The Benefits of Development and Environmental Injustice

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INTRODUCTION

Environmental justice has been called one of the most important issues in the last two decades of environmental law.[1] The federal government and virtually all states have developed legislative and regulatory structures aimed at alleviating the disproportionate risks of pollution currently being borne by low-income and minority communities.[2] Yet, despite both the recognition of the deep unfairness of environmental injustices and the large scale regulatory response, current environmental justice regulation has been severely criticized as ineffective. Partly in response to these criticisms, the Obama administration has announced new initiatives to strengthen regulation of environmental injustice at the federal level.[3]

It is impossible to fully diagnose the many reasons for the failure of environmental justice regulation to reduce the burdens of development placed on low-income and minority communities. However, one notable cause of this failure is likely the significant additional costs of

1. *See, e.g.*, Craig M. Greczyn, Comment, *Different Ethics, Different Results: How Ethical Frameworks Shape Environmental Justice Concerns*, 34 J. LEGAL PROF. 227, 228–29 (2009); David R. Rice, Note, *The Bus Rider's Union: The Success of the Law and Organizing Model in the Context of an Environmental Justice Struggle*, 26 ENVIRONS ENVTL. L. & POL'Y J. 187, 187 (2003).

2. The definition of "environmental justice" is itself amorphous. The notion that environmental justice includes effects on not just minority communities but also low-income communities can be found in Executive Order 12,898, issued in 1994 by President Clinton. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 § 1-101 (Feb. 11, 1994) (ordering "each Federal agency [to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions . . . ."). Other authorities define environmental justice to include effects on individuals of all races, cultures, incomes, and educational levels. *See, e.g.*, CAL. GOV'T CODE § 65040.12(e) (West 2010) (defining environmental justice as "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies"). For a discussion of the alternate formulations of the term, see generally Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681 (2000) (discussing alternate understandings of the term "environmental justice," and the various contexts—political, geographical, affiliation to the development of the movement—that act to shape those views).

3. *See generally* OFFICE OF ENVTL. JUSTICE, U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014 (2011), *available at* http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf (a four-year plan to strengthen efforts to promote and integrate environmental justice into the Environmental Protection Agency's programs). Named in recognition of the twentieth anniversary of President Clinton's issuance of Executive Order No. 12,898, Plan EJ 2014 is an overarching strategy for advancing environmental justice through three identified goals: to "[p]rotect the environment and health in over-burdened communities"; to "[e]mpower communities to take action to improve their health and environment"; and to "[e]stablish partnerships with local, state, tribal and federal organizations to achieve healthy and sustainable communities." *Id.* at i.

environmental risk reduction that would be placed on development in such communities. Existing locally unwanted land uses ("LULUs") in low-income and minority communities are already subject to environmental regulations, which generally require the use of cost-effective pollution protection technologies.[4] Thus, efforts to decrease emissions below existing thresholds in environmental justice communities confront the relatively high marginal cost of even small reductions beyond what is already legally required.

In most cases, environmental laws do not require net decreases in pollution as a condition of permitting.[5] Therefore, every time a new LULU or a modification of an existing LULU (together referred to as "new LULU") is permitted in an environmental justice community, the construction of that new LULU increases the aggregate amount of pollution borne by community members. Put simply, in almost every environmental justice community new LULUs are being permitted on a regular basis and each time a new LULU is permitted the aggregate amount of pollution borne by individual community members increases.

One reason for the perceived tolerance of this phenomenon is the fact that new LULUs carry with them not just burdens, but also benefits. These benefits include job opportunities, increased tax revenue, and increased demand for local businesses that may provide services to the new use.[6] Pollution burdens are inextricably intertwined with the benefits of development. Thus, in cases where benefits outweigh burdens—that is, where development provides a net benefit—it may well be in the community's interest to allow for the development of a new LULU. Little effort, however, has been made to consider whether these perceived benefits actually accrue to members of environmental justice communities, and, if not, how regulators might respond to this problem.

This Article seeks to fill that gap. It first asserts that the perceived benefits of development often do not accrue to local residents. Rather, jobs generally go to workers in other communities, and other benefits are primarily received by economic and political elites. Having described a vision of benefits much different than what many may assume, the Article then considers a regulatory mechanism for ensuring that local community members receive the benefits of development.

In the process of describing this "reasonable benefit scheme," the

4. *See infra* note 96 and accompanying text.

5. One notable exception would be the offset requirements for new sources under the Clean Air Act. *See, e.g.*, 42 U.S.C. § 7503(c) (2006).

6. For a discussion of the benefits, see *infra* Part III.A.

Article also explains how a benefits-based regulatory regime may overcome the cost problem that currently hamstrings efforts to decrease the risks created by new LULUs in environmental justice communities. By defining the harm being done to communities as the creation of an increased risk, a benefits-based scheme would require a proportional response. For example, if a new LULU will increase the risk of death in a community of 50,000 people by 1 in 50,000 per year, the permit-seeker would be required to provide the community with a benefit of equal amount (saving one life per year). Because many environmental justice communities lack much public health infrastructure, the cost of providing the benefit would likely be much smaller than the cost of reducing pollution. For example, a permit-seeker might pay for a mobile clinic to visit the community a number of times per year, for a vaccination program, or for a lead abatement program that would save one life per year. Because the scheme does not focus on decreasing pollution as the basis for responding to environmental injustice and instead focuses on reducing risk, a benefit scheme may provide a more cost-effective mechanism for responding to the unequal harms done to such communities.

Part II of this article provides a brief overview of the problem of environmental injustice and the way in which the regulatory response to the problem thus far has been ineffective. Part III brings to bear on the environmental justice problem research that demonstrates the limited benefit new LULUs create for existing communities. Part IV considers how a requirement that industry provide reasonable community benefits could be implemented and how such a scheme would compare to other existing environmental justice solutions.

I. ENVIRONMENTAL INJUSTICE AND ITS REGULATION

A. Environmental Injustice and Its Causes

Environmental injustice is based on the observation that minority and low-income communities (sometimes referred to as "environmental justice communities") often bear a disproportionate amount of environmental harms in society.[7] One of the most influential early

7. *See* Mossville Envtl. Action Now v. United States, Case 242-05, Inter-Am. Comm'n H.R., Report No. 43/10, OEA/Ser.L/V/II.138, doc. 47 (2010) (case deemed admissible because of racially disproportionate effects of environmental pollution); Sariyah S. Buchanan, *Why Marginalized Communities Should Use Community Benefit Agreements as a Tool for Environmental Justice: Urban Renewal and Brownfield Redevelopment in Philadelphia, Pennsylvania*, 29 TEMP. J. SCI.

studies of environmental injustice was the 1987 analysis of the location of hazardous waste facilities prepared by the United Church of Christ's Commission for Racial Justice.[8] Among other things, the study found that race—more than any other factor considered—correlated with the location of hazardous waste sites, and that communities with the highest proportion of ethnic and racial minorities also had the highest number of commercial hazardous waste facilities.[9] Numerous other studies finding a strong correlation among race, socioeconomic status, and the siting of LULUs have since been published.[10]

The causes of environmental injustice have also been well catalogued, although argument still remains as to the roles played by each of the different factors in the creation of such injustice. Some scholars argue that the main cause of environmental injustice is pure and simple racism.[11] Others suggest that the disproportionate siting of LULUs results from a lack of economic and political power in minority

TECH. & ENVTL. L. 31, 36 (2010) (noting that brownfields are often found in "urban centers" with "large minority populations"); Robert D. Bullard, *Environmental Justice for All: It's the Right Thing to Do*, 9 J. ENVTL. L. & LITIG. 281, 281–83 (1994); R. Gregory Roberts, Comment, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229, 244 (1998) (noting that "abandoned commercial and industrial properties (known as 'brownfields') . . . are located overwhelmingly in minority and poor communities").

8. COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987), *available at* http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf. The study by the United Church of Christ concluded that, although socioeconomic status appeared to play an important role, race was the most significant factor associated with the location of commercial hazardous waste facilities. *Id.* at xiii. The study also found that in communities with two or more facilities or one of the nation's five largest landfills, the average minority percentage of the population was more than three times that of communities without facilities. *Id.* According to the study, three out of five of the largest commercial landfills in the nation were located in predominantly African-American or Hispanic communities. *Id.* at xiv. These three landfills accounted for forty percent of the total estimated commercial landfill capacity in the nation. *Id.*

9. *Id.* at 15.

10. *See, e.g.*, LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 167–84 (2001); Charles Lord & Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENVTL. L. 551, 597 n.47 (2010) (listing numerous studies that demonstrate a correlation between race and the siting of hazardous waste facilities); Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research*, 14 VA. ENVTL. L.J. 615, 622 (1995).

11. *See, e.g.*, Conner Bailey, Kelly Alley, Charles E. Faupel, & Cathy Solheim, *Environmental Justice and the Professional*, *in* ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 35, 44 (Bunyan Bryant ed., 1995); Robert D. Bullard, *Building Just, Safe, and Healthy Communities*, 12 TUL. ENVTL. L.J. 373, 393 (1999); Charles Lee, *Warren County's Legacy for the Quest to Eliminate Health Disparities*, 1 GOLDEN GATE U. ENVTL. L.J. 53, 66 (2007).

communities.[12] According to this perspective, LULUs are put in places where the community does not have the power or the ability to fight against them. Still others have argued that market forces may play a role in the siting of LULUs.[13] There are two steps in this market-based theory. First, LULUs are placed in a community without regard to socioeconomic makeup.[14] Second, those who can afford to leave the area depart and, as property values decrease, poorer individuals move into the community.[15] Longitudinal studies, however, have suggested that this last causal mechanism may not be a major source of environmental injustice.[16]

Environmental injustice also takes a number of forms other than the paradigmatic example of too many polluting sources located in low-income or minority communities. For example, studies have also demonstrated that environmental laws are less likely to be enforced in communities of color.[17] Similarly, it has been shown that poor workers may be exposed to excessive amounts of toxins.[18] Environmental

12. *See, e.g.*, Jacalyn R. Fleming, *Justifying the Incorporation of Environmental Justice into the SEQRA and Permitting Processes*, 6 ALBANY L. ENVTL. OUTLOOK J. 55, 83 (2002); Stephen M. Johnson, *NEPA and SEPAs in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 572 (1997); David Schoenbrod, *Environmental 'Injustice' Is About Politics, Not Racism*, WALL ST. J., Feb. 23, 1994, at A21.

13. *See, e.g.*, Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1388–89 (1994) (arguing that land becomes undesirable once a LULU is sited near it, thus making it more affordable for low-income families).

14. *Id.*

15. *Id.*

16. *See* Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9 (1997).

17. *See, e.g.*, Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1, S2, S3. This report analyzed all civil judicial enforcement cases resolved by EPA from 1985 to 1991, and found that penalties for violations of federal environmental laws were forty-six percent higher in white communities than in minority communities. *See id.* at S1. *But see* Evan J. Ringquist, *A Question of Justice: Equity in Environmental Litigation, 1974–1991*, 60 J. POL. 1148, 1162–63 (1998) (questioning the conclusions of the *National Law Journal* study). Professor Ringquist found that the results varied depending on how one used the historical data. *See id.* at 1160. During the entire period from 1974 to 1991, there was little difference in average fines between white and minority areas (though penalties were higher in poor areas). *Id.* at 1160–62; *see also* Mark Atlas, *Rush to Judgment: An Empirical Analysis of Environmental Equity in U.S. Environmental Protection Agency Enforcement Actions*, 35 LAW & SOC'Y REV. 633, 676–77 (2001) (concluding that the income level of an area had no meaningful effect on penalties, and that while a community's race affected penalties, it was the opposite direction of what the *National Law Journal* study found—penalties *increased* as the proportion of minorities in an area increased).

18. Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All These Years*, 38 ENVTL. L. 371, 381 (2008).

injustice also has a global dimension. Global climate change, for example, is rife with issues of injustice between rich and poor countries.[19]

In order to respond to the variety of manifestations of environmental injustice, regulation must be similarly varied. This Article, however, focuses on one particular manifestation of environmental injustice: the location of new sources or the modification of existing sources of pollution in low-income and minority areas, so that additional pollution is borne by the community. In this scenario, a firm or government seeks to locate a new source of pollution in a community that is already overburdened by polluting sources, or the operator of an existing source in the community seeks a new permit that will increase emissions. Such a facility requires approval from local regulators, and developers must apply for environmental permits for pollutant discharges.

19. *See, e.g.*, Marc Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 GA. J. INT'L. & COMP. L. 543, 553 (2010); Eric W. Orts, *Climate Contracts*, 29 VA. ENVTL. L.J. 197, 210 (2011); Rachel Ward Saltzman, Note, *Distributing Emissions Rights in the Global Order: The Case for Equal Per Capita Allocation*, 13 YALE HUM. RTS. & DEV. L.J. 281, 282 (2010).

B. Regulation of Environmental Injustice

A patchwork of laws, regulations, executive orders, and agency policies at both the federal and state levels address environmental injustice. These regulations use many different mechanisms in an effort to limit the risks borne by members of low-income and minority communities, such as requiring the dissemination and gathering of information on the problem, enhancing public participation, and promoting the enforcement of existing laws.[20] These regulations respond to the problem of environmental injustice through indirect means. In other words, they seek to solve the problem of increased pollution in low-income and minority communities through means other than directly limiting emissions from existing or new LULUs in the communities. Little environmental justice regulation provides for direct relief from increased pollution in minority and low-income communities, and where the law does provide this remedy, efforts to impose this standard have generally failed.[21] This section will briefly describe the main components of the regulatory landscape and how they fail to directly limit the effects of pollution on low-income and minority communities.

The federal government has created sources of regulation focused specifically on the issue of environmental injustice. Civil rights law has provided another basis for the regulation of environmental injustice at the federal level. This section will analyze the federal sources of environmental justice regulation, and will then turn to an analysis of the civil rights framework.

1. Non Civil-Rights-Based Federal Regulation

To the extent regulators have responded to environmental justice concerns outside the civil rights context, the response has taken the form of executive orders and agency policies. In 1994, President Clinton issued Executive Order 12,898 on environmental justice (the "Order" or "Executive Order").[22] The Order directs every federal executive agency to identify and address, as appropriate, disproportionately high and adverse effects of its programs and policies on minority and low-income populations.[23] Executive Order 12,898 was continued in force under

20. *See infra* Parts II.B.1 & 2.
21. *See infra* Part I.B.1.
22. Exec. Order No. 12,898, 59 Fed. Reg. 7629 § 1-101 (Feb. 11, 1994).
23. *Id.*

George W. Bush and continues in force currently.[24] While clearly recognizing the compelling needs of such communities, the Order, as written and implemented, does little to actually alleviate the harms these communities suffer. Rather, the Order attempts to address these problems through indirect means, such as by improving research related to the health and environment of low-income and minority communities, enhancing public participation of community members in relevant processes, and collecting data on whether agency programs are having disproportionate effects on such populations.[25] The Order does contain language regarding enforcement of existing laws.[26] Existing law, however, is generally not directed toward the alleviation of distributive harms.[27] Indeed, some laws may actually increase local impacts in their application.[28] What is noticeably missing from the Order is any requirement for the reduction of emissions in communities disproportionately impacted by pollution.

The EPA has also developed and implemented an environmental justice strategy, which has changed over time.[29] Most recently, the EPA

24. Memorandum of Understanding on Environmental Justice and Executive Order 12,898 (Aug. 4, 2011) *available at* http://www.epa.gov/compliance/ej/resources/publications/interagency/ej-mou-2011-08.pdf.

25. Exec. Order No. 12,898, 59 Fed. Reg. 7629 § 1-103(a) (Feb. 11, 1994).

26. *Id.* § 1-103(a)(1) (charging each federal agency to "promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations").

27. *See* CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY AND REGULATION 22 (2d ed. 2009) (noting that "environmental justice advocates have long observed that environmental laws have not prevented disproportionate environmental harms from occurring . . . . With few exceptions, environmental regulation focuses on improving overall ambient environmental conditions, and does not consider the distributional consequences of where pollution is occurring.").

28. Consider, for example, the Clean Air Act's regulation of stack height. Stack Height Provisions, 40 C.F.R. § 51.118 (2011). The purpose of limiting stack height is to ensure that polluters cannot externalize harms on individuals in other states and far away from the source of the pollution. Of course, decreasing the height at which stacks can be built increases the harms imposed near the source. *See* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2355–56 (1996) (noting that the height correlates to where the effects are felt and this dynamic creates three tradeoffs—environmental, regulatory, and aggregate—each with a different resolution).

29. For examples of how EPA's strategy has changed over time, see OFFICE OF ENVTL. JUSTICE, U.S. ENVTL. PROT. AGENCY, THE EPA'S ENVIRONMENTAL JUSTICE STRATEGY (1995), *available at* http://www.epa.gov/compliance/ej/resources/policy/ej_strategy_1995.pdf; OFFICE OF ENVTL. JUSTICE, U.S. ENVTL. PROT. AGENCY, 1996 ENVIRONMENTAL JUSTICE IMPLEMENTATION PLAN (1996), *available at* http://www.epa.gov/compliance/ej/resources/policy/implementation_plan_ej_1996.pdf; U.S. ENVTL. PROT. AGENCY, EPA'S ACTION DEVELOPMENT PROCESS, INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION (2010), *available at* http://www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf.

updated its strategy in 2011 with the release of Plan EJ 2014.[30] This strategy has five cross-agency focus areas: (1) incorporating environmental justice into rulemaking; (2) considering environmental justice in permitting; (3) advancing environmental justice through compliance and enforcement; (4) supporting community-based action programs; and (5) fostering administration-wide action on environmental justice.[31] Of course, many of these strategies are mimicked in the Executive Order and, like the Executive Order, EPA's strategy calls for the enforcement of existing environmental laws in disproportionately impacted communities.[32] However, like the Executive Order, no language specifically aims to decrease emissions from existing sources, or to stop the siting of new polluting sources in minority or poorer communities.

EPA's efforts to carry out environmental justice initiatives have also been deeply and thoroughly criticized as ineffective. For example, both a panel of the National Academy of Public Administration and the U.S. Commission on Civil Rights criticized EPA and other agencies for failing to establish meaningful specific performance standards by which the agencies' environmental justice activities could be assessed.[33] Without such standards, the groups argued, EPA could provide lip service to environmental justice goals without having to consider whether the goals were being achieved.[34] Perhaps the most critical evidence of EPA's poor record of addressing environmental justice issues came from a report issued by the agency's own Office of the Inspector General concerning Executive Order 12,898. The Inspector General found in 2004 that the EPA had not fully implemented Executive Order 12,898, nor had it consistently considered environmental justice issues in its day-to-day operations.[35] Although the Obama administration has indicated a desire to address issues of environmental injustice,[36] efforts to date have been marked by half-

30. *See* PLAN EJ 2014, *supra* note 3.

31. *Id.* at 4.

32. *Id.* at 2.

33. *See* Bradford Mank, *Executive Order 12,898*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 101, 112–13 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) (describing the criticism of the National Academy of Public Administration and the U.S. Commission on Civil Rights).

34. *Id.* at 112–13.

35. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, REPORT NO. 2004-P-00007, EVALUATION REPORT: EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE, at i (2004), *available at* http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf.

36. *See* Plan EJ 2014, *supra* note 3, at 1–2.

hearted regulation and incomplete enforcement that seek at best to express a desire to deal with problems of environmental justice, but that, upon closer review, do little to actually address the problem.

2. Civil Rights Law

Pursuant to Title VI of the Civil Rights Act, all federal fund recipients must ensure that their programs do not discriminate on the grounds of race, color, or national origin.[37] The story of Title VI and its use in matters of environmental injustice is a complicated one that has been thoroughly detailed by many commentators.[38] While initially promising as a mechanism for private parties to combat excessive pollution in their communities, recent Supreme Court jurisprudence allowing private actions only when a party can prove actual intent to discriminate on the part of the government has greatly decreased the effectiveness of Title VI as a remedy for environmental injustice.[39] Similarly, application of EPA's Title VI regulations, while full of promise in theory, has been a failure in actuality.[40]

There are two potential vehicles for applying Title VI to matters of environmental injustice—agency action and private rights of action. This section will look first at agency regulatory efforts to enforce Title VI and will then turn to private rights of action.

a. Title VI Regulation

Section 602 of the Civil Rights Act requires federal agencies to develop standards to ensure that federal fund recipients are not engaging in racially discriminatory behavior.[41] These regulations guard not just against intentional discrimination, but also against actions that are

37. The specific language of Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006).

38. *See generally* Bradford Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 33, at 26–30 [hereinafter Mank, *Title VI*] (discussing EPA's dismissal of most Title VI complaints); RECHTSCHAFFEN, *supra* note 27, at 492–515; Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 69–76 (2009) (detailing how *Alexander v. Sandoval*, 532 U.S. 275 (2001), closed the door for private individuals bringing environmental justice claims under Section 602 of Title VI).

39. *See infra* notes 58–63 and accompanying text.

40. *See infra* notes 41–51 and accompanying text.

41. The text of § 602 provides that "[e]ach Federal department or agency . . . is authorized and directed to effectuate the provisions of [§ 601]." 42 U.S.C. § 2000d-1 (2006).

discriminatory in effect.[42]

While EPA's regulations clearly prohibit disparate impacts,[43] the agency's failure to actually enforce its regulatory standards has been well documented.[44] In 2003, Professor Michael Gerrard studied EPA's enforcement of its regulations and concluded, among other things, that EPA had denied all claims of discrimination in every Title VI complaint that it had decided up until that time.[45] In 2006, Gerrard and his colleague Kristin Alexander updated his 2003 analysis.[46] The results of their unpublished findings were included in an article by Professor Bradford Mank, who reported that the agency rejected twenty-eight of the twenty-nine complaints it decided between October 20, 2003 and December 6, 2005 without investigation for a variety of technical reasons.[47] The one complaint the agency accepted for investigation during that time was then rejected because the agency found no significant impact.[48] This process of clearing the Title VI backlog "by dismissing cases for technical reasons without examining whether a recipient decision or permit caused disparate impacts" has been highly criticized.[49] So, too, has the EPA's general failure to enforce its Title VI regulations.[50] Yet, regardless of the basis for its failure, one thing remains clear: for decades, individuals seeking review of their civil rights complaints in environmental justice matters have not had their claims investigated.[51] As a result of this lack of enforcement, EPA's

42. *See e.g.*, 45 C.F.R. § 80.3(b)(2) (2011).

43. *See* 40 C.F.R. § 7.35(b) (2011) (stating that "a recipient [of federal funds] shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex").

44. For a general overview of EPA's historic failure to enforce its regulations, see Mank, *Title VI*, *supra* note 38, at 26–33. For a detailed analysis of enforcement, see Michael Gerrard, *EPA Dismissal of Civil Rights Complaints*, N.Y. L.J., Nov. 28, 2003, at 3.

45. Mank, *Title VI*, *supra* note 38, at 27.

46. *Id.* at 28.

47. *Id.* (stating the following as some of the reasons the agency did not fund the recipient: the complaint was untimely, the alleged behavior did not violate the agency's regulations, and the case was moot).

48. *Id.*

49. *Id.* at 29 (citing U.S. COMM'N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 55 (2003), *available at* http://www.usccr.gov/pubs/envjust/ej0104.pdf).

50. *See, e.g.*, June M. Lyle, *Reactions to EPA's Interim Guidance: The Growing Battle for Control over Environmental Decisionmaking*, 75 IND. L.J. 687, 693–95 (2000); Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations? The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 17–19 (1999); Waterhouse, *supra* note 38, at 107–10.

51. Mank, *Title VI*, *supra* note 38, at 26–28 (describing how EPA from 1970 to 1993 and during the second Bush administration failed to investigate environmental justice claims).

regulations have rarely, if ever, been used to actually provide direct relief from the disproportionate impacts of pollution to affected communities.

b. Private Rights of Action

Section 601 of the Civil Rights Act provides private parties with the ability to remedy instances of intentional discrimination by federal fund recipients.[52] Initially, parties could also file suit for violations of regulations created pursuant to Section 602 of the Act. In *South Camden Citizens v. New Jersey Department of Environmental Protection*,[53] for example, residents of a section of Camden, New Jersey challenged the granting of permits for the construction of a facility used to make cement products.[54] The district court found that although the environmental laws were satisfied, Title VI was not.[55] Specifically, the district court—following the majority of cases that have considered the issue in contexts other than environmental discrimination—found that Section 602 of the Civil Rights Act provided an implied right of action for private parties.[56] The district court thus remanded the case to the New Jersey Department of Environmental Protection for consideration of the Title VI claim.[57]

As the Third Circuit Court of Appeals noted, however, "*South Camden* . . . had a short shelf life."[58] Just five days after the ruling, the Supreme Court handed down *Alexander v. Sandoval*, holding that private rights of action under Title VI were limited to claims of intentional discrimination brought pursuant to Section 601 of the Act.[59] The

52. Specifically, Section 601 prohibits discrimination based on race, color, or national origin in any "program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006).

53. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot. (*South Camden I*), 145 F. Supp. 2d 446, 450–51 (D.N.J. 2001)

54. *Id.*

55. *Id.* at 461, 503 (granting injunctive relief on the merits of the Title VI cause of action, notwithstanding a finding that "[t]he SLC facility [would] . . . be in compliance with the current NAAQ standard for PM-10 emissions.").

56. *Id.* at 474. For other cases allowing an implied right of action under Section 602, see, e.g., Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996) (implying that a private right of action exists under Title VI implementing regulations); N.Y. Urban League v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (same); City of Chicago v. Lindley, 66 F.3d 819, 828 (7th Cir. 1995) (same); Elston v. Talladega Cnty. Bd. of Educ., 997 F.2d 1394, 1406–07 (11th Cir. 1993) (same); Larry P. v. Riles, 793 F.2d 969, 981–82 (9th Cir. 1984) (same); *see also* Buchanan v. City of Bolivar, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996) (dictum); Latinos Unidos de Chelsea en Accion v. Sec'y of Hous. & Urban Dev, 799 F.2d 774, 785 n.20 (1st Cir. 1986) (dictum).

57. *See South Camden I*, 145 F. Supp. 2d at 505.

58. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot. (*South Camden III*), 274 F.3d 771, 776 (3d Cir. 2001).

59. Alexander v. Sandoval, 532 U.S. 275 (2001). The case concerned the State of Alabama's decision to give its driver's license exam exclusively in English. *Id.* at 279. Martha Sandoval, a

Supreme Court in *Sandoval* noted that it would only find a private right of action in situations where Congressional intent to create such a right was clear.[60] Having found that Title VI provided an individual right of action only for intentional discrimination, the Court ultimately held in a 5-4 decision that agency regulations could not create a private right of action under Title VI based on disparate impact that the statute did not clearly contemplate.[61] Therefore, as a result of the *Sandoval* decision, a plaintiff challenging a LULU under Title VI must show that the federal fund recipient acted with discriminatory intent in siting the LULU in a minority or low-income community.[62] This is significantly more difficult than proving disparate impact discrimination because the plaintiff must show that the recipient both intended to discriminate and knew that it was discriminating against the individual.[63] Efforts to enforce disparate impact regulations via Section 1983 have met a similar fate.[64]

In sum, although it is clear that low-income and minority communities bear disproportionate risks of environmental harm, little has been done to meaningfully decrease this risk. Environmental justice regulation has, instead, been characterized by a lack of regulatory will, as well as legal remedies that require a party to prove intentional discrimination in order to prevail in a challenge to the siting of a LULU. As a result, LULUs continue to be developed and expanded in areas that are already overburdened by pollution.

Hispanic woman, filed a class action suit under § 602 of Title VI alleging that Alabama's English-only policy for the exam had a disparate impact on non-English speakers. *Id.*

60. *Id.* at 286–87.

61. *Id.* at 289. In dictum, Justice Scalia questioned the validity of regulations that prohibited disparate impacts for the same reason. *Id.*

62. *See South Camden III*, 274 F.3d at 781.

63. *See* Gordon Bonnyman, *Dynamic Conservatism and the Demise of Title VI*, 48 ST. LOUIS U. L.J. 61, 71 (2003) ("Such a showing [of intentional discrimination] is an almost impossible burden of proof that makes the law useless for dealing with the current manifestations of discrimination."). A disparate impact claim, on the other hand, requires a plaintiff to show that a facially neutral practice, adopted without discriminatory intent, has a disproportionate impact on a protected class. Mona T. Peterson, Note, *The Unauthorized Protection of Language Under Title VI*, 85 MINN. L. REV. 1437, 1452 (2001).

64. *South Camden III*, 274 F.3d at 788 (holding that a § 1983 claim could not be used by private parties to enforce § 602 regulations). Section 1983 provides a remedy—including both damages and injunctive relief—for an individual who has been deprived of constitutional rights by a person acting under color of state law. Environmental projects that cause a disparate impact in the communities where they are cited would potentially fall under this statute.

II. THE DEVELOPMENT MYTH AND ITS IMPLICATIONS

As Part I has demonstrated, regulation of environmental injustice at the federal level has been lacking. Regulation that actually attempts to provide any form of direct relief from excess pollution has rarely been enforced, and, instead, efforts have been focused on indirect methods of avoiding environmental injustice, such as gathering and disseminating information, enhancing public participation in the decision-making process, and enforcing existing environmental laws. Put simply, efforts to decrease the risks borne by minority community members have been grossly ineffective.

Thus far, the Article has discussed the risks of LULU siting that are disproportionately borne by low-income and minority communities. However, there may also be benefits created when LULUs are sited in a community, as benefits and risks are inextricably intertwined.[65] While substantial research has documented the disproportionate allocation of harm to environmental justice communities, little effort has been made to consider whether the benefits assumed to flow from this same development actually accrue to the community.[66]

Indeed, to the extent community groups have sought to capture benefits, the literature seems to treat their efforts as somewhat unfounded and based solely on power rather than the existence of any form of distributional harm. The primary mechanisms used by communities to capture benefits are, appropriately enough, called "community benefits agreements" ("CBAs"). CBAs are a relatively new phenomenon and, as a result, little information about their use and enforcement exists.[67] Generally, CBAs are contracts that are negotiated by developers and community groups.[68] CBAs arise when community groups have

65. Every new development or modification of an existing development will carry with it potential harms, such as pollution, and potential benefits, such as jobs. At the very least, regulation of new and modified sources of pollution in environmental justice communities should ensure that these communities receive a "net benefit" from each development.

66. For an interesting synopsis of the benefits of development, *s*ee Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994) (discussing the effects of siting decisions on local communities, how opposition arises to those decisions, and who suffers from industry's countermeasures to that opposition).

67. *See* Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 6 (2010) (noting that because CBAs are relatively new, there is "scant evidence" from which to evaluate whether they provide net benefits to the communities that enter into them).

68. *Id.* at 5–6 (recognizing that the government is involved in the negotiation in some cases); *see also* Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 FORDHAM ENVTL. L. REV. 543, 545 (2010).

leverage, such as the ability to legally challenge a permit so as to delay the development of a project.[69] In such cases, the developer will agree to provide benefits in exchange for the community group's agreement to support, or, at least, not to challenge the developer's project.[70]

While CBAs hold some promise as a means of capturing community benefits, they suffer from many limitations.[71] In addition, current literature focusing on CBAs fundamentally misperceives the general argument regarding benefits, describing these agreements as resulting from leverage that community groups use to force the hands of developers to provide benefits.[72] In other words, until now, the literature has conceived of providing benefits to communities as normatively defenseless: the willingness to provide benefits is not based on perceived unfairness or distributional concerns; rather, it is coerced. This Part responds to this limitation. It describes how distributional harm is likely to occur as a result of the permitting of a new LULU in any environmental justice community. Once it is evident that such an additional distributional harm is likely to occur, the normative basis for CBAs becomes clearer, but, more importantly, the need for a systemic rather than an ad hoc response to the problem of benefits distribution also becomes defensible.

A. The Myth

The predominant development narrative suggests that new business construction, while creating costs for a community, ultimately provides community benefits that outweigh a LULU's harms. When a LULU is sited in an overburdened community, community members are subject to

69. Been, *supra* note 67, at 11.

70. *Id.* at 5.

71. *See infra* Part IV.B.2.

72. Been, *supra* note 67, at 11 (suggesting that a CBA is most common when a community group has the ability to block approvals for land uses or the developer wants a government contract that the group could prevent); *see also* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1221–22 (2011) (recognizing that developers will enter into a CBA to secure the political support of the community group and to avoid falling under the preemption of federal laws); Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291 (2008) (discussing CBAs and presenting many examples of how specific CBAs were negotiated); Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482 (2009) (arguing that cities both give too much away to attract capital and then try to exact too much from it once it locates in the locality); Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 642 (2011) (noting that developers lack incentives to enter into a CBA).

the burdens of increased pollution, among other harms. Less apparent is the fact that what are traditionally considered to be the benefits of development may also bypass community members.

The traditional development narrative suggests that development brings with it benefits such as jobs, increased tax revenue, and the "economic multiplier effect"—the result of a new business using other existing services from the community and adding wage earning consumers to the community.[73] Because of these perceived benefits, it is relatively common to hear news of government efforts, such as tax relief or other financial incentives, to keep businesses within a community.[74] This general benefits narrative also impacts LULU siting in environmental justice communities.[75]

Some scholars, however, question whether development actually benefits a community at all.[76] These scholars—generally concerned with whether community efforts to attract businesses through tax breaks and other means are ultimately beneficial—do not specifically address development in minority and low-income communities. To the extent the literature considers the net effect of development on community benefits, however, it is equally relevant to the present analysis. That is, if a community does not get any "net" benefit from attracting new development, its members certainly will not benefit from attracting a LULU that increases pollution to the community. The findings of this literature are mixed and suggest that specific situations determine whether a community receives any net benefit from development. While

73. *See, e.g.*, William F. Fox & Matthew N. Murray, *Do Economic Effects Justify the Use of Fiscal Incentives?*, 71 S. ECON. J. 78, 78–79 (2004); Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. AMER. PLAN. ASS'N 27, 28 (2004); Gene F. Summers & Kristi Branch, *Economic Development and Community Social Change*, 10 ANN. REV. SOC. 141, 143 (1984).

74. *See, e.g.*, Richard Danielson, *Tampa City Council Approves Incentives to Keep Finance Firm from Moving Jobs*, TAMPA BAY TIMES, July 22, 2011, at 1B, *available at* http://www.tampabay.com/news/localgovernment/tampa-city-council-approves-incentives-to-keep-finance-firm-from-moving/1181691 (expanding tax incentives to keep company from leaving the state); David Giambusso & Sarah Portlock, *Panasonic to Move North American Headquarters from Secaucus to Newark*, NEWARK STAR-LEDGER, Apr. 19, 2011, http://www.nj.com/news/index.ssf/2011/04/panasonic_will_move_headquarte.html (same); Jen Sabella, *Sears Considers Leaving Illinois, Governor Quinn Fighting to Keep Them*, HUFFINGTON POST (May 9, 2011, 6:42 PM), http://www.huffingtonpost.com/2011/05/09/sears-considering-leaving_n_859653.html (same).

75. *See* Gerrard, *EPA Dismissal of Civil Rights Complaints*, *supra* note 44 (noting the importance of the development narrative to the politics of siting LULUs in low-income and minority communities).

76. *See, e.g.*, Fox & Murray, *supra* note 73, at 88; Peters & Fisher, *supra* note 73, at 35; Summers & Branch, *supra* note 73, at 141, 148.

it is clear that new business brings with it new jobs, the potential for increased tax revenue, and some ancillary economic growth, scholars who find no benefit have demonstrated that communities often pay excessive costs in terms of community services, tax breaks, and other incentives to lure new business to an area.[77] These costs can outweigh the benefits for communities that attempt to attract business, especially when tax breaks are used to entice the new development to locate in the community.[78] Thus, in some cases at least, new development projects within a community create no real benefit.

The more compelling question—and the question this section will focus on primarily—concerns who generally shares in the benefits of development when they actually result. The existing literature on the effects of development in minority communities strongly suggests that members of an environmental justice community rarely get jobs from new developments, and also raises serious questions about how much tax or economic benefit is received.[79] Rather, it suggests that employment and other benefits rarely accrue to the affected population, while the quality of life for that population deteriorates.[80]

Gene F. Summers and Kristi Branch have conducted a meta-review of existing literature regarding how the economic benefits that accrue to community members when new business comes to a community are distributed.[81] Their review concludes that the community itself does not typically share in the benefits. For example, Summers and Branch found:

77. Those who find no community benefit generally base their arguments on the observation that the community pays as much for increased policing, trash disposal, and other public services for new development as the development benefits the community, especially when tax breaks are given to the new development. *See* KRISTIN SHRADER-FRECHETTE, ENVIRONMENTAL JUSTICE: CREATING EQUITY, RECLAIMING DEMOCRACY 72 (2006); David Brunori, *Principles of Tax Policy and Targeted Tax Incentives*, 29 ST. & LOC. GOV'T. REV. 50, 54 (1997); Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J. OF URB. ECON. 306, 327 (2000); Josh Reinert, *Tax Increment Financing in Missouri: Is It Time for Blight and But-For to Go*, 45 ST. LOUIS U. L.J. 1019, 1037 (2001); Brent C. Smith, *If You Promise to Build It, Will They Come? The Interaction Between Local Economic Development Policy and the Real Estate Market: Evidence from Tax Increment Finance Districts*, 37 REAL EST. ECON. 209, 232 (2009); Rachel Weber, *Equity and Entrepreneurialism: The Impact of Tax Increment Financing on School Finance*, 38 URB. AFF. REV. 619, 640 (2003).

78. Thomas L. Evans, *The Taxation of Nonshareholder Contributions to Capital: An Economic Analysis*, 45 VAND. L. REV. 1457, 1492–93 (1992).

79. *See supra* notes 81–92 and accompanying text.

80. *See* Larry Lyon et al., *Community Power and Population Increase: An Empirical Test of the Growth Machine Model*, 86 AM. J. SOC. 1387, 1389 (1981).

81. *See generally* Summers & Branch, *supra* note 73, at 141 (exploring employment patterns, income, population, agriculture, local business, and public sector costs and revenues by reviewing studies on the industrialization of rural communities).

> Opening a plant creates new employment opportunities . . . . As a policy objective, one would hope that new workers would be recruited from the ranks of the local, disadvantaged residents—i.e. the unemployed, the poor, and members of racial minorities—but this seldom happens. In the majority of cases examined, only a small proportion of the jobs were filled by previously unemployed persons. The proportion was above 14% in only 3 instances and over half the studies report hiring rates below 10%.[82]

As to the race of those hired, "considerable evidence shows that nonwhites [sic] are underrepresented . . . [and w]hen they are hired, they are concentrated in unskilled and semiskilled [sic] jobs."[83]

Plants do not create jobs for local, disadvantaged, minority residents because those residents generally do not have training in the types of skills needed by new industry.[84] Indeed, "the high-skill, high-wage industries that are most likely to increase a community's aggregate income are least likely to hire the local disadvantaged; low-skill, low-wage industries are more likely to employ them."[85] Furthermore, even if trained, many employers deeply believe the myth that "inner-city residents do not want to work and opt for welfare over gainful employment."[86] Some employers also question the reliability and work ethic of these workers, believing low-income and minority workforces to be lacking in this regard.[87]

82. *Id.* at 143–44 (internal citations omitted).

83. *Id.* at 144 (internal citations omitted). Other studies support the Summers and Branch findings. In 2002, the U.S. Government Accountability Office studied whether benefits of development inured to community members. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-479, COMMUNITY INVESTMENT: INFORMATION ON SELECTED FACILITIES THAT RECEIVED ENVIRONMENTAL PERMITS (2002), *available at* http://www.gao.gov/assets/240/234764.pdf (analyzing the number and types of jobs provided, affect on property values, and contributions to the community). The GAO asked the studied facilities to provide employment information about communities nearest the facilities, the types of jobs offered, and the salaries for each job. *See id.* at 15. Unfortunately, only about half of the facilities provided any data on where the people who worked in their facilities lived. *Id.* at 8. Of those who did provide data, only one provided data regarding the employment of individuals from within the community. *Id.* (Hunts Point Water Pollution Control Plant). Instead, most facilities indicated that most of their employees came from within a one- or two-county radius of the facility. *Id.* The one entity that did provide specific information indicated that it had sixty-seven employees from the county in which it was located. *Id.* Of those sixty-seven employees, only one lived in the community in which the facility was located. *Id.*

84. *See* Michael E. Porter, *New Strategies for Inner-City Economic Development*, 11 ECON. DEV. Q. 11, 17 (1997) (providing results from employer surveys regarding the lack of skilled labor).

85. Summers & Branch, *supra* note 73, at 144.

86. Porter, *supra* note 84, at 15.

87. *See id.* at 16. One employer comment received by Professor Porter in response to a survey is representative. This employer notes:

As a result of these factors, the notion that development will provide employment benefits to residents of environmental justice communities is, at best, suspect. Contrary to what many believe about the job benefits that come from opening new industry in a community, non-whites are seriously underrepresented in the workforce. Furthermore, when new industry is sited and non-whites and minorities are hired, they are concentrated in unskilled and semi-skilled jobs.[88] Moreover, "the new employment opportunities created by the establishment of a plant often benefit workers from outside the immediate area."[89] In sum, it is highly likely that the employment benefits created when a new facility is sited in an environmental justice community will not accrue to the members of that community in any meaningful amount.

While little empirical data exists on the distribution of tax and economic benefits from new development in low-income and minority communities, scholarship suggests a distributive result similar to that of employment benefits—albeit through different mechanisms. On reflection, it is perhaps not surprising that minority community members do not receive economic benefits from development. Rather, the same factors that limit their ability to oppose the siting of excess pollution-causing facilities in their community also likely diminish their ability to capture the economic benefits of that development.[90] The lack of political power among low-income and minority community members has been well-documented; not only do the members of low-income and minority groups generally lack the education and oral and written communication skills necessary to meaningfully participate in local politics, but, to the extent that politics continues to be increasingly driven by money, the financial limitations of the community, as compared to

> [T]he vast majority [of the inner-city workers] I hire lacked basic attitudes rather than skills. It was very difficult to find individuals who consistently arrived at work on time, followed direction, worked as a team, or showed even a modest degree of enthusiasm or ambitions. It was necessary to frequently test for drug use to control this problem as well as exercise careful supervision to prevent crime in the workplace. Despite the fact that our wages and promotion opportunities were the best in each area, it was often difficult even to find willing candidates.

Id. at 16. It should be noted that a major distinction seems to exist between recent immigrants and long-term U.S. residents and citizens. Employers report much higher satisfaction with "immigrant workers, many of whom are African-Americans and Latinos." *Id.*

88. *See* Summers & Branch, *supra* note 73, at 144.

89. *Id.*

90. There are many ways in which environmental justice communities are disempowered politically. *See infra* notes 117–128 and accompanying text.

business elites, becomes a severe limitation on political power.[91] Since one of the functions of local government is to distribute the gains from development,[92] to the extent tax money is distributed by political entities, the political power of individual constituents matters.

Thus, it is not the general community but, rather, community elites who often receive the economic benefits of development.[93] Elites benefit from growth in terms of both increased business demand and higher property values.[94] Economic benefits to other members of the community, particularly rise in property values, may also result, but such benefits accrue only at a proportional amount. Thus, the vast majority of economic benefits created by development generally accrue to the few political and economic elites of an environmental justice community, with only small amounts going to the remaining community members.

In sum, while empirical data is limited, well-understood mechanisms of disempowerment suggest that increasing economic development in a racial or ethnic minority community by attracting LULUs is of limited benefit to the community's members. Jobs generally are given to individuals who commute to the worksite from other towns, and other economic benefits, such as those created by the multiplier effect and taxes, accrue only in small amounts to the local community. The benefits of development therefore fail to accrue to members of low-income and minority communities in meaningful amounts. The Article will next consider the implications of these findings for existing risk-reduction focused regulation, and will then propose responding to the problems of environmental injustice through a regulatory scheme that internalizes the benefits in the community at a reasonable level.

B. Implications for Existing Regulation

When a business decides to locate a new source of pollution in a particular community, the decision usually reflects the most cost-effective balance of proximity to resources, shipping, and labor for that

91. *See, e.g., American Democracy in an Age of Rising Inequality,* 2 PERSP. ON POL., 651, 655–58 (2004); Henry E. Brady, Sidney Verba & Kay Lehman Schlozman, *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271 (1995) (using a "resource model" for political participation and power).

92. *See* Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 313–14 (1976).

93. *See* Summers & Branch, *supra* note 73, at 142–48 (noting that elites benefit from growth in terms of higher property values and increased business demand while little benefit is distributed to the general population).

94. Molotch, *supra* note 92, at 314.

facility.[95] All businesses are required to satisfy the environmental regulations promulgated pursuant to statutes such as the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act, regardless of whether a business locates in a low-income or minority community.[96] Requiring more environmental protection in a low-income and minority community than that required by existing standards will raise the cost of producing a product in such a community. Requiring a business to produce a product in a less economically advantageous location may increase costs in a way that makes that business less competitive. As mentioned earlier, individuals generally consider economic development to be a net positive for communities.[97] As a result, regulators who share this belief may be reticent to require industry to decrease harms to low-income and minority communities further than the amount already required by law because they do not want to deter development in those communities.

To the extent this thinking influences the current reticence to meaningfully regulate risks in environmental justice communities, this Article suggests it must be rethought. If the observations of this Article are correct, well-meaning regulators who turn a blind eye to the siting of additional sources of pollution in low-income and minority communities because they want those communities to benefit from the new

95. *See* Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1061 n.330 (1993); Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121, 138 (1997); *see also* Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1093 (2003) ("Numerous 'objective' factors influence the land use siting process. Although individual needs vary, large-scale manufacturers often consider a wide range of factors, such as real estate costs; the physical features of the property; access to transportation, such as highways, rail, river, or oceans; access to raw materials; access to markets; infrastructure and site development costs; the presence and cost of the requisite labor force; and government regulation." (footnote omitted)); Heidi G. Robertson, *One Piece of the Puzzle: Why State Brownfields Programs Can't Lure Businesses to the Urban Cores Without Finding the Missing Pieces*, 51 RUTGERS L. REV. 1075, 1110 (1999) (discussing the findings of various studies of the motivation behind siting decisions in corporate relocations from the 1980s); Rhoda J. Yen*, Green Versus Green: When Economic Concerns of Minority Communities Clash with Environmental Justice Concerns*, 17 J. NAT. RESOURCES & ENVTL. L. 109, 126 (2003) (concluding that "market factors . . . are more influential on corporate siting decision-making than intentional racism.").

96. It should be noted that these laws do not necessarily treat all areas the same in all instances. *See, e.g.,* 33 U.S.C. § 1311(3)(B)(e) (2006); 42 U.S.C. §§ 6921–25 (2006). For example, the Clean Air Act generally requires less environmental protection expenditures from industries located in places that currently meet federal ambient air standards than it does from industries located in areas that do not. *Compare* 42 U.S.C. §§ 7470–92 (2006) (attainment) *with* 42 U.S.C. §§ 7501–15 (2006) (non-attainment). Moreover, some laws treat new sources differently from existing sources, requiring more protection from new sources than existing ones. 42 U.S.C. § 7411 (2006).

97. *See supra* Part III.B.

development are actually fueling further injustice. That is, they are allowing the increased risk without much real benefit. If, indeed, potential benefits are as persuasive a factor in siting decisions as some commentators suggest,[98] it may well be that the findings of this Article support a complete ban on further development in such areas. Of course, it is unlikely that such a ban would be politically acceptable, or even desirable in some circumstances. A full analysis of a complete ban that balances the social costs of requiring industry to move to less advantageous locations against the benefits to a community of decreasing pollution is well beyond the scope of this Article.[99]

Instead, this Article proposes a standard to ensure that community members will receive benefits at least equal to potential harms (a "net benefit standard"). To accomplish this goal, the Article suggests that a federal statute "requiring provision of a reasonable benefit to an environmental justice community" as a condition of a permit for a new LULU be created. A standard that internalizes benefits commensurate with harm is justified as a means of ensuring that the already substantial environmental injustices borne by minority and low-income communities are not exacerbated by a second injustice in which benefits are distributed to others. Such a standard will certainly create costs to industry beyond the costs of compliance with existing environmental standards. However, properly designed, such a scheme will keep these costs to a minimum. The Article will discuss elements of design in the next Part.

Before entering into a discussion of the specific elements of such a standard, however, one further caveat is necessary. A reasonable benefit scheme is not meant to replace regulation that attempts to further decrease pollution in an environmental justice community. Decreasing pollution continues to be the priority of environmental justice advocates. Rather, a net benefit scheme should be used to supplement existing environmental justice regulation. That is, a net benefit scheme is relevant only in situations where existing environmental permitting standards are met and a new LULU will be built. In such a case, any individual source will be adding pollution to an already overburdened community. In other words, a reasonable benefit scheme accepts as its baseline existing environmental regulation, but also recognizes that existing law does not create a "zero pollution" standard because new

98. *See* SHRADER-FRECHETTE, *supra* note 77, at 15 (2006).

99. *See* Gerrard, *The Victims of NIMBY*, *supra* note 66, at 501–21 (discussing the beneficiaries and victims of LULU siting decisions).

LULUs will cause additional pollution when constructed. In such cases, the goal of a reasonable benefit scheme would be to ensure that a secondary and separate injustice—a failure to create benefits commensurate with the additional burden—does not occur.

III. A REASONABLE BENEFIT STANDARD

This Part considers how a "reasonable benefit" standard requirement as a condition of receiving an environmental permit for a LULU in an environmental justice community could be implemented. In addition to discussing the basic administrative logistics associated with implementing the standard, this Part raises and responds to a number of other concerns that would arise depending on the manner in which regulators choose to implement the standard. For example, a reasonable benefit regulatory requirement may be structured solely to decrease risk, or to provide other community benefits such as investment in education. Takings law may require that risks be decreased.[100] If takings jurisprudence does not so require, however, regulators must consider what counts as a benefit to a community. Similarly, the standard may be implemented in a way that responds to and overcomes some of the main limits on community power. Of course, increasing a community's power over decisions to permit LULU development would increase administrative costs and compliance costs. These concerns will be considered after the basic framework of a reasonable benefit scheme is developed.

A. What Is a Reasonable Benefit and How Is It Determined?

1. What Is a Reasonable Benefit?

From a business's perspective,[101] the decision to locate a LULU in a particular community is based on a number of factors, such as proximity to natural resources, markets, transportation, and labor.[102] As noted

100. *See* notes 108–110 and accompanying text.

101. Of course, siting decisions have impacts on individuals and communities. It is important to stress that this is a cost issue from the perspective of business.

102. *See* Been *supra* note 95, at 1017; Kevin *supra* note 95, at 137–39; *see also* Timothy J. Bartik, *Business Location Decisions in the United States: Estimates of the Effects of Unionization, Taxes, and Other Characteristics of States*, 3 J. BUS. & ECON. STAT. 14, 18, 20–21 (1985); Adam B. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, *in* ECONOMICS OF THE ENVIRONMENT 53, 79 (Robert Stavins ed., 5th ed. 2005).

previously, a business will site a new facility in a location that balances all of these factors in the most cost-effective way to ensure the lowest cost for the production and sale of its products.[103] It is, of course, only when a low-income or minority community already overburdened by polluting sources provides the most cost-effective location for development that concerns about internalizing benefits within the community will arise. In situations where an environmental justice community is not the most cost-effective location, business will not develop in that community.

The lower costs to industry of locating in an already overburdened community must be balanced with the needs of that community, and a standard must ensure that development occurs only when the community will benefit from the development. Thus, regulators will need to consider the amount of risk and other harm to community members created by the proposed development.[104] The community benefit should be proportional to the amount of increased harm. To the extent a new facility may cause substantial harm—through substantial releases of hazardous air pollutants, for example—the community could seek a response that provides more substantial relief[105] than for a minimal source of pollution.[106] If these added costs to industry do not make locating the facility economically disadvantageous, industry would provide the benefit and build in the community. In cases where providing the benefit increases the cost of development so that the environmental justice community provides a less cost effective balance after internalization of the benefit than another location, businesses will choose to build in other locations. This is the trade-off embodied by the reasonable benefits scheme outlined herein.

103. Bartik, *supra* note 102, at 15.

104. Pollution carries with it other harms, such as aesthetic impacts, that may also require remedy. However, for clarity of analysis and because health risks are often the primary source of harm, this section focuses solely on remedying health risks. Agencies have had substantial experience in remedying other types of harms through the use of mechanisms such as supplemental environmental projects. *See e.g.,* Final EPA Supplemental Environmental Project Policy Issued, 63 Fed. Reg. 24,796, 24,796–804 (May 5, 1998).

105. Of course, the opposite is also true. If a facility can show that it is already providing a net benefit to community members, then no further benefit would be required.

106. A separate issue would concern the possibility of determining whether to incorporate into the analysis the benefits actually created by new development, so that a total "net cost" is established. As the earlier discussion suggests, new development in environmental justice communities may bring some benefits in the form of jobs, tax revenue, and economic benefits to a community. If a "net cost" were the goal of a reasonable benefit scheme, these benefits would need to be subtracted from increased costs to determine the actual cost of development to a community.

2. Two Different Forms of Benefits: All Benefits and Risk-Reduction

Community benefits can take many forms. For example, if a community determines that job creation is its most valued goal, then it should be able to pursue that benefit. Different benefits will have different costs. Providing unskilled employment opportunities to the community, for example, may be much less costly than providing job training for skilled labor positions. A properly structured negotiation between the community and developer can determine the most cost-effective balance of benefits for the community to receive.[107]

There may, however, be some limitations as to what benefits may be properly conditioned on the development of property. In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court found that there must be a substantial nexus between proposed development and the exactions demanded as a condition of the development by the government.[108] While it is not certain that a substantial nexus test would apply in the case of a reasonable benefit scheme,[109] even if the standard did apply, it would serve only to constrain the types of benefits that could be demanded of the developer to those that respond directly and proportionally to the increase in health risk and other harms created by the development.[110] This limitation would do little to dampen the appeal of a reasonable benefit scheme. Indeed, such

107. In this form, the benefits provided by a reasonable benefit regime are akin to the types of benefits pursued by communities in CBAs. The Article has already discussed the conceptual limitations of CBAs in the current literature and provided a foundation for them grounded in the recognition that benefits, like burdens, are not fairly distributed to environmental justice communities. *See supra* notes 67–72 and accompanying text. However, CBAs are also completely inadequate as a regulatory response to the problem of unfair benefit distribution. See discussion *infra* Part IV.B.2.

108. Dolan v. City of Tigard, 512 U.S. 374, 383 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

109. *See generally* Been, *supra* note 67 (discussing the benefits and drawbacks that various stakeholders believe CBAs to offer or threaten). Been raises this concern in connection with community benefits agreements. *Id.* Uncertainty may result from the structure of the demands made of the developer. *See* Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Fees as Takings*, 51 WM & MARY L. REV., 1833, 1850 n.83 (noting that the form of the exaction, particularly if it is structured as a fee, may or may not rise to the level of a taking); *see also* David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 29 VAL. U. L. REV 527 (1989) (internal citations omitted) (stating that the Supreme Court has noted that there is no set formula for analyzing a taking and that such analysis calls as much for an exercise in judgment as an application of logic, and also describing the difficulties of applying the takings analysis in early Supreme Court jurisprudence). Also, to the extent benefits run to community members directly, there may be reason for less concern regarding government misuse of the exaction.

110. *See* Dolan v. City of Tigard, 512 U.S. at 390–91.

a limitation would work to alleviate the problem of disproportionate risk at the core of environmental injustice.

One of the positive aspects of a reasonable benefit scheme is that it can be used to alleviate the risks created directly by a polluter. Consider a simple hypothetical example of the development of a manufacturing facility in an environmental justice community. Assume that the community members to be affected by the new pollution caused by this facility number approximately 50,000 and that the amount of pollution to be added will increase the likelihood of death in the community by 1 in 50,000 people every year. In other words, the pollution will likely cause one death per year. Based on these assumptions, a reasonable benefit that bears a nexus to the pollution would be for the polluter to pay for public health infrastructure that will benefit the community in a similar amount. Such a benefit could be in the form of funding a clinic or a mobile clinic in the community, subsidizing the purchase of medicine, or creating information campaigns that will help individuals detect cancer sooner and thus have a greater chance of survival.

In such a case, a reasonable benefit scheme may make risk reduction much more cost effective than efforts focused on decreasing pollution. It would do this by focusing not on decreasing pollution, but rather on decreasing risk. The cost of decreasing risk to the community through an investment in public health protection is likely to be much smaller than the cost to a developer of lowering pollution emissions as a means of decreasing risk. Many regulations already require businesses to expend all reasonable expenses to limit pollution emissions.[111] Thus, any further reductions in emissions required of industry will almost necessarily be high cost protections that provide little meaningful decrease in health risk on a dollar for dollar basis. On the other hand, many environmental justice communities lack basic public health infrastructure.[112] In other words, the low-hanging fruit of risk-reduction still likely exists in many of these communities. If a campaign to increase self-examination for

111. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1311(2)(a) (2006) (requiring use of "best available technology economically achievable"); Clean Air Act, 42 U.S.C. § 7502 (2006) (requiring use of reasonably available control measures).

112. *See* D.P. ANDRULIS & L.M. DUCHON, HOSPITAL CARE IN THE 100 LARGEST CITIES AND THEIR SUBURBS, 1996-2002: IMPLICATIONS FOR THE FUTURE OF THE HOSPITAL SAFETY NET IN METROPOLITAN AMERICA (2005), *available at* http://www.rwjf.org/files/research/Andrulis%20Hospitals%20Report-final.pdf (discussing how low-income metro areas have lost hospitals and low-income suburban areas have little access to health care); *see also*, Bernice Yeung, *Finding the Invisible: Public Health in California's Low-income Incorporated Communities,* USC ANNENBERG, (April 6, 2012), http://www.reportingonhealth.org/blogs/2012/04/06/finding-invisible-public-health-californias-low-income-unincorporated-communities.

cancer would decrease risk by one life per year, this campaign alone could provide a reasonable benefit to the community.

It is important to clarify that there is room left for negotiation between the community and developer over a reasonable benefit even if a significant nexus must exist. While the developer may well desire the cheapest response to the risk it creates, the community may have reasons for arguing that a different response is necessary. It is now well understood and documented that lay people and experts may perceive risk differently.[113] Consider, for example, the different responses to cancer. While the value of one life lost, regardless of its cause, is the same for all risk experts, lay individuals may actually perceive cancer risks to be worse than other risks of death because of the lack of control and dread that generally surrounds perceptions of cancer death in society.[114]

In sum, there are two different ways to conceive of the benefits that a community would receive. On the one hand, the benefits analysis may not be constrained by the need for a substantial nexus between the development and the harm government is seeking to protect. In that case, benefits such as jobs, job training, or support for local education will all potentially be available to the community. If, however, the benefits analysis is subject to the substantial nexus requirement, efforts that improve public health will be the only benefits available for consideration. The fact that efforts to improve public health respond to the problem of environmental injustice more directly and can accomplish a decrease in risk in a more cost-effective manner than existing regulation that focuses solely on decreasing pollution may make a constrained reasonable benefit scheme more attractive, regardless of the existence of a nexus requirement.

3. Procedure for Determining a Reasonable Benefit

Regardless of the mechanism chosen to internalize benefits, a process for accomplishing this task will be necessary. Depending on the applicability of the substantial nexus test, a process for determining what public health response is proportional to the harm being created may be

113. *See, e.g.*, Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 604–10 (1992); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1099 (2000).

114. *See* Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield*, 1997 U. CHI. LEGAL F. 59, 98 (1997); Molly Wilson, *Cultural Understandings of Risk and the Tyranny of Experts*, 90 OR. L. REV. 113, 165, 168 (2011).

needed. If a substantial nexus is not required, the process will need to address the question of what other benefits may be compensatory. The next section of this Article will outline some considerations of the procedures to be used in determining a reasonable benefit.

There are many different ways in which a requirement that new or modified LULUs provide a reasonable benefit to an impacted community could be implemented. Factors that should be considered include administrative costs, the need for community input, and responding to current limits on community power. This section considers two different responses that reflect different balances of these considerations.

The first response would have the lowest administrative costs, but it would do little to provide the community with input or overcome limits to community power. Such a scheme would simply require that a permit applicant describe the risks that its new construction will create and the benefits it will provide to the community, with regulators making the decision regarding the point at which benefits outweigh costs. In cases where the community is not organized, regulators would have to consider how to seek community member input into their decision. Many mechanisms for getting community input already exist, and these may be easily adaptable to the task of considering what benefits the community needs.[115]

At the other end of the spectrum would be a regulatory response that provides meaningful representation to communities but has higher administrative costs. Pursuant to that scheme, when any permit for a major modification or new source of pollution in a low-income or minority community is sought, advocates responsible for identifying and representing potentially affected community members would be designated.[116] These advocates would work to ensure that the

115. *See, e.g.*, FED. INTERAGENCY WORKING GRP., ENVIRONMENTAL JUSTICE FEDERAL INTERAGENCY DIRECTORY (2011), *available at* http://www.epa.gov/environmentaljustice/resources/publications/interagency/directory.pdf (listing various agency contacts dealing with environmental justice issues); MD. DEP'T OF ENV'T, PUBLIC PARTICIPATION GUIDE CITIZEN HANDBOOK 15–32 (2006), *available at* http://www.mde.state.md.us/programs/CrossMedia/EnvironmentalJustice/EJResources/Documents/www.mde.state.md.us/assets/document/MDEPublicParticipationGuide2006.pdf; N.M. ENV'T DEP'T, A REPORT ON ENVIRONMENTAL JUSTICE IN NEW MEXICO 18 (2004), *available at* http://www.nmenv.state.nm.us/Justice/Reports/NMEDFinalReport-Dec07-04.pdf (recommending different avenues by which to communicate with environmental justice communities); *Interagency Working Group on Environmental Justice, U.S. Envtl. Prot. Agency*, ENVTL. PROT. AGENCY, http://www.epa.gov/environmentaljustice/interagency/schedule.html (last visited June 22, 2012).

116. There are many existing funding sources for environmental justice communities, including the Center for Community Action and Environmental Justice. *See* CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE, http://www.ccaej.org/ (raising awareness of environmental

community's needs were addressed by a developer's benefits proposal.

The use of advocates to organize and represent the community would help to overcome some of the limitations on political participation faced by low-income and minority groups. As previously discussed, the majority of regulatory efforts to date emphasize such factors as gathering data and otherwise enhancing community participation in the permitting process.[117] Such efforts fail to overcome completely the limitations on political power that hamper the political participation of community members in permitting decisions.[118] In particular, such efforts cannot make up for the lack of civic skills, education and financial resources that exist in most low-income and minority communities.[119] A reasonable benefit requirement on its own would provide the community with a small additional amount of legal power by requiring, as a condition of a permit, that community needs be considered and served. As part of a government permitting process, the determination of what constitutes a reasonable benefit could also be appealed if the community had legal advocates.

While the reasonable benefit standard alone would provide some additional community power, it would still do little to overcome the lack of civic skills and limited resources of many environmental justice communities.[120] By contrast, a properly designed reasonable benefit scheme could help overcome some of the most significant limitations on community power. Political scientists find that a lack of "[c]ivic skills—those communications and organizational capacities that are so essential to political activity" contributes significantly to a lack of participation in political activities.[121] Civic skills are acquired through a variety of

issues and providing leadership training, skill development, and other programs to effected communities); NEW YORK ENVIRONMENTAL JUSTICE COMMUNITY IMPACT GRANT PROGRAM, http://www.dec.ny.gov/public/31226.html (providing state assistance funding to community-based organizations for projects that address exposure of communities to multiple environmental harms and risks); *Environmental Justice Small Grants Program*, ENVTL. PROT. AGENCY, http://www.epa.gov/compliance/environmentaljustice/
grants/ej-smgrants.html (last visited June 22, 2012) (providing federal grants to community-based organizations and local and tribal organizations working with communities facing environmental justice issues); *References/Links: Environmental Justice*, NATURAL RESOURCES DEF. COUNCIL, http://www.nrdc.org/reference/topics/environ_justice.asp (last visited June 22, 2012) (listing community-based organizations that work on environmental justice issues).

117. *See supra* Part I.B.

118. *See supra* notes 90–92 and accompanying text.

119. *Id.*

120. *See* Brady, Verba & Lehman, *supra* note 91, at 275–76, 283.

121. Henry Brady et al., *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271, 273 (1995) (discussing the correlation between civic skills and political participation).

means, and vary based on an individual's education, type of employment, and depth of participation in nonpolitical organizations:

> The acquisition of civic skills begins early in life—at home and, especially, in school. However, the process need not cease with the end of schooling but can continue throughout adulthood. Adult civic skills relevant for politics can be acquired and honed in the nonpolitical institutions of adult life—the workplace, voluntary associations, and churches. Managing a reception for new employees and addressing them about company benefits policy, coordinating the volunteers for the Heart Fund drive, or arranging the details for a tour by the church children's choir—all these undertakings represent opportunities in nonpolitical settings to learn, maintain, or improve civic skills.[122]

Education level, in particular, influences the development of civic skills. Not only are highly educated people more likely to have the vocabulary, speaking, and writing skills necessary for political engagement, but higher levels of education also influence opportunities to engage in leadership and organizational tasks in both work and volunteer organizations.[123] For example, Brady and Verba have observed that "those with higher education are only slightly more likely to be working than those with less education, but among those with jobs, the better-educated are much more likely to have chances to practice skills.[124] While the mechanism is somewhat different, higher levels of education also correlate with increased practice of civic skills in non-work organizations.[125]

Civic skills—particularly communication and organizational skills—are extremely important to those communities that seek to challenge an environmental permit.[126] Without such skills, community organization is unlikely to occur when a new polluting source seeks a permit in the community. First, the lack of knowledge of, and engagement in, the political process may lead to general community apathy toward proposed development. Even if some community members do learn of and have concerns about a proposed development, a lack of civic skills will likely make it difficult to communicate these concerns to and mobilize other community members. Moreover, once a community is organized, often

122. *Id.*

123. *Id.* at 275.

124. *Id.*

125. *Id.* ("[T]hose with high levels of educational attainment are considerably more likely than those at lower levels to be involved with an organization.").

126. *See* COLE & FOSTER, *supra* note 10, at 131–32, 152–53.

times it is hard to keep a coalition of community members together as the members' interests diverge regarding the group's goals and means of achieving them. Put simply, it takes substantial leadership skills to mobilize a group of people and to keep them together. The lack of such skills is a core cause of environmental injustice and is not likely to be overcome for purposes of determining community benefits without intervention to organize community members.

Lack of civic skills is exacerbated by a lack of money. Indeed, as politics grows "increasingly [reliant] on modes of activity that use money rather than time as a resource, the edge enjoyed by the already advantaged is enhanced."[127] Environmental permitting decisions are procedurally complex and often require the application of specialized technical knowledge to determine whether to grant a permit application.[128] Even if efforts are made to include community members in the process, without the skills necessary to understand both the process and standards, community members cannot meaningfully take part in the permitting discussion. In the case of a reasonable benefit application, community members will be hard put to understand the risks being created by any proposed development or the potential responses to the development that the community might desire.

These technical standards and complex procedures are generally well understood only by those with specialized knowledge, such as lawyers and environmental scientists. Unless such resources are made available to the individuals being impacted by the potential development, it will be much more difficult for members of affected communities to engage the environmental permitting process. Environmental justice communities are thus greatly disadvantaged by their lack of financial resources when it comes to environmental permitting matters. Whereas wealthy, educated communities can organize themselves and hire the experts necessary to take issue with a permit, low-income communities cannot do so. There are, of course, *pro bono* attorneys available to help some communities, but many communities go without such representation because of limited resources. The lack of legal and scientific guidance ensures that these communities will not be able to effectively take part in the determination of a reasonable benefit.

In sum, there are a myriad of different schemes that could be used to

127. *See* Brady, Verba & Lehman, *supra* note 91, at 274.

128. *See generally* 40 C.F.R §§ 50.1–50.17 (2011) (containing standards relevant to air permitting); 40 C.F.R. §§ 122.1–122.64 (2011) (containing standards relevant to water permitting); 40 C.F.R. §§ 270.1–270.320 (2011) (containing standards relevant to hazardous waste permitting).

determine what amounts to a reasonable benefit. Each scheme will, of course, balance considerations differently. This section has briefly outlined two possible ways of implementing the standard—a low administrative cost scheme and a high one. A combination of schemes could also be used depending on the size of the project, with larger projects providing more process.

B. Comparisons to Other Environmental Justice Responses

A reasonable benefit scheme is related to two other responses to environmental injustice—compensation schemes and community benefits agreements. The purpose of this section is to consider the relationship of a reasonable benefit scheme to these other two concepts.

1. Reasonable Benefits Versus Compensation Schemes

A reasonable benefit standard is related to earlier suggestions that businesses provide compensation to communities in which LULUs are to be sited.[129] Compensation schemes have been defined very broadly to include almost any situation in which a developer provides a community any benefit.[130] The mechanisms by which the provision of benefits is accomplished have also been described broadly to include such means as auctions and negotiated agreements with a community.[131] Compensation schemes are supported by a number of policy justifications: compensation payments may internalize the external costs of pollution, ensure more efficient allocation of resources,[132] help overcome disparities in costs and benefits of LULUs by ensuring that more benefits are received by those most harmed by a LULU, and make the siting of a LULU in a particular community more acceptable to community members.[133] Similar to compensation schemes, a reasonable benefit scheme would also serve a number of these goals.

A reasonable benefit scheme, however, is different from the traditional notion of a compensation scheme in important ways. One of the main criticisms leveled at compensation schemes is that they are a form of bribery.[134] That is, the structure and rationale of most compensation schemes is to overcome community resistance to the siting of a new

129. Vicki Been, *Compensated Siting Proposals: Is it Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787, 787 (1994).

130. *Id.* at 792–94.

131. *Id.* at 794–96.

132. *Id.* at 796.

133. *Id.*

134. Been, *supra* note 67 at 29.

LULU by paying for the right to build.[135] In addition, some compensation schemes limit the community's rights to fight the siting of a new LULU once its members have accepted compensation.[136] A reasonable benefit scheme is not susceptible to these criticisms. For example, a reasonable benefit scheme is not based on the notion of enticing a community to accept a source of pollution. As noted previously, a reasonable benefit regulation would not provide benefits in exchange for assumption of pollution[137] and would not require voluntary acceptance of a new LULU in exchange for the payment of money. Rather, a reasonable benefit regulation would simply condition development on the provision of benefits equal to costs. Moreover, a reasonable benefit regulation would do nothing to hamper the rights of a community to fight the development of a LULU on other grounds, such as its failure to comply with existing laws. A reasonable benefit scheme therefore does not fall victim to the objection that, in essence, it would be a form of bribery that limits community power.

Nor is a reasonable benefit scheme a mechanism for purchasing the right to harm people's health. Rather, a reasonable benefit scheme is based on the recognition that, once sited, certain benefits—primarily jobs and economic benefits—that are created by a new LULU are not necessarily distributed to those harmed by the LULU. It would not provide any affirmative basis for allowing development, with its attendant health impacts, and would only serve to ensure that benefits will be provided to those who are harmed.

2. Reasonable Benefits and Community Benefits Agreements

A reasonable benefit scheme shares a noted relation to CBAs. CBAs are a relatively new phenomenon and, as a result, little information about their use and enforcement exists.[138] In general, developers and community groups negotiate CBAs.[139] Usually, the community groups

135. Been, *supra* note 129, at 808 (noting that the Nuclear Waste Policy Act of 1982 authorizes "impact assistance" in the form of "compensation to induce volunteers for facilities"). Been goes on to discuss the merits of individual compensation schemes in Massachusetts and Wisconsin as two examples where "[s]everal states have adopted compensated siting as part of their hazardous waste siting programs. *Id.* at 811.

136. *Id.* at 812.

137. See discussion *supra* Part III.B.

138. *See* Been, *supra* note 67, at 5 (noting that because CBAs are relatively new there is scant evidence from which to evaluate whether they provide net benefits to the communities that enter into them).

139. *Id.* at 6 (recognizing that, in some cases, government is involved in the negotiation); *see also* Fazio & Wallace, *supra* note 68, at 555.

agree to support or, at least, agree not to challenge, a developer's project in exchange for an agreement by the developer to provide certain benefits to the community.[140] CBAs have been used to provide a variety of benefits, such as ensuring that jobs are given to community members, correcting environmental problems at the project site, and ensuring a living wage for workers employed by the project.[141]

CBAs and a reasonable benefit standard overlap to the extent that both internalize benefits of development into the community. However, CBAs and a reasonable benefit standard differ in a number of important ways. First and foremost, CBAs come into existence only in situations where communities are empowered to demand them.[142] CBAs are built on a developer's need to get community approval or forbearance from litigation and other opposition to a permit.[143] For CBAs to exist, therefore, there must be organized community opposition to a development. Moreover, the organized opposition must have enough legal or political power to create a need on the part of the developer to negotiate. If there is no basis in existing land use or environmental law for communities to take issue with a permit, delay caused by the challenge process is the extent of a community group's leverage, assuming a community group has organized against the development in the first place. As such, CBAs occur relatively rarely, while the problem of unfair distribution of benefits is likely to be ubiquitous.

Relatedly, because CBAs are based on community leverage and not on a requirement that a community receive benefits commensurate with the harms being done by a new LULU, there is little principled means for determining the amount of benefits to be provided. Put simply, when negotiating a CBA, a developer will provide benefits only to the extent necessary to pacify a community group holding leverage. In many cases, the leverage may just be the ability to delay development. Thus, the provision of benefits is commensurate with the leverage held by a community group rather than the potential harm resulting from a LULU, indicating that CBAs may simply decrease distributional injustice rather than fully remedy it.

Other concerns about CBAs arise from their nature as contractual remedies. For example, the contractual nature of CBAs creates concerns regarding their enforceability.[144] As Professor Been has noted, the terms

140. Been, *supra* note 67, at 6.
141. *Id.*
142. *See* Been, *supra* note 67, at 6–7.
143. *Id.* at 7; *see also* Sachs, *supra* note 72, at 1221–22.
144. Been, *supra* note 67, at 29–31.

of a CBA are often ambiguous.[145] Moreover, given resource limitations, it would be extremely hard for communities to monitor the terms of their CBAs and also enforce them through a contract action in court. Further, the various forms of CBAs make remedy selection for them difficult. As noted by Professor Been, "[i]f the public approval process was influenced by the existence of a CBA . . . and the CBA is later breached, should the remedy for the community be the revocation of any permits given in the public process?"[146]

Other concerns arise from the ad-hoc nature of CBAs. For example, some question whether the groups that generally oppose development can adequately represent the interests of all members of the community.[147] Often times these groups may be organized around a particular interest, such as environmental protection or community redevelopment.[148] Similarly, groups may sometimes be formed by those most immediately threatened by a LULU because their harms are generally high enough to overcome the transaction costs of organizing. While these groups may be seriously harmed by a LULU, such groups clearly do not represent the interests of all those harmed. Consequently, their demands may well focus on their own specific sense of benefits rather than the community's at large. Put simply, CBAs are not standardized. Rather, they are negotiated by particular groups with their own agendas and needs. Such ad hoc agreements may not reflect actual community-wide need, nor demand the full possible extent of benefits necessary to offset potential harms.

A reasonable benefit regulatory regime responds to many of these concerns. Because provision of a reasonable community benefit would be a permit standard, violation of the reasonable benefit standard would be subject to challenge under existing procedures by public officials or through citizen suits. One major advantage of addressing failure to provide benefits through citizen suits is that many citizen suit provisions provide prevailing parties with their attorneys' fees.[149] Such a provision is particularly useful to enforcement in the environmental justice context, as it helps overcome the financial limitations on community efforts to

145. *Id.*

146. *Id.* at 31.

147. Schragger, *supra* note 72, at 511–12.

148. COLE & FOSTER, *supra* note 10, at 102.

149. *See, e.g.*, Solid Waste Disposal Act, 42 U.S.C. § 6972(e) (2006) (stating that courts may award costs of litigation, including reasonable attorneys fees, to the prevailing or substantially prevailing party); Clean Air Act, 42 U.S.C. § 7604(d) (2006); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (2006).

police the standards. Remedies traditionally available for violation of a standard would include fines and, in certain circumstances, separate projects aimed at remedying the specific harm caused.[150]

In addition to responding to enforcement limitations, a properly designed reasonable benefit regime largely overcomes the ad hoc nature of both creating and enforcing community benefits agreements. A reasonable benefit regime would require the reorientation of existing administrative personnel toward ensuring that communities receive reasonable benefits. Such a regime would require, at the outset, a means of identifying the affected community and how that community has been harmed. As the regime progressed, mechanisms for providing community benefits would be refined and, of course, because a benefit scheme would be part of the permitting process, the language and other mechanisms used to create community benefits would be easily found in the permit itself instead of private agreements between developers and community groups, making it easier to monitor and enforce.[151]

In sum, a reasonable benefit scheme shares many commonalities with both compensation schemes and community benefits agreements. However, a reasonable benefit scheme also differs from both of these other responses to environmental injustice in ways that may make it a more appealing means for responding to the problem of unfair benefit distribution.

IV. CONCLUSION

Conventional wisdom suggests that development provides net benefits to the communities in which the development occurs. The specific benefits equated with development often include jobs, increased tax revenue, and other benefits that result from the infusion of additional capital into a community. This Article has challenged the general wisdom. It argues that development in low-income and minority communities may not actually result in net community benefits. It then considers the implications of this argument and suggests a regulatory response to the identified problem.

The Article argues that, at a minimum, a means for providing benefits commensurate with burdens must be developed. Unlike the high cost of increased reduction of pollution, a scheme that internalizes benefits is

150. *See generally* Federal Water Pollution Control Act, 33 U.S.C § 1318 (2006); Solid Waste Disposal Act, 42 U.S.C. § 6928 (2006); Clean Air Act, 42 U.S.C. § 7413 (2006).

151. Some CBAs are made part of the permit process or the public record, but nothing generally requires this to be done.

economically feasible. The Article suggests the addition to existing law of a standard that requires a permit-seeker to provide an affected environmental justice community with a reasonable benefit as a means of accomplishing this goal. While regulators may argue over the manner in which to accomplish the internalization of benefits, until means are found to eradicate burdens in environmental justice communities, failure to attend to the benefits side of the environmental justice issue simply exacerbates an already serious distribution problem.