asserts that “toxic dumping and the location of locally unwanted land uses (LULUs) have followed the ‘path of least resistance,’ meaning black and poor communities have been disproportionately burdened with these types of externalities.” Activists such as the Reverend Benjamin Chavis have said that environmental justice is “a fight against ‘environmental racism,’ or ‘racial discrimination in environmental policy-making.”

A major premise of the environmental justice argument is that disproportionate impacts to minority communities “are widespread” and, according to several lines of investigation, discrimination during the siting process of unwanted land uses is one of the leading causes. Environmental justice lawsuits asserting a discriminatory outcome in a regulatory decision affecting insular communities are typically “raised with respect to permitting and siting decisions, enforcement patterns, and the development of clean-up plans, as well as environmental impact reviews.” An environmental justice claim can require proof of

1. See, e.g., Major Willie A. Gunn, From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice, 22 OHIO N.U. L. REV. 1227, 1232 (1996) (discussing “the definitions of the key terms of environmental equity, environmental justice and environmental racism [and] the significance of the definitions in the context of the movement”).


intentional discrimination in direct violation of civil rights laws and constitutional guarantees of equal protection. More frequently, the cause of action involves challenging administrative agency decisions with evidence of disproportionate impacts to African American or Latino communities as compared with similarly situated white neighborhoods. To take such action, however, environmental justice claimants must meet procedurally arduous legal requirements that, as it turns out, seldom prevail.

As a social justice issue and civil rights concern with the potentially discriminatory application of environmental laws, the origins and theory of environmental justice are richly documented in the law review scholarship, as elsewhere, and there is some scholarly consensus that environmental justice claims in court rarely work. A considerable range of academic commentary covers both "the articulation of concepts of environmental justice and environmental racism" and the history of the environmental justice movement in terms of the importance of grassroots political organizing. A good deal of the analysis aims to examine the

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8. See Washington v. Davis, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."); see also Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265 (1977) (noting that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

9. See, e.g., Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) ("[C]laims that stress 'disparate impact'... involve practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another....")


12. See generally supra note 3 (for examples of noted authors of the theory of environmental justice); EDWARDO LAO RHODES, ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM (2003); CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION (2002); KRISTIN SHRADER-FRECHETTE, ENVIRONMENTAL JUSTICE: CREATING EQUALITY, RECLAIMING DEMOCRACY (2002).

“gap” between environmental laws and equal justice under law, and to discover how environmental justice “contribute[s] to social and political debates about fair treatment.”

Efforts to conceive of novel judicial and legislative strategies to advance the legal theory of environmental justice are also fully developed in the legal literature.

Legal theories to address various forms of alleged discrimination in environmental protection appear to have attained more academic notice than actual recognition as legal remedies in court. A consensus concerning the professed barriers to architecting effective legal rights for environmental justice, gleaned from across the commentary, can be characterized in the following way: “[L]aw and policy in civil rights and environmental protection have been based on drastically different problem paradigms, and . . . the failure to understand and address these differences has impeded greater progress in the integration of the concerns of the environmental justice movement into the traditional environmental regulatory framework.” As recent accounts indicate, the major civil rights remedies attempting to address environmental justice impacts have been essentially unsuccessful. For example, nearly every claim “alleging intentional discrimination has failed” and the use of disparate-impact regulations and traditional civil rights tools, such as equal protection claims, “have met with very limited success when raised in environmental discrimination suits.”

Likewise, no existing federal

17. Tseming Yang, Melding Civil Rights and Environmentalism: Finding Environmental Justice’s Place in Environmental Regulation, 26 HARV. ENVTL. L. REV. 1, 28 (2002). Yang further argues that “the dichotomy is not just a historical artifact rooted in the contrasting history of environmental regulation and civil rights law. It is also reflective of deeper concerns about institutional competencies and concerns related to minorities.” Id.
18. See infra Part II.
19. Kyle W. La Londe, Who Wants to be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27, 60 (2004). La Londe acknowledges the limits of constitutional and civil rights remedies but proceeds to discuss several causes of action “that can be effectively used to achieve environmental justice.” Id.
20. Tseming Yang, The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation, 29 B.C. ENVTL. AFF. L. REV. 143, 155 (2002). Yang further argues “the primary reason for this failure has been located
legislation incorporates environmental justice remedies, and state legislation and policies similarly fail to incorporate environmental justice concerns.\textsuperscript{21} Though they are active on a community advisory level similar to that of the stakeholder outreach efforts undertaken by the U.S. Environmental Protection Agency (EPA) during the 1990s, only a few states such as Arkansas, California, Indiana, New Jersey and Rhode Island have enacted laws or promulgated new regulations to convene interagency and multi-stakeholder environmental justice strategies or establish specific siting requirements.\textsuperscript{22}

Given the apparent failure of existing laws to adequately defend the interests and well-being of low-income communities and communities of color from disproportionate impacts in siting decisions and other examples of environmental protection, another important stakeholder consideration remains. That is, should corporations be held to standards that explicitly address the concerns or principles of environmental justice as a matter of "corporate social responsibility"\textsuperscript{23} or "sustainable development"?\textsuperscript{24} Twenty years ago when the environmental justice

\textsuperscript{21} See Kevin, supra note 6, at 130. See also Richard J. Lazarus, Civil Rights in the New Decade: Highways and Bi-ways for Environmental Justice, 31 CUMB. L. REV. 569, 582 (2001) ("[S]ince 1990, Congress has failed to amend any of the major pollution control laws."). See also No, supra note 16, at 400 (arguing that "many attempts have been made to create a bill which would withstand the pitfalls of the legislative process, but all have failed").

\textsuperscript{22} See Gross, supra note 16, at 69 ("[I]t may be difficult to assess a state's response to environmental justice concerns simply by analyzing whether new laws or procedures have been passed. Often, environmental justice concerns are not best addressed through new processes but, rather, by changing existing processes."); see also Ann E. Goode & Suellen Keiner, Managing for Results to Enhance Government Accountability and Achieve Environmental Justice, 21 PACE ENVTL. L. REV. 289, 292 (2004) (examining reports by the National Academy of Public Administration, which "found that Indiana, California, Florida, and New Jersey have used a variety of approaches to address environmental justice problems, including: Enacting new legislation . . .").

\textsuperscript{23} See, e.g., Ilias Bantekas, Corporate Social Responsibility in International Law, 22 B.U. INT'L L.J. 309 (2004) (offering an increasingly accepted way of describing corporate social responsibility: "[A]s a result of mounting public pressure, consumer awareness, and other forces, [a multinational enterprise] is forced to self-regulate in the sphere of human rights (broadly understood) and the environment. This self-regulation and cleansing, undertaken voluntarily by corporations, is known as corporate social responsibility (CSR), or 'corporate citizenship.'"). See also Paulette L. Stenzel, Why and How the World Trade Organization Must Promote Environmental Protection, 13 DUKE ENVTL. L. & POL'Y F. 1, 27-29 (2002) (arguing that "there is precedent for holding a non-governmental organization responsible for the social consequences of its actions. It comes from the public movement to promote Corporate Social Responsibility . . ."); infra Part IV(B).

\textsuperscript{24} See, e.g., David Hodas, The Climate Change Convention and Evolving Legal Models of Sustainable Development, 13 PACE ENVTL. L. REV. 75, 77 (1995) (tracing the evolution of sustainable development: "First conceived in the 1972 Stockholm Declaration, sustainable development has been the clarion for many as the answer to the jobs versus environment dilemma."); Benjamin J. Richardson, Enlisting Institutional Investors in Environmental Regulation: Some Comparative and Theoretical Perspectives, 28 N.C.J. INT'L L. & COM. REG.
movement came to national attention, the mainstream environmental movement was only vaguely aware of the social and socio-economic contextual forces inherent in protecting human health and the environment. In fact, it was the environmental justice movement that pointed out the social and economic structural differences associated with environmental protection.

At the same time that environmental justice movement was becoming well-known, a broader analysis of economic development emerged in the form of sustainable development, adding the potential for social indicators to the economic or financial assessment of environmental outcomes. Soon thereafter, corporate social responsibility emerged as a business-led movement and workable means for corporations to assess the social and environmental impacts of the business function, most notably in the supply-chain with regard to child labor, human rights, and environmental management. This Article centers attention on the nexus (or gap) between where existing legal remedies for environmental justice arguably appear to end, and where the private sector commitment to corporate social responsibility is said to begin. It explores, as a controlling idea, the tenuous link between environmental justice and corporate social responsibility, variously defined, and raises questions as to why the principles of environmental justice are not more expressly identified with the social accountability and environmental sustainability tenets of corporate social responsibility. The Article also attempts to narrow the conspicuous intellectual gap between environmental justice and corporate social responsibility by suggesting that the human rights discourse within the latter movement should provoke the development of a similarly important and presently-lacking discussion about environmental justice as a corporate social responsibility.

Whereas legal claims based on environmental justice are more often than not aimed at public policies and the legal means for addressing disparate impacts in vulnerable communities, and at ensuring the equal

247, 247-48 (2002) ("The principles of sustainability, as defined in international laws and policies and among scientific and academic institutions, define economic prosperity as dependent on environmental integrity."). See also infra Part IV(C) (discussing how sustainable development is variously defined in terms of both economic development and business processes).

25. See Bantekas, supra note 23, at 311 (commenting that "essentially, CSR recognizes that corporations are not only responsible to their shareholders, but owe, or should owe, particular duties to persons or communities directly or indirectly affected by their operations; such persons or communities comprise a corporation's 'stakeholders.'"). Bantekas further proposes that "[t]he human rights conformity of the supply chain can be further guaranteed by entering into binding contracts whereby such agents and suppliers are obliged to adhere to the corporation's Business Principles." Id. at 329.
environmental justice arguably must also encompass disparate environmental impacts or outcomes that emanate from race-conscious private sector decisions made by corporations whose stock is publicly-traded. For the most part, environmental justice has not been well correlated with the “stakeholder theory” and practice of corporate social responsibility, that somewhat ambiguous but unrelenting adage that “the corporation should use its powers not merely for shareholder profit but for the benefit of the entire community.” While discrimination concerns in business commonly focus on employee hiring and promotion, “they also should extend to customers, suppliers, and others with whom the corporation interacts” such as community stakeholders. Given the evolution of corporate social responsibility management and reporting over the past decade, are corporations expected to adopt policies, or interpret the ones they have, to ensure that their facility siting and environmental management decisions do not result in discriminating outcomes? On the other hand, a larger and more vexing question is whether environmental justice principles ought to be explicitly engaged in the drive for greater corporate social responsibility given its largely voluntary and corporate-defined characteristics.

26. See, e.g., Pinney, supra note 10, at 359 (describing a 1992 National Law Journal study that “focused on the government's enforcement of environmental laws in minority communities, finding that laws were not enforced equally in minority communities as compared to predominantly white communities. As a result, the environmental justice movement expanded its focus from inequitable distribution of environmental burdens to include concerns about the unequal enforcement of environmental laws.”) (emphasis in original).

27. See Foster, supra note 11, at 808 (arguing that “[g]rassroots struggles frequently pit low-income and/or minority communities against the facility owners and state environmental agencies.”).

28. Bantekas, supra note 23, at 311 (“‘Stakeholder theory,’ especially as propounded in the United States, recognizes various forms of relationships between the enterprise and its stakeholders: primary (employees, customers, investors, suppliers) and secondary (all others).”)


31. Id. at 1243 (“[A]n increasing number of scholars outside the corporate law area are recognizing the potential benefit of private, as opposed to public, solutions to socio-legal problems.”)

32. See generally Wells, supra note 29, at 139-40 (“Corporations remain today, as they were in the 1920s, the most powerful nongovernmental institutions in America. In innumerable ways they shape the nation's politics and culture, and the lives of their employees and consumers. They create great wealth and opportunities, but often deliver them unevenly; they frequently use their power in ways that benefit shareholders and managers, but harm the rest of us.”)
Part I of this Article gives a brief overview of the environmental justice movement as represented in the legal literature. To illuminate an understanding of the demise of existing civil rights remedies for environmental justice claims, Part II discusses recent court rulings that have limited or closed the legal avenues available to communities concerned with equal protection of environmental laws. Notwithstanding this apparent dead end in the courts, some of the core values underlying the environmental justice movement, it is argued, should apply to corporate decision-making as part of the voluntary commitment to corporate social responsibility. Part III then analyzes the break between the express principles of environmental justice and the movement toward stakeholder theories of corporate social responsibility. To further understand this relationship, Part IV looks at environmental justice in relation to corporate social responsibility and sustainable development by examining the influence that international human rights has on environmental justice.

I. ENVIRONMENTAL JUSTICE REVISITED

The environmental justice movement, as documented, began as a community-led grassroots movement organized around the idea “that the burdens of environmental pollution should not fall disproportionately on poor and minority communities.” Over time, the definition of environmental justice has evolved considerably. Although some scholars in the field assert precise definitions are needed for such terms, other commentators have observed that there is “no universally accepted definition” of environmental justice. Most accept or use the colloquialism to refer to community-based activism or legal efforts to challenge “the existing environmental protection paradigm, which results in disparate impact.” That is, the environmental justice movement is said to deal with the link between minority and low-income communities, and the lack of environmental protection they receive from government. Regardless of how the legal and academic literature might ultimately

33. Pinney, supra note 10, at 354 (“The concept of environmental justice is not a judicial construct . . . [n]or did the media invent it.”).
34. Docherty, supra note 5, at 541 (“The environmental justice movement began in the 1980s in an effort to fight the placement of polluting industries in poor, minority areas.”).
36. Stephens, supra note 7, at 223.
37. Deeohn Ferris, A Call for Justice and Equal Environmental Protection, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 298, 299 (Robert D. Bullard ed., 1994). See also Moya, supra note 15, at 219 (“It has been well documented that our nation’s environmental policies have resulted in disparities to our nation’s poor and minority communities.”).
38. See No, supra note 16, at 373–74.
define environmental justice, it will never refer, as one scholar justly notes, "unproblematically to a single set of measurable conditions, such as the associations between distributions of pollution and demographic characteristics." \(^{39}\)

As a grassroots social justice movement combining the principles of civil rights and environmental protection, environmental justice emerged in the 1980s\(^{40}\) within the anti-toxics movement and was soon adopted by social justice leaders and environmental activists in the struggle against the siting of hazardous waste facilities in their communities.\(^{41}\) Many writers point to the "African American protests in 1982 against a North Carolina toxic waste dump as the beginning of the environmental justice movement."\(^{42}\) Numerous studies\(^{43}\) then and now, strongly suggest that some communities or populations, usually members of minority groups, suffer from disproportionately higher levels of "exposure to environmental hazards, including automobiles, industrial facilities, both legal and illegal toxic waste disposal sites and incinerators, and toxic products, such as lead paint."\(^{44}\) The movement's original thrust was

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39. Holifield, supra note 35, at 82.
40. See No, supra note 16, at 376 (noting that "[a]lthough the 1970s marked the beginning of the environmental movement, it was not until much later that environmental justice became a significant factor on the environmentalists' agenda.").
42. Id. at 1168.
43. See, e.g., Thomas Lambert & Christopher Boerner, Environmental Inequity: Economic Causes, Economic Solutions, 14 YALE J. ON REG. 195, 198 (1997) ("Examining population data for areas surrounding landfills and incinerators in Houston, Texas, Dr. Bullard found that the vast majority of the city's landfills and incinerators were located in disproportionately black communities.") (citing Robert D. Bullard, Solid Waste Sites and the Black Houston Community, 53 SOCIOLOGICAL INQUIRY 273 (1983)); U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983); Rachel D. Godsil, Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism, 53 EMORY L.J. 1807, 1836 (2004) (discussing "a recent nationwide study of the relationship between race and environmental quality [where] Professors John Hird and Michael Reese found that 'pollution tends to be distributed in a way that disproportionately affects people of color'"). But cf. Lynn E. Blais, Environmental Racism Reconsidered, 75 N.C. L. REV. 75, 83-87 (1996) (explaining that factors such as educational attainment, income level, and political participation are also indicators of proximity to environmentally sensitive land uses); Lambert & Boerner, supra note 43, at 195 (claiming that their "study finds that economic factors—not siting discrimination—are behind many claims of environmental racism").
44. Richard D. Glick, Environmental Justice in the United States: Implications of the International Covenant on Civil and Political Rights, 19 HARV. ENVTL. L. REV. 69, 71 (1995). Glick notes that "[e]mpirical studies demonstrate a significant correlation between race and exposure to environmental hazards, apart from other factors such as income." Id. (citing
exemplified by reports such as *Toxic Wastes and Race in the United States* and *Richmond at Risk,* two seminal works on the disproportionate environmental impacts and conditions existing in communities close to chemical manufacturers and petroleum refineries. In a pioneering 1987 study, “[u]sing population data from ZIP codes as well as information gathered from the EPA and other sources, the [United Church of Christ Commission for Racial Justice] discovered a positive correlation between the number of commercial waste facilities in a ZIP code area and the percentage of minority residents in that area.” The study showed “that approximately fifteen million people, or sixty percent of the total African-American population, live in communities where at least one uncontrolled toxic waste site is located.” Several prominent leaders emerged from community and social organizations, as well as academia, to voice concern over what many of the studies tended to show—a patterned lack of equal protection under environmental pollution laws, leading to a disproportionate impact of toxic pollution on low-income communities and communities of color. Throughout the 1990s, environmental justice gained footing as a grassroots political movement with a strong locally-based focus that increasingly achieved greater national recognition.

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45. COMM’N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) (concluding that race was the most significant variable associated with the location of hazardous waste sites).


47. See Rodger C. Field, *Risk and Justice: Capitalist Production and the Environment,* 8 Capitalism, Nature, Socialism 69, 73 (1997) (“There have been a number of studies since 1987 which have used a similar methodology, i.e., comparing the number of pollution sources within poor or minority communities with the number in other communities. With few exceptions, these studies have concluded that the distribution of pollution sources is not random, but falls more heavily on poor and/or minority communities.”).


49. Suzanne Smith, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom,* 12 B.U. Pub. Int. L.J. 223, 226. Smith also notes that waste siting problems are growing: “In 1994, UCCCRJ updated its report and concluded that the racial inequality in choosing hazardous waste facility locations has grown throughout the past decade.” Id.

50. See generally TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE (Richard Hofrichter ed., 1993). See also Adler, *supra* note 2, at 1430 (observing that “a full distributive justice analysis of regulatory outcomes would arguably consider illness and injury; wealth and income; unemployment; loss of natural resources; and many other welfare benefits or hindrances . . .”)).
The academic legal discourse surrounding environmental justice is indeed wide-ranging. Environmental racism, the "most explosive and politically charged term used to explain the phenomenon of minorities and the poor suffering disproportionate impacts" is used to describe alleged "racial discrimination in environmental policy-making and enforcement of regulations and laws," emphasizing the intentional and "deliberate targeting of communities of color for toxic waste facilities." Transversely, "environmental equity" is used to depict the problem of disproportionate impacts "as a matter of achieving an 'equitable' redistribution of pollution." For instance, Dr. Beverly Wright of the Deep South Center for Environmental Equity defines environmental equity as the right "of all people to benefit from the environment and to be equally protected from the effects of human use and abuse of it."

"Scholars have proposed numerous subdivisions of environmental equity, including 'procedural equity', 'geographic equity', 'social equity', 'distributional equity', and 'generational equity.' Much of the research explaining environmental justice in this way is concerned with the procedural and distributive equity of environmental laws, as well as


52. Gunn, supra note 1, at 1232. Gunn further observes: "Reverend Benjamin Chavis is credited with being the first to use the term in 1987. Sociologist Robert Bullard states that environmental racism encompasses any environmental 'policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color.'"


54. Holifield, supra note 35, at 80.

55. Gunn, supra note 1, at 1234. Gunn also points out that the use of the term "environmental justice" itself is controversial: "However, Charles Lee, Director of the United Church of Christ's Special Project on Toxic Injustice takes exception to the term, because from his perspective it implies that if everyone shares in the problem of hazardous pollution, there is no problem." Id.

56. Holifield, supra note 35, at 80.

57. See Docherty, supra note 5, at 544-45 (commenting that "[p]rocedural justice involves giving everyone an equal opportunity to contribute to a decision").

58. See Adler, supra note 2, at 1424 ("Activists in the so-called 'environmental justice' movement, as well as numerous scholars writing about 'environmental justice,' have argued quite vigorously that the geographic distribution of air and water pollutants, toxic waste sites, and other health and safety hazards is unfair to racial and low-income groups, and that risk regulation should be structured to eliminate this inequity."). But see Noriko Ishiyama, Environmental Justice and American Indian Tribal Sovereignty: Case Study of a Land-Use Conflict in Skull Valley, Utah 3 (unpublished study, Rutgers University), available at http://aesop.rutgers.edu/~enviro/AMERICANINDIAN.DOC (last visited Mar. 30, 2006) (arguing "[t]he existing scholarship has been dominated by [sic] theory of distributive justice,
Robert Kuehn, former director of the Tulane Law Clinic, defines distributive justice as the "equitable distribution of the benefits and burdens of environmental hazards or the benefits of environmental protection." Equity concerns with procedural fairness means that environmental justice extends to "exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and regulatory bodies."

The environmental justice critique was not limited to government agencies and the lack of equal protection of environmental laws. At the same time as the environmental justice message focused attention on public policy decisions allowing the siting of hazardous waste sites and polluting industrial facilities near minority neighborhoods, it was also meant to confront mainstream environmental policy developments and lobbying activities. In fact, some environmental justice advocates charged the mainstream environmental groups with complicity in the problem, because they competed for scarce funding grants and advocated for environmental laws without regard to the disproportionate burdens placed on communities of color. Alice Kaswan points out, "[e]nvironmental justice writers note that the absence of poor and minority members and leaders has meant that the mainstream environmental groups generally do not focus on environmental problems specific to poor and minority groups, or on the distribational implications of environmental policies."

From its inception, the environmental justice movement took a multifaceted approach to analysis and problem-solving, and accordingly met resistance on many fronts. It is clear, for instance, that the corporate tendency to look at these communities as areas of weak resistance or which problematizes the unequal allocation of hazards based on racial and economic characteristics of communities")

59. See also Steven A. Light & Kathryn R.L. Rand, Is Title VI A Magic Bullet? Environmental Racism in the Context of Economic Processes and Imperatives, 2 MICH. J. RACE & L. 1, 48 (1996) ("The current environmental protection paradigm has institutionalized unequal enforcement, traded human health for profit, placed the burden of proof on the 'victims' rather than on the polluting industry, legitimated human exposure to harmful substances... and failed to develop pollution prevention as the overarching and dominant strategy.").

60. Docherty, supra note 5, at 544-45.


62. Kaswan, supra note 14, at 265-66. Kaswan observes the racial divide in the environmental movement: "The typical member of the environmental movement is described as white, well-educated, and middle- to upper-class. The same is true of the leadership of most mainstream environmental groups." Id.

63. Id. at 266. See also BULLARD, supra note 4, at 96 ("The nine largest environmental organizations have a combined membership of more than 4 million people. Blacks and other minorities make up a small share of the membership in mainstream environmental organizations. They are also severely underrepresented among the professional staff of these organizations.").
minor political influence played a significant role in the private sector decisions to locate heavy industrial activities in low-income communities and communities of color. “Not everyone agrees that environmental injustice exists,” however, and some “studies have failed to find evidence of racial discrimination regarding the construction of hazardous waste facilities.”

Researchers, critical of the documentary record assembled by scholar activists, contend that housing and job market forces are responsible for the distribution of environmental impacts. According to some researchers, the distribution of locally undesirable land uses looks more like “a confluence of the forces of housing discrimination, poverty, and free market economics.” They challenge the environmental justice line of argument “with chicken-and-egg logic according to which the key question becomes: Which came first, the minorities or the facilities?”

Analytical inferences such as this tend to reduce the unequal distribution of impacts to an unremarkable outcome of the free-market system for which there is apparently no need to assign legal or economic responsibility. An ingrained problem with a conventional or classical economic line of reasoning, however, is that it is so beholden to efficiency and rational incentives as the sole means for allocating costs and benefits that it ignores the fact that certain policy decisions with admittedly socially marginal costs or externalities “may be both inefficient and inequitable.”

For example, in land use disputes between poor

64. Smith, supra note 49, at 225 (“These studies compared areas with and without hazardous waste facilities and found no significant statistical difference in the percentage of the population that is African-American or Hispanic in the two types of areas. Studies revealing a higher proportion of minority groups near hazardous waste facilities attributed the discrepancy to the “moving to nuisance hypothesis” acting in conjunction with the “white flight theory.””).

65. See Vicki Been, Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?, 103 YALE L.J. 1383, 1406 (1994). See also Michael Fisher, Environmental Racism Claims Brought Under Title VI of the Civil Rights Act, 25 ENVTL. L. 285, 288 (1995) (“postulat[ing] that market forces are responsible for the distribution of environmental hazards; as a result, she expresses doubt that ‘the siting process [for polluting facilities] is ‘broke’ and needs fixing.’”).

66. Been, supra note 65, at 1406.

67. Ishiyama, supra note 58, at 4. See also Holifield, supra note 35, at 85 (“[S]uch studies assume that if minority populations moved into neighborhoods after the siting of toxic facilities or waste dumps, they can rule out discriminatory intent in siting and thus cast doubt on the possibility of environmental racism.”) (citing Laura Pulido, A Critical Review of the Methodology of Environmental Racism Research, 28 ANTIPODE 142 (1996)).

68. Been, supra note 65, at 1391-92 (“Some might argue that the disproportionate burden is part and parcel of a free market economy that is, overall, fairer than alternative schemes, and that the costs of regulating the market to reduce the disproportionate burden outweigh the benefits of doing so. Others might argue that those moving to a host neighborhood are compensated through the market for the disproportionate burden they bear by lower housing costs, and therefore that the situation is just.”).

communities and industrial polluters, an economic argument based on superior allocative efficiency that fails to account for the social costs of community well being or the environment will "almost always favor the polluter." 70

Environmental justice activism also provoked an exploration of environmental litigation and civil rights legal remedies for plaintiff communities suffering from the documented disproportionate impacts of the alleged "race-conscious" application of environmental laws. 71 Initially, environmental justice fomented a considerable degree of legal thought and experimentation, leading to some promising and successful environmental law and civil rights theories for remedying environmental justice claims. 72 To confront suspected race-conscious outcomes in agency decisions, "minority community groups and environmental justice organizations have employed a wide variety of legal strategies." 73 In tandem with successful organizing campaigns directed at state and federal governments and business, the environmental justice and public-interest legal community began to forge litigation strategies that employed "environmental statutes, common law property claims, constitutional challenges, and civil rights laws." 74 Certain grassroots activists point out that "it is extremely important" to a community "that a formal judicial decision be obtained" because it confirms the idea and belief that

The market efficiency theory rests on the assumption that some people or communities, if adequately compensated, will rationally choose to accept LULUs. That choice, however, may be rational only in the sense that the recipients so lack economic resources and power that they are willing to expose themselves to harm for money, which implicates the market justice problem and the specter of "environmental job blackmail."

Id.
70. Godsil, supra note 43, at 1876. Godsil writes:
As noted above, the standard economic definition of an efficient resolution is one that results in the entitlement going to the party willing to pay the most. The amount one is willing to pay is obviously partially determined by the amount one is able to pay. It is beyond obvious that an industrial polluter will be able to pay significantly more than a group of poor residents regardless of residents' strength of feeling.

Id.
71. See Kevin, supra note 6, at 145 ("To deal with siting impacts upon minority communities, environmental justice advocates seek to apply race-conscious solutions to change the outcomes of siting decisions.").
environmental protection is a civil rights issue. However, as various writers have observed, and as discussed in some detail ahead in this Article, "[t]hese tools have been used with infrequent success and have generally exposed major shortcomings in environmental justice litigation."76

Perhaps the most direct public policy response to the call for environmental justice occurred with the formation of the National Environmental Justice Advisory Committee (NEJAC) by the EPA in 1993, which also created the EPA's Office of Environmental Justice. Soon thereafter, the Clinton administration issued an executive order to focus on environmental justice in relation to minority and low-income populations. Executive Order 12,898 requires that "to the greatest extent practicable and permitted by law" each federal agency is required to make environmental justice part of its mission by identifying and addressing "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." The EPA defines

75. Lazarus, supra note 11, at 829 ("[T]he symbolic value of filing the lawsuit is itself substantial. The mere filing of a formal complaint provides a very powerful and visible statement by minorities regarding their belief that distributional inequities exist in environmental protection. . . . Should, moreover, a victory on the merits be achieved, the benefits could be tremendous.").

76. Hoidal, supra note 74, at 202. See also Lazarus, supra note 11, at 857.

77. NEJAC is a federal advisory committee that was established by charter on September 30, 1993, to provide independent advice, consultation, and recommendations to the Administrator of the EPA on matters related to environmental justice. EPA, National Environmental Justice Advisory Council, http://www.epa.gov/compliance/environmentaljustice/nejac/index.html (last visited Mar. 30, 2006).

78. EPA, Office of Environmental Justice, http://www.epa.gov/Compliance/about/offices/oej.html (last visited July 8, 2005) ("The Office of Environmental Justice (OEJ) provides a central point for the Agency to address environmental and human health concerns in minority communities and/or low-income communities—a segment of the population which has been disproportionately exposed to environmental harms and risks.").


In accordance with Title VI of the Civil rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.

Id.

80. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994). See also President's Cover Memorandum for Executive Order 12,898 (Feb. 11, 1994), available at http://www.epa.gov/Compliance/resources/policies/ej/clinton_memo_12898.pdf (mandating "[e]ach Federal agency [to] analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act").
environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." 81 However, an agreed method for implementing Executive Order 12898, and measuring distributional inequities in pollution and environmental protection, "has yet to emerge." 82 Moreover, the executive order "is not judicially enforceable." 83

Early on, amid the ensuing debates pertaining to the civil rights goals of environmental justice, both commentators and activists were somewhat at odds regarding how to practicably confront the disparate impacts associated with the enforcement of environmental laws. 84 Some remarked, as Sten-Erik Hoidal has, that "environmental justice cannot be effectively redressed solely within the environmental law context, its message must be understood as not being confined to that discrete area of the law." 85 In fact, this latter line of reasoning was foreseen by Luke Cole who has often noted that "[t]oo much of the focus of the traditional environmental movement has been on law and legal tools," 86 including, perhaps, environmental justice. "Moreover, the distinction between environmental justice, which focuses on the disproportionate nature of the harm, and environmental rights, which focus on the environmental standards that apply to all people, often becomes blurred in both domestic and international law approaches." 87

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81. EPA, Environmental Justice: Basic Information, http://www.epa.gov/compliance/basics/ejbackground.html (last visited Mar. 30, 2006). "Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies." Id.

82. Adler, supra note 2, at 1427 (quoting Robert Kuehn, former director of the Tulane Law Clinic: "Risk assessors should be required to include information on the exposures and risks experienced by relevant subpopulations disaggregated by race, ethnicity, income, age, and other important variables.").

83. Kelly D. Lynn, Seeking Environmental Justice for Cultural Minorities: The South Lawrence Trafficway of Lawrence, Kansas, 12 KAN. J.L. & PUB. POL’Y 221, 229 (2003) (discussing the relative ineffectiveness of the National Environmental Policy Act and National Historic Protection Act to address environmental justice in the South Lawrence Trafficway in Lawrence, Kansas).

84. See Hari M. Osofsky, Learning from Environmental Justice: A New Model for International Environmental Rights, 24 STAN. ENVTL. L.J. 71, 88-89 (2005). "Since the advent of the environmental justice movement in the early 1980s, United States advocates, decisionmakers, and tribunals have struggled with how to address disproportionate environmental harm to humans." Id.

85. Lazarus, supra note 11, at 857.

86. Cole, supra note 9, at xvi (noting that "[f]or the environmental justice movement to stay vibrant, oppositional, creative, and strong, it must reject the self-reinforcing tendency to use a legal strategy as its primary strategy").

87. Osofsky, supra note 84, at 89 n.75. See also Yang, supra note 17 (concluding that the differing paradigms in environmental and civil rights remedies have served as barriers to environmental justice advocacy).
While it is true that the environmental justice movement "seeks to ensure that environmental harms are equally distributed and that environmental protections benefit all citizens, regardless of their race or socio-economic background," many of the civil rights and environmental litigation strategies have been unsuccessful. The movement has had greater, though still limited, success meeting these goals "by empowering communities and pressuring government agencies and businesses to change their practices." As discussed in the next section, various litigation strategies have been pursued in the name of environmental justice, including federal civil rights laws. "While private litigation has been crucial to the environmental justice movement, and to Title VI [of the Civil Rights Act of 1964] enforcement in particular, in light of recent federal decisions, such litigation has been severely limited."

II. THE LIMITS OF LITIGATION STRATEGIES IN ENVIRONMENTAL JUSTICE

Environmental justice plaintiffs have, with limited success, litigated claims "alleging discrimination in the environmental permitting context." In the memorandum accompanying Executive Order 12,898, the executive branch suggested that a private cause of action might be sought pursuant to Title VI of the Civil Rights Act of 1964. If the executive order "directed federal agencies to ensure compliance with the nondiscrimination requirements of Title VI" then perhaps a private cause of action could be maintained based on an asserted right violated by an administrative agency action, such as a siting decision, where it is alleged that an agency regulation has led to a disproportionate or disparate environmental impact based on race. Environmental justice plaintiffs


89. Id.


93. See White, supra note 91, at 1161–62. “While laying out the appropriate procedures for processing complaints made to the EPA pursuant to Title VI, the Guidance also notes that ‘individuals may file a private right of action in court to enforce the nondiscrimination
also sought recourse pursuant to civil rights laws, specifically section 1983 of the Civil Rights Act of 1871\(^4\) and the Equal Protection Clause of Fourteenth Amendment to the United States Constitution.\(^5\) Although initially met with a considerable degree of supportive legal commentary, these approaches—Title VI, Equal Protection, and section 1983—now appear to have run their course and threaten to forestall most of the legal avenues originally conceived for raising claims based on the premise of environmental justice.\(^6\)

Proving intentional discrimination is usually difficult if not mostly impossible, and legal advocates bringing Equal Protection environmental justice claims have "also failed to convince courts of the lesser showing of disparate impact [even] where environmental impact was starkly disproportionate along racial lines."\(^7\) Traditionally, any government action that discriminates "on the basis of ‘suspect classifications,’ such as race or national origin, is subject to strict scrutiny under the Equal Protection Clause, while other actions must meet only a rational basis test."\(^8\) As declared in the longstanding 1977 *Village of Arlington Heights v. Metropolitan Housing Development Corp.* opinion,\(^9\) the Supreme Court held "that a race-neutral law with a disparate impact on minorities requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies."\(^9\)


95. U.S. CONST. amend. XIV, § 1.

96. See, e.g., La Londe, *supra* note 19, at 34. "While the decision in *Alexander v. Sandoval* [discussed below] closed the door to private individuals seeking to bring environmental justice claims under § 602 of Title VI, it was not the death knell of the environmental justice movement."


98. Robert V. Percival, "*Greening* the Constitution—Harmonizing Environmental and Constitutional Values," 32 ENVTL. L. 809, 853–54 (2002). "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits any state from denying to ‘any person within its jurisdiction the equal protection of the laws.’ This prohibition, which also applies to the federal government, has served as an important constitutional restriction on government policies that discriminate on the basis of race or national origin, or that impinge upon individuals' exercise of fundamental rights." Id.

or low-income individuals will only violate the Equal Protection Clause if
the enacted law is discriminatory in its intent."\textsuperscript{100} Of course, even when
plaintiffs can show direct evidence of a defendant agency's intent to
discriminate, "the government has a second chance if they can establish
that they would have taken the same action even absent an intent to
discriminate."\textsuperscript{101} The intentional discrimination hurdle has effectively
precluded the use of the Equal Protection Clause as a legal remedy for
seeking environmental justice.\textsuperscript{102} What is more, the Court has stated that
"the Equal Protection Clause does not impose an affirmative duty to
equalize the impact of official decisions on different racial groups."\textsuperscript{103}

As an alternative to equal protection claims some environmental
justice plaintiffs turned to Title VI of the Civil Rights Act of 1964 for
legal recourse. It provides that no person "shall, on the ground of race,
color, or national origin, be excluded from participation in, be denied the
benefits of, or be subjected to discrimination under any program or
activity receiving federal financial assistance."\textsuperscript{104} If an agency or recipient
of federal assistance is discovered to have discriminated, then aggrieved
individuals may file suit in federal court or refer the matter to the
Department of Justice for appropriate legal action. Title VI suits can
either be filed against the recipient of federal funds or against the funding
agency itself, and the Supreme Court has held that a private party can
bring suit for prospective relief to enforce Title VI
regulations.\textsuperscript{5} Presumably, federal agency "actions having an unjustifiable
disparate impact on minorities could be redressed through agency regulations

\textsuperscript{100} Carolyn Graham & Jennifer B. Grills, Comment, Environmental Justice: A Survey of
Federal and State Responses, 8 VILL. ENVTL. L.J. 237, 246 (1997). "Subsequent case law
indicates that providing the necessary evidence of discriminatory intent is a burden which has
been difficult, if not impossible, for environmental justice plaintiffs to overcome." Id.

\textsuperscript{101} Smith, supra note 49, at 233. "Proving intent to discriminate in environmental justice
litigation can be difficult because, in many cases, there is none." Id.

\textsuperscript{102} See id. at 244; R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), aff'd., 977 F.2d
573 (4th Cir. 1992) (finding that there is no constitutional requirement to ensure equal
protection in government agency landfill siting decisions and that the equal protection clause
only prohibits intentional discrimination). See also Knorr, supra note 44, at 105 (finding
"[t]he burden of proving intentional discrimination is virtually impossible in environmental
injustice cases"); Smith, supra note 49, at 233 ("While it is possible to use statistics to show intent
to discriminate, environmental justice plaintiffs have generally not succeeded in doing so. This
may be due in part to the high standards set in previous cases such as Yick Wo [118 U.S. 356, 374
(1886)] and the deference courts tend to afford government agencies.").


\textsuperscript{105} See Bradford C. Mank, Using § 1983 to Enforce Title VI's Section 602 Regulations, 49
discrimination are probably limited to prospective relief. Thus, any suit under section 1983 to
enforce Title VI's disparate impact regulations against a state or a state official in his official
capacity is most likely limited to prospective relief, such as an injunction barring discriminatory
conduct." Id.
designed to implement the purposes of Title VI."\(^{106}\) Moreover, Title VI typically does not demand proof of discriminatory intent.\(^{107}\) However, despite Title VI's initial promise, litigants have filed only a handful of environmental justice-type cases seeking a private right of action against a federally funded recipient or a funding agency, and those have gained only limited procedural advances.\(^{108}\)

Although the U.S. Supreme Court has adopted the "general rule that [Section] 1983 also provides a cause of action to redress violations of federal statutory law," it has "never expressly held that federal administrative agency regulations alone constitute 'laws' within the meaning of section 1983 and thus may independently create privately enforceable rights."\(^{109}\) The Court addressed whether a private cause of action exists under section 602 of the Civil Rights Act of 1964 in the case of *Alexander v. Sandoval*.\(^{110}\) According to *Sandoval*, there are three aspects of Title VI that are settled: (1) private individuals may sue to enforce section 601 of Title VI and obtain both injunctive relief and damages; (2) section 601 prohibits only intentional discrimination (with the same or similar hurdles as the Equal Protection Clause);\(^{111}\) and (3) "that regulations promulgated under [section] 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under [section] 601."\(^{112}\) "Previous Supreme Court rulings suggested that there might be an implied right of action under section 602, and some federal circuit courts had held that such a cause of action was available."\(^{113}\) However, in deciding *Sandoval*, the Court held that there is no private cause of action under section 602

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107. See Fisher, *supra* note 65, at 316 ("Title VI requires only disparate impact—a lesser showing.").
108. See Joseph Ursic, *Finding A Remedy for Environmental Justice: Using 42 U.S.C. § 1983 To Fill in a Title VI Gap*, 53 CASE W. RES. 497, 504–05 (2002) (discussing that the "Supreme Court held in *Guardians Ass'n v. Civil Service Commission* [463 U.S. 582 (1983)] that a plaintiff who brought a claim under section 601 had to prove intentional discrimination just as it would under the Equal Protection Clause... [thus] environmental justice advocates began suggesting that suits be brought directly under section 602 against a recipient based on the EPA's regulation that prohibits a disparate impact").
110. See Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (discussing a case involving whether Spanish-speaking persons could sue a state for discrimination under Title VI for establishing an English-only requirement for obtaining a driver's license, the court held that: "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602 [which proscribed activities having disparate impact on racial groups]. We therefore hold that no such right of action exists.").
111. *Id.*
112. *Id.* at 281.
of Title VI to enforce regulations that prohibit federally funded state and local agencies from acts that disparately impact minorities:

[Title VI section 602 is] phrased as a directive to federal agencies engaged in the distribution of public funds. When this is true, there is far less reason to infer a private remedy in favor of individual persons. So far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action.\textsuperscript{114}

This decision firmly closed the direct route to private enforcement of EPA's disparate impact regulations by using Title VI itself but debatably left open the possibility that a private litigant could enforce these regulations under 42 U.S.C. section 1983.\textsuperscript{115}

The \textit{Sandoval} decision represents a milestone in the history of environmental justice. Scholars have recognized the significance of the Supreme Court's fairly lamentable finding "that there was no private right of action to enforce the disparate impact regulations promulgated under Title VI section 602."\textsuperscript{116} The finality of this civil rights remedy, once advocated by environmental justice legal activists over a decade ago, was driven home again in \textit{Gonzaga University v. Doe},\textsuperscript{117} another Title VI section 602 decision which reached a similar conclusion in \textit{Sandoval}. "\textit{Sandoval} and \textit{Gonzaga}, when read together, essentially hold that regardless of whether a litigant characterizes her claim as a 1983 action to enforce the statute against the state or an implied right of action directly under a statute that regulates how federal funds are used by the states, a federal court must first determine whether Congress intended to create a private federal right in the statute."\textsuperscript{118} Scholars point out that the

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\textsuperscript{114} Id. at 505. "Sandoval involved a decision by the Alabama Department of Public Safety (DPS) to administer state driver's license examinations solely in English because the Alabama Constitution had been amended to declare English as the state's official language.... The Court did not inquire whether the English-only policy actually had a discriminatory effect, but considered only whether a private right of action existed to enforce the regulations.... The Court found no intent to create a private remedy in the methods provided to enforce regulations in section 602...." Id. at 507.

\textsuperscript{115} Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000). See Ursic, supra note 108, at 508. "The Supreme Court in Sandoval did not address whether a section 1983 claim can be brought to enforce agency regulations, but limited its holding to whether section 602 provided its own private right of action. In his dissent, though, Justice Stevens suggested that 'litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference section 1983 to obtain relief.'" Id.


\textsuperscript{117} 536 U.S. 273 (2002).

\textsuperscript{118} Klee, supra note 116, at 146-47. "Gonzaga mirrored the Sandoval requirement that even where a statute has 'rights creating' language, a plaintiff suing under an implied private right of action must show that the statute itself manifests an intent to 'create not just a private right but also a private remedy.'" Id.
\end{footnotesize}
language in *Sandoval* strongly suggested that it would later be read to eliminate the ability of plaintiffs to enforce disparate-impact regulations through [section] 1983,” as confirmed in *South Camden III*,119 and “that agencies may lack the authority to promulgate disparate-impact regulations under section 602 of Title VI altogether.”120

In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, a federal district court case decided in the midst of the Supreme Court decision in *Sandoval*, environmental justice plaintiffs attempted to bring a private cause of action under 42 U.S.C. section 1983.121 The district court judge ruled in favor of the plaintiffs’ private right to sue under the Title VI claim that “provides a remedy for deprivation under color of state law of any rights secured by the Constitution and laws.”122 The primary issue on appeal, however, was whether following the Supreme Court decision in *Sandoval* plaintiffs could maintain their action under section 1983 for disparate impact discrimination in violation of Title VI and its implementing regulations. The legal theory promulgated by the plaintiffs on appeal was that section 1983 provides a private cause of action to enforce Title VI where an agency action would create an “assertedly protected” right sufficient to enforce the Title VI nondiscrimination provisions:123

The Supreme Court has established a three-part test to determine whether a federal statute creates an individual right enforceable through a section 1983 action: First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff

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119. 274 F.3d 771 (3d Cir. 2001).
120. Crossman, supra note 90, at 616.

While environmental justice has stalled in the wake of *Sandoval* and *South Camden III*, commentators may have signaled its death a bit prematurely. Disparate-impact regulations, if proven to still be valid exercises of administrative discretion under Title VI, and despite *Sandoval’s* assertions to the contrary, can still be enforced by private parties in certain, albeit narrow, circumstances.

Id. at 620.
122. 42 U.S.C. § 1983 (2000). *See South Camden Citizens in Action*, 145 F. Supp. at 474 (“Under the law of this Circuit, then, section 602 of Title VI creates an implied private right of action which allows Plaintiffs to seek preliminary injunctive relief against the NJDEP Defendants on a theory of disparate impact discrimination in the administration of a federally funded program.”).

[T]he Eleventh Circuit stated that regulations may not themselves establish rights, but concluded that regulations could ‘further define’ or ‘flesh out’ rights that are implicit in the underlying statute. The ‘fleshing out’ approach reflects the reality that agencies often have the best understanding of what a statute means because they often help Congress write the statutes they will be in charge of implementing.

Id.
must demonstrate that the right assertedly protected by the statute is not so ‘vague and amorphous’ that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.\textsuperscript{124}

The Third Circuit in \textit{South Camden} found that “the Supreme Court’s primary concern in considering enforceability of federal claims under [section] 1983 has been to ensure that Congress intended to create the federal right being advanced.”\textsuperscript{125} It rejected the argument that “enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable right.”\textsuperscript{126} Relying on \textit{Sandoval}, the court found that “Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination and that while the EPA’s regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983.”\textsuperscript{127} Although it may hold other “interesting implications,”\textsuperscript{128} the \textit{South Camden} decision “has undoubtedly foreclosed all suits that assert the right to be free from disparate-impact discrimination in violation of Title VI regulations, in addition to any other claims that seek to enforce regulatory interests that are not implicit in the provisions of the enforcing federal statutes.”\textsuperscript{129} Reading the cases together, the legal commentary is uniform in the conclusion that \textit{Alexander v. Sandoval} and \textit{South Camden III} “definitively” ended the

\textsuperscript{124} South Camden Citizens in Action, 274 F.3d at 779.

\textsuperscript{125} Id. at 790.

The Supreme Court’s primary concern in considering enforceability of federal claims under section 1983 has been to ensure that Congress intended to create the federal right being advanced. \ldots Accordingly, we hold that a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.

\textsuperscript{126} Id.

\textsuperscript{127} Id. at 791.

\textsuperscript{128} See Jeffrey M. Gaba, \textit{South Camden and Environmental Justice: Substance, Procedure, and Politics}, 31 ENVTL. L. REP. (Envtl. L. Inst.) 11,073, 1, 6 (2001) (“First, in applying Title VI civil rights legislation to environmental permitting, the judge apparently applied a new, general environmental standard of ‘no significant adverse affect’ for permit decisions that disproportionately affect minority communities. Thus, a new standard may have been added to the roster of environmental standards and acronyms.”). See also Ursic, supra note 108, at 524 (“Because the Third Circuit held in \textit{South Camden} that Congress did not intend for section 602 violations to be enforceable under section 1983, it did not reach the question of whether Congress had foreclosed a remedy.”).

\textsuperscript{129} Lamb, supra note 94, at 1168. “The \textit{South Camden} decision will certainly serve as a final pronouncement in the Third Circuit on the availability of section 1983 claims to redress state violations of administrative regulations.” Id.
theory that "a private right of action exists under section 602." At least one commentator predicted as much a year before the decision in Sandoval that "there is affirmative evidence in the legislative history of section 602 that Congress did not intend to take away agencies' nullification powers by providing a private right of action to enforce the section 602 regulations."

In addition to the limitations posed by the federal judiciary, environmental justice is not sufficiently incorporated into or addressed by state and local governance. At the municipal level, decades of "redlining" and segregation contributed to the concentration of environmental degradation in affected communities. Advocates have successfully used civil rights laws to end racial discrimination in the delivery and availability of municipal services, but have not managed to eliminate similar disparities in environmental protection. At the state level, there is some evidence that legislative efforts to address environmental justice have had minor success, although the integrated performance measurements and accountability mechanisms necessary to identify and prevent environmental injustices among state agencies are "still lacking" or absent in state law.

Scholars in the field repeatedly document the evident limitations of civil rights laws and the Equal Protection Clause as legal remedies to

130. Ursic, supra note 108, at 505. See also Daniel V. Madrid, Can the Environmental Justice Movement Survive Without Title VI of the Civil Rights Movement? 14 VILL. ENVT. L.J. 123, 148 ("Sandoval eliminates the theory that an implied right of action exists to enforce disparate-impact regulations under section 602. Though only a circuit court case, South Camden III potentially makes section 1983 unavailable for plaintiffs seeking to prove disparate-impact discrimination.").


132. See generally Godsil, supra note 43, at 1838 ("In their seminal work addressing racial segregation in America, Douglas Massey and Nancy Denton document the dramatic transformation of residential patterns from the relatively integrated period before the Civil War to the hypersegregated present.").

133. See Diane Schwartz, Environmental Racism: Using Existing Legal and Social Means to Achieve Environmental Justice, 12 J. ENVT. L. & LITIG. 409, 429 (1997) ("States such as California, New York, and Pennsylvania also unsuccessfully attempted to enact environmental justice legislation. The failure to enact legislation at either the state or federal level stems from the lack of political acceptability.").

134. See Goode & Keiner, supra note 22, at 294 (finding that government "initiatives addressing environmental justice concerns fail to integrate these efforts into the basic fabric of core agency functions and lack performance and accountability measures to determine the effectiveness of environmental justice programs").

135. See Miller, supra note 94, at 1427 ("[T]he Third Circuit held that 'a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.' The decision was appealed, and the Supreme Court denied the petition for certiorari."). But see Bradford C. Mank, Are Title VII's Disparate Impact Regulations Valid?, 71 U. CIN. L. REV. 517, 539 (2003) (observing that Section 1983 "does not explicitly authorize a prohibition against disparate impact discrimination").

136. See Percival, supra note 98, at 854–55.
address environmental justice claims. For example, Alice Kaswan attributes the “consistent” failure of environmental justice equal protection cases, in part “to the courts’ findings, under the facts of those cases, that substantive and procedural requirements and norms were followed.” Tessa Meyer Santiago found that very few plaintiffs “meet the burden of proof under current judicial remedies.” Dawn Somerville Zalfa surmises that “many environmental justice issues remain unresolved because of unsuccessful litigation approaches employed to remedy these issues.” Michael Fisher concludes the failure of environmental justice claims are not limited to equal protection but that “[e]ach type of litigation against environmental racism suffers from

In Bean v. Southwestern Waste Management Corporation [482 F. Supp. 673, 674–75, 681 (S.D. Tex. 1979), aff’d without opinion, 782 F.2d 1038 (5th Cir. 1986)], a federal district court rejected an equal protection challenge to a decision to site a solid waste dump in a minority community. The court held that statistical evidence of the disparate impact was insufficient to establish intentional discrimination despite the fact that the community initially was told a shopping mall or steel mill was being built there.

Id.

137. See generally Hoidal, supra note 74, at 221 (“The decisions rendered in Sandoval and Camden III eliminated the possibility of using citizens’ suits to enforce the EPA’s disparate impact regulations promulgated under section 602 of Title VI.”). Richard J. Lazarus writes:

To date, minority plaintiffs appear to have favored the civil rights approach. However, virtually none of those suits has been successful. This is largely because existing equal protection doctrine, which has been the focal point of most lawsuits, has not proved hospitable to the kinds of arguments upon which environmental justice claims have depended.

Lazarus, supra note 11, at 828. Swartz states that:

To date, most attempts to stop environmental racism in the court house have relied upon the equal protection clause of the U.S. Constitution, and § 1983 of the Civil Rights Act of 1866, which gives citizens statutory authority to bring civil actions to vindicate their constitutional rights. Unfortunately, the burden of proof faced by plaintiffs alleging environmental racism and a violation of the equal protection clause is extremely high: the plaintiff must establish not only discriminatory effects, but also discriminatory intent.


139. Tessa Meyer Santiago, An Ounce of Preemption is Worth a Pound of Cure: State Preemption of Local Authority as a Means for Achieving Environmental Equity, 21 VA. ENVTL. L.J. 71, 112 (2002). “Equal protection plaintiffs need to find the smoking gun of discriminatory intent. Civil rights plaintiffs under Title VI and VIII need to compile a body of evidence that shows either disparate impact or actual impact on housing opportunities. Furthermore, all plaintiffs must show actual harm resulting from discriminatory decision-making.” Id.

140. Dawn Somerville Zalfa, Air Pollution Trading Programs Under the Clean Air Act: Compliance or Civil Rights Contravention, 20 WHITTIER L. REV. 485, 488 (1998). “Traditionally, the focus of environmental justice lawsuits has been on equal protection claims. These suits have ‘generally failed because of the Equal Protection Clause’s discriminatory intent requirement.’” Id.
serious faults,” including the fact that legally permitted pollution will bar such cases. Paul Maynard Hendrick similarly reports that “[e]nvironmental justice advocates acknowledge that the doctrine has not overcome the remedial limitations of constitutional law, environmental law, civil rights law, administrative law, tort law, and property law.”

E. Andrew Long states that “the law has yet to provide sufficient protection for minorities against environmental discrimination, as demonstrated by the lack of a clear avenue for raising environmental justice claims in federal court.”

Echoing this, Hoidal stresses that the court cases holding that the EPA’s disparate impact regulations are not enforceable through citizen’s suits, “the environmental justice movement lost its most promising prospect for success” resulting in “a deflated environmental justice movement again searching for a plausible legal mechanism with which to pursue its objectives.” Even common law nuisance actions, the oft-cited first line of defense against undesirable land uses, “are no longer a reliable way to protect homes from noxious land uses.”

In sum, environmental justice litigation claims haven proven to be too onerous to sustain and suffer from serious substantive and procedural drawbacks that have yet to be surmounted. The commentary is in accord with respect to the premise that there is no adequate private legal defense against federal agency decisions that lead to negative disproportionate environmental impacts for low-income communities and communities of color. Whether a similar but more effective corollary of disparate-impact litigation at the state level will gain judicial recognition, or whether federal agencies will produce a viable form of administrative enforcement of EPA’s disparate-impact regulations, remains to be seen.

141. Fisher, supra note 65, at 333.

Equal Protection claims impose an often impossible standard of proof. Suits under environmental or common law offer inadequate remedies: only procedural rights in siting battles; only damages when a community suffers tortious injury; and no protection from the pollution emitted by numerous, concentrated facilities so long as each is complying with its individual permit.

Id.


143. Long, supra note 41, at 1213.

144. Hoidal, supra note 74, at 202. “Professor Richard J. Lazarus calls this the ‘graying of U.S. environmental law.’ As environmental justice matures and creeps away from its 1990s heyday, it is beginning to lose some of its passion. Thus, as with environmental law and civil rights, environmental justice appears to have fallen slightly out of vogue.” Id.

145. Godsil, supra note 43, at 1810. “This change was spurred by the development of a web of laws and regulations on land use and the environment that was intended to avoid the need for nuisance actions by segregating conflicting uses at the outset and limiting overall levels of air and water pollution.” Id.
III. THE PRINCIPLES OF ENVIRONMENTAL JUSTICE

In expressing the fundamental shortcomings of the environmental justice movement's problem-solving strategies, advocates "point to the legality of pollution that does not exceed legislated (or regulated) levels, the lack of effective civil rights tools to challenge institutional biases, and the effectiveness of many high- and middle-income, white neighborhoods in using environmental laws to keep out LULUs, which then are located in low-income, minority neighborhoods." Just as most forms of pollution appear to be legally permissible, so then are negative disproportionate environmental outcomes based on race and income. Ultimately, as this discussion has established, disparate discriminatory environmental impacts have no justiciable cause of action or legal remedy. However, the underlying social justice principles raised by the environmental justice perspective are not limited to the legal domain of equal protection or civil rights law involving state and federal regulatory actions such as hazardous waste siting permits. In fact, many environmental justice concerns involve the disproportionate impacts from lawful pollution attributable to private sector decisions or practices at facilities and in communities where companies operate. Fundamentally, environmental justice, as a set of ethical principles, is as much an issue of corporate social responsibility and sustainable development as it is a matter of equal protection of laws.

Beyond the introduction of multiple legal strategies to rectify negative environmental justice impacts, grassroots activism accompanied

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146. Arnold, supra note 69, at 29-30. "Thus, Cole argues, the environmental regulatory system perpetuates political inequity and causes environmental injustice." Id.

147. See, e.g., Bernd Schuemann, Rethinking Federal Criminal Law: Principles of Criminal Legislation in Postmodern Society: The Case of Environmental Law, 1 Buff. Crim. L. Rev. 175, 184 (1997) ("The proponents of the anthropocentric view stress that in contemporary industrial societies the vast majority of polluting acts are entirely legal, and that criminal prosecution thus tends to be limited to petty cases..."); Charles Komanoff, Pollution Tax Forum: Pollution Taxes for Roadway Transportation, 12 Pace Envtl. L. Rev. 121, 136 (1994) (discussing the Clean Air Acts, Komanoff notes that "it is legal to pollute so long as emission rates fall within mandated thresholds"); Molly Elizabeth Hall, Pollution Havens? A Look at Environmental Permitting in the United States and Germany, 7 Wis. Envtl. L.J. 1, 26 (2000) (observing "Professor Richard Stewart [Reconstitutive Law, [sic] MD. L. Rev. 86, 101 and 103 (1986)] has described United States environmental law as a "jurisprudential waste land, littered by legal pollution").


149. See John T. Suttles, Jr., Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry, 16 Tul. Envtl. L.J. 1, 10 (2002) ("Indeed, global race theorists define 'justice,' as a countervailing force necessary to stem an ungoverned race to the bottom in terms remarkably similar to the themes that resonate throughout the environmental justice movement.").
by academic scholarship eventually led to a widely attended national organizing event in Washington, D.C.: The First National People of Color Environmental Leadership Summit. In 1991, minority leaders at the Summit articulated "a seventeen-point statement entitled Principles of Environmental Justice, [and] pledged to build a national environmental justice movement to address the ecological threats facing minority and disadvantaged communities." The principles engage both public policy (e.g., "governmental acts of environmental injustice") and what could be described as corporate responsibilities (e.g., the "right of all workers to a safe and healthy work environment"). Robert Bullard identifies five basic elements of the environmental justice framework: (1) a right of all individuals to be protected from pollution; (2) a preference for prevention strategies; (3) a shift to polluters and dischargers of the burdens of proof; (4) a definition of discrimination that includes disparate impacts and statistical evidence; and (5) an emphasis on targeted action to redress unequal risk burdens. On the whole, the "principles of the

150. See Long, supra note 41 ("Academics have also 'played a crucial role in both sparking and shaping' the movement."); Pinney, supra note 10, at 359–60 ("The modern environmental justice movement was ushered in by a group of scholars and environmental activists who gathered at the University of Michigan School of Natural Resources to share ideas and to search for solutions to the problem of environmental injustice.").

151. See generally Robert D. Bullard, Essays on Environmental Justice: Environmental Racism and Invisible Communities, 96 W. VA. L. REV. 1037, 1046 (1994) ("The movement has been successful in galvanizing broad-based support across geographic, political, racial, and ethnic perspectives as exhibited by the 1991 First National People of Color Environmental Leadership Summit...The Summit was held in Washington, D.C., and attracted over 600 delegates and participants from every state in the nation."); David Hahn-Baker, The 20th Anniversary of Love Canal: Lessons Learned, 8 BUFF. ENVTL. L.J. 225, 236 (2001) (finding that The People of Color Environmental Leadership Summit held in 1991 "produce[d] seventeen principals of environmental justice, which to this day, I think, still provide the best definition of what environmental justice means").

152. Pinney, supra note 10, at 358. See Julian Agyeman & Tom Evans, Rethinking Sustainable Development: Toward Just Sustainability in Urban Communities—Building Equity Rights with Sustainable Solutions, 590 ANNALS 35, 49 (2003) (listing principles of environmental justice such as Principle number 1: "Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction").

153. Agyeman & Evans, supra note 152, at 49. The second principle of environmental justice states: "Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias." Id. Principle number 10 also notes that "[e]nvironmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration on Human Rights, and the United Nations Convention on Genocide." Id. at 50.

154. Agyeman & Evans, supra note 152, at 50. Principle number 8 holds: "Environmental justice affirms the right of all workers to a safe and healthy work environment, without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards." Id.

155. See June M. Lyle, Reactions to EPA's Interim Guidance: The Growing Battle for Control over Environmental Justice Decisionmaking, 75 IND. L.J. 687, 688 (2000) ("The core principle of the environmental justice movement is that '[t]he nation's environmental laws,
environmental justice movement include not only equal protection from environmental risks, or life and health issues, but also the right for people to live in communities that are environmentally safe, regardless of their race or income.\textsuperscript{156}

A variety of these principles are positively constructed and state that environmental justice, among other things, "mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things."\textsuperscript{157} The principles also state that environmental justice "demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement, and evaluation."\textsuperscript{158} These principles embody the ultimate goals of environmental justice; as such, some of them may appear problematic or highly indeterminate from the point of view of policy makers or business managers insofar as the principles tend to be philosophically all-encompassing or politically terminal in their reach. For instance, the principles state that environmental justice "opposes the destructive operations of multinational corporations"\textsuperscript{159} and "demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials and demands that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production."\textsuperscript{160} The scope of all seventeen of the environmental justice principles articulated at the People’s Summit is expansive and, therefore, potentially unmanageable from a business management perspective.\textsuperscript{161}
Generally speaking, compliance-driven company environmental management has not and does not address environmental justice, at least not explicitly. However, this problem cannot be solved with superficial treatment. In examining the nexus between environmental justice principles of equal treatment and the corporate responsibility to community stakeholders, one discovers that an effective implementation of business ethics and corporate responsibility requires more than an equal economic distribution of pollution imposed through regulatory enforcement and compliance alone. In part, environmental justice requires a meaningful corollary in business ethics and the corporate management of the environment, most obviously in terms of corporate social responsibility and environmental sustainability.

IV. SYNTHESIZING ENVIRONMENTAL JUSTICE WITH CORPORATE SOCIAL RESPONSIBILITY AND SUSTAINABLE DEVELOPMENT

A. The Corporate Interaction with Environmental Justice

Actionable legal theories that aim to address discriminatory or disparate environmental impacts, for which civil rights law may or may not provide a remedy in the future, typically focus attention on state or federal agency decisions. The questions and principles raised by the environmental justice movement, though, are also directed at the private sector policies and practices of operating companies. While a regulated business will rationally strive to be in full compliance with applicable environmental laws, routine company decisions, policies, or lawful facility operations may nevertheless have disproportionate or disparate impacts in disadvantaged communities, however unintentional and irrespective of public policy. Disparate environmental impacts to insular or susceptible communities caused by otherwise “legal” polluting industrial activity routinely occur. And, as we now know, “unless violations of the

specific actions they might or might not undertake, when they should or should not do so, and why it would or would not be in their interest to undertake such a course of action.”

162. The author is aware of only two corporate social or environmental report with an express reference or section addressing environmental justice—the Aveda Corporation and PG&E Corporation. See AVEDA COALITION FOR ENVIRONMENTALLY RESPONSIBLE ECONOMIES (CERES) REPORT 19 (2001-02) available at http://www.aveda.aveda.com/protect/we/ceres2001_2002.pdf (recognizing that environmental justice concerns are serious: “We are well aware of the multiple dimensions associated environmental justice issues and the potential for business activities to affect minority and limited-income communities through operations, supply chain, wastes and products... We believe that we contribute to the positive advancement of environmental justice through” a number of operational goals and objectives.); PG&E Corporation, Our Communities, Environmental Justice, http://www.pgecorp.com/corp_responsibility/reports/2004/com_environmentaljustice.htm (recognizing that the company’s facilities are close to population centers and the need to “minimize impacts on adjacent communities”).
respective environmental laws occur, enforcement provisions, including citizen suit provisions, tend not to cover adverse impacts caused by the legal emission of constituents into the environment.\textsuperscript{163}

Paralleling government and corporate interest in market\textsuperscript{164} and performance-oriented regulatory reforms\textsuperscript{165} and the use of voluntary agreements,\textsuperscript{166} stakeholder-based theories\textsuperscript{167} such as corporate social responsibility and sustainable development have led to the emergence of voluntary global corporate standards\textsuperscript{168} and codes of conduct\textsuperscript{169} to guide corporate behavior. Apart from the current governance focus on

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  \item \textsuperscript{164} See, e.g., Robert Bejesky, \textit{An Analytical Appraisal of Public Choice Value Shifts for Environmental Protection in the United States \& Mexico}, 11 IND. INT'L \& COMP. L. REV. 251, 252 (2001) (finding "a second value shift that challenged expansive and rigid regulatory structures materialized to question the effectiveness of austere environmental regulations. . . . This perspective . . . matured into a more moderate, cooperative, and market-oriented approach to environmental regulation in the United States.").
  \item \textsuperscript{165} See, e.g., Bradley C. Karkkainen, \textit{Information As Environmental Regulation: Tri And Performance Benchmarking, Precursor To A New Paradigm?}, 89 GEO. L.J. 257, 263 (2001) (concluding "what may lie ahead for the next generation of Toxics Release Inventory-inspired performance monitoring and benchmarking [is using them] as tools of environmental regulation.").
  \item \textsuperscript{166} See, e.g., Richard B. Stewart, \textit{A New Generation of Environmental Regulation?}, 29 CAP. U.L. REV. 21, 77 (2001) ("These agreements, variously referred to as 'environmental agreements,' 'environmental protection agreements,' 'voluntary agreements,' 'negotiated agreements,' or 'environmental covenants' establish regulatory requirements, agreed to by government and industry, which either implement, augment, or substitute for requirements established by legislation and agency directives.").
  \item \textsuperscript{167} See Neugebauer, supra note 161, at 1241 ("Stakeholder theory arose as a corporate managerial model whereby decisions are made taking into account the interests—the 'stakes'—of a corporation's various 'stakeholders.' In its simplest form, 'stakeholder' refers to an individual or group affected by corporate operations."); Cynthia A. Williams, \textit{Corporate Social Responsibility in an Era of Economic Globalization}, 35 U.C. DAVIS L. REV. 705, 716 (2002) (arguing "directors ought to consider the impact of their decisions on a wider range of constituents than shareholders, and thus ought to consider the implications of their actions on employees, consumers, suppliers (in some cases), the community, and the environment").
  \item \textsuperscript{168} See, e.g., Pall A. Davidsson, \textit{Legal Enforcement of Corporate Social Responsibility within the EU}, 8 COLUM. J. EUR. L. 529, 548-49 (2002) (discussing various international CSR "standards of practice" including the UN Global Compact and the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy). "It is clear that the content of these agreements covers a wide range of issues that fall under CSR. None of them is, however, legally binding on states or businesses." \textit{Id}.
  \item \textsuperscript{169} See \textit{SIMON ZADEK, CIVIL CORPORATION: THE NEW ECONOMY OF CORPORATE CITIZENSHIP} 56 (2001) (explaining that corporate codes of conduct or "Civil Regulatio . . . can best be understood as non-statutory regulatory frameworks governing corporate affairs. They lie between formal structures of public (statutory) regulation, and market signals generated by more conventional individual and collective preferences underpinned by the use and exchange of value of goods and services."). See also Sean D. Murphy, \textit{Taking Multinational Corporate Codes of Conduct to the Next Level}, 43 COLUM. J. TRANSNAT'L L. 389, 400 (2005) ("The codes typically consist of a series of principles, standards or guidelines, which may be broad and aspirational in nature or may be more detailed and operational in nature.").
\end{itemize}
corporate accountability in the wake of accounting and earnings management abuses, corporate social responsibility has achieved greater significance and "is now commonly used by those in civil society and business to refer to the commitments or practices a company undertakes that include but also lie beyond legal compliance in addressing its ethical, social and environmental responsibilities as a corporate citizen."\textsuperscript{170} The theory that both shareholders and stakeholders expect corporations to have responsibilities toward society is not new, although "the idea to extend social responsibility to issues going beyond labor, such as human rights and the environment, is much more recent."\textsuperscript{171} This expectation and commitment, which for some companies has become a business reality if not also a comparative advantage, exists irrespective of ongoing academic debates over whether or not corporations actually have responsibilities to society beyond maximizing shareholder returns and obeying the law.\textsuperscript{172} These companies recognize the "divergence of [corporate] operations from social expectations, and consequently many have embraced the movement toward voluntary codes of conduct that inculcate key norms in the fields of labor, human rights, consumer protection, anticorruption, and the environment."\textsuperscript{173}

B. Corporate Social Responsibility

Responding to pressure from stakeholders including employees, consumers, communities, and governments, and continual scrutiny by segments of the media and investment community, a growing number of multinational and transnational companies are aware that the

\textsuperscript{170} David Monsma & John Buckley, Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure, 11 U. BALI. J. ENVTL. L. 151, 175-76 (2004). "In the broadest or most general sense, corporate accountability probably covers a number of enforceable responsibilities including the need to inform investors of risks and liabilities, the responsibility for legal compliance, and the governance responsibility that a board of directors has to its shareholders to oversee management and disclose material financial information." Id.

\textsuperscript{171} See generally Davidsson, supra note 168, at 543. But see Gerald F. Tietz, Strict Product Liability, Design Defects and Corporate Decision-Making: Greater Deterrence Through Stricter Process, 38 VILL. L. REV. 1361, 1403-04 (1993) ("According to economist Milton Friedman, the business corporation has one and only one social responsibility: to make as much money for shareholders as possible. To be fair to Professor Friedman, however, his exhortation to corporations to maximize profits is accompanied by a caveat to observe the 'rules of the game' and to not engage in deception or fraud. Nonetheless, the 'rules of the game' are frequently not observed ...").

\textsuperscript{172} See, e.g., Cyrus Mehri, Andrea Giampteto-Meyer, & Michael B. Runnels, One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability and Workplace Fairness, 9 FORDHAM J. CORP. & FIN. L. 395, 399-400 (2004) ("Economists, lawyers, professors/scholars, and social activists have argued for decades about the nature of the corporation's relationship with and obligations to society, including their obligations to gather and report accurate information to a variety of stakeholders.").

\textsuperscript{173} Murphy, supra note 169, at 400.
commitment to social and environmental responsibility, and the level of accountability it entails, has changed. The unofficial, community-recognized bar of acceptable corporate conduct has shifted, and for some multinational companies the question of where to set it is largely dictated by the "civil society" influences that inform its meaning and set its accountability requirements.174 As such, a "progressive" practice of corporate social responsibility has yielded complex management methods that entail greater transparency and accountability than in the past. This development may or may not be satisfactorily explained by social contract theories of corporate responsiveness to "community norms."176 Local or community "norms are always contested, even within their communities, and 'local' actors may well invoke 'non-local' norms for strategic or political advantage.177 While "[g]eneral debates about the appropriate relationship between the corporation and society inform and underlie arguments about the worth of increased corporate transparency and accountability as objectives,"178 the current measures of corporate

174. See ZADEK, supra note 169, at 137 (stating that the term "civil corporation"—and the need for "civil learning"—“describes ‘civil society’ as being the collective of associational relationships that form between individuals in pursuit of (varied) common interests”). Civil society has similarly been defined as “the public space between the state and the individual citizen” where the latter can develop autonomous, organized and collective activities of the most varied nature. Alex Hadenius & Fredrik Uggla, Making Civil Society Work, Promoting Democratic Development: What Can States and Donors Do?, 24 WORLD DEV. 1621, 1621 (1996).

175. See Mehri, et al., supra note 172, at 403 (“In light of the pervasiveness of corporations in our lives, advocates of the progressive perspective [of corporate social responsibility] argue that corporations must view themselves beholden to both shareholders and stakeholders.”).

176. While it is true that a "corporation's information-collection system should gather the morally salient features of its environment," probably few, if any, company managers ever weigh the difference between community norms and "hypernorms." David Hess, Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness, 25 J. CORP. L. 41, 53 (1999).

177. See Paul Schiff Berman, From International Law to Law and Globalization, 43 COLUM. J. TRANSNAT'L L. 485, 551 (2005) (“[L]ocal actors deploying or resisting national or international norms may well subvert or transform them, and the resulting transformation is sure to seep back “up” so that, over time, the “international” norm is transformed as well. And on and on.”).

social responsibility are increasing in international importance, managerial particularity, and, conceivably, financial materiality.

The contemporary stakeholder paradigm of corporate social responsibility not only recapitulates the progressive law and academic interpretation of corporate social responsibility in the form of a business management practice; it conduces to requiring measurable social and environmental performance linked to disclosure practices, financial performance, and investment screening criteria. The practice of "new" corporate social responsibility encompasses modern

179. See, e.g., Davidsson, supra note 168, at 537 ("In June 2000, the EU adopted a new Social Policy Agenda. It stressed the importance of corporate social responsibility in terms of the employment and social consequences of economic and market integration and the adaptation of working conditions to the new economy."). See also Kamil Ahmed, International Labor Rights—A Categorical Imperative?, 35 R.D.U.S. 145 (2004) (finding, for example, formal standards as found in Core Labor Standards or Codes of Corporate Conduct (i.e., "important human rights [that] include basic union rights, freedom from forced labour, equal opportunity in employment, and the abolition of child labour") "have international significance partly because of today's unprecedented transnational economy").

180. See Monsma & Buckley, supra note 170, at 176 ("CSR discourse is also one of the iterative means for shaping 'what' social and environmental responsibilities corporations ought to have, plus 'how' to implement and assess their performance.").

181. See id. at 188.

Theoretically, and perhaps only theoretically under the current meaning of materiality in securities disclosures, one might argue that unfavorable or negative non-financial (i.e., environmental and social) performance information, in the company's conscious possession, would constitute a material omission (or be materially misleading) if there have been company statements, reports or commitments to indicate otherwise, and said unfavorable information is not fully disclosed as part of the total mix of information available to the shareholder.

Id.

182. See David Case, Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective, 76 U. COLO. L. REV. 379, 394–95 (2005) (finding "[m]odern 'best practices' require disclosure of hard, quantitative data and rigorous performance reporting, including disclosure of negative information such as regulatory compliance violations").

183. See id. at 398 (noting that while "[o]riginally governed by a steering committee representing a diverse mix of stakeholder groups, the GRI's fundamental purpose is to build international consensus on credible core metrics for voluntary reporting on environmental and sustainability practices and performance that eventually rise to the level of standard financial reporting in terms of widespread acceptance").

184. See Joshua Newberg, Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct, 29 VT. L. REV. 253, 288 (2005) ("Socially responsible investing" has been defined as investment 'that considers the social and environmental consequences of investments, both positive and negative, within the context of rigorous financial analysis.' In the United States, as of 2003, $2.18 trillion was invested according to socially responsible investment criteria.").

185. Referring to a "new" and revitalized corporate social responsibility movement, one professor writes:

Under various labels, including 'progressive corporate law,' 'good governance,' 'social disclosure,' and 'socio-economics,' a diverse group of legal academics has trained its attention on problems perceived to be related to corporations' lack of attention to interests other than short-term maximization of shareholder profits. Admittedly, attention to corporate social responsibility is not new in the usual meaning of the word.
management and reporting standards that challenge or enlarge upon the early or progressive accounts of its meaning and application, mostly without corresponding advances in "reflexive" laws.186 If, as some commentators point out, "the current corporate social responsibility debate often involves a competition between shareholder versus stakeholder conceptions of the corporation," 187 does that dynamic change considerably when increasingly sophisticated shareholders and stakeholders become one and the same? That is, socially responsible shareholders may reflect the interests that non-shareholder constituents and other stakeholders traditionally represent. By connecting the need to disclose non-financial188 performance for corporate conduct to socially responsible investment criteria, corporate social responsibility may act as a further indicator of business performance, if not also an additional benchmark for comparing corporate performance.189

Today, corporate social and environmental responsibility is evaluated by both stakeholders and shareholders through an assessment of a company's demonstrated public commitment to corporate social responsibility (CSR), albeit entirely voluntarily and inexact. To benchmark or otherwise assess corporate social responsibility arguably requires that companies adopt the following minimum steps: the implementation of a set of integrated social and environmental policies, combined with a senior level signatory pledge to a recognized global code-of-conduct; a management system for implementing and monitoring specific non-financial social and environmental objectives; and an auditable level of transparency preferably in conformity with a reporting process acknowledged by civil society organizations and/or socially responsible investors and rating agencies, regardless of the fact that these commitments are entirely voluntary and unenforceable. Anything less, such as the bulk of "current, essentially voluntary approaches by individual companies to corporate citizenship will alone not contribute

Testy, supra note 30, at 1228–29.

186. See Hess, supra note 176, at 42 (characterizing Professor Eric Ort's description of reflexive law "as a regulatory system that recognizes the limited ability of the law in a complex society to direct social change in an effective manner").

187. Cynthia A. Williams, Corporate Social Responsibility in an Era of Economic Globalization, 35 U.C. DAVIS L. REV. 705, 707 (2002). "In particular, academics have sought to evaluate the conditions under which decisions presumed to be shareholder wealth-maximizing have had negative effects on employees, consumers, communities, or the environment." Id. at 721.

188. Non-financial is used here synonymously with "extra-financial" or, in some cases, intangible assets.

189. See, e.g., Newberg, supra note 184, at 289. "Given their predispositions, social investors may also be more likely to: monitor the extent to which a firm's conduct is consistent with its code; hold the firm accountable for living up to its ethical commitments; and compare its record to those of other firms." Id.
significantly to resolving deeply rooted social and environmental problems."190

"Various organizations promote CSR principles. For example the Coalition for Environmentally Responsible Economies (CERES) asserts that corporations have a responsibility to protect the environment."191 Business for Social Responsibility (BSR), a non-profit business support organization, characterizes corporate social responsibility "as a comprehensive set of policies, practices and programs that are integrated into business operations, supply chains, and decision-making processes throughout the company—wherever the company does business—and includes responsibility for current and past actions as well as future impacts."192 Correspondingly, the international efforts advanced by companies and non-governing organizations working together on corporate social responsibility entail specific first principles for labor conditions, human rights and the environment.193

One explicit set of voluntary goals for corporations "sets down [ten] broad principles on corporate social responsibility with respect to human rights, labor standards and the environment."194 The United Nations Global Compact (UNGC), in short, "seeks to embed the behavior of

190. ZADEK, supra note 169, at 73–74 (emphasis in original). Inversely, legal and regulatory approaches by individual countries alone will not necessarily resolve the same deeply rooted social and environmental problems.


192. Business for Social Responsibility, Overview of Corporate Social Responsibility, http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=48809 (last visited Apr. 18, 2006). BSR states that "CSR means addressing the legal, ethical, commercial and other expectations society has for business, and making decisions that fairly balance the claims of all key stakeholders. In its simplest terms it is: 'what you do, how you do it, and when and what you say.'" Id.

193. See Mary Robinson, former U.N. High Commissioner for Human Rights, Address at the Annual Meeting of 'Respect Table' Companies: The Ways a 'Business Leaders Initiative on Human Rights' Might Add Value (May 7, 2003) ("Environmental degradation and human rights violations often go hand in hand and it is no longer the case that a social imperative must trump an environmental one, or vice versa."). available at http://www.eginitiative.org/documents/respect_table.html (last visited Apr. 19, 2006).

194. United Nations Global Compact, The Global Compact 1999, available at http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Apr. 20, 2006). The ten principles are: Human Rights: (1) support and respect for the protection of internationally proclaimed human rights; (2) non-complicity in human rights abuses; Labor: (3) freedom of association and the effective recognition of the right to collective bargaining; (4) the elimination of all forms of forced and compulsory labor; (5) the effective abolition of child labor; (6) the elimination of discrimination with respect to employment and occupation; and Environment: (7) a precautionary approach to environmental challenges; (8) a greater environmental responsibility; (9) encouragement of the development and diffusion of environmentally friendly technologies; and (10) Businesses should work against all forms of corruption, including extortion and bribery. As many, or few, as nearly 1500 companies from 70 countries have signed the UNGC. See Press Release, Global Compact, Global Compact Summit Concludes With Emphasis on Need to Fight Corruption, U.N. Doc. ECO/70 (Jun. 24, 2004), available at http://www.un.org/News/Press/docs/2004/eco70.doc.htm.
business in the universal principles of the United Nations—in cooperation with labor and civil society, as well as national and local authorities." The challenge for signatory companies is to satisfactorily demonstrate a competency to "translate their commitment to the Global Compact principles into concrete corporate practices." Presumably, there is an opportunity through frameworks such as the Global Compact—and the Global Reporting Initiative (GRI)—a global reporting framework for corporate sustainability—for opening a commitment-based dialogue among business, labor, and civil society organizations, including environmental and climate justice advocates, the aim of which is "to reach socially more inclusive definitions of what constitutes good practices than any of the parties could achieve alone."

The global standards for corporate conduct such as the UNGC cannot as yet be defined or implemented "with the precision required for a viable code of conduct" or in a way that would explicitly address impacts associated with environmental justice. However, the UNGC's "precautionary principle" (i.e., "that in the face of environmental uncertainty the bias should favor avoiding risk") and its principle of "non-complicity' in human rights abuses" closely correlate with one or more of the principles of environmental justice mentioned above.

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195. John Gerard Ruggie, Trade, Sustainability and Global Governance: Keynote Address, 27 COLUM. J. ENVTL. L. 297, 301 (2002). “The Compact enlists the global business community itself as a potential agent of change. Business has the global reach and resources but it lacks the incentives and the legitimacy to play a governance role.” Id.
196. Murphy, supra note 169, at 412.

Critics, however, including many developing states, note that the lack of monitoring or enforcement provides little confidence that, by joining the Global Compact, corporations will comply with its principles. Indeed, critics believe that through the Global Compact major corporations may simply 'bluewash' their misconduct; that is, corporations would join the initiative and achieve a public relations gain through association with the United Nations, but in the end would not significantly change their behavior.

Id.
197. Ruggie, supra note 195, at 302.
198. See, e.g., Case, supra note 182, at 399.
199. Ruggie, supra note 195, at 302-03. See also Case, supra note 182, at 401 (noting “[t]he permanent GRI is a non-profit organization established under Dutch law and headquartered in Amsterdam, and is an official collaborating centre of the United Nations Environment Programme”).
200. Ruggie, supra note 195, at 304.
201. See id. Principle 2 states that Businesses should make sure that their own corporations are not complicit in human rights abuses. Principle 6 states that businesses “should uphold the elimination of discrimination in respect of employment and occupation.” Principle 7 states that businesses “should support a precautionary approach to environmental challenges.” Principle 8
new precedent for greater corporate social responsibility for environmental justice principles would necessarily entail a signed commitment to the UNGC combined with the publication of a corporate sustainability report “in accordance with” the GRI. For example, the GRI includes a non-discrimination reporting clause that standardizes one of the basic tenets of environmental justice for companies reporting “in accordance” with GRI’s framework and protocol: “HR4. Description of global policy and procedures/programmes preventing all forms of discrimination in operations, including monitoring systems and results of monitoring.” As of now, under the current or emerging scheme for managing greater corporate social responsibility, environmental justice is implied rather than explicit. Corporate environmental reports do not reference environmental justice and only those that report in accordance with the GRI are committing to describe or account for “global policy and procedures/programmes preventing all forms of discrimination in operations” if such policies and procedures exist.

Corporate social responsibility, like the UNGC and other voluntary social and environmental initiatives involving corporate commitments, “is not without critics.” Activists and stakeholders, critical of corporate social responsibility as it is practiced, ask “what guarantees they may have to ensure that the principles of CSR are respected and what remedies they can pursue in case those principles are breached.” In what is probably the most direct attack on the voluntary nature of corporate social responsibility to date, Christian-Aid, a civil society nongovernmental organization (NGO) based in the U.K., states that CSR “is unable to deliver on its grand promises . . . [and that it] is a completely inadequate response to the sometimes devastating impact that multinational companies can have in an ever-more globalized world—and

states that businesses “should undertake initiatives to promote greater environmental responsibility.” United Nations Global Compact, supra note 194.


203. Ruggie, supra note 195, at 302. “The major criticism, leveled by the anti-globalization front, has been for what it is not: a regulatory arrangement, specifically a legally binding code of conduct with explicit performance criteria and independent monitoring of company compliance.” Id.

204. Davidsson, supra note 168, at 543–44.

Given that there is no clear definition of CSR, it is hard to argue that its nature precludes enforcement through legally binding codes. The nature of CSR is still undergoing debate and development, in practice as well as in the academic realm. Statements that CSR has a purely voluntary quality must therefore be taken as a point of view rather than a statement of fact.

Id. See also Don Mayer, Community, Business Ethics, and Global Capitalism, 38 AM. BUS. L.J. 215, 256 (2001) (arguing that “unless systemic changes are wrought, the ethical component of corporate social responsibility becomes a mere holding action against a relentless tide of economic competition that has been freed from serving the public interest.”).
that it is actually used to mask that impact."  

Admittedly, corporate social responsibility, like many legal remedies for environmental justice, can be strong in theory but ineffective in practice. As a consequence of perceived legal ambiguity, or as part of any inevitable criticism, the voluntary nature of CSR obviously raises questions about its actual capacity as a mechanism for ensuring corporate accountability and its effectiveness for addressing environmental and social responsibilities.

C. Sustainable Development

Actors in the business and policy arenas define the term "sustainable development" in a multitude of ways, not all of them precise or satisfactory. It has become a "buzz word" that, as some critics point out, "is rarely defined but used to promote arguments favoring business interests." Although sustainable development has a highly problematic history and "has been used dishonestly" to wrest private investment opportunities from the public commons, it has gained importance within policy setting segments of both the public and private sectors. This is particularly true among companies working with NGOs to set measurable and reportable standards for corporate social and environmental responsibility, such as the GRI.

205. CHRISTIAN AID, BEHIND THE MASK: THE REAL FACE OF CORPORATE SOCIAL RESPONSIBILITY 2 (2004), available at http://www.christianaid.org.uk/indepth/0401csr/csr_behindthemask.pdf (connecting, in principle, CSR to environmental justice: "Those who suffer the most as a result are the poor and vulnerable people in developing countries and the environments in which they live.").

206. Cf. Davidsberg, supra note 168, at 544 ("CSR takes place through a process in which the private sector defines its social role through voluntary principles. But this is only part of its development. In another sense, national and international authorities seek means to promote CSR and search for methods to ensure that the private sector respects its social obligations.").

207. See Hodas, supra note 24, at 77 ("Agenda 21 and the Rio Declaration of the United Nations Conference on Environment and Development tried to place the concept of sustainable development at the center of international policy so that in the coming decades, economic development would proceed in a fashion compatible with environmental protection."); F. Douglas Muschett, An Integrated Approach to Sustainable Development, in PRINCIPLES OF SUSTAINABLE DEVELOPMENT 1, 1 (F. Douglas Muschett ed., 1997) ("[S]ustainable development means economic development and a standard of living which do not impair the future ability of the environment to provide sustenance and life support for the population.").

208. Paulette L. Stenzel, The U.S. and Mexico Sin Fronteras-Without Borders: Sustainable Development from a Local Perspective, 27 WM. & MARY ENVTL. L. & POL'Y REV. 441, 444 (2002) (finding that while "[t]he term 'sustainable definition' is widely used; there is no one definition of it") (quoting Professor Ramesh Diwan).

209. David Monsma, Sustainable Development and the Global Economy: New Systems in Environmental Management, 24 VT. L. REV. 1245, 1245 (2000). "Unfortunately, sustainable development has been [sic] misused at times by international banks and the like to palm-off western growth attitudes on lesser developed countries in need of capital flows and economic assistance." Id. Other authors take even bigger issue with the term's misuse: "Many argue, however, that sustainable development is too 'slippery' a concept to have meaning, and therefore has been a failure." Hodas, supra note 24, at 77.
"A seminal feature of sustainability is the principle of integrating environmental and economic issues in decision-making."210 The oft-cited conceptual definition used to convey sustainable development as a principle is the one put forth by the Bruntland Commission in 1987: "[t]o meet the needs of the present without compromising the ability of future generations to meet their own needs."211 Put another way, the idea of sustainable development, which serves more as a bearing for economic development and commerce than a destination, "is that over time deliberate conscientious, albeit secondary, changes in commerce will lead to significant advances in resource productivity ... heading away from business as usual toward an economy that is more equitable and sustainable if not also one that is ecologically restorative."212

Proponents of sustainable development "characterize the object of sustainability as the ongoing need to better align economic, social and environmental goals, and, similarly, to develop policies and practices that consider how these three pillars are interdependent."213 Herman Daly, scholar and former senior economist at the World Bank, reasons that "[t]he power of the concept of sustainable development is that it both reflects and evokes a latent shift in our vision of how the economic activities of human beings are related to the natural world—an ecosystem which is finite, non-growing, and materially closed."214 Barbara Stark further explains that sustainable development "qualifies the privileged conception, the subject of the phrase ('development'), by explicitly linking it with the notion of environmental sustainability."215

210. Richardson, supra note 24, at 248. "This integration requires the embedding of ecological concerns in both government and market-decision processes." Id.
211. THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 8 (Oxford Univ. Press 1987).
212. Monsma & Buckley, supra note 170, at 171. Mayer writes:

There are numerous and very sound suggestions about how current capitalist forces might be redirected into more sustainable, equitable, and community-oriented business. I will suggest just a few, knowing that there are many more, and that none of them will be taken quite seriously in the U.S. without a sharp decline in the economy or a substantial resurgence of civic-minded and politically active citizens.

Mayer, supra note 204, at 259.
213. Monsma & Buckley, supra note 170, at 171.

This change in vision involves replacing the economic norm of quantitative expansion (growth) with that of qualitative improvement (development) as the path for future progress. This shift is resisted by most economic and political institutions, which are founded on traditional quantitative growth and legitimately fear its replacement by something as subtle and challenging as qualitative development.

Id.
Many companies apply sustainable development as a policy and managerial approach, for orienting their business activities toward meeting social and environmental goals so that these non-financial objectives become more simultaneous and unintentional\(^\text{216}\) with meeting financial business objectives; this is the so-called “triple-bottom line” approach.\(^\text{217}\) This model of sustainable development, like others, “requires that businesses do more than simply make continuous improvements in environmental management systems, an important consideration because some environmental management systems merely focus on compliance with existing environmental regulation.”\(^\text{218}\) For this reason, any company that purports to have made a commitment to sustainability should be expected, in order to be credible with civil society, shareholders and governments, to address and disclose social responsibilities that lie beyond compliance, including potentially negative or discriminatory community impacts that affect certain populations more severely or disproportionately than others.

The link between environmental justice and sustainable development is more certain in the legal commentary than is the one between environmental justice and corporate social responsibility. Tracing the “strikingly similar pathways” and “co-evolution of sustainable development and environmental justice,” J.B. Ruhl theorizes that “[e]nvironmental justice benefited from the increasingly broad policy acceptance that sustainable development enjoyed across international and national lines which legitimized the more narrow message of environmental justice.”\(^\text{219}\) One group of commentators agrees that the “concept of sustainable development and environmental justice share many critical and defining characteristics” and that “[e]ach requires taking into account and integrating policies relating to social justice,

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which one term endlessly undoes the other. The process of deconstruction begins by identifying the opposition contained in a particular concept.” \(\text{Id.}\)

216. In order for sustainable development to be successful, its goals and objectives must become integrated within business and governance systems rather than superimposed as policy props or accessories.


218. Nancy J. King & Brian J. King, \(\text{Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring United States and the European Union, 23 VA. ENVTL. L.J. 397, 402 (2005).}\) “Sustainability efforts must include businesses because current business practices contribute significantly to environmental and social problems.” \(\text{Id.}\)

219. J. B. Ruhl, \(\text{The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, Then Competition, Then Conflict, 9 DUKE ENVTL. L. & POL’Y F. 161, 162 (1999) (discussing the co-evolutionary patterns and relations between sustainable development and environmental justice that can be explained by using concepts being developed through complex systems research).}\)
environmental protection, and economic development.” Unfortunately, as Ruhl points out, “it is apparent that none of the indicators being forged for sustainable development has anything meaningful to say about environmental justice as environmental justice advocates define it, and that none of the indicators being forged for environmental justice has anything meaningful to say about sustainable development as sustainable development advocates define it.” Emily Fisher agrees that, “[c]onsidered separately, environmental justice and sustainable development each has a missing piece that prevents it from maximizing its effectiveness as a movement.”

Some advocates go so far as to suggest that “[e]nvironmental justice and its sister concepts of social justice and equity should be at the heart of emerging policies for sustainability at the local, regional and national (and international) level.” Whether or not the principles of environmental justice achieve policy importance within “international accords for sustainable development,” corporate commitments to become more sustainable (or socially responsible), which are no longer uncommon or unusual to find in corporate statements and reports, do not as yet make explicit references to environmental justice and do not include measures for identifying potentially disparate impacts. Indeed, as voluntary agreements for sustainable development and corporate social responsibility become standardized, and, whereas, most expressions of corporate social responsibility include explicit commitments to human


221. Emily Fisher, Sustainable Development and Environmental Justice: Same Planet, Different Worlds?, 26 ENVIRONS ENVTL. L. & POL’Y J. 201, 207-08 (2003). “If sustainable development fails to prioritize issues of distributive justice, it will be little more than an accomplice to the ongoing exploitations of the market. Similarly, environmental justice cannot achieve its goal of distributive justice as long as there are burdens to distribute.” Id.

222. Agyeman & Evans, supra note 152, at 36-37.

At a less pivotal but more practical level, there exists a nexus of theoretical compatibility between sustainability and environmental justice, including an emphasis on community-based decision making; on economic policies that account fiscally for social and environmental externalities; on reductions in all forms of pollution; on building clean, livable communities for all people; and on an overall regard for the ecological integrity of the planet.

Id.


rights, the absence of direct references to environmental justice principles in company pledges is conspicuous to say the least.

D. Environmental Justice as Human Rights

As mentioned above, many of the environmental justice principles are addressed at the level of public policy decision-making. On the other hand, some of the principles are directed at private sector responsibilities, at least when viewed through the lens of corporate social responsibility or sustainable development. For example, two or more of the environmental justice principles can be correlated with international codes of conduct such as the Universal Declaration on Human Rights, the common fount of authority for the human rights and labor standards articulated vis-a-vis the fiat of corporate social responsibility. Sean Murphy points out that international codes of conduct "draw on or refer to international law norms (particularly in the field of international labor, environmental, or human rights law) and tend to focus on multi-national company "adherence to local laws, and/or may call for adherence to norms articulated solely in the code itself." "In this respect," as Kinley and Tadaki note, "there is one particular feature of the interrelationship between human rights and environmental protection that deserves special attention: that is, the essentially procedural form of consultation and participation that binds them." Indispensable to guaranteeing procedural environmental rights, environmental justice principles embrace the "principles of informed consent" and "the fundamental right to clean air, land, water, and food."

225. See, e.g., Agyeman and Evans, supra note 152, at 50. Principle number 2: states: "Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias." Id.


227. See Bantekas, supra note 23, at 324 (describing human rights as a major corporate social responsibility issue: "We understand human rights within the scope of [multinational enterprise (MNE)] operations to encompass not only labor rights, health and safety, child labor, and consumer protection, but also human rights issues that affect the communities where MNEs operate, whether corporate action has a direct or indirect effect on such populations.").

228. Murphy, supra note 169, at 400.

229. David Kinley & Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 VA. J. INT'L L. 931, 985 (2004). "This entails guaranteeing procedural environmental rights, which include access to environmental information, participation in environmental decision-making, and remedies for environmental harm." Id.

230. Agyeman & Evans, supra note 152, at 50. Additionally, environmental justice "affirms the fundamental right to political, economic, cultural, and environmental self-determination of all peoples." Id.
The evolution of a "human rights approach" to the environment "began essentially with the 1972 United Nations Conference on the Human Environment, which declared that 'man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights.'"\textsuperscript{231} The argument that human well-being and the environment are interrelated is also not new, of course, although there are clearly limits to both domestic and international laws as to how far environmental protection is meant to extend. "The most far-reaching application of the argument for extending environmental rights is found in the view that international law recognizes a human right to a decent, viable, or healthy environment."\textsuperscript{232}

Several international policies demonstrate the inherent relationship between environmental justice and human rights. For instance, the correlation between human rights and the environment is made more explicit in the Stockholm Declaration on the Human Environment, which was the first international policy instrument to integrate a human rights outlook with environmental quality.\textsuperscript{233} As a source of persuasive authority for asserting that states ought to observe and uphold the fundamental right of communities to a healthy environment, and certainly one free of disparate impacts based on race or income,\textsuperscript{234} the Stockholm Declaration


The many linkages between protection of human rights and protection of the environment have long been recognized in human rights standard-setting and action . . . Principle 10 of the Rio Declaration led to the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), which was ratified by some thirty-five states and the European Community and entered into force on October 30, 2001.

Marks, supra, at 750.

\textsuperscript{232} PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 190–91 (Oxford Univ. Press 1992). "Most writers are, however, skeptical of the view that a right to a decent environment presently forms part of international law in this extended form." Id.


\textsuperscript{234} See Worika, supra note 233, at 14.

The Stockholm Declaration on the Human Environment was, perhaps, the first authoritative instrument which recognised the environment as an aspect of human rights. Principle 1 of that Declaration states that 'man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'
established the same or similar connection between human rights and environmental protection as the environmental justice principles declare. Likewise, one of the touchstones for advancing the link between environmental justice and human rights, and for extending that link to corporate social responsibility, appears in the Draft Declaration of Principles on Human Rights and the Environment, prepared for the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) in 1991, which provides that: “All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment.” Moreover, international human rights commentators readily assert that “human rights should also influence the conduct of private entities, such as multinational business enterprises, which have an interest not only in avoiding legal violations, but also in maintaining a positive public image.” In the extractive and life-sciences industries, for instance, corporate social responsibility ought to extend to environmental justice principles such as the right to “political, economic, cultural, and environmental self-determination” of indigenous people.

More recently, ten years after the first Earth Summit on sustainable development in Rio de Janeiro, leaders from government, business and non-government organizations gathered in Johannesburg for the 2002 World Summit on Sustainable Development. In the years between the Rio Summit and the Johannesburg Summit, “businesses and business-oriented NGOs became active participants in the discussion and pursuit of sustainable development” including the recognition of human rights as a tenet of corporate social responsibility. Although panned at the time

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236. Id. at 494. “Environmental human rights have the potential to shape the conduct of individuals, groups, governments, international organizations, and transnational corporations.” Id. at 603.

237. Agyeman & Evans, supra note 152, at 50 (Principle number 11 states: “Environmental justice must recognize a special legal and natural relationship of native peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.”).

238. See, e.g., Carl Bruch & John Pendergrass, The Road from Johannesburg: Type II Partnerships, International Law, and the Commons, 15 GEO. INT’L ENVTL. L. REV. 855, 866–67 (2003) (“Mining [like forestry] is another area of concern, particularly in light of its environmental and social impacts. . . . [T]o date, there is still no meaningful international legal framework specifically addressing the often dire impacts of this frequently destructive and generally international extractive industry.”).

239. Stenzel, supra note 208, at 446. “The business focus, however, created significant dissent before and during the Johannesburg Summit.” Id. See Bruch & Pendergrass, supra note 238, at 856 (“[A]t the Rio+10 conference—the World Summit on Sustainable Development
by the press and many onlookers, including many NGOs, the Johannesburg Summit resulted in a declaration and implementation plan. "The plan, divided into ten sections, emphasizes 'the integration of the three components of sustainable development—economic development, social development, and environmental protection—as independent and mutually reinforcing pillars.'"\(^{240}\) For its proponents, environmental justice fits squarely in the discussion on human rights and sustainable development and was put forward as such in Johannesburg.\(^{241}\)

In parallel events and meetings organized with nongovernmental organizations (NGOs), more than three hundred environmental justice leaders from around the world gathered to participate in the Environmental Justice Forum and carry their message forward to the World Summit. "The four-day forum served as a pre-summit kick-off to the opening of the World Summit and the Global People's Forum."\(^{242}\) "The Global People's Forum, also called the 'Anti-Summit,' was organized by relief agencies, trade unionists, and anti-globalization

(WSSD), which was held in Johannesburg, South Africa in the summer of 2002—delegates from many nations, most significantly the United States, endorsed an approach that relied on voluntary partnerships between governments and the private sector to advance sustainable development.”\(^{240}\)


The plan also addresses protecting the natural resource base of economic and social development, sustainable development in a globalizing world, as well as health and regional perspective . . . The reaffirmation of these goals follows from the Rio Declaration in 1992 and the blueprint for action from the Earth Summit contained in Agenda 21.

*Id.*


More than three hundred environmental justice leaders from around the world gathered at the Shaft 17 Education Center in Johannesburg to participate in the Environmental Justice Forum. The four-day forum, sponsored by the South African-based Environmental Justice Networking Forum (EJNF), served as a pre-summit kick-off to the opening of the World Summit on Sustainable Development (WSSD) and the Global People's Forum—a meeting of nongovernmental organizations that run parallel to the official government meeting. The meetings run through September 4th in Johannesburg.

*Id.*
activists." At these meetings, environmental justice groups like the National Black Environmental Justice Network (NBEJN) and the South African-based Environmental Justice Networking Forum (EJNF) declared that sustainable development cannot be achieved in the world without addressing racial, social, economic, and environmental injustice. They also expressed their concern that the impacts of global climate change will fall disproportionately on minority communities and low-income communities. This contention, which echoes the principles of environmental justice, is rooted in the connection between human rights and sustainable development that environmental justice puts forward. Given the participation of industry and commerce in voluntary agreements, state partnerships, and global compacts via the conduits of sustainable development and corporate social responsibility, the importance of the relationship between human rights and environmental justice cannot be ignored.

In August 2002, environmental justice advocates jointly released Ten Principles for Just Climate Change Policies in the U.S. These World Summit participants identified several common themes that they wanted presented and adopted at the WSSD. Climate Justice, as therein identified, integrally links human rights and ecological sustainability, recognizing that communities bearing the greatest share of environmental and social problems associated with polluting industries are also at the forefront in the battle against climate change. "The overall focus of climate justice policy is to assist individuals and communities in adapting to the impacts of climate change, while the specifics of policies deal with issues of access to resources." Included among the Ten Principles is the need to protect and empower vulnerable communities so stated: "Low-income workers, people of color, and Indigenous Peoples will suffer the

243. Stenzel, supra note 208, at 446.

During the summit, two alternative conferences were held. One was the Global People's Forum in Soweto, an all-black township twenty miles from the UN-sponsored summit. . . . A second alternative conference in Johannesburg was sponsored by the Anti-Privatization Forum. Nearly seven thousand demonstrators from the two alternative summits marched in Johannesburg on August 31, 2002 to protest the corporate agenda of the UN-sponsored summit.

Id.

244. ANSIE MILLER & CODY SISCO, TEN ACTIONS OF CLIMATE JUSTICE POLICIES (2002), available at http://www.ejrc.ca.gov/summit2/SummIIClimateJustice%20.pdf. For example Principle 9, Caution in the Face of Uncertainty, states that "there is a clear scientific consensus that global warming is occurring and that human activity is the cause. The questions remaining are about the magnitude of the impacts, where they will occur, and how we can minimize them. We should use the precautionary principle as our guide in enacting policies to minimize the impacts of climate change." Id. at 8.

245. Id. at 3.
most from climate change’s impact. 246 The link between human rights and environmental justice is clear. The normative acknowledgement of this connection, however, in the manifestation of private sector commitments to sustainable development and corporate social responsibility, is less apparent.

Groups such as CorpWatch, Friends of the Earth, Greenpeace, and NBEJN promote ongoing efforts to develop a constituency of people in the United States who are active around climate change, and to inject an environmental justice and human rights perspective into the climate change debate, it being an accepted issue that is well-developed in dialogue on sustainable development. 247 The International Climate Justice Network is a consortium comprising fourteen groups from five continents; in 2002, this Network released the Bali Principles of Climate Justice, a set of action principles designed to be more inclusive of local communities impacted by climate change. 248 Climate justice advocates express concern that local communities and indigenous peoples have been kept out of the global processes to address climate change even though they are the hardest hit by the effects of climate change. "The principles of climate justice address the inadequacies of current


Unit[ing] under the umbrella of an international Climate Justice Programme, the alliance wants to see existing laws enforced to help present and future generations and hold the perpetrators of climate damage accountable and liable for the consequences of their actions. These cases have already started, with more expected as the cuts agreed in greenhouse-gas emissions are not being met and are—when met—nevertheless inadequate.

Id.


[a]n international coalition of groups gathered in Johannesburg for the Earth Summit has released a set of principles aimed at “putting a human face” on climate change. The Bali Principles of Climate Justice redefine climate change from a human rights and environmental justice perspective. The principles were developed by the coalition—which includes CorpWatch, Third World Network, Oil Watch, the Indigenous Environmental Network, among others—at the final preparatory negotiations for the Earth Summit in Bali in June 2002.

Id.
negotiations to address climate change and puts local communities at the center of the solution."

The principles also address the central role that industrialized nations and transnational corporations play in causing climate change, and question market-based mechanisms currently being promoted by climate change experts, which do not necessarily address the potential of disproportionate environmental impacts. Here then, is a direct appeal to the proponents of corporate social responsibility to revisit the social justice and human rights concerns articulated in the discourse on environmental justice but less often discussed in the advancement of corporate social accountability. Corporate vows to address climate change are no longer unusual, but corporate acknowledgement and implementation of the corollary between human rights, the environment, and corporate social responsibility remains elusive.

The climate justice debate, which extends the principles of human rights and environmental justice to climate change, is implied in the dialogue on corporate social responsibility but not explicitly as with other evolved notions of sustainable development. One way in which environmental justice and human rights are linked perhaps more conspicuously is through the precautionary principle, Principle 9 among the climate justice principles enunciated in conjunction with the World Summit in Johannesburg. "A precautionary approach seeks to identify alternatives that minimize harm before it occurs rather than trying to figure out "acceptable" levels of harm based on our limited understanding of the interactions between humans and the environment." The move toward a legal framework for sustainable development was also raised at the World Summit. The question of the need for a regulatory or legal liability, of course, is somewhat antithetical to the idea of sustainable development or corporate social responsibility,

250. Miller & Sisco, supra note 244, at 8 ("Climate change is a long-term problem. Our actions today always have consequences for the future, but in the case of global warming the effects of not acting will be irreversible.").

We express our conviction that the Judiciary, well informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the implementation, development and enforcement of laws, regulations and international agreements relating to sustainable development, plays a critical role in the enhancement of the public interest in a healthy and secure environment.

But see Bruch & Pendergrass, supra note 238, at 856 (observing that “[t]o justify the reliance on voluntary rather than coercive approaches, some nations argued that the commitments made at Rio had not been fulfilled and the last thing the international community needs is more international law that will fail to be implemented.”).
which many proponents believe should remain a voluntary regime guided by principles of materiality and disclosure. 252

Sustainable development and corporate social responsibility, which comprise unequivocal commitments to uphold human rights, both share a potential for addressing environmental justice principles through a framework of transparent reporting commitments linked to social investment253 and stakeholder responsibility, and both receive the criticism that neither system is sufficiently developed, accountable, or "legal" enough to become as effective as, for instance, financial accountability. 254 Insofar as corporate social responsibility is explicitly aligned with global standards for corporate conduct, which define human rights as an ethic (if not a right) to a healthy environment, it would seem logical for proponents of corporate social responsibility to also reference environmental justice principles as conferring a duty on corporations to evaluate and report on their activities in terms of their potential for discriminatory disparate impacts. 255 For instance, to further such a responsibility by means of transparency, as is expected by socially responsible investors and civil society proponents to substantiate corporate environmental and human rights commitments, the GRI mentioned above, "intends, among other things, to assist organizations in reporting information clearly demonstrating the impact of their operations, products, and services on air, water, land, biodiversity, and human health." 256 The GRI guidelines require companies that produce public reports in accordance with its protocol to describe global policy

252. See Ruggie, supra note 195, at 303 ("Any UN attempt to impose a code of conduct not only would be opposed by the business community, but also would drive progressive business leaders, who are willing to engage with the Compact, into a more uniform anti-code coalition."). But see Bruch & Pendergrass, supra note 238, at 875 ("The articulation of international sustainable development law could help to clarify the potential conflicts among the various bodies of international law bearing on environmental protection, economic development, and social advancement. . . . Adding the social dimension of sustainable development will further complicate the analyses and negotiation.").

253. See Richardson, supra note 24, at 247 (noting "the role of private financial organizations in environmental policy and argu[ing] that the effectiveness of environmental regulation may be enhanced when it can encourage institutional investors to take account of the environmental effects of their decisions").

254. Cf. Tietz, supra note 171, at 1403 (analogizing to the duty of care in manufacturing, Tietz observes: "Corporate resistance to safety is substantially due to the absence of a sense of social accountability. As Blackstone observed, corporations have no souls. If this is true, then perhaps it is unreasonable to expect corporations to act as responsibly—and be held as socially accountable—as individual persons.").

255. See Roger Brownsword, Cells and Cloning: Where the Regulatory Consensus Fails, 39 NEW ENGR. L. REV. 535, 552 (2005) (finding that "while human rights sets a demanding standard for the ethics of corporate social responsibility, it recognizes a relatively restricted class of stakeholders who are direct beneficiaries of this approach").

256. Case, supra note 201, at 399. "For example, current and potential investors can utilize such information to 'assess intangible aspects of [the firm's] performance and value.'" Id.
and procedures for preventing all forms of discrimination in their operations. There is no reason why reporting indicators for environmental justice, such as this one found in the GRI, could not become as normative as other human rights and environmental criteria used by socially responsible investors in their rating and investment decisions. This depends, of course, on the attitude of socially responsible investors and corporate social responsibility proponents toward environmental justice.

V. IMPLIED ENVIRONMENTAL JUSTICE

Apart from how competing notions of environmental justice shape ongoing interpretations of social justice or civil rights, "the quest for environmental justice" presumably does not end with "an equitable distribution of negative externalities." Environmental justice, which some argue is fading as a social and political influence, continues to have some bearing on domestic and international public policy, remaining an important paradigm in the global dialogue on environment and social justice. "Indeed, there are some indications that the environmental justice movement is headed in this direction already, as exemplified by the Environmental Justice and Climate Change Coalition, which is comprised of environmental justice leaders and climate change activists." "It has been suggested that the future success of the environmental justice movement depends on its ability to expand and connect with other movements, thereby bolstering resources, power, and support in the political arena." Furthermore, in terms of social justice, with or without any definitive corollaries in existing United Nations

257. See Global Reporting Initiative, supra note 202.


259. See Hoidal, supra note 74, at 202. "Undoubtedly, environmental justice remains an important social and political issue; yet, public and political support for the movement may be fading slightly." Id.

260. See Suttles, supra note 149, at 4. "A synthesis of the civil rights and environmental movements in the United States, environmental justice shares attributes, methodologies, and objectives of both, but can be adequately defined by neither." Id.

261. Pinney, supra note 10, at 363-64. "Academics think that such unions will increase the support for environmental justice concerns, broaden the political debate over such issues, and will eventually result in a progressive coalition of diverse leaders striving toward the same goal." Id.

declarations and International Labor Organization's conventions, the explicit reference to salient principles of environmental justice are missing or are unobvious in the ongoing and emerging development of corporate codes of conduct for corporate social responsibility.

In contrast to the language and affirmations promulgated by EPA, and with the exception of a few socially responsible investors (SRI) and religious organizations, business and business support organizations for corporate social responsibility have been less willing to adopt or incorporate explicit principles on environmental justice. Similarly, most corporations do not address environmental justice explicitly and although many civil society NGOs and international corporate accountability organizations use the term and promote environmental justice awareness, only passing references to it can be found in any the formalized business-targeted principles and reporting standards on corporate social responsibility. Human rights, women's advancement, workplace diversity, minority hiring, community investment, sustainable development, and environmental stewardship are all treated as major CSR topics among most outspoken authors and consultants, many of whom work with well-known brand-name companies. The subject of environmental justice, though, appears not to share the same level of acknowledgement or technical management specificity.

A cursory review of major corporate social responsibility, environmental, and sustainable development reports, suggests that corporations that are active in corporate social accountability reporting and voluntary commitments are comfortable including references to community and stakeholder involvement, human rights, and sustainable environmental practices, but do not address environmental justice as a specific principle or reporting segment of corporate social and

263. See Neugebauer, supra note 161, at 1237 (finding "various shortcomings have caused these legal entitlements to malfunction and fail to deliver the protection they promised").

264. See, e.g., Evangelical Lutheran Church in America (ELCA), 2001 Pre-Assembly Report: Report of the Memorials Committee 24 (2001), available at http://www.elca.org/assembly/03/reports/Memorials%20Report.pdf (addressing issues of social responsibility: "Based on ELCA social policy, the Division for Church in Society has undertaken a variety of advocacy ministries. Its Corporate Social Responsibility (CSR) program has developed a shareholder resolution on global warming which mentions steps that some major corporations are taking.").

265. See e.g., Business for Social Responsibility, http://www.bsr.org/CSRResources/IssueBriefsList.cfm?area=all ("BSR's Issue Briefs provide critical summary information on the full spectrum of corporate social responsibility issues."); Sustainability, http://www.sustainability.com/insight/issue-briefs.asp ("An overwhelming number of issues seem to fall under the umbrella of corporate responsibility and keeping abreast of them can be a real challenge.").

266. Whereas, environmental justice is accorded significant treatment in the law review literature. A search on LexisNexis for law reviews with the term "environmental justice" in the past two years returns over 800 articles.
environmental reporting. At least one survey studying a wide range of journal articles on corporate environmental reporting published between 1995 and 2000 contains no references to environmental justice. The terminology is used, the apparent disproportionate impacts are discussed, the community advocates and national experts are invited to speak, but the corporate commitment and reportable accountability for the environmental justice principles and concerns for potentially disparate or discriminatory impacts are not invoked and are not obvious. In other words, the corporate social responsibility network and community of business professionals and experts makes some references to environmental justice but have not elevated it to the level of the major corporate and global standards that are now the badges of excellent corporate citizenship and commitment. The issue of disproportionate or discriminatory impacts, and the principle of environmental justice, are implied by reference to universal human rights rather than made an explicit objective of overall corporate social responsibility.

CONCLUSION

Certain academic theories of corporate social responsibility "cast a potentially [broad] net, emphasizing all of the social costs of corporate activity, and therefore embrace, for example, environmental or political concerns as well as stakeholder interests." John T. Suttles of the Tulane Environmental Law Clinic further asserts that the "global justice' polemic ... links political concerns for justice with civil liberties, which also forms one of the cornerstones of the environmental justice movement." From this perspective, the definition of justice and "the prospects for justice in the context of multinational corporate competition," are necessarily tied to human well-being, and thus "to the political and economic factors that expand the realm of human choice and possibility." If environmental justice can assert its presence among

267. See, e.g., M.R. Mathews, THE DEVELOPMENT OF SOCIAL AND ENVIRONMENTAL ACCOUNTING RESEARCH 1995-2000 at 37-38, available at http://www-accountancy.massey.ac.nz/docs/Discussion%20Paper/205.pdf ("Several empirical studies examined the motivation by management in respect of environmental disclosure. In general, this appeared to be a narrow form of legitimacy theory, based on the perceived need of management to address issues and events which may be of concern to certain limited stakeholders.").

268. Testy, supra note 30, at 1228-29 (explaining, inter alia, that "[i]n response to the need to address the perceived illegitimate and unchecked power of corporations, what has been termed by some a 'new' corporate social responsibility movement is taking shape in the legal academy").

269. Suttles, supra note 149, at 10.

270. Id.

271. Id. "[R]ead the 1948 Universal Declaration of Human Rights, we see that issues such as health, housing and education have equal prominence. Those businesses that have looked at their activities across the full spectrum of civil, political, economic, social and cultural rights have seen that they are already doing much that should be informed by human rights."
the standards and dialogue on global corporate conduct as "treating members of different races and classes equally," then corporate social responsibility and environmental justice share, at the very least, an "articulation of normative goals and values."

Environmental justice, in theory and principle, seeks to addresses the lack of equal environmental protection experienced by minority and low-income communities. Attempts to craft justiciable claims for communities that incur a disproportionate share of the burden of lawfully regulated pollution have not proven successful as legal remedies, although the effort has led to a substantial body of legal scholarship. Given the perceived inability of the legal process to protect low-income communities and communities of color from the disproportionate impacts of environmental pollution, the question remains as to whether or not the private sector adequately addresses the central concerns or principles of environmental justice as a matter of corporate social responsibility and sustainable development.

International laws and multilateral declarations have also gone a long way toward articulating the fundamental rights that all people should enjoy. For instance, under the Draft U.N. Declaration on the Rights of Indigenous People, indigenous communities would have the right "to participate in decisions that bear on their well-being, including those implicating development or resource-management strategies for traditional tribal lands." Similarly, "a provision in the executive order executing NAFTA required that the North American Agreement on Environmental Cooperation 'be implemented to advance sustainable development, pollution prevention, environmental justice, ecosystem protection, and biodiversity preservation and in a manner that promotes transparency and public participation in accordance with the North American Free Trade Agreement [and the Environmental Cooperation] Agreement.'"

Such rights, though, are slow to materialize and are often just as difficult as environmental justice is to put into effect. Neither


272. Docherty, supra note 5, at 544. (citing Robert Kuehn, former director of the Tulane Law Clinic).

273. Testy, supra note 30, at 1249.

274. Neugebauer, supra note 160, at 1235.


Individuals, though, lack meaningful recourse to tribunals or other institutions to enforce them in most instances, as international law—although increasingly involving
compliance with domestic and international environmental laws, nor reliance on statutory or constitutional provisions for equal protection, will ensure that communities of color and low-income communities escape a disproportionate level of the negative environmental impacts from industrial pollution, commerce or, indeed, globalization. Notwithstanding the legal inadequacy of the U.S. Constitution's Equal Protection Clause, or the lack of any means for enforcement of voluntary corporate commitments to global codes of conduct,77 business advisory organizations and corporate accountability experts working with leadership companies to address all manner of corporate social responsibility and sustainable development issues should begin crafting a more precise and workable corporate response to any legitimate concerns raised by the environmental justice perspective.

Environmental justice is the conceptual link between human rights and the environment that is missing in the dialogue on corporate social responsibility and sustainable development. With respect to the swelling degree of corporate management activity associated with corporate social responsibility and sustainable development, both of which encompass company level commitments to human rights, environmental justice can only be addressed when a company is openly committed to ensuring that all of its affected community stakeholders enjoy an equal degree of consideration and protection from negative environmental and social impacts regardless of race, culture, or income. To do so, corporate responsibility proponents and socially responsible investors must also make a more explicit contribution to upholding human environmental rights and equal protection according to existing or evolving environmental justice principles. As we have seen in the context of the environmental justice movement itself, compliance with applicable environmental and civil rights laws is no safeguard against discriminatory outcomes in environmental management and protection.

In business, corporate social responsibility is a potentially useful framework for developing and guiding a better corporate response to the questions raised by environmental justice, one that reflects and respects

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77. But see Bruch & Pendergass, supra note 238, at 875 ("Nevertheless, international law seems to be moving toward a coherent body of international sustainable development law, as environmental justice (addressing social and environmental concerns, often in the context of economic development), the relationships between indigenous rights and environmental protection, and links between environment and labor continue to evolve.").
the competing material claims for all stakeholder groups.\textsuperscript{278} There are natural synergies between environmental justice, sustainable development, and existing principles and standards in the area corporate social responsibility. And there are certainly potential links with particular industrial sectors, including petroleum refining, electronics and computer production, chemical manufacturing, and other industries where issues center on the inequity or lack of equal protection from exposure to toxic substances and heavy industrial polluting activity.

Whether it is the environmental justice principles first put forth by the First National People of Color Environmental Leadership Summit in Washington D.C. in 1991, the Bali Principles of Climate Justice, or the 10 Principles for Just Climate Change Policies presented in Johannesburg in 2002, a sufficient level of research and documentation exists to begin distilling the salient particulars of these principles and incorporating them with the emerging global standards for corporate social responsibility and social accountability reporting. Environmental justice will undoubtedly continue to influence the meaning and nature of corporate citizenship on community and regional levels. It will also come to influence the debate on globalization and sustainable development as a discernible impact resting on economic inequities and the equal protection of laws.

\textsuperscript{278} On October 31, 2003, EFQM held a workshop titled \textit{Corporate Social Responsibility: Strengthening the Focus on Relationships}, with the following description: "Expectations of stakeholders not only relate to the direct transactions between parties, they now expect management to participate in the debate on societal problems and proactively think about the effects of the business on society at large" (on file with author).