RESURRECTING EQUAL PROTECTION CHALLENGES TO ENVIRONMENTAL INEQUITY: A DELIBERATELY INDIFFERENT OPTIMISTIC APPROACH

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INTRODUCTION

On October 31, 2000, the New Jersey Department of Environmental Protection ("NJDEP") issued five permits to the St. Lawrence Cement Company authorizing it to construct and operate a granulated blast furnace slag grinding facility in the Waterfront South neighborhood of Camden, New Jersey. Upon evaluation of St. Lawrence's application and air pollutant and toxin studies, the NJDEP concluded that the facility's pollutant emissions would satisfy the National Ambient Air Quality Standards set by the United States Environmental Protection Agency ("EPA"). Seemingly, the cement plant would not pose a serious health risk to those in the surrounding area since it would not exceed negligible emissions levels of carcinogenic substances, as set periodically by the EPA Administrator.

However, the Waterfront South community has much about which to be concerned. Like many other predominantly minority

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1 This issuance came exactly one year after the St. Lawrence Cement Company had received preliminary authorization to begin constructing the facility at its own risk while the permit review process was underway. New Jersey law sanctions a permit applicant to begin construction once its application is "administratively complete." N.J. ADMIN. CODE tit. 7, § 27-8.24(a)(1) (2002).


and low-income communities across the country, Waterfront South is host to an inordinate amount of factories, sewage plants, incinerators and other industrial facilities. Arguably, the primary reason for this unjust result is that the disparity in industrial siting drives down these communities' property values, and in turn, entices companies seeking cheap land on which to construct facilities to apply for permits.

This so-called disparate impact does not discount the inherent discrimination within the state agencies reviewing the permit applications. As an ever-developing body of scientific studies reveals, risk assessment in communities burdened with industrial sites cannot accurately be conducted on an individualized, factory-by-factory basis, as this overlooks the hazards of cumulative risk. Definitive "proof" of the correlation between cumulative environmental risk and the disparity in health statistics between white and minority communities remains elusive; nonetheless, much research is currently being conducted to provide this needed ammunition for environmental justice advocates.

Far from illusory, this concern spurred the development of the legal side of the environmental justice movement, spearheaded by lawsuits challenging states' permitting decisions on an overall equal protection basis. The plausible types of legal challenges have been significantly narrowed through time, as I will briefly recount in the following sections. However, the Supreme Court recently recognized that a state entity's "deliberate indifference" to its responsibilities to

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4 Based upon the 1990 Census, which provides the most accurate demographic statistics for the period during which St. Lawrence's permits were pending, 91% of the community's residents were persons of color (63% African American and 28.3% Hispanic) and over 50% of the residents lived at or below the federal poverty level. Camden County, as a whole, is 75.1% non-Hispanic white. See S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 459 (D.N.J. 2001) ("S. Camden I") (citing the 1990 census).

5 Id.


7 See generally Ken Sexton, Sociodemographic Aspects of Human Susceptibility to Toxic Chemicals: Do Class and Race Matter for Realistic Risk Assessment?, 4 ENVTL. TOXICOLOGY & PHARMACOLOGY 261 (1997) (arguing that the EPA does not adequately account for the increased susceptibility to acute and chronic illness acquired in communities shouldered with heavy industry).


9 See infra Part I.A (discussing several of the initial constitutional challenges to perceived environmental inequity).
preclude instances of discrimination, albeit in the school sexual harassment context, may rise to the equivalent of intentional discrimination. Thus, there may be hope of resurrecting equal protection claims against industrial siting decisions using a state agency’s deliberate indifference in not conducting a thorough—and EPA-mandated—investigation of a community’s cumulative health risk and demographic background.

In Part I, I briefly examine the early equal protection challenges to state and local government industrial siting decisions before environmental justice became a prominent national issue. These early challenges provide insight into the prospects for environmental justice equal protection (and statutory civil rights) actions and the strategies that may prove most effective.

In Part II, I discuss the current developments in federal and state responses to environmental equity obligations under the civil rights regulatory framework. The degree of federal and state accountability for failure to address environmental justice concerns and implement procedural guidelines will weigh heavily upon the future viability of equal protection intentional discrimination claims.

In Part III, I evaluate the potential application of the “deliberate indifference” theory of liability as both supplementary and principal support for fact-intensive claims of intentional discrimination by state agencies in industrial siting. While the “deliberate indifference” theory has been developed by the Supreme Court mostly in the context of Title IX school sexual harassment claims, there is a solid legal and practical basis for applying this approach to the environmental justice context. When state environmental protection agencies knowingly ignore their responsibility to evaluate the impact of their decisions on minority communities, they deliberately choose to ignore the great potential for a discriminatory disparate impact on an overburdened, at-risk community.

I. THE EQUAL PROTECTION CLAUSE AND ENVIRONMENTAL JUSTICE

The principles of the Equal Protection Clause of the Fourteenth Amendment have provided the common thread by which the envi-

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10 See Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (holding a school district liable for damages under Title IX under the theory of “deliberate indifference” for not adequately responding to actual notice of peer harassment); see also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (reasoning that a plaintiff may recover damages on a “deliberate indifference” theory if a school board had sufficient knowledge of a teacher’s harassment of a student and did not act on this knowledge).

11 See Davis, 526 U.S. at 629 (applying the theory to peer harassment); see also Gebser, 524 U.S. at 274 (applying the theory to teacher-student harassment).

12 Section 1 of the Fourteenth Amendment provides, in relevant part:
The environmental justice movement has been connected. The limited prospect of success in the courts once again has brought environmental justice litigants back to satisfying the intentional discrimination requirement of the Equal Protection Clause.

A. Early Equal Protection Challenges to Siting Decisions

Most of the early equal protection challenges to state environmental protection agencies' siting decisions ultimately failed to clear the intentional discrimination hurdle of the Supreme Court's doctrinal approach to equal protection lawsuits. The primary obstacle in proving intentional discrimination in this context is the inherent complexity of siting decisions: namely, the many scientific and economic factors that a state environmental protection agency can claim motivated their decision rather than racial animus. However, given the Court's present approach to Title VI environmental discrimination causes of action after Alexander v. Sandoval—through the same limited intent-based discrimination framework—it is instructive to examine these cases for insight into the factors courts require in their analysis of discriminatory intent.

Several circuit courts of appeals and district court decisions in the 1980s and early 1990s, when the environmental justice movement

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All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

13 The Supreme Court will not apply strict scrutiny analysis to a statute unless the aggrieved plaintiffs can prove both a discriminatory impact and a discriminatory intent. See Washington v. Davis, 426 U.S. 229, 242 (1976) ("Standing alone, [disproportionate impact] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."). Though in the environmental justice context courts are examining state siting decisions rather than statutes, courts examine the state action under the same conjunctive test and require a showing of intentional discrimination.


15 532 U.S. 275 (2001) (proscribing the use of regulations enacted pursuant to Title VI of the Civil Rights Act as a basis for private causes of action).

16 There has been much scholarship about these cases in light of the seeming dead-end they spelled for pure equal protection challenges to environmental injustice. See, e.g., Colin Crawford, Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits, 74 B.U.
was still in its embryonic stages,\textsuperscript{17} highlight the difficulty of inferring discriminatory intent within a state agency charged with making difficult administrative policy decisions.\textsuperscript{18}

These lawsuits were all brought after the Supreme Court's decision in \textit{Village of Arlington Heights v. Metropolitan Housing Development} L. REV. 267, 279–91 (1994) (discussing the failed efforts to mount equal protection challenges specific to industrial siting); Richard J. Lazarus, \textit{Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection}, 87 Nw. U. L. REV. 787, 831–33 (1993) (specifying cases in which equal protection litigation theories similarly failed); Peter L. Reich, \textit{Greening the Ghetto: A Theory of Environmental Race Discrimination}, 41 U. Kan. L. REV. 271, 290–94 (1992) (suggesting more generally the inadequacy of federal law in addressing contentions of environmental race discrimination); James H. Colopy, \textit{Note, The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964}, 13 STAN. ENVTL. L.J. 125, 147–48 (1994) (discussing how equal protection challenges fail the demanding discriminatory intent standard despite significant pieces of evidence that suggest racial bias); Rachel D. Godsil, \textit{Comment, Remedying Environmental Racism}, 90 MICH. L. REV. 394, 410–16 (1991) (discussing how the establishment of intent by plaintiffs in environmental racial discrimination cases has become an onerous burden of proof). However, because \textit{Alexander v. Sandoval} once again limits environmental justice litigants to proving intentional discrimination, see \textit{supra} note 15, a brief discussion of the pitfalls in these cases is central to constructing an inferential strategy based on "deliberate indifference," see \textit{infra} Part III (analyzing the salience of the deliberate indifference theory as a strategy in equal protection challenges).

\textsuperscript{17} The inequity of discriminatory siting emerged on a national scale in 1987 through a study released by the United Church of Christ Commission for Racial Justice, called \textit{Toxic Wastes and Race: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites}, which maintained that race rather than income was the prime correlative characteristic in industrially overburdened communities. See JAMES P. LESTER ET AL., \textit{ENVIRONMENTAL INJUSTICE IN THE UNITED STATES: MYTHS AND REALITIES} 2 (2000) (citing the report for its efficacy in bringing attention to the fact that disproportionate numbers of polluting facilities were located in minority areas); see also ERIC PEARSON, \textit{ENVIRONMENTAL AND NATURAL RESOURCES LAW} 195 (2002) (discussing the origins of the environmental justice movement). However, the environmental justice movement did not garner broad governmental support until President Clinton's Executive Order called attention to the issue in 1994. \textit{See Exec. Order No. 12,898, 3 C.F.R. 859 (1994), reprinted as amended in} 42 U.S.C. § 4321 (1994) (addressing environmental and human health conditions of minority communities and encouraging federal agencies to bolster their efforts to protect public health).

\textsuperscript{18} But see, e.g., Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986) (affirming district court finding of intentional discrimination in lack of adequate maintenance of the streets and storm drainage system in a minority community); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983) (affirming district court finding that city council intentionally discriminated against a primarily minority sector of the city by not providing the same level and quality of maintenance of the streets and water distribution system in that area as compared to other parts of the city). However, the inequitable maintenance provisions found unconstitutional in Dowdell and Ammons, the nature of which provided statistical evidence of a systematic program to favor white sectors of the city, present a different empirical framework than that of industrial siting decisions. Though the two issues are closely related, courts have been reluctant to infer as much intent from more isolated decisions of where to permit industrial entities as from systematic municipal programs. \textit{See Luke W. Cole, Environmental Justice Litigation: Another Stone in David's Sling}, 21 FORDHAM URB. L.J. 523, 537–38 (1994) (discussing the analogies that can be drawn between these closely related discrimination concepts, despite courts' different treatment of them); Lazarus, \textit{supra} note 16, at 833–34 (discussing how uniformly opposed to equal protection challenges the rulings of high courts have been, despite the rulings in favor of such challenges in analogous municipal provisions cases).
Corp. laid out the factors courts should consider when evaluating an inference of intentional discrimination short of a "smoking gun." The Court established five principal areas of focus: (1) "[t]he impact of the official action[,] whether it 'bears more heavily on one race than another;' (2) whether "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face;" (3) whether "[t]he historical background of the decision . . . reveals a series of official actions taken for invidious purposes;" (4) whether there were "[d]epartures from the normal procedural sequence" or "[s]ubstantive departures" in the decision-making process; and (5) whether the "legislative or administrative history" behind the decision reveals discriminatory purpose.

The main inferential thrust of the early equal protection challenges to industrial siting decisions focused on the first three factors, relying primarily on disparate impact statistics highlighting the disparity in the siting of landfills between minority communities and white communities. The minority plaintiffs in Bean v. Southwestern Waste Management Corp. presented statistics detailing the minority composition of areas surrounding waste sites in Houston in order to establish a pattern of discriminatory siting and a historical tendency of Texas's Department of Health to site waste dumps in minority communities. The plaintiffs' motion for a preliminary injunction failed primarily because the statistics they presented were flawed in

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20 If there is actual proof of a racially discriminatory purpose, a court will approach the state action under a strict scrutiny analysis even without first examining the Arlington Heights factors in depth. See id. ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [to the defendant] is no longer justified."); see also Alice Kaswan, Environmental Laws: Grist for the Equal Protection Mill, 70 U. COLO. L. REV. 387, 420 (1999) (noting that even absent a disparate impact, an action motivated by an invidious purpose could be considered discriminatory). Finding such invidious discrimination in the context of industrial siting is extremely unlikely given the technical nature of the decision itself and the improbability that the decision can be traced to a particular racist person or act. See Yang, supra note 14, at 156 (describing the myriad of factors that tend to undermine a finding of specific intent).
21 Arlington Heights, 429 U.S. at 266 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).
22 Id.
23 Id. at 267.
24 Id.
25 Id. at 268.
26 See Kaswan, supra note 20, at 420-23 (discussing early challenges to perceived industrial-siting inequities); Lazarus, supra note 16, at 830-31 (discussing cases in which plaintiffs primarily advanced equal protection challenges on grounds of discriminatory effect).
27 482 F. Supp. 673 (S.D. Tex. 1979). Bean was later affirmed by the Fifth Circuit. 780 F.2d 1038 (5th Cir. 1986).
28 482 F. Supp. at 679.
their temporal accuracy, their geographical unit of measurement, and their overall legitimacy.\footnote{The court reasoned that the data sets providing the percentages of minority residents in communities containing waste sites "on the day that the sites opened" revealed that more than half the communities were actually populated mostly by non-minority residents. Presumably, the plaintiffs based their argument on demographic data taken at the time of the lawsuit. Id. at 677. The court examined the available data by census tract whereas the plaintiffs presented their data by neighborhood demographics. Id.; see Kaswan, supra note 20, at 435 (describing the court's consideration of the historic background of the neighborhood as suggesting discriminatory intent).}

Similarly, minority plaintiffs in \textit{R.I.S.E. v. Kay}\footnote{706 F. Supp. 880 (M.D. Ga. 1989).} tried to use statistics about the high minority population surrounding three existing landfills and surrounding the proposed landfill they were challenging in order to infer a discriminatory siting pattern and a historical background of racial animus by the County Board of Supervisors.\footnote{Id. at 884 ("[T]his court is convinced that the Commission's decision to approve the conditional use in question was not motivated by the intent to discriminate against black persons.").} The plaintiffs' statistics contended that of the three existing landfills in the county, the estimated minority population surrounding two of them at the time of siting was nearly 100\% while the third was between 90\% and 95\%.\footnote{Id. at 884–85. Accordingly, the court rejected their arguments regarding a pattern of discrimination and a historical background of racial animus. Id.} While the court was moved by this great disparity,\footnote{Id. at 1148.} the plaintiffs' equal protection challenge ultimately failed to sufficiently infer intentional discrimination because it was deficient under the \textit{Arlington Heights} evidentiary analysis.\footnote{The court noted that "the historical placement of landfills in predominantly black communities provides 'an important starting point' for the determination of whether official action was motivated by discriminatory intent." Id. at 1149 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).}

In a third equal protection case of the time, \textit{East Bibb Tiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission},\footnote{768 F. Supp. 1144 (E.D. Va. 1991).} the minority plaintiffs presented a more complete argument against the siting of a landfill in terms of the \textit{Arlington Heights} factors, yet failed to substantively support most of their five inferential points of contention.\footnote{Id.} Most notably, their statistical evidence manifesting a majority population of blacks in the landfill's proposed census tract was directly undermined by statistics that the only other approved landfill in the county was in a predominantly white census tract.\footnote{Id. at 1148.} Further, the court rejected plaintiffs' unsubstantiated claims that
procedural irregularities and administrative testimonials implied that race influenced the County Commission’s siting decision, characterizing these arguments in general as reaches and "without merit."³⁸

B. The Abandonment of the Equal Protection Clause

These and other equal protection challenges during the early years of the environmental justice movement failed to sufficiently infer discriminatory animus in county and state siting boards.³⁹ Following R.I.S.E. v. Kay,⁴⁰ the general consensus among environmental justice scholarship was that the Equal Protection Clause in the industrial siting context was a dead-end because evidence primarily of statistical disparities in minority communities would not be sufficient ammunition.⁴¹ Luke W. Cole, an attorney for the Center on Race, Poverty and the Environment, has noted that “because of the difficulty of proving discriminatory intent such claims are at the very bottom of [the] litigation hierarchy. While one may wish to bring a Constitutional claim for its political value, it should only be brought alongside environmental and statutory civil rights claims.”⁴² Richard Lazarus, a Professor of Law at Georgetown University, has suggested that courts may be reluctant, in general, to intrude on state agencies and judicially shift the burdens of environmental hazards even if a highly inferential base of data, administrative history, and procedural irregularities highlight discrimination as a motivating factor.⁴³

In essence, the perceived equal protection dead-end led directly to a proliferation of scholarship on alternative litigation strategies through the civil rights laws,⁴⁴ as well as to actual statutory and regula-

³⁸ Id. at 885–87.
³⁹ See, e.g., Kaswan, supra note 20, at 437–40 (discussing in depth Terry Properties, Inc. v. Standard Oil Co., 799 F.2d 1523 (11th Cir. 1986), which held that plaintiffs’ factual assertions failed to infer discriminatory purpose as a motivating factor in a Roanoke, Alabama manufacturing facility siting decision); Lazarus, supra note 16, at 832 (discussing NAACP v. Gorsuch, No. 82-768-GIV-5 (E.D.N.C. Aug. 10, 1982), which held that plaintiffs’ mainly statistical evidence did not prove any inference of discriminatory purpose in the siting decision of a disposal facility).
⁴¹ See supra note 16 (providing examples of such scholarship).
⁴² Cole, supra note 18, at 541 (footnote omitted).
⁴³ Lazarus contends that courts are not only concerned about judicial restraint in this policy context, but also at offending the “quality of the environment enjoyed by those in the community wielding great political and economic influence.” Lazarus, supra note 16, at 834.
⁴⁴ See Crawford, supra note 16, at 291 (discussing alternative strategies that practitioners and academics developed in reaction to failed equal protection challenges, including Title VI lawsuits). See generally Cole, supra note 18, at 526 (creating a hierarchy of legal tools, including environmental and civil rights laws); Lazarus, supra note 16, at 834–37 (discussing the use of Title VI of the Civil Rights Act of 1964); Mank, supra note 14, at 11–13 (arguing, before Alexander v. Sandoval precluded private rights of action through Title VI regulations, that environmental justice claims should focus on EPA Section 602 disparate impact regulations).
However, as Alice Kaswan, a Professor of Law at the University of San Francisco, points out, "a wholesale abandonment of the equal protection approach is premature. The inquiry is highly fact-specific." Kaswan’s cautiously optimistic view derives from her pragmatic, yet rather simple, approach to proving an inference of intentional discrimination under the Arlington Heights five-point schema:

Essential to an equal protection claim are the facts—facts about disparate impacts, about historical circumstances, about decision-making processes, about the rules and procedures guiding decisions, and about what decision makers have said and done in making their decisions. Where environmental laws apply to the decision in question, as is frequently the case in the siting of an undesirable land use, they have the potential to generate and reveal many relevant facts.

Environmental laws, Kaswan explains, establish substantive or procedural requirements and mandate site-specific or regional investigations into environmental or demographic concerns. Ultimately, as Kaswan’s primary argument stresses, facts about compliance, or rather non-compliance, with these requirements provide the traps necessary for a successful inference of intentional discrimination under Arlington Heights, “the environmental laws can thus provide the ‘grist’ for the equal protection mill.”

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45 See, e.g., Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997) (holding that plaintiffs’ disparate impact private cause of action under 42 U.S.C. § 602, challenging the Pennsylvania State Department of Environmental Protection’s siting of a waste facility, was valid), vacated as moot, 524 U.S. 974 (1998); S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 145 F. Supp. 2d 505 (D.N.J. 2001) (“S. Camden II”) (implying a private right of action under the EPA’s Section 602 regulations through 42 U.S.C. § 1983 after Alexander v. Sandoval precluded the direct route), rev’d, 274 F.3d 771 (3d Cir. 2001), cert. denied, 536 U.S. 999 (2002); S. Camden I, 145 F. Supp. 2d 446 (D.N.J. 2001) (implying a private right of action under the EPA’s Section 602 regulations before this direct avenue was precluded by Alexander v. Sandoval). For purposes of this Comment, the present state of the law after the Supreme Court denied certiorari to the South Camden plaintiffs in 2002 is more important than an examination of the rejection of private causes of action under Title VI’s implementing regulations. Nonetheless, a brief discussion of the development of the regulatory background, which facilitated the rise and fall of the Section 602 private causes of action, appears infra Part II, as such is essential to my discussion of the non-responsiveness of state agencies and their “deliberate indifference” to their policy-making responsibilities in industrial siting.

46 Kaswan, supra note 20, at 456 (considering the state of future equal protection claims after reviewing in depth the previously cited equal protection environmental justice claims).

47 Id.

48 Id. Such requirements, as will be highlighted infra Part II, establish the framework in which a state agency’s “deliberate indifference” to its administrative responsibilities can provide abundant factual background to infer discriminatory intent.

49 Id. at 456–57; cf. Cole, supra note 18, at 526–28 (championing the use of environmental laws in their own right to challenge general environmental infractions).

50 Id. at 456. “Grist” means “something that can be turned to one’s advantage.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 580 (1969).
The federal and state laws defining the notice and comment procedures agencies must follow when assessing potential pollution levels and implementing a permit for an industrial facility are well-established law. However, procedural accountability in assessing inequitable siting on a state-by-state basis is still an unattained goal of the environmental justice movement. The next part briefly examines how state environmental-justice procedural requirements have largely not developed and how the *South Camden* case highlights the difficulty and importance of securing these procedural requirements as true "environmental laws" under the Kaswan schema.

II. THE STATE OF THE STATES: THE NEED FOR MANDATORY STATE ENVIRONMENTAL JUSTICE PROTOCOLS

As I will discuss in Part III, the potential success of using the "de-liberate indifference" theory to infer intentional discrimination depends greatly upon the continued development of environmental justice protocols at the state level. While the environmental justice movement gained some momentum with President Clinton's Executive Order 12,898 in 1994, the order itself was directed toward and confined to executive agencies, particularly the EPA. The Executive Order indirectly impacted the states by prompting the EPA to make use of Title VI of the Civil Rights Act of 1964, which forbids entities

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51 See Kaswan, supra note 20, at 458-59 (highlighting examples of these laws); see, e.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2003) (establishing administrative procedures for federal agencies considering a siting decision that will have a significant impact upon the environment).

52 The EPA's Title VI regulations enacted pursuant to Section 602 of the Civil Rights Act of 1964 mandate that each state receiving federal funding enact a program to comply with the equality principles of Title VI. 28 C.F.R. § 42.410 (2004). However, the EPA's enforcement of this regulation, discussed infra Part II.A, is one of the main challenges facing the current stage of the environmental justice movement. See Yang, supra note 14, at 221-27 (arguing that much of the failure of the EPA to monitor state programs springs from its own institutional uncertainty of how to approach environmental justice concerns).


55 See Memorandum from President Clinton on Environmental Justice, to the Heads of All Departments and Agencies (Feb. 11, 1994), reprinted in CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 396-97 (2002) (directing the federal agency heads to take specific actions to implement the Executive Order); Mank, supra note 14, at 3 (noting that the Executive Order applied only to agencies and gives citizen no enforcement power).

56 See Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2003) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in,
receiving federal funding from discriminating on the basis of race, color, or national origin. However, as I discuss below, the EPA's regulatory response in directing state environmental equity investigations has been widely criticized, and, not surprisingly, states have been reluctant to comply with the EPA's nudges.

A. The Lingering Confusion of the Draft Guidances

The EPA enacted regulations pursuant to Section 602 of the Civil Rights Act of 1964 in part to ensure that recipients of federal funds would not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this [p]art applies on the grounds of race, color, national origin, or sex.

The EPA may enforce such disparate impact regulations by cutting off federal funding to (or by taking other remedial action against) a program or activity that it finds violates its specific commands.

To facilitate its enforcement of the disparate impact regulations, the EPA developed an Office of Civil Rights ("OCR") in 1994, which eventually promulgated a set of guidelines for the EPA and state agencies to follow in implementing the disparate impact regulations. Known collectively as the Draft Guidances, these regulatory

be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Section 602 of the Civil Rights Act permits federal agencies which disperse federal funds to other programs or activities to issue regulations to effectuate the goals of Section 601, in essence conditioning the funding. Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2003); see also 40 C.F.R. § 7.80 (2000) (prohibiting discrimination in programs receiving federal assistance from the EPA).

For the purposes of this Comment, the distinction between the reach of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 is not implicated. The actors making the industrial siting decisions—namely, state environmental protection agencies—fall under the ambit of both provisions: they are state actors under the Fourteenth Amendment and they are virtually all funded by the federal government.

See Worsham, supra note 54, at 650 (explaining the process by which the EPA may sanction a funding recipient). See generally 40 C.F.R. § 7.130 (2000) (outlining EPA nondiscrimination regulations). As has been noted, the EPA's Section 602 regulations do not imply a private cause of action. See Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that Title VI implementing regulations cannot be the basis for a private cause of action); Bradford C. Mank, Using § 1983 to Enforce Title VI's Section 602 Regulations, 49 U. KAN. L. REV. 321, 363–64 (2001) (arguing that section 1983 of the Civil Rights Act can serve as a basis for a disparate impact lawsuit before this avenue was closed by the Third Circuit in South Camden).

See Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000) [hereinafter Draft Guidances] (suggesting a mode for state and local recipients of federal funding to develop approaches and activities that would address Title VI concerns (Draft Recipient Guidance) and describing procedures for EPA staff
guidelines provide procedural suggestions regarding two separate phases of the enforcement process: (1) the EPA’s investigation of private complaints it receives from citizen groups challenging states’ issuance of operating permits to industrial facilities (the Internal Guidance); and (2) states’ administrative, preventative protocols for investigating the demographics of and potential cumulative risk in a community already burdened by industry (the External Guidance). Released on June 27, 2000, the Draft Guidances replaced a highly criticized Interim Guidance that the EPA had promulgated in 1998 to aid the EPA OCR in evaluating citizen complaints. However, these guidances have yet to be finalized and do not set mandatory procedures that the EPA or the states must follow.

The Internal Guidance sets out a six-part evaluation of a citizen’s complaint to determine whether an alleged disparate impact is significant enough to warrant a full-scale investigation. The guidance then provides for an evidentiary phase and a rebuttal phase, during which a state agency can put forth alternative reasons for its decision to site a particular industrial entity. If the EPA ultimately finds a state agency has violated the disparate impact regulations by ignoring less discriminatory alternative sites, it may take such remedial action as it deems necessary to bring the agency into compliance, including cutting off federal funding upon congressional approval.

While the EPA has been relatively committed to following the Internal Guidance procedures in responding to complaints from aggrieved citizen groups, the efficacy of this administrative scheme is to use in investigations of Title VI administrative complaints (Draft Revised Investigation Guidance); see also Yang, supra note 14, at 162–69 (outlining in depth the policy guidelines and suggestions of the guidances).

61 See Yang, supra note 14, at 162–69.

62 U.S. ENVT. PROT. AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998), available at http://www.epa.gov/civilrights/docs/interim.pdf. This guidance was criticized primarily for its simplicity, lack of a clear investigative procedure, and ambiguity regarding essential definitions, such as what constitutes a sufficient “disparate impact.” See Cheryl Hogue, Comments on Title VI Guidance Seek Clearer Definitions, Input from More Parties, 29 ENV'T REP. 234 (1998) (discussing various problems with the EPA’s Title VI guidance); Worsham, supra note 54, at 651–56 (chronicling the complaints of different entities).

63 See Draft Guidances, supra note 60, at 39,651 (addressing the non-obligatory nature of the guidances).

64 For an in-depth discussion of this preliminary process, see Yang, supra note 14, at 165–69. Essentially, the EPA’s OCR evaluates and weighs the demographics of the affected population, the type of impact the facility would have, and its potential adverse effects.

65 Id.

66 Id.

67 See generally Denis Binder et al., A Survey of Federal Agency Response to President Clinton’s Executive Order 12,898 on Environmental Justice, 31 ENVT. L. REP. 11,133 (2001) (discussing the EPA’s good-faith response to rising environmental justice concerns as compared to other federal agencies).
dubious. As of November 21, 2003, only 17 of 143 administrative complaints filed since 1993 had met the EPA's jurisdictional and substantive criteria to warrant a preliminary investigation.\textsuperscript{68} Of these complaints "accepted" for investigation, only one, involving the Select Steel facility in Michigan, has been adjudicated on the merits by the EPA.\textsuperscript{69} Most of the other accepted claims are steered toward alternative dispute resolution or are dismissed on other grounds, most likely on the basis of a state agency rebutting the complainants' allegations of discrimination with alternative technical data.\textsuperscript{70}

The reasons for this underlying sluggishness of the EPA's administrative civil rights process abound. First, the inherent technicality of any administrative process, particularly one dealing with complex risk assessments and the intermingling of numerous pollutant sources, is at odds with the more qualitative precepts of the civil rights movement.\textsuperscript{71} Further, the EPA has espoused a very narrow view of what constitutes an "adverse impact" caused by a particular facility; it will consider only emission-related pollution levels rather than the many other pollutant sources that arise in the daily operation of an industrial plant (i.e., through potential accidents at a plant or from chronic-noncompliance of a facility).\textsuperscript{72} The application of the "adverse impact" criteria is equally daunting, as the Draft Guidance provides that the EPA generally must find that the adverse effects upon a particular community are at least twice as large as upon a relevant comparison community.\textsuperscript{73}

There are also more practical problems with the procedural approach of the Internal Guidance to the investigation of industrial siting complaints. While it is rather easy to file a complaint with the


\textsuperscript{70} See OCR Title VI Complaints, supra note 68 (listing complaints filed and their status). See generally Yang, supra note 14, at 168-69 (discussing the process for providing rebuttal evidence).

\textsuperscript{71} See Yang, supra note 14, at 198-99 (illustrating the problem of using quantitative analysis on a civil rights issue).

\textsuperscript{72} See Eileen Guana, EPA at 30: Fairness in Environmental Protection, 31 ENVTL. L. REP. 10,528, 10,540-41 (2001) (discussing the EPA's efforts to combat environmental inequity and the efficacy of the draft guidances).

\textsuperscript{73} See Bradford C. Mank, The Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?, 30 ENVTL. L. REP. 11,144, 11,146 (2000) (discussing the development of the draft guidances and potential improvements that could be made).
EPA’s OCR, a complainant is essentially severed from the investigation process once OCR receives his grievance. Thus, it is a non-adversarial process in which the EPA conducts an investigation independent of the aggrieved party. The original complainants do not have an opportunity to respond to the EPA’s finding unless the state recipient being investigated is found liable and requests an appeal. Furthermore, the original complainants do not even have the right to appeal the EPA’s decision to an administrative law judge if the EPA finds in the state recipient’s favor.

Thus, seeking an administrative resolution to a discriminatory industrial siting through the EPA’s OCR has proven to be a tenuous route. The success of the alternative course—bringing a private cause of action in federal court—will much depend on how the states respond to the EPA’s External Guidance.

B. The Status and Importance of State Environmental Equity Protocols

While the EPA’s internal system of addressing complainants’ claims has its pitfalls, the future development of states’ programs for assessing potential disparate impacts is of more importance to environmental justice litigants. As with the Internal Guidances of the EPA, the states receiving federal funds are not tied to the protocols espoused in the EPA’s External Guidance. However, the EPA provides funding to all state environmental agencies, and thus they must comply with the edicts of its disparate impact regulations. The viability of using the “deliberate indifference” evidentiary framework in equal protection challenges to state industrial siting decisions will depend on how meticulously and how faithfully states conform their procedures to meet this broad requirement.

The External Guidance speaks directly to the states in suggestive terms. The purpose section provides:

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74 A complainant does not need legal representation to file such a complaint, and the EPA’s website directs a potential complainant on how to prepare a statement for investigation. See Office of Civil Rights, U.S. Envtl. Prot. Agency, How to File a Title VI Complaint (providing instructions for filing a complaint with the OCR), at http://www.epa.gov/civilrights/filecmplnt.htm (last updated Aug. 11, 2004).

75 See Guana, supra note 72, at 10,544 (describing the role, or lack thereof, of complainants in the grievance process).

76 Id.

77 Id.; see also Mank, supra note 73, at 11,159 (noting complainants’ lack of right to appeal).

78 See supra note 60 (discussing guidance recommendations of the EPA to recipients of federal funding).

79 See 40 C.F.R. § 7.35(c) (2000) (prohibiting discrimination among funding recipients); Jacalyn R. Fleming, Justifying the Incorporation of Environmental Justice into the SEQRA and Permitting Processes, 6 ALB. L. ENVTL. OUTLOOK J. 55, 60 (2002) (noting that the EPA provides funding to all state environmental departments as well as many local environmental agencies).
[The draft guidance] provides a framework to help you address situations that might otherwise result in the filing of complaints alleging violations of Title VI of the Civil Rights Act of 1964 . . . and EPA's Title VI implementing regulations. It provides a framework designed to improve your existing programs or activities and reduce the likelihood or necessity for persons to file Title VI administrative complaints with EPA alleging either: (1) discriminatory human health or environmental effects resulting from the issuance of permits; or (2) discrimination during the permitting public participation process.80

The External Guidance proposes ideas regarding administrative staff training, effective public participation approaches, demographic and adverse impact research techniques, and intergovernmental communication.81 The non-obligatory, broad strokes of this guidance (as opposed to the more detailed framework of the Internal Guidance) has left much to the imagination, and time frame, of the states.

Some states have formed environmental justice commissions within their environmental protection agencies and have begun the process of drafting protocols.82 As of 2000, thirty-five states had information available to the public about their efforts to distribute industrial facilities in a socially conscientious manner and about their programs to accomplish this goal.83 However, the limited information available shows that the level of development of these programs varies dramatically, with California being the only state to have actually passed legislation mandating certain permitting standards.84 Most of the states with information available have delegated responsibility for drafting protocols to advisory work groups, rather than to their state legislatures.85

Further, a report released by the Public Interest Law Center of Philadelphia on December 8, 2003 bears even less optimistic results. The Law Center surveyed all fifty states about their progress in implementing environmental justice protocols in their industrial per-

80 See Draft Guidances, supra note 60, at 39,655.
81 Id. at 39,657.
83 See generally HILLARY GROSS ET AL., ENVIRONMENTAL JUSTICE: A REVIEW OF STATE RESPONSES (2000) (discussing individual state programs to combat environmental inequity, and noting that the remainder of the states do not have available information on such programs), available at http://www.uchastings.edu/site_files/environjustice.pdf.
84 Id. at 12.
85 See, e.g., supra note 82 (providing examples of state agencies' drafting of protocols).
mitting processes.\footnote{Press Release, Public Interest Law Center of Philadelphia, EPA Refuses to Enforce Civil Rights Law (Dec. 8, 2003) (on file with author).} Of the thirty-one states that responded to the survey, nine reported that they had an environmental justice advisory council firmly in place.\footnote{Id.} However, of those nine states, only three had actually drafted and implemented protocols (Connecticut, Illinois, and New York).\footnote{Id.} Connecticut and Illinois, along with Massachusetts, which does not yet have specific protocols, were the only three states to report that they have actually launched investigations into some of their own permitting decisions.\footnote{Id.}

This lack of progress is not surprising in light of the non-obligatory nature of the Draft Guidances. However, complying with the EPA’s disparate impact regulations enacted pursuant to Section 602 of the Civil Rights Act of 1964 is mandatory.\footnote{See 28 C.F.R. § 42.410 (2004) (requiring each state agency administering a continuing program that receives federal financial assistance to establish a Title VI compliance program).} Thus, as the EPA funds the majority of states that have yet to show any progress or willingness to observe these regulations, it implicitly ratifies, and perpetuates, these states’ noncompliance.\footnote{See supra text accompanying notes 86–89 (explaining that although the majority of states grossly fail at complying with civil rights law, the EPA has not investigated this noncompliance, nor has the agency imposed penalties or cut off funding).}

Furthermore, there is arguably an inherent reluctance within many states to employ the manpower and resources necessary to augment their environmental regulatory processes with an additional set of criteria. When the EPA first promulgated its Interim Guidance in 1998, some states revealed an underlying frustration with this “new” wave of obligations. The Illinois Environmental Protection Agency classified the guidance as “yet another unfunded federal mandate to state and local governments.”\footnote{Hogue, supra note 62, at 235.} The Wisconsin Department of Natural Resources aired similar concerns that complying with civil rights considerations would undermine environmental protection overall.\footnote{See id. at 236 (discussing property rights and the problems with denying permit renewals); see also U.S. CONST. amend. V (stating that private property cannot be taken for public use without just compensation).} Furthermore, a number of states have raised fiduciary concerns, worrying that if they were to deny an existing business a renewal permit because of environmental equity constraints, they would have to provide such a business compensation under the Takings Clause of the Constitution.\footnote{See id. (explaining the department’s concern that it would have to reallocate resources to comply with the guidance, which could lead to lower levels of environmental protection).} Clearly, states would rather not
have to worry about civil rights on top of the already complex data involved in environmental regulation.

Whether state environmental protection agencies will begin to take the EPA's disparate impact regulations more seriously within the current framework of non-accountability is a difficult question to answer. Certainly, the EPA needs to exert some external pressure upon the states to implement protocols or else risk losing their federal funding in the environmental protection sphere. If such threats do not work, the EPA should consider making certain aspects of its Final Guidances, when released, mandatory upon the states. It is not likely that the EPA would preempt the states in this otherwise very local policy area; however, this may be the only way to force the states to implement concrete procedures that would allow citizens an opportunity to monitor the states' civil rights compliance and to bring actions in court when such procedural safeguards are skirted.

III. THE EQUAL PROTECTION CLAUSE REVISITED: "DELIBERATE INDIFFERENCE" AS INFERENTIAL EVIDENCE

_South Camden Citizens in Action v. New Jersey Department of Environmental Protection_, now in its third reincarnation, stands to set the tone for the future prospects of environmental justice causes of action. For present purposes, the history of the lawsuit's setbacks, while significant, is relevant only in the fact that it narrowed and focused the plaintiffs' litigation strategy back to an equal protection type inten-

95 My conversations about the potential of the "deliberate indifference" theory with Jerry Balter of the Public Interest Law Center of Philadelphia, for whom I worked in the summer of 2003, inspired my notions about and research on the potential of this legal approach. However, while Mr. Balter advocates "deliberate indifference" as an alternative (or effective equivalent) to proving the intentional discrimination requirement in Title VI actions, I will address the potential of the theory as inferential evidence in the framework of constitutional equal protections claims.


97 The present action is currently in the discovery phase. It is significant to note that while the plaintiffs in the original phase of the lawsuit brought an equal protection claim, the New Jersey District Court never addressed the case on the merits because it found for the plaintiffs on their Section 602 disparate impact claim. _S. Camden I_, 145 F. Supp. 2d at 472.

98 For a thorough discussion of the plaintiffs' travails in trying to apply the Title VI civil rights laws and regulations to their advantage, see generally Lisa S. Core, Comment, _Alexander v. Sandoval: Why a Supreme Court Case about Driver's Licenses Matters to Environmental Justice Advocates_, 30 B.C. ENVTL. AFF. L. REV. 191, 210-13, 228-36 (discussing the rise and fall of the use of the EPA's Section 602 disparate impact regulations, both directly and through the civil rights statutory private right of action provision, 42 U.S.C. § 1983 (2003), to challenge the siting of the St. Lawrence cement plant by the New Jersey Department of Environmental Protection).
tional discrimination analysis. In brief: the first two favorable district court decisions were vacated by the Third Circuit Court of Appeals because the Supreme Court foreclosed the private use, either through implication or through Section 1983 of the Civil Rights Act, of the EPA's Section 602 disparate impact regulations. Given the necessity of now proving intentional discrimination to succeed on the remaining Title VI claim and the arguably fertile background of circumstantial evidence, the pending case provides a constructive model for examining the potential for use of "deliberate indifference" in equal protection actions.

A. Application of the "Deliberate Indifference" Standard in Statutory Civil Rights Actions

"Deliberate indifference," in the general context of governmental discrimination claims, refers to "an official [in a federally funded program or activity] who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf [and] has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." The Supreme Court first applied the deliberate indifference approach to civil rights actions in Gebser v. Lago Vista Independent School District, a

99 Courts require that plaintiffs bringing a Title VI claim prove that the recipient of the federal funding intentionally discriminated against them, which is the same standard plaintiffs must satisfy to succeed on the merits of an equal protection claim. See Alexander v. Choate, 469 U.S. 287, 293 (1985) (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607-08 (1983)) (holding "that Title VI itself directly reached only instances of intentional discrimination"); see also Worsham, supra note 54, at 645 (explaining that environmental justice cases challenging the permitting of decisions under Section 601 of Title VI must demonstrate intentional discrimination to make a prima facie case); Yang, supra note 14, at 162 (explaining that the Supreme Court has held that Title VI itself only directly reaches constitutionally prohibited intentional forms of discrimination).

100 See S. Camden III, 274 F.3d at 777 (foreclosing the use of 42 U.S.C. § 1983 to bring a lawsuit under the Section 602 regulations); see also Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that there is no private right of action to enforce disparate impact regulations promulgated under Title VI).

101 In a comment in the North Carolina Law Review, Derek Black similarly addresses the use of "deliberate indifference" in the intentional discrimination context. Derek Black, Picking Up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact, 81 N.C. L. Rev. 356 (2002). However, my analysis differs from Black’s hypothesis in that it focuses on an equal protection rather than a Title VI framework, examines the importance of the direction of the environmental justice movement on the potential efficacy of the approach, and discusses how the approach may advance equal protection claims where they have failed in the past.

102 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998); see also Black, supra note 101, at 377 (outlining the four basic elements of a deliberate indifference claim).

103 See Gebser, 524 U.S. at 274 (holding that defendant was not liable for damages under plaintiff's Title IX discrimination suit for lack of sufficient evidence that school board had actual notice of a teacher's harassment of student).
case addressing a plaintiff’s claim for damages under Title IX of the Education Amendments of 1972. The plaintiff, a female high school student, sued the federally funded school district for not adequately investigating claims that her teacher made sexually inappropriate comments in class and carried on an inappropriate sexual relationship with her. The Supreme Court affirmed the district court and Fifth Circuit’s finding that there was insufficient evidence that the school district had constructive or actual knowledge about the improprieties and, thus, could not be held liable under Title IX. However, the Court stated that, under the administrative enforcement scheme of Title IX, if an official with knowledge of a discriminatory problem and the authority to take remedial action fails to remedy the violation, the federally funded entity may be found liable under the deliberate indifference standard.

The Court carefully scrutinized the evidence of the school district’s notice because of the lack of clarity about whether Congress intended for federally funded recipients to be held liable for damages under Title IX. In fact, the school district arguably conceded that, while it could be held liable in general under a deliberate indifference

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104 20 U.S.C. § 1681 (2004). Congress modeled Title IX after Title VI of the Civil Rights Act, prohibiting federally funded programs from discriminating on the basis of sex, and courts have approached the two statutes in a doctrinally similar manner. See Gebser, 524 U.S. at 286 (stating that Title IX is parallel to Title VI); Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979) (“Congress intended to create Title IX remedies comparable to those available under Title VI . . . .”).

105 The teacher initiated a sexual relationship with the student, but the student did not come forward with this information until a police officer discovered the two engaged in sexual intercourse. Parents of other students, however, complained about the teacher’s improper classroom comments to the school’s principal; the principal did not relay this information to the school district’s superintendent. Gebser, 524 U.S. at 278.

106 Id. at 279.

107 The Department of Education has enacted disparate impact regulations pursuant to 42 U.S.C. § 1682, providing guidelines and notice to recipients that it may cut off federal funding if it finds discriminatory actions, much like the EPA’s Section 602 regulations. Id. at 280; see, e.g., 34 C.F.R. § 100.8 (2004) (effectuating the provisions of Title IX).

108 Gebser, 524 U.S. at 290.

109 Id. at 287 (“Our central concern in that regard is with ensuring that ‘the receiving entity of federal funds [has] notice that it will be liable for a monetary award.’” (quoting Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (alteration in original))). Arguably, the Court elevates the requisite level of proof when plaintiffs sue for damages under Title IX rather than for declaratory or injunctive relief. See id. (“[W]hen the Court first recognized the implied right under Title IX in Cannon, the opinion referred to injunctive or equitable relief in a private action.”). This discord in the law derives from the Supreme Court’s interpretation of Civil Rights legislation, including Title VI and Title IX, as part of Congress’s spending power authority rather than its enforcement power under the Fourteenth Amendment. See Deborah L. Brake, School Liability for Peer Sexual Harassment after Davis: Shifting from Intent to Causation in Discrimination Law, 12 HASTINGS WOMEN’S L.J. 5, 15 (2001) (“[W]hile the [Supreme] Court has frequently articulated a notice requirement in claims to recover damages for violations of Spending Clause statutes, it has not been completely clear about the type of notice required.”).
standard, it should not be made to pay damages. Thus, the legitimacy of the deliberate indifference standard in general was not the center of controversy.

The Supreme Court further validated and extended the deliberate indifference approach to discrimination in *Davis v. Monroe County Board of Education.* While dealing with student-on-student harassment rather than teacher-on-student harassment, the Court nonetheless concluded that because the school principal and several teachers were well-informed about the incidences of sexual harassment taking place, the school district could be held liable under a theory of deliberate indifference.

The Court clarified its holding in *Gebser,* explaining that the school district's liability for discrimination "arose . . . from 'an official decision by the recipient not to remedy the violation,'" not from its own active conduct. The Court further explicated the basic logic behind applying the deliberate indifference standard by stating that it makes sense as "a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action." The Supreme Court has applied the deliberate indifference standard in this line of cases as a wholesale theory of liability rather than as an evidentiary indicator of a recipient's discriminatory purpose.

Jerry Balter has advocated utilizing this Title IX application of deliberate indifference in Title VI challenges to state agencies' discriminative practices.

110 The school district's brief states:

[T]he manner in which Title IX is phrased simply determines that a violation of the statute may occur whenever a person is discriminated against on the basis of sex, regardless of the school district's knowledge of the discrimination. But nothing in the language of the statute indicates that a school district must respond in damages for every such violation, regardless of its own knowledge or culpability. *Gebser,* 524 U.S. at 298 n.7 (Stevens, J., dissenting) (quoting Respondent's brief).

111 This is particularly important because, in the context of applying "deliberate indifference" as a piece of evidence in a constitutional environmental justice claim, plaintiffs like those in *South Camden I* may only be suing for declaratory and injunctive relief. *See, e.g., South Camden I,* 145 F. Supp. 2d 446, 450 (D.N.J. 2001) (stating that plaintiffs were seeking injunctive and declaratory relief on their discrimination claims).

112 526 U.S. 629 (1999) (holding a school district liable for damages under Title IX under the theory of deliberate indifference for not adequately responding to actual notice of peer harassment).

113 *Id.*

114 *Id.* (quoting *Gebser,* 524 U.S. at 290). *See generally Brake,* supra note 109, at 7–13 (explaining that schools should be held accountable for their own action (and inaction) in response to harassment by students).

115 *Davis,* 526 U.S. at 644.

116 See *Brake,* supra note 109, at 7–13 (emphasizing that deliberate indifference is a causation analysis rather than a direct discriminatory conduct analysis).
tory industrial siting decisions\textsuperscript{117} on the basis of the Court's similar approach to the respective Civil Rights statutes.\textsuperscript{118} However, a recent Third Circuit Court of Appeals decision has denied the application of a "pure" deliberate indifference standard in the Title VI context.

In \textit{Pryor v. NCAA},\textsuperscript{119} the Third Circuit affirmed the dismissal of a Title VI racial discrimination claim argued on the basis of deliberate indifference, refusing to apply \textit{Gebser} to a Title VI purposeful discrimination case.\textsuperscript{120} The court framed the issue in terms of "merging" the deliberate indifference theory with the intentional discrimination standard for Title VI liability.\textsuperscript{121} The court held that it could not apply the deliberate indifference theory of liability for an omission in the case of the NCAA's actual commission of an act, such as passing Proposition 16.\textsuperscript{122} While it is unclear whether the Supreme Court would be willing to make this jump in the future, the \textit{Pryor} decision does not foreclose using a deliberate indifference theory \textit{within} a claim of intentional discrimination, as opposed to "conflating" the two standards.\textsuperscript{123} The \textit{Pryor} Court actually reversed the district court's dismissal of the plaintiff's intentional discrimination argument, as such is a fact-specific inquiry.\textsuperscript{124} Thus, the underlying logic of the deliberate indifference theory informs that it may provide great evidentiary value in an equal protection challenge of a state agency's discriminatory industrial siting decision.\textsuperscript{125}

This distinction between using deliberate indifference as an independent theory for liability and as an evidentiary piece of a larger puzzle is also important with regard to the relief sought. In \textit{Davis} and \textit{Gebser}, the Supreme Court discussed the validity of a deliberate

\textsuperscript{117} See supra note 95 (discussing my conversations about "deliberate indifference" with Jerry Balter); see also Black, supra note 101, at 376–86 (arguing that the Court's Title IX pure deliberate indifference theory should extend to Title VI environmental justice lawsuits).

\textsuperscript{118} See supra note 104 (explaining how Congress modeled Title IX after Title VI of the Civil Rights Act).

\textsuperscript{119} 288 F.3d 548 (3d Cir. 2002) (holding that plaintiffs could not prevail in Title VI lawsuit against the NCAA for adoption of Proposition 16 on a pure deliberate indifference claim, but remanding to district court on the basis of alternative Title VI intentional discrimination claim).

\textsuperscript{120} The plaintiffs argued that the NCAA's Proposition 16, which elevated the academic requirements for freshman athletes to maintain their scholarships, discriminated against black athletes by intentionally "screening" many of them out. The court also dismissed similar claims brought pursuant to 42 U.S.C. § 12,101 (ADA), and 29 U.S.C. § 701 (Rehabilitation Act). \textit{Pryor}, 288 F.3d at 552.

\textsuperscript{121} Id. at 568.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 569.

\textsuperscript{124} Id. at 565 ("[T]he complaint in this case does sufficiently state facts showing intentional, disparate treatment on account of race.").

\textsuperscript{125} This may be the case regardless of the fact that the plaintiff cannot bring a lawsuit on the basis of the disparate impact regulations under \textit{Alexander v. Sandoval}, 532 U.S. 275 (2001).
indifference claim for damages.\textsuperscript{126} The nature of environmental justice litigation, however, is better fit for injunctive relief, as citizens in the affected areas are concerned about the long-term health hazards from the prospective operation of industrial plants.

The initial equal protection causes of action sought declaratory and injunctive relief, as citizen groups fought to void operating permits that state environmental agencies had granted industrial plants.\textsuperscript{127} The avenue for injunctive relief through an equal protection claim is still very much open, as these cases notably failed on the merits rather than on a procedural bar. In fact, the court in \textit{Bean v. Southwestern Waste Management Corp.} found that the plaintiffs' motion for a preliminary injunction was extremely persuasive with regard to the equitable considerations but fell short on the requirement for a substantial likelihood of success on the merits.\textsuperscript{128} The court specifically noted:

\begin{quote}
Damages cannot adequately compensate for these types of injuries... If a substantial likelihood of success on the merits were shown, there is no doubt that the threatened injury to the plaintiffs would outweigh that to the defendants and that the public interest would not be disserved by granting the plaintiffs an injunction.\textsuperscript{129}
\end{quote}

Thus, while the deliberate indifference theory has been forwarded in the context of Title IX claims for the purposes of securing damages, the theory as applied in the context of an overall equal protection claim could successfully be used to secure equitable relief.

\begin{footnotes}
\item[128] 482 F. Supp. at 677. Generally, in adjudicating a motion for a preliminary injunction, courts examine several factors: whether the plaintiff has a reasonable possibility of success on the merits; whether the plaintiff will be irreparably injured by denial of the requested relief; whether the relief requested will cause even greater harm to the defendant; and whether the relief requested is in the public interest. See, e.g., \textit{ECRI v. McGraw-Hill, Inc.}, 809 F.2d 223, 226 (3d Cir. 1986) (reiterating the factors a court examines before granting a preliminary injunction); \textit{Canal Auth. of Fla. v. Callaway}, 489 F.2d 567, 572 (5th Cir. 1974) ("The district court does exercise unbridled discretion [to grant preliminary injunctive relief]. It must exercise that discretion in light of... the four prerequisites of extraordinary relief... "). Ultimately securing a permanent injunction is based largely on the same considerations. See \textit{Amoco Prod. Co. v. Vill. of Gambell}, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").
\item[129] \textit{Bean}, 482 F. Supp. at 677.
\end{footnotes}
B. Potential Application of the "Deliberate Indifference" Theory in Environmental Justice Equal Protection Actions

The early constitutional challenges to industrial siting decisions generally fell prey to the intentional discrimination hurdle of the Supreme Court's equal protection canon. The Supreme Court acknowledged that a plaintiff could infer a violation of the Equal Protection Clause by presenting enough circumstantial evidence to demonstrate that discriminatory purpose was a motivating factor in a governmental law or decision. However, the early challenges, while often presenting much evidence about disparities in the demographic background of heavily sited communities, could not generate enough additional evidence of state administrators failing to adequately follow state and federal environmental permit procedures. This was common in the 1990s because administrators were only required to satisfy the national and state environmental protection standards, which provided them great leeway in their decisions.

1. Drawing an Inference from Ongoing Developments

The growth of the environmental justice movement since the middle of the 1990s may provide fresh ammunition for equal protection challenges. In particular, as states construct and officially promulgate environmental equity procedures and programs in conformity with EPA regulations and draft guidances for Title VI, numerous facts about administrators' actions, and inaction, in responding to their new requirements will be generated. In light of Alice Kaswan's observations about the magnitude of facts in equal protection chal-

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130 See supra Part I.A (examining the early equal protection challenges to industrial siting decisions).
131 See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands [an] . . . inquiry into such circumstantial and direct evidence of intent as may be available.").
132 See, e.g., E. Bibb, 706 F. Supp. at 886-87 (analyzing plaintiffs' cause of action under the factors espoused in Arlington Heights). In particular, the East Bibb plaintiffs' attempt to demonstrate discriminatory purpose through the administrative history of the siting decision was weak. The plaintiffs' claim—that the County Planning Commission's decision to permit a waste site it had previously denied was motivated by animus—was a conjectural leap, though they tried to use this "evidence" to fill the administrative or legislative history factor of Arlington Heights. Id.
133 See Light & Rand, supra note 14, at 11 (noting the many scientific and economic factors that a state environmental agency can claim as the basis for its decision).
134 The substance of equal protection challenges is now practically synonymous with Title VI challenges because both turn on the intentional discrimination requirement. See supra note 99 (noting that plaintiffs bringing a Title VI claim must prove that the recipient of the federal funding intentionally discriminated against them).
135 See supra Part II.B (examining state environmental protocols).
lenges, the Supreme Court's recognition of the deliberate indifference theory could potentially energize such claims, particularly their use of the administrative and legislative history factor in the *Arlington Heights* schema.

As in the Title IX cases, where a school board opens itself up to liability by not preventing discrimination it knows to be occurring, state environmental protection agencies are similarly in full control when it comes to investigating the minority and health status of a potential industrial site. Furthermore, the Court acknowledged in *Davis* that contemporary studies and reports aimed at informing federally funded entities of potential liability for allowing discrimination to continue may provide additional notice to warrant a finding of deliberate indifference. The studies on cumulative risk and inequitable siting in environmental permitting decisions may serve a similar function. The *Davis* Court also pointed to policy guidelines, analogous to the Draft Guidances released by the EPA's OCR, issued by the Department of Education's Office for Civil Rights, and published in the Federal Register, as a further source of sufficient constructive notice.

Ostensibly, states' hands will become more tied by the development of environmental justice programs within their environmental protection agencies. Failing to follow their own procedural requirements for conducting an environmental equity analysis before issuing a permit will become an increasingly egregious display of deliberate indifference in an abstract sense. Such blatant inaction

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136 See *supra* notes 46-50 and accompanying text (emphasizing a fact-specific approach to making an equal protection claim).

137 Derek Black also stresses the importance of this factor in using the deliberate indifference theory to provide inferential evidence in an intentional discrimination claim. See Black, *supra* note 101, at 388.

138 The Supreme Court stressed the importance of this autonomy and control in *Davis*, defining the words "subject" and "under" in regards to deliberate indifference only existing if a school board "subjects" its students "under" its control by not taking action to remediate existing discrimination. In fact, Justice O'Connor, taking a page from Justice Scalia's statutory interpretation modus operandi, gives definitions from two different dictionaries for each word, respectively. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 644-45 (1999).

139 The Court cited a publication issued by the National School Boards Association Council of School Attorneys in 1993 that informed districts of potential Title IX liability for failing to remedy acts of sexual harassment between students. *Id.* at 647.

140 See, e.g., *supra* notes 7-8 (citing environmental health studies).

141 See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (providing educational institutions with information regarding the standards that should be used to investigate and resolve allegations of sexual harassment of students), cited in *Davis*, 526 U.S. at 647-48.

142 See *supra* Part II.B (discussing the reluctance of states to finalize administrative procedures and pass legislation pertaining to environmental justice protocols).

143 It is important, however, to note that the Court will not, and cannot, find an agency or recipient of federal funding deliberately indifferent to its responsibilities on the basis of its fail-
would not satisfy the Supreme Court’s standard for an intentionally discriminatory act or law in its own right; nonetheless, assuming the Court does not extend the “pure” doctrine of deliberate indifference to Title VI causes of action, it could provide substantial administrative and legislative facts to bolster a collective inference of intentional discrimination.

2. Drawing an Inference from Ignored Pleas: “Deliberate Indifference” in South Camden

Despite the noted weight of state agencies’ constructive knowledge about their responsibilities and duties to formulate and follow their own environmental equity protocols, actual notice and resultant inaction seem to be a minimum requirement for applying a deliberate indifference argument to an overall claim of intentional discrimination. As in Gebser, where the Court held that the school district was not liable because it never had actual knowledge of the discriminatory problem, and therefore could not be deliberately indifferent to it, a state environmental protection agency must have actual notice of its duty to investigate a community and fail to do so. As previously demonstrated, it is quite doubtful that a permitting agency to promulgate its own protocols in the first place. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291-92 (1998) ("Lago Vista’s alleged failure to comply with the regulations, however, does not establish the requisite actual notice and deliberate indifference... [and] the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX."). In essence, this lack of accountability on the part of states to promulgate and finalize official environmental equity policy is what most hampers the movement and the potential of an equal protection claim. See supra Part II.B (describing environmental regulations under state laws).

See Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (holding that for a law or action to be suspect under equal protection analysis, "the decisionmaker... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); Kaswan, supra note 20, at 418-20 (explaining that, under Feeney, a pattern of foreseeable effects on its own is not sufficient to prove invidious purpose).

Kaswan contends that the Feeney analysis does not discount the truth that the more foreseeable a discriminatory impact an industrial siting decision could have, the more relevant the denial of the probable impact is to inferring discriminatory purpose. See Kaswan, supra note 20, at 419-20 ("Where the disparate impact is an inevitable consequence 'a strong inference that the adverse effects were desired can reasonably be drawn.'").

See Gebser, 524 U.S. at 291 (noting that parental complaints about a teacher’s inappropriate classroom remarks were insufficient to alert the principal about the possibility that the teacher was having a sexual relationship with a student); Brake, supra note 109, at 25-26 (noting that, in the context of sexual harassment in schools, courts set a high threshold for proving actual notice in discrimination claims).

But cf. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633-35, 646 (1999) (finding that even though a school district board was never directly informed of the student-on-student harassment, the egregious nature of the principal’s and teachers' non-response to the problem, and the inherent nature of the board’s control over activities on its member schools’ grounds, sufficed for deliberate indifference).
could ever claim it was not aware of its obligations under the EPA’s Section 602 regulations to make an effort to quell disparate impact in siting. Nonetheless, specific facts in a particular case revealing that concerned citizens pressed a state environmental protection agency to fulfill its regulatory duty, or at least to hold an environmental equity hearing for the community to air its concerns, may provide the key facts for an intentional discrimination inference.

In South Camden I, such pleas for governmental deliberation were soundly ignored by the New Jersey Department of Environmental Protection ("NJDEP") in its siting of the St. Lawrence Cement facility. In his decision granting a preliminary injunction to South Camden Citizens in Action ("SCCIA") on the basis of their first Title VI regulations private cause of action, Federal District Court Judge Stephen Orlofsky dedicated eighteen pages to detailing the pertinent facts. Judge Orlofsky referenced the same findings of fact in his second opinion less than one month later, granting SCCIA relief on the basis of 42 U.S.C. § 1983 rather than on the basis of an implied right. Judge Orlofsky’s basic conclusion was that “it is entirely clear... that the NJDEP is aware that its obligations under Title VI extend beyond ensuring that permitted facilities do not violate environmental laws, and in fact include considering claims... that a particular permit will result in an adverse, disparate impact in violation of Title VI.”

Specifically, Judge Orlofsky found that the NJDEP shirked its known responsibilities most starkly in its failure to respond to an administrative complaint that the plaintiffs filed with the agency in the months before the operating permits were issued to St. Lawrence. The plaintiffs requested a grievance proceeding by the NJDEP, pur-

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148 For example, in South Camden I, the trial court stated:
The fact that the EPA has drafted a Guidance to assist states in complying with Title VI, and the substantive content of the Guidance, reinforce the Court’s conclusion, based on the implementing regulations and the Revised Draft Investigation Guidance, that the NJDEP is required by law to consider the Title VI implications of its permitting decisions. S. Camden I, 145 F. Supp. 2d 446, 478 (D.N.J. 2001); see also supra Part II.A (discussing the regulatory guidelines adopted by the EPA).
149 S. Camden I, 145 F. Supp. 2d at 452-70.
150 S. Camden II, 145 F. Supp. 2d 505, 510 (D.N.J. 2001). The Court of Appeals for the Third Circuit reversed Judge Orlofsky’s decision for the plaintiffs on the theory that Congress did not intend for 42 U.S.C. § 1983 to give a private right of action through Title VI disparate impact regulations, rather than on the basis of the District Court’s findings of fact. See S. Camden III, 274 F.3d 771, 783 (3d Cir. 2001) ("[N]one of the [Supreme Court] opinions... justifies the district court’s conclusion that valid regulations may create rights enforceable under Section 1983.").
151 S. Camden I, 145 F. Supp. 2d at 481.
152 The plaintiffs simultaneously filed a complaint with the EPA’s OCR complaining about NJDEP’s failure to conduct a disparate impact investigation. See id. at 452 (recounting the procedural history of the case).
suant to EPA civil rights regulations, at which they could voice their concerns about the numerous other industrial facilities already polluting the predominantly minority community. Judge Orlofsky concluded that "[t]here is no evidence in the record to indicate that any action has been taken by the NJDEP or EPA's OCR in response to the filing of these administrative complaints."

Further, at the routine public hearing NJDEP did hold to give notice of the St. Lawrence facility permitting process, many public comments called for an environmental impact study beyond the NJDEP's cursory examination of the facility's compliance with the National Ambient Air Quality Standards. Dr. Iclal Atay, the Chief of the NJDEP's Bureau of Air Quality Engineering, responded to these pleas by summarily stating that the NJDEP had already determined that the facility was in compliance with environmental standards, completely disregarding the agency's responsibilities under the EPA's disparate impact regulations. Though this administrator was not the commissioner of NJDEP, she was certainly in a position of sufficient authority and control to know of NJDEP's responsibilities and to further notify those in NJDEP's Advisory Council on Environmental Equity.

Overall, the NJDEP failed to assume its responsibilities under the EPA's Title VI regulations (including the Draft Guidances) and its

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154 Judge Orlofsky details the myriad of other county municipal and industrial facilities in the Waterfront South community, as well as points to other health hazards in the community, including: two superfund sites, four sites the EPA has investigated for hazardous substances, and fifteen other contaminated sites. S. Camden I, 145 F. Supp. 2d at 459-60. Further, Judge Orlofsky cites a report prepared by Camden about the pollution hazards in Waterfront South which was prepared some time before the lawsuit. The study specified Waterfront South as "an area in need of redevelopment" and stated that "[t]he dense arrangement of buildings, the close proximity of residential and industrial uses, and unregulated truck traffic makes the spillover effects of noxious manufacturing or related industrial activity . . . detrimental to surrounding property users and residents throughout Waterfront South." Id. at 460. For more up-to-date information about the health risks in, and the facilities polluting, Camden County, see Envtl. Def., Pollution Report Card: Camden County, at http://www.scorecard.org/community/index.tcl?zip_code=08101 (last visited Nov. 1, 2004).


156 Id. at 469-70.

157 See id. (describing the testimony of Dr. Iclal Atay).

158 Considering the Supreme Court's finding in Davis that the school board had sufficient control over the decision making process to substantiate its deliberate indifference to the discrimination taking place "under" it, it is likely that this administrator was in a similar position of liability for choosing not to follow up on the NJDEP's regulatory responsibilities. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644 (1999) (explaining that deliberate indifference is a plausible theory of liability as long as the funding recipient "has some control over the alleged harassment").
own evolving Environmental Equity program,\(^{159}\) in addition to directly ignoring public demand for a disparate impact and cumulative risk study. Similar to the deliberate indifference framework applied in *Gebser* and found controlling in *Davis*, the NJDEP's inaction cannot be explained on any other grounds, save ignorance of the law. By not investigating the facility's potential cumulative effect on the endangered community—populated predominantly by minorities—NJDEP intentionally made a decision not to act on its responsibilities. By itself, this does not imply that NJDEP had the "intent" to discriminate by siting the facility in a neighborhood that presumably would not have the political capital to oppose it; nonetheless, NJDEP's inactivity, in light of its constructive and actual knowledge of its responsibilities, represents an "intentional" act tantamount to deliberate indifference.

Considering the previously noted evidence documenting the siting disparities in Waterfront South relative to the community's demographic and industrial background, the residents of Waterfront South seemingly have as strong a factual case under the discriminatory pattern and historical background factors of the *Arlington Heights* analysis as the earlier equal protection environmental justice challenges.\(^{160}\) The NJDEP's deliberate indifference to its regulatory obligations to investigate such disparities may provide the relevant administrative history to tip the scales for a collective inference of intentional discrimination where the earlier challenges failed.

**CONCLUSION**

The environmental justice movement gradually developed as it became clear that a large number of minority communities were being deprived of the equal protection of the law. However, the passive nature of the discriminatory activity—as opposed to active lawmaking—has been the Achilles heel of the litigation side of the movement. Overburdened communities and civil rights advocates have been unable to prove racial animus motivated a particular industrial siting decision, and thus have failed to clear the intentional discrimination hurdle.

After initial failures using the Equal Protection Clause as a legal basis for lawsuits, environmental justice activists turned to other legal strategies, such as using the implementing regulations of Title VI of the Civil Rights Act of 1964, to circumvent this seemingly closed door.

\(^{159}\) See N.J. Dep't of Env'tl. Prot., Environmental Justice Taskforce (describing New Jersey's developing environmental justice program), at http://www.nj.gov/ejtaskforce (last visited Nov. 1, 2004).

\(^{160}\) See supra Part I.A (discussing the pitfalls of early equal protection environmental justice challenges).
However, these efforts proved fruitless as the Supreme Court barred the use of such regulations for private causes of action. The environmental justice movement once again finds itself back to where it started: challengers need to prove that a state environmental protection agency intentionally discriminated against their community when it issued an operating permit to an industrial facility.

However, the development of the movement, and the growing awareness on a national scale of the disparate impact of environmental hazards since the initial equal protection challenges, provide some hope for the future of legal challenges. The EPA's disparate impact regulations, enacted pursuant to Title VI, put state agencies receiving federal funding on notice that they cannot site industrial facilities in already overburdened minority communities. Further, the EPA's Draft Guidances provide the states with a loose blueprint of how they should construct programs to preclude violating the regulations. Following these guidances is not mandatory upon the states; however, as they individually develop protocols to assess a permitting decision's impact on a community, they will become more legally accountable for ignoring their self-mandated procedural obligations.

The Supreme Court's recent jurisprudence concerning a federally-funded school district's "deliberate indifference" may provide the legal tool necessary to infer intentional discrimination in an industrial siting decision. As school districts violate their duty to prevent discrimination when they do not act upon actual notice, a state permitting agency arguably has similarly violated its duty when it deliberately ignores its responsibility to investigate and prevent disparate impacts. Thus, aggrieved communities may be able to use a state's "deliberate indifference" to its regulatory obligations as a prime piece of evidence in an overall intentional discrimination claim. Whether under the guise of an equal protection or a Title VI challenge, there may still be hope for these causes of action and the citizens of the Waterfront South community.