

UPHOLDING CIVIL RIGHTS IN ENVIRONMENTAL LAW: THE CASE FOR EX ANTE TITLE VI REGULATION AND ENFORCEMENT

CLAIRE GLENN[∞]

ABSTRACT

In the twenty-first century, discrimination has become increasingly subliminal, unconscious, and structural. Yet the legal framework for addressing discrimination has ignored this shift, remaining focused on intentional discrimination and reliant on ex post enforcement. The old model is a poor fit for today's reality. Nowhere is this truth more striking than in cases of environmental racism. While the particular ingredients that make up each local toxic cocktail vary, communities of color across the country bear a disproportionate and discriminatory brunt of environmental harms. In response, the Environmental Protection Agency has relied almost exclusively on ex post remedies, borrowing from other civil rights frameworks to enforce its nondiscrimination mandate. In practice, this means that the agency addresses complaints only after an alleged discriminatory harm has occurred, if at all—a model that has utterly failed to enforce the civil rights of environmental justice communities. Fixing the current system is crucial, and the stakes are high. But what reforms should we be fighting for? What is the best enforcement model for achieving environmental justice goals? This article answers these questions by revisiting the long-debated choice between ex ante (or prophylactic) enforcement and ex post (or reactive) enforcement. By synthesizing this debate with those over environmental injustices and structural forms of racism, the article reveals the limitations of overreliance on an outdated ex post framework. Environmental justice today requires prophylactic regulations and ex ante enforcement that address discriminatory harms earlier and prevent them from manifesting in the first place.

[∞] J.D., New York University School of Law, 2016; B.A., B.M., Michigan State University, 2011. I am sincerely grateful to Professor Richard Revesz for his guidance and encouragement through the development of this article from start to finish, to attorney Al Huang for sparking the ideas that pushed me to write, and to attorney Brent Newell for his invaluable insights along the way. Thank you to Leora Moreno, Sarah Brafman, Michael Gsovski, Lucy Zhou, Elisa Cariño, and the editorial staff of the *N.Y.U. Review of Law & Social Change* for your thoughtful assistance through the workshopping and editing process. I would also like to thank my family and friends for their love and support, always. This article is dedicated to the attorneys and community organizers who work tirelessly to advance environmental justice goals—it is an honor to work with and learn from you. All opinions and errors are my own.

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I. INTRODUCTION

Located in the heart of the American Black Belt, Uniontown, Alabama, is a small community plagued by massive pollution. Residents live within a four-mile ring that also includes a cheese plant, catfish mill, sewage lagoon, and what they describe as a “mega-landfill.”¹ The landfill is authorized to handle 15,000 tons of waste per day, by far the largest volume authorized in the state.² The landfill also disposes highly toxic coal ash waste.³ Foul odors, corrosive dust, and contaminated rivers and streams have become routine.⁴ The simple pleasures of life—sitting on a porch, growing a garden, sending children to play outside—have become unenjoyable, if not unsafe.⁵ Property values have plummeted,

1. See Kristen Lombardi, *Environmental Justice, Denied: Thirty Miles from Selma, a Different Kind of Civil Rights Struggle*, CTR. FOR PUB. INTEGRITY, Sept. 11, 2015, <http://www.publicintegrity.org/2015/08/05/17703/thirty-miles-selma-different-kind-civil-rights-struggle>.

2. Complaint at 7–8, Title VI Civil Rights Complaint and Petition for Relief or Sanction: Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama, EPA OCR File No. 01R-12-R4 (May 30, 2013) [hereinafter Title VI Civil Rights Complaint], <https://www.documentcloud.org/documents/2067658-12r-13-r4-complaint-redacted.html>.

3. *Id.* at 16 n.9; Lombardi, *supra* note 1.

4. Lombardi, *supra* note 1.

5. *Id.*

preventing those who want to leave from being able to do so.⁶ In short, pollution is holding Uniontown residents hostage. Unfortunately, it is unsurprising that this pollution is concentrated in a community in which eighty-eight percent of residents are Black and the median annual household income is \$13,800.⁷ Communities of color across the country are consistently faced with disproportionate and compounding environmental harms and toxins.⁸ Their stories reflect one of the largest and most dangerous civil rights challenges of our time: environmental racism.

The American movement for civil rights remains an inspiring cornerstone of our national history. In response to pervasive intentional discrimination and racial terror, civil rights activists fought to bring about massive reforms, shaping what became modern Equal Protection and antidiscrimination jurisprudence. A hallmark victory of this movement, the Civil Rights Act of 1964 created new legal mechanisms for challenging and addressing discrimination. The Act's broad reach sought to end discrimination on the basis of race, color, religion, sex, and national origin in numerous aspects of social, economic, and political life. Its anti-discrimination mandate extended to voting,⁹ public accommodations and facilities,¹⁰ schools,¹¹ and employment¹² and applied to all entities receiving federal funds.¹³

The Civil Rights Act of 1964 understandably responded to the form of discrimination most clearly perceived and prevalent at that time—intentional discrimination. As a result, its legal framework sought to combat purposeful exclusion, denial, segregation, and animus, rather than systemic and structural inequalities.¹⁴ The Act thus established an ex post enforcement model focused

6. Title VI Civil Rights Complaint, *supra* note 2, at 13, 22–23.

7. Lombardi, *supra* note 1.

8. For a complete list of the hundreds of civil rights complaints that have been filed with the Environmental Protection Agency, see *Complaints Filed with EPA Under Title VI of the Civil Rights Act of 1964*, ENVTL. PROT. AGENCY, <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964> (last visited Oct. 8, 2016) [hereinafter *Complaints Filed with EPA*]. For more information, see, for example, CTR. ON RACE, POVERTY, & THE ENV'T, A RIGHT WITHOUT A REMEDY: HOW THE EPA FAILED TO PROTECT THE CIVIL RIGHTS OF LATINO SCHOOLCHILDREN (2016), <http://www.crpe-ej.org/crpe/index.php/news/publications/396> [hereinafter *RIGHT WITHOUT A REMEDY*]; Heather Kathryn Ross, *Righting Civil Wrongs*, EARTHJUSTICE, June 1, 2016, <http://earthjustice.org/features/righting-civil-wrongs>.

9. See Civil Rights Act of 1964, Pub. L. No. 88-352, tits. I & VIII, 78 Stat. 241 (1964).

10. See *id.* at tits. II & III.

11. See *id.* at tit. IV.

12. See *id.* at tit. VII.

13. See *id.* at tit. VI.

14. Under current Supreme Court doctrine, a disparate impact cause of action is only allowed under Title VII of the Act. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (striking down testing and educational requirements for employment that disparately exclude racial minorities, despite employer's lack of discriminatory intent). Except in the employment context, therefore, plaintiffs are limited to bringing claims of intentional discrimination. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001).

on redressing harms that had already manifested and were caused by intentional discrimination.

In the twenty-first century, however, this inherited legal framework has failed to keep pace. While cases of intentional discrimination are now relatively rare, racial discrimination and inequality are as pervasive as ever. The change is one of form—discrimination has become less purposeful and overt and, instead, has become increasingly subliminal, unconscious, and structural.¹⁵ As a result of existing inequalities, individuals do not need to harbor “specific ill will or racial hatred” in order to take actions that contribute to the perpetuation of structural discrimination.¹⁶ And nondiscriminatory explanations for discriminatory effects—even economically rational explanations—abound.¹⁷ Yet the legal framework for addressing discrimination has ignored this shift, remaining focused on intentional discrimination and reliant on ex post enforcement.¹⁸

The old model is thus a poor fit for today’s reality.¹⁹ Nowhere is this truth clearer than in cases of environmental racism. In the United States, race- and class-based inequalities combine to create uniquely acute environmental and health vulnerabilities.²⁰ When variables like income, education, and occupation are held constant, however, people of color face elevated levels of toxic exposure

15. In fact, the Supreme Court has now recognized the role of unconscious and implicit bias in racial discrimination. See *Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015) (“Recognition of disparate-impact . . . permits plaintiffs to counteract *unconscious prejudices and disguised animus* that escape easy classification as disparate treatment.” (emphasis added)).

16. Tseming Yang, *The Form and Substance of Environmental Justice: the Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 B.C. ENVTL. AFF. L. REV. 143, 210 (2002); see also Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994) (describing how market dynamics cause those with low incomes to locate near sources of pollution and, as a result, lead to disparate environmental impacts even in the absence of discriminatory siting by polluting facilities).

17. See, e.g., Randall Kennedy, *Suspect Policy*, THE NEW REPUBLIC, Sept. 13, 1999, <https://newrepublic.com/article/63137/suspect-policy> (describing the “economic rationality” behind excluding jurors on the basis of race, charging different life insurance premiums on the basis of race, and racial profiling in the contexts of policing, hiring, and housing); Been, *supra* note 16 (describing how disparate environmental impacts result from the economically rational decisions of low-income people to move to neighborhoods with lower housing costs). But see, e.g., Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1283–89 (1995) (discussing how unconscious biases and subtle discrimination “interfere[] with the assumptions of [economic] rationality.”).

18. Yang, *supra* note 16, at 156 (explaining that the Court’s jurisprudence “ignores the fact that discriminatory outcomes are frequently the result of processes that cannot be traced to any specific actor or act, but are instead the result of institutions and processes that are biased against racial minorities”).

19. Cf. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1079 (2006) (finding regulatory models that assume discrimination takes place overtly or explicitly to be “woefully out-of-date”).

20. Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 15, 21 (Robert D. Bullard ed., 1993).

and, as a result, disproportionately suffer the costs of environmental harms.²¹ For example, research has shown race to be an independent factor, not reducible to class, in predicting the distribution of: (1) air pollution; (2) contaminated fish consumption; (3) landfill and incinerator sites; (4) abandoned toxic waste dump sites; and (5) lead poisoning in children.²² Thus, while the particular ingredients that make up their local toxic cocktail may vary, communities of color bear a disproportionate and discriminatory brunt of environmental harms nationwide.

In response, the Environmental Protection Agency (“EPA”)—the federal agency tasked with enforcing civil rights in the environmental context—has relied almost exclusively on ex post remedies.²³ Title VI of the Civil Rights Act of 1964 (“Title VI”) establishes the general nondiscrimination mandate that applies to all federal agencies.²⁴ Title VI states that “[n]o 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.”²⁵ As a federal agency, EPA is thus required to comply with and enforce Title VI’s nondiscrimination mandate in the environmental justice context. Borrowing from other civil rights regulatory frameworks, EPA has attempted to enforce Title VI through a reactive scheme in which the agency investigates complaints submitted after an alleged discriminatory harm has already occurred.

By all accounts, EPA’s ex post model has utterly failed to enforce the civil rights of environmental justice communities.²⁶ EPA has targeted its limited civil

21. *Id.*

22. *Id.* (internal citations omitted).

23. While EPA does nominally require ex ante compliance in the form of Title VI assurances from those receiving funding from the agency, *see* 40 C.F.R. § 7.80 (2015), this prophylactic component has played a very minor and ineffective role in practice, serving largely as a rubber stamp in the EPA grant process. *See infra* Parts IV, VI.

24. *See* 42 U.S.C. § 2000d *et seq.* (2012).

25. 42 U.S.C. § 2000d (2012). Title VI directs agencies empowered to extend federal financial assistance to promulgate regulations effectuating the law’s nondiscrimination mandate. *Id.* § 2000d-1. EPA has complied by promulgating regulations that prohibit discrimination in programs receiving EPA assistance. *See* 40 C.F.R. § 7.10 *et seq.* (2015); *see also* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 539 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) [hereinafter THE LAW OF ENVIRONMENTAL JUSTICE].

26. I use the phrase “environmental justice communities” to refer to communities disproportionately impacted by environmental harms on the basis of race, color, or national origin, i.e., communities to which Title VI applies in the environmental justice context. At least in some contexts, the concept of environmental justice has been broadened to also include low-income communities regardless of race. *See, e.g., Environmental Justice*, ENVTL. PROT. AGENCY, <https://www.epa.gov/environmentaljustice> (last visited Oct. 8, 2016) (“Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” (emphasis added)). A normative analysis of what environmental justice should include is beyond the scope of this article. It is important to note, however, that for purposes of this article I use environmental justice to refer to environmental discrimination on the basis of race, color, and national origin, while noting that such discrimination is both related to

rights funding on superficial projects like “heritage events,” rather than on “the critical discrimination cases affecting . . . disadvantaged communities.”²⁷ EPA has egregiously and consistently delayed complaint processing and investigations.²⁸ Between 1997 and 2011, EPA responded to only six percent of Title VI complaints within the required timeframe.²⁹ As a result, many complaints have been backlogged for years,³⁰ some for a decade or more.³¹ In addition to these extreme delays, EPA’s complaint investigation process has been deeply flawed, cutting complainants out of the process and leaving them without notice or an opportunity for participation or representation.³² Enforcement is further hampered by the lack of direct remedies, EPA’s reluctance to use the main remedy at its disposal (withdrawal of funding), and the absence of meaningful judicial review of adverse administrative decisions.³³

income and wealth disparities and independently significant in the environmental justice context. *See infra* Part II.

27. DELOITTE CONSULTING LLP, FINAL REPORT: EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 2 (2011) [hereinafter DELOITTE REPORT], <http://src.bna.com/gmK>.

28. *See, e.g.*, Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309, 392–95 (1994); Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 760–61 (2013).

29. Brentin Mock, *The EPA Attempts CPR on Its Own Civil Rights Act Enforcement*, GRIST, May 22, 2014, <http://grist.org/cities/the-epa-attempts-cpr-on-its-own-civil-rights-act-enforcement/>.

30. *Rosemere Neighborhood Ass’n v. U.S. Env’tl. Prot. Agency*, 581 F.3d 1169, 1175 (9th Cir. 2009); *see also* Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1329 (2014) (“Despite heavy investments in Title VI advocacy, environmental justice advocates have struggled to get the EPA to strengthen its enforcement. The agency has been plagued by backlogs in processing complaints, and according to a recent account, the EPA’s Office of Civil Rights has failed to make a single final finding of noncompliance among the 247 complaints advocates have filed since 1993.”).

31. EARTHJUSTICE, WAITING FOR JUSTICE: COMPLAINTS SHEET 1 (2015) [hereinafter WAITING FOR JUSTICE], <http://earthjustice.org/sites/default/files/files/Waiting%20for%20Justice%20Complaints%20Sheet.pdf>. These five complaints had originally been submitted by varied communities across the country—in Michigan, California, Texas, New Mexico, and Alabama. *Id.* at 1–4. The complaints all shared a common theme. The state permit process had failed to adequately consider and account for the cumulative impacts of multiple sources of pollution affecting environmental justice communities. *Id.* The plaintiffs had thus filed administrative complaints alleging Title VI violations with EPA between 1994 and 2003. *See* Complaint for Declaratory and Injunctive Relief ¶ 2, *Californians for Renewable Energy v. U.S. Env’tl. Prot. Agency* (N.D. Cal. July 15, 2015), <http://earthjustice.org/sites/default/files/files/Title%20VI%20Unreasonable%20Delay%20Complaint.pdf>. EPA had accepted these complaints for investigation between 1995 and 2005. *Id.*

32. *See* Mock, *supra* note 29 (Title VI regulations continue to “leave the aggrieved party with all the vexation without self-representation in the resolution . . . Citizens can file administrative complaints, but it falls on the EPA to investigate and litigate, if necessary. That exclusive power also means that the EPA can settle a Title VI complaint without involving the party who originated it . . .”); *see also* RIGHT WITHOUT A REMEDY, *supra* note 8, at 8 (describing the secret settlement reached in the *Angelita C.* case, of which the complainants had learned only after the ink had dried).

33. THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 25, at 526.

Strikingly, despite receiving hundreds of complaints, EPA has not once found a civil rights violation in the entire history of its Title VI regulatory framework.³⁴

The consequences of EPA's abysmal enforcement record have been devastating for environmental justice communities like Uniontown, Alabama. For decades, environmental justice advocates have called for improvements to EPA's ineffective, reactive model of ex post enforcement, with little success.³⁵ Without a credible threat of enforcement, polluting entities have continued to operate, pollute, and infringe on the civil rights of communities of color.

Fixing the current system is crucial, and the stakes are high. But what reforms should we be fighting for? The question is particularly important as racial justice efforts gain political traction, due to the work of groups like Black Lives Matter and others.³⁶ Given an opportunity for reform, how do we make the most of it? What specific changes will be most effective and impactful? In short, what is the best enforcement model for achieving environmental justice goals?

In seeking to answer these questions, I assess the long-debated choice between ex ante (or prophylactic) enforcement and ex post (or reactive) enforcement. Instead of describing how EPA's ex post enforcement scheme could be improved, this article makes the case for a new model altogether—a model of ex ante enforcement that relies on prophylactic regulatory requirements.

The ex ante model predominates in other areas of environmental law. Most environmental enforcement includes a robust prophylactic component. Whether regulating water, air, waste, or hazardous substances, polluting facilities must first demonstrate compliance with technology and performance standards to obtain a permit—before they operate, expand, or build in the first place. It is absurd to imagine environmental laws that instead require regulators to sit on their hands and wait, empowered to act only after harmful pollution, contamination, or exposure has occurred. Yet this is essentially how EPA's framework for environmental justice has attempted to function.

Of course, an ideal regulatory system combines elements of both ex ante and ex post enforcement—mechanisms for both prophylactic and reactive measures. In fact, “ex ante and ex post regulation actually are inseparable; because compliance with rules is never 100 percent, there must be a machinery for punishing violators.”³⁷ In the case of environmental justice, however, there

34. See *Complaints Filed with EPA*, *supra* note 8.

35. See *infra* Part IV.

36. Notably, the Supreme Court's recognition of “unconscious prejudices and disguised animus” in *Inclusive Communities Project* reflects how racial justice has gained political salience, social acceptance, and judicial recognition, in no small part due to the advocacy of Black Lives Matter and similar groups. See *Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

37. Richard A. Posner, *Regulation (Agencies) versus Litigation (Courts): An Analytical Framework*, in *REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 14 (Daniel P. Kessler ed., 2011).

has been immense overreliance on a broken ex post enforcement scheme. I therefore do not argue against continued work to improve the existing ex post scheme. Instead, I argue that reform efforts must also pay much more attention to implementing prophylactic measures that can prevent environmental injustices in the first place. Even further, much of what is broken in the ex post enforcement scheme stems precisely from the overreliance upon it.

Effective environmental justice enforcement requires primary reliance on a robust ex ante framework. To support this argument, I synthesize the now familiar theoretical debate on regulatory choice with considerations of structural racism and racial inequality integral to the environmental justice context. As a result, while this article focuses on reforming Title VI enforcement by EPA, it has implications beyond the environmental justice context. Ex ante regulations may provide a better solution for addressing other forms of structural racism and implicit bias that remain pervasive today. Because discrimination more often occurs through implicit biases unaffected by conscious and express intent, effective regulation requires “proactive structural interventions that minimize harm without relying solely on potential individual litigation.”³⁸ In the fight for equality and justice for all, we should look for ways to address structural inequality and unconscious discrimination earlier and prevent it from manifesting in the first place.

Part II introduces the concept of environmental racism, situating it within the broader social context and discussing implications for environmental justice generally and my proposal in particular. Next, Part III defines the terms ex ante and ex post and clarifies the scope of my analysis. Part IV continues by describing the current state of environmental justice jurisprudence: reliance on ex post enforcement, key legal developments, and EPA’s failure to enforce its Title VI mandate. Part V then makes the case for ex ante regulation for environmental justice, incorporating both established and new theoretical justifications in the context of EPA’s Title VI enforcement. To demonstrate how a more ex ante-focused enforcement scheme can work in practice, Part VI describes the comparatively robust disparate impact framework established by the Department of Transportation (“DOT”). Finally, Part VII concludes by highlighting some thoughts for implementation and possible applications beyond environmental justice.

II.

ENVIRONMENTAL RACISM IN CONTEXT: CAUSES AND SOLUTIONS

Across the country, communities of color are disparately exposed to environmental harms. While the disparity is clear, the causes are complex, systemic, and varied. On one hand, locally undesirable land uses (“LULUs”) that generate environmental and health harms may be strategically located in

38. Kang & Banaji, *supra* note 19, at 1080.

politically vulnerable communities. A 1984 report to the California Waste Management Board has become an infamous example of such strategic siting.³⁹ The report recognized that while communities in all socioeconomic groups tend to resent locally sited LULUs, “middle and upper-socioeconomic strata possess better resources to effectuate their opposition.”⁴⁰ The report explicitly concluded that because of this resource disparity, “[m]iddle and higher-socioeconomic strata neighborhoods should not fall at least within the one-mile and five-mile radii of [a proposed LULU site].”⁴¹ Necessarily, the report demonstrates a conscious and strategic choice to locate LULUs in communities with the least social and political power. LULUs strategically sited in “low-income, disempowered neighborhoods with a high concentration of nonvoters,” are, in turn, sited more often in communities of color as they are more likely to fit this profile.⁴²

On the other hand, systemic inequalities may drive those in search of the cheapest available housing to effectively “come to the nuisance” by moving to neighborhoods that already host LULUs.⁴³ The dynamics of the housing market “are likely to cause the poor and people of color to move to or remain in the neighborhoods in which LULUs are located, regardless of the demographics of the communities when the LULUs were first sited.”⁴⁴ Thus, environmental justice problems do not always result from predatory or strategic siting decisions. Systemic market mechanisms contribute as well:

As long as the market allows the existing distribution of wealth to allocate goods and services, it would be surprising indeed if, over the long run, LULUs did not impose a disproportionate burden upon the poor. And as long as the market discriminates on the basis of race, it would be remarkable if LULUs did not eventually impose a disproportionate burden upon people of color.⁴⁵

39. CERRELL ASSOCIATES, INC. & J. STEPHEN POWELL, POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING (1984).

40. *Id.* at 26.

41. *Id.*; *see also* Bullard, *supra* note 20, at 18.

42. Bullard, *supra* note 20, at 18.

43. Been, *supra* note 16, at 1385.

44. *Id.* at 1390.

45. *Id.* at 1390–91 (“[F]airness of the distribution becomes a question about the fairness of our market economy.”). For example, systemic racism and poverty leave people of color and the poor with fewer opportunities to “vote with their feet” and more vulnerabilities to “job blackmail,” effectively translating lack of market power into a lack of political capital and legal protections. *See* Bullard, *supra* note 20, at 21–23. Been does not argue that her theory is definitively true in all cases, but that current environmental justice efforts have been hampered by a lack of data and understanding of the causes of distributional concerns. Been, *supra* note 16, at 1406. Without knowing “which came first—the people of color and poor or the LULU,” it becomes impossible to know whether the solution lies in better siting decisions or more system-oriented solutions. *Id.*

Whether attributing disparities to strategic siting decisions or broader structural dynamics, these injustices ultimately link back to pervasive racial inequality. First, because people of color are disproportionately poorer than others, they are more likely to live in low-income neighborhoods and work in low-income jobs associated with higher exposure rates. Second, numerous barriers have led people of color to have disproportionately less opportunity for political influence. Although powerful organizing work has been done to counteract historical and present-day barriers, with less access to or influence over political structures it is more difficult to challenge a polluting facility. Third, intentional, structural, and implicit racial biases have compounding effects on existing economic inequality and political barriers.⁴⁶ Critically, this explains why race is consistently found to be an independent factor not reducible to class in predicting the distribution of environmental harms.⁴⁷

Research demonstrating the significance of race in disparate exposure to environmental hazards dates back decades. In the 1980s, a study by the U.S. General Accounting Office (“GAO”) and a report by the United Church of Christ (“UCC”) Commission for Racial Justice brought national attention to the significant correlation between race and exposure to toxic substances.⁴⁸ The UCC report was particularly impactful in demonstrating the national scope of this problem. It found that one third of the nation’s hazardous waste landfills were located in five southern states: Alabama, Louisiana, Oklahoma, South Carolina, and Texas. The three largest sites—accounting for about forty percent of the total estimated hazardous waste landfill capacity in the entire country—were located in primarily Black zip codes. The study found race to be by far the most prominent factor for predicting the location of commercial hazardous waste landfills, a more significant factor than either household income or home value.⁴⁹

Publication of this research led to increasing public awareness about disproportionate environmental burdens and a closer examination of the claim that race, in particular, was a significant independent factor for predicting

46. See, e.g., James K. Boyce, *Is Inequality Bad for the Environment?*, WORKING PAPER NO. 135, POLITICAL ECONOMY RESEARCH INSTITUTE 7 (2007) (recognizing that political power in practice is unequally distributed and tends to be correlated with purchasing power and stating that both these dimensions of social differentiation not only matter, but reinforce each other).

47. See, e.g., Bullard, *supra* note 20, at 21–22.

48. U.S. GEN. ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983), <http://archive.gao.gov/d48t13/121648.pdf>; UNITED CHURCH OF CHRIST COMM’N FOR RACIAL JUSTICE, *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES* (1987), <https://www.csu.edu/cerc/researchreports/documents/ToxicWasteandRace-TOXICWASTESANDRACE.pdf>; see also *The Environmental Justice Movement*, NRDC.ORG, <https://www.nrdc.org/stories/environmental-justice-movement> (last visited Nov. 20, 2016) (describing the rise of the environmental justice movement and the impact of the GAO study and UCC report).

49. UNITED CHURCH OF CHRIST COMM’N FOR RACIAL JUSTICE, *supra* note 48, at 15–16.

exposure.⁵⁰ Study after study confirmed its significance. For example, in a summary assessment of fifteen studies conducted between 1971 and 1992, Paul Mohai and Bunyan Bryant found that “[w]here the distribution of pollution has been analyzed by both income and race (and where it was possible to weigh the relative importance of each), in most cases race has been found to be more strongly related to the incidence of pollution.”⁵¹ More recently, a twenty-year retrospective on the original UCC report described the advances in research that have more accurately matched the locations of people to hazardous sites and, in doing so, demonstrated racial and socioeconomic disparities to be even greater than previously shown.⁵² Overall, people of color now comprise a majority in neighborhoods with commercial hazardous waste facilities.⁵³ More than nine million people are estimated to live within three kilometers (1.8 miles) of the nation’s 413 commercial hazardous waste facilities, over fifty-five percent of whom (over 5.1 million) are people of color.⁵⁴ Furthermore, the proportion of people of color is much larger (often over two-thirds of residents) in neighborhoods with clusters of more than one facility.⁵⁵ These racial disparities are widespread throughout the country, whether one examines national data or data from EPA regions, states, or metropolitan areas.⁵⁶

Recognizing the compounding effects of economic, political, and racial inequality, the systemic barriers to environmental justice are immense, extending far beyond the context of environmental harms. This, however, does not make environmental justice a futile goal. Instead, it raises four central points for successful advocacy. First, because environmental racism is intricately linked to other forms of political, social, and economic subordination, large-scale success cannot be achieved in a silo. Environmental justice advocates must ally with social justice advocacy more broadly. Second, to the extent that environmental justice mechanisms can recognize and respond to larger systemic problems, they

50. ROBERT D. BULLARD, PAUL MOHAI, ROBIN SAHA & BEVERLY WRIGHT, *TOXIC WASTES AND RACE AT TWENTY: 1987–2007*, at 38 (2007), <https://www.nrdc.org/sites/default/files/toxic-wastes-and-race-at-twenty-1987-2007.pdf>.

51. Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* 167 (Bunyan Bryant & Paul Mohai eds., 1992). See also BULLARD, MOHAI, SAHA & WRIGHT, *supra* note 50, at 45 (finding that the number of research studies has grown steadily and dramatically over the past twenty years, the majority of which have found “significant racial and socioeconomic disparities in how environmental hazards of a wide variety are distributed”).

52. BULLARD, MOHAI, SAHA & WRIGHT, *supra* note 50, at 39–45. Newer, distance-based methods (as opposed to those that rely on census or zip code boundaries) better match where people are located in relation to environmentally hazardous sites. *Id.* at 44.

53. *Id.* at 63.

54. *Id.* at 52. These figures are based on information reported during the 2000 census. *Id.* The over 5.1 million people of color includes approximately 2.5 million Hispanic/Latinos, 1.8 million Black/African Americans, 616,000 Asian/Pacific Islanders, and 62,000 Native American/American Indians. *Id.*

55. *Id.* at 63.

56. *Id.*

will more successfully protect communities of color. Third, environmental justice successes in practice require that perfect not be the enemy of good. While perfect environmental justice is impossible until we live in a perfectly equal society, that should not prevent zealous advocacy to improve the lives of people suffering the harms of environmental racism now. Finally, equal protection under the law is a principle with value beyond what might otherwise be characterized as economic rationality. Discrimination, including disparate impacts that perpetuate structural inequalities, can frequently be framed as economically “rational.” It is easy to imagine “race-neutral” explanations—“the mega-landfill got a permit to be sited in Uniontown simply because the land was cheap, not because of racial animus!” But equal protection under the law is a value that Americans have decided is worth at least some price.⁵⁷ The remaining question is how much we, as a society, are willing to pay. While this question is impossible to answer in the abstract, it highlights the important role environmental justice advocates can play in identifying and implementing solutions that get us the most equality bang for our buck.

With these four points in mind, this article puts forward a proposal for reform, with some caveats. My proposal provides an avenue for more effective civil rights enforcement by shifting to a more *ex ante* focused model that better reflects and responds to the realities of modern structural discrimination and unconscious bias. Like any policy, its implementation would come with costs. But it would also bring immense civil rights benefits to the communities that have long-suffered the doubly toxic effects of environmental racism. Finally, my proposal is neither a panacea, nor without shortcomings. Environmental justice successes require many sustained steps taken by many people working together and across traditional categories of social justice advocacy. That said, my proposal would serve as a meaningful and much-needed step in the right direction.

III.

EX ANTE VERSUS EX POST: DEFINITIONS AND SCOPE

The choice between *ex ante* and *ex post* enforcement is often muddled in discussions of rules and standards. Authors have characterized rules and standards as dichotomies along a continuum of specificity;⁵⁸ as poles of a

57. Equality protection is a value recognized in law, even where economic analysis may characterize discrimination as “rational” in light of the connection between social inequality and economic inequality. Equal protection under the law is required regardless of economic rationality, even when it requires additional imposed costs. *See, e.g.*, Kennedy, *supra* note 17 (noting that it is illegal to charge different life insurance premiums on the basis of race, even though life expectancies vary based on race, and illegal to discriminate on the basis of race in rental housing, even though race is an even higher predictor of unemployment than education). Title VI is no exception.

58. *See, e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974) (“[W]e will sometimes treat the specificity–generality

spectrum ranging from simple to complex,⁵⁹ as distinctions between whether law is given content before or after a regulated act;⁶⁰ as enforcement mechanisms defined by whether they take force before or after the regulated activity occurs;⁶¹ and as combinations of the above.⁶² To avoid confusion, therefore, this paper does not use either “rule” or “standard” as analytic terms of art. Instead, I focus on the distinction between *ex ante* and *ex post* enforcement mechanisms to center my analysis on the temporal question of when laws should be enforced.⁶³

I use the term *ex ante* to refer to those enforcement mechanisms that operate before a regulated activity takes place. These are prophylactic regulations aimed at preventing an undesirable harm from occurring in the first place. In the environmental context, examples of prophylactic regulations include operational requirements that describe how hazardous waste generators must store and dispose of toxics, manufacturer requirements that limit the emissions cars can produce, procedural requirements that detail the steps to complete an Environmental Impact Statement before a project can be undertaken, and permit requirements that must be met before a LULU can be constructed at a given site and operate at a given capacity.

In contrast, I use the term *ex post* to refer to those enforcement mechanisms that operate only after a harm has occurred—methods for identifying a harm and its cause, undertaking remedial action, and imposing a consequence that

continuum as if it were a dichotomy between ‘rules’ and ‘standards’ . . . The difference between a rule and a standard is a matter of degree—the degree of precision.”).

59. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 589–90 (1992) (arguing that if “the desirability of the complex standard arises from its complexity,” rather than its promulgation *ex post*, then “a complex rule may be even better than the complex standard”).

60. *Id.* at 585 (describing the difference between rules and standards as whether a law is given content *ex ante* or *ex post*).

61. See Steven Shavell, *Liability for Harm Versus Regulation for Safety*, 13 J. LEGAL STUD. 357, 357–60 (1984).

62. Louis Kaplow, for example, critiques authors who subsume the benefits of complexity under the banner of *ex post* standards or those of simplicity under the banner of *ex ante* rules rather than distinguishing them analytically. Kaplow, *supra* note 59, at 596 (“[S]ubsuming the benefits of complexity under the banner of standards or those of simplicity under the banner of rules not only obscures the analysis, . . . but does not correspond very well to the legal universe.”).

63. While a distinct choice between *ex ante* and *ex post* enforcement is conceptually useful, it is important to note that enforcement regimes in practice are often mixed and exist in a spectrum rather than a neat binary. See *id.* at 561–62. For example:

[A]dvance determination of the appropriate speed on expressways under normal conditions, or even of the criteria that will be relevant in adjudicating reasonable speed . . . are “rule-like” when compared to asking an adjudicator to attach whatever legal consequence seems appropriate in light of whatever norms and facts seem relevant. Yet the same advance determination would be “standard-like” when compared to a precise advance determination of what constitutes normal conditions and what constitutes reasonable speed under various exceptional circumstances.

Id. at 562 (internal citations omitted).

internalizes costs and creates a deterrent effect. The common law system of tort litigation is the paradigmatic example.

Paradigms aside, *ex ante* regulation can be judicial as well as administrative—as in the case of preventive detention, injunctions, and regulatory decrees—and *ex post* regulation can be administered by agencies as well as courts—such as the Federal Trade Commission and the National Labor Relations Board, which operate mainly by trial-type proceedings conducted after a legal violation has occurred.⁶⁴

That said, my analysis examines the choice between *ex ante* and *ex post* within the context of agency enforcement, an area to which scant attention has been paid.⁶⁵ Because the courts have closed their doors to claims of disparate impact discrimination, judicial remedies are now unavailable to almost all environmental justice plaintiffs.⁶⁶ As a result, the relevant question is not whether, but how agencies should regulate. The choice between *ex ante* and *ex post* enforcement becomes a question of whether an administrative scheme should focus on prophylactic or reactive measures.

IV.

THE CURRENT EX POST SYSTEM FOR ENVIRONMENTAL JUSTICE ENFORCEMENT

Traditionally, antidiscrimination laws have taken the form of general prohibitions on discrimination enforced by *ex post* remedies.⁶⁷ Generally, the *ex post* model has relied on two means for enforcement: the private attorney general (in which a private citizen sues as an alleged victim of discrimination) and public enforcement (in which a public agency either brings a case to court or adjudicates claims through an administrative process).⁶⁸

Environmental justice enforcement—both in the courts and under the regulatory regime established by EPA—has followed the *ex post* model established by earlier civil rights laws. Title VI of the Civil Rights Act of 1964 (“Title VI”) serves as the clearest legal hook for environmental justice enforcement.⁶⁹ Title VI mandates that “[n]o 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

64. Posner, *supra* note 37, at 13.

65. See Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 120 (2013) (“[S]cant attention has been directed at the tradeoffs [between *ex ante* regulation and *ex post* liability] in the domain of public law, an area where the question is not one of administrative versus common law enforcement.”).

66. See *infra* Part IV.

67. See, e.g., Kang & Banaji, *supra* note 19, at 1078–79 (“The basic components of traditional antidiscrimination law are (1) *ex ante* commands not to discriminate, and (2) *ex post* legal remedies if plaintiffs prove discrimination.”).

68. Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1343 (2012).

69. 42 U.S.C. § 2000d *et seq.* (2012).

activity receiving Federal financial assistance.”⁷⁰ Both the private attorney general model and the public enforcement model have served as Title VI enforcement mechanisms—the former via private litigation in the federal courts, the latter via EPA’s Title VI complaint investigation process.

In the courts, Title VI enforcement has been severely limited by precedent constraining private civil rights litigation. In *Regents of the University of California v. Bakke*, the Supreme Court stated that Title VI’s antidiscrimination provisions were coextensive with the Equal Protection Clause, effectively limiting the substantive reach of the statute.⁷¹ During the same period, the D.C. Circuit established precedent limiting opportunities for judicial appeal when agencies fail to effectively enforce Title VI.⁷² More recently, the Court returned to the question of Title VI’s scope in *Alexander v. Sandoval*, specifying that Title VI created a private cause of action only for claims of intentional discrimination.⁷³ In a devastating blow to those fighting the disparate impacts of structural environmental racism, the Court in *Sandoval* acknowledged the validity of agency regulations prohibiting disparate impact discrimination but held that these regulations do not provide a private cause of action.⁷⁴ In short, the *Sandoval* decision turned the federal courts hostile to environmental justice claims that had once fit under the disparate impact framework.⁷⁵

With the development of such significant barriers to federal court enforcement by private litigants, those wronged have become increasingly reliant on administrative remedies to vindicate their interests.⁷⁶ Title VI directs agencies empowered to extend federal financial assistance to promulgate regulations that effectuate the statute’s nondiscrimination mandate.⁷⁷ EPA has complied by establishing regulations that prohibit discrimination in programs receiving EPA assistance, focusing primarily on complaint investigation as its enforcement

70. 42 U.S.C. § 2000d (2012).

71. 438 U.S. 265, 287 (1978); see also Johnson, *supra* note 30, at 1299–1306.

72. See Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973); see also Johnson, *supra* note 30, at 1306–08.

73. Alexander v. Sandoval, 532 U.S. 275, 281 (2001).

74. *Id.* at 285.

75. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, for example, the plaintiffs had originally alleged that the New Jersey Department of Environmental Protection (“NJDEP”) had violated Title VI by granting a permit for construction and operation of a granulated blast furnace slag grinding facility in Camden. 2006 U.S. Dist. LEXIS 45765, at *1–3, 34 (D.N.J. Mar. 31, 2006). After amending their complaint in light of *Sandoval*, the court dismissed their claims for failing to show NJDEP had either attempted to evade civil rights protections or grounded its policies in discrimination. *Id.* at *65–67, 98–100. The court explained that despite evidence of potentially discriminatory enforcement and foreseeable disparate impact, the plaintiffs had failed to establish that NJDEP issued permits “because of, not merely in spite of, [the] adverse effects upon the minority community.” *Id.* at *115–16.

76. See Yang, *supra* note 16, at 146; THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 25, at 33.

77. 42 U.S.C. § 2000d-1 (2012).

model.⁷⁸ These regulations prohibit both intentional and disparate impact discrimination and apply to all entities that receive financial assistance from the agency.⁷⁹

EPA's Title VI regulations seek to incorporate the mandates of a civil rights statute under the traditional environmental regulatory framework.⁸⁰ On one hand, these are two very different legal systems with unique histories addressing fundamentally different subject matters.⁸¹ While civil rights law is primarily associated with judicial intervention and ad hoc resolution of individual disputes, environmental law has been primarily concerned with public programs that affect many.⁸² Environmental regulations have overwhelmingly sought to address Garrett Hardin's "Tragedy of the Commons" and the distinctly majoritarian concern of how to maximize overall social welfare given limitations, tradeoffs, and conflicting individual incentive effects.⁸³ Civil rights litigation, in contrast, has sought precisely the reverse—counter-majoritarian protection of minorities against discrimination, exclusion, and unfair treatment by the majority.⁸⁴

In one sense, there is ample room for these two movements to converge on shared goals in the environmental justice context—a rising tide, after all, will raise all ships. Environmental justice communities can benefit when environmentalists advocate for better minimum standards that are enforced across the board. Unfortunately, these antithetical approaches have also posed difficulties. In advancing majoritarian environmental interests through the sausage machinery of politics, the civil rights interests of environmental justice communities have too often not made the cut.⁸⁵ This has understandably left environmental justice communities suspicious of general environmentalist agendas, goals, and models—an unfortunate result given what environmental justice advocates could gain from adopting the *ex ante* model used to enforce other aspects of environmental law.

In an effort to impute civil rights values into its environmental laws, EPA imported the *ex post* model used in other civil rights contexts for its Title VI enforcement.⁸⁶ Originally, environmental justice advocates hoped that EPA's

78. See 40 C.F.R. §§ 7.10–180 (2015).

79. As noted above, after *Sandoval*, there remains a private cause of action for intentional discrimination, but the sole avenue for relief for disparate impact discrimination is through EPA's administrative process of complaint investigation.

80. Yang, *supra* note 16, at 170.

81. See *id.*

82. *Id.* However, civil rights law has not been completely devoid of administrative agencies. The Equal Employment Opportunity Commission ("EEOC") and the Department of Housing and Urban Development ("HUD"), for example, have been important actors in the implementation of anti-discrimination law. *Id.* at 170 n.170.

83. *Id.* at 172–73; see Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

84. Yang, *supra* note 16, at 175.

85. *Id.* at 176.

86. See, e.g., *id.* at 147.

Title VI regulatory framework would provide an effective mechanism for proving claims of environmental discrimination.⁸⁷ In practice, however, it has proven completely ineffective.⁸⁸ While prevalent in the civil rights context, the ex post enforcement model has been increasingly unable to effectively address the systemic and structural issues that continue to disadvantage communities of color.⁸⁹ In addition, environmental justice enforcement poses specific challenges exacerbated by reliance on an ex post model. These include challenges in defining what constitutes disparate impact, identifying the bounds of an “environmental justice community,” and proving causation in the “doubly difficult” context of both environmental and civil rights law.⁹⁰ Furthermore, and as a practical matter, effective ex post remedies require “access to the relevant information to establish liability after the fact, and access to an effective enforcement tribunal.”⁹¹ Yet numerous barriers have sufficiently restricted access even to these most basic requirements, rendering these ex post remedies wholly ineffective.

Egregious and persistent agency inaction has severely hampered EPA’s ex post complaint investigation regime. In the last decade and a half, EPA has responded to only six percent of Title VI complaints within the required timeframe.⁹² Many complaints have been backlogged for years.⁹³ The Ninth Circuit found that these delays were so substantial as to reflect the agency’s disregard for its own regulations.⁹⁴ Staggeringly, despite receiving hundreds of civil rights complaints, EPA has not once found a civil rights violation in the entire history of its Title VI regulatory framework.⁹⁵ Unsurprisingly, EPA’s Title VI complaint investigation and enforcement program has been widely criticized.⁹⁶

87. See, e.g., *id.*; James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 180–85 (1994); Cole, *supra* note 28, at 320.

88. Yang, *supra* note 16, at 213; Colopy, *supra* note 87, at 180.

89. Yang, *supra* note 16, at 213.

90. RONALD G. BURNS, MICHAEL J. LYNCH & PAUL STRETESKY, ENVIRONMENTAL LAW, CRIME, AND JUSTICE 196–97 (2008).

91. See Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 380 (2007).

92. Mock, *supra* note 29.

93. See Johnson, *supra* note 30, at 1329; LoPresti, *supra* note 28, at 760–61.

94. *Rosemere Neighborhood Ass’n v. U.S. Env’tl. Prot. Agency*, 581 F.3d 1169, 1175 n.4 (9th Cir. 2009).

95. See *Complaints Filed with EPA*, *supra* note 8. As of February 2014, EPA had received nearly three hundred Title VI civil rights complaints. *Id.* Of these, 214 were rejected or dismissed and three were partially rejected or dismissed. *Id.* Twenty-four were referred to another federal agency, fourteen were dismissed due to related litigation, and twenty-one were informally resolved or had the complaint withdrawn. *Id.* Eight were under review, and only fourteen had been accepted for investigation. *Id.*

96. See, e.g., *Rosemere Neighborhood Ass’n*, 581 F.3d at 1175 (characterizing EPA’s Title VI complaint investigation and enforcement program as marred by an egregious and consistent pattern of delay and noting that EPA, for example, had “failed to process a *single* complaint from 2006 or 2007”); Carlton Waterhouse, *Abandon All Hope Ye That Enter: Equal Protection, Title VI*,

In response, during the summer of 2015 community organizations from across the country sued EPA for its failure to investigate their Title VI civil rights complaints after a decade or more.⁹⁷ Extending between ten and twenty years, EPA's delays have long passed the 180-day timeframe to issue preliminary findings and continue to extend "with no clear end in sight."⁹⁸ Because of these delays, the facilities at issue in each of these communities have continued to operate, pollute, and infringe on the civil rights of residents in the decade or longer in which EPA has failed to take action.⁹⁹ The injuries complained of in the plaintiffs' Title VI complaints are thus "exacerbated by EPA's failure to comply with its mandatory duties to properly investigate and resolve these Complaints."¹⁰⁰ Ironically, EPA has recently proposed amendments to its Title VI regulations that would remove the investigation deadlines altogether and even give the agency discretion not to investigate complaints at all.¹⁰¹ EPA's proposal has been sharply criticized as a clear attempt to only further abdicate the agency's responsibility to enforce civil rights.¹⁰²

Beyond these extreme delays, EPA's complaint investigation process is deeply flawed, leaving complainants without notice or opportunities for representation or participation. After its first and only prima facie finding of racial discrimination in its investigation of the *Angelita C.* complaint,¹⁰³ EPA did not provide the complainants with an opportunity to represent their interests.¹⁰⁴ EPA did not even notify the affected school children or their families of the prima facie finding until after a settlement had been reached.¹⁰⁵ Unfortunately, this problematic policy is consistent with EPA's interpretation of its complaint investigation regulations:

[A] complainant's role is to report what he or she believes is an act violating Title VI . . . The EPA is not in an adjudicatory role,

and the Divine Comedy of Environmental Justice, 20 FORDHAM ENV'T. L. REV. 51, 110 (2009) (criticizing EPA for its "glacial pace" in processing and investigating complaints).

97. See *supra* note 30.

98. Complaint for Declaratory and Injunctive Relief, *supra* note 31, ¶ 36.

99. See WAITING FOR JUSTICE, *supra* note 31, at 1–4.

100. Complaint for Declaratory and Injunctive Relief, *supra* note 31, ¶ 37.

101. Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 77284, 77287 (Dec. 14, 2015) (to be codified at 40 C.F.R. pt. 7 and 9).

102. See, e.g., Jeronimo Nisa, *EPA Proposal Would Weaken Civil Rights Protections*, EARTHJUSTICE, Jan. 8, 2016, <http://earthjustice.org/news/press/2016/epa-office-of-civil-rights-proposal-weakens-civil-rights-protections>; RIGHT WITHOUT A REMEDY, *supra* note 8, at 2.

103. The complaint alleged that heavy pesticide use in close proximity to schools, including the use of the highly toxic chemical methyl bromide, disparately impacted Latino schoolchildren. See Complaint to the Environmental Protection Agency, *Angelita C. v. Cal. Dep't of Pesticide Regulation* (June 30, 1999), <http://www.ejnet.org/ej/angelitac-complaint.pdf>; see also RIGHT WITHOUT A REMEDY, *supra* note 8, at 5.

104. Mock, *supra* note 29; RIGHT WITHOUT A REMEDY, *supra* note 8, at 8.

105. Mock, *supra* note 29; RIGHT WITHOUT A REMEDY, *supra* note 8, at 8.

evaluating evidence produced by opposing sides, but instead investigates allegations about its recipient, and reaches a conclusion regarding whether a violation of Title VI has occurred. The EPA's regulations do not prescribe a role for the complainant once he or she has filed a complaint.¹⁰⁶

Beyond the substantial delays and flawed processes, the Title VI administrative process has also proven ineffective due to a lack of direct remedies, the reluctance of EPA to use the main remedy at its disposal (withdrawal of funding), and the absence of meaningful judicial review of adverse administrative decisions.¹⁰⁷ Furthermore, the regime is vulnerable to political shifts. During the Bush Administration, for example, EPA raised its evidentiary standard to such an extent that it arguably required proof of intentional discrimination even under the agency's disparate impact regulations.¹⁰⁸ Finally, limited funds and staffing restrict EPA's ability to carry out its duties to the extent required by the law.¹⁰⁹

To be fair, EPA has undertaken some efforts to respond to the critiques of its Title VI program. In 2011, Deloitte Consulting released a damning report of the agency's abysmal civil rights record.¹¹⁰ Among other things, the report criticized EPA for placing "too much emphasis on minor responsibilities, like executing heritage events, and not enough on the critical discrimination cases affecting employees and disadvantaged communities."¹¹¹ Responding to these critiques and relying on recommendations from the Deloitte report, EPA produced Plan EJ 2014, its most recent public document on environmental justice.

Largely an exercise in lip service, EPA's Plan EJ 2014 unfortunately put forth little in terms of meaningful reform. EPA's Plan EJ 2014 states as its goal

106. U.S. ENVTL. PROT. AGENCY, OFFICE OF CIVIL RIGHTS, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: ROLES OF COMPLAINANTS AND RECIPIENTS IN THE TITLE VI COMPLAINTS AND RESOLUTION PROCESS 2 (2015), <https://assets.documentcloud.org/documents/2178959/final-roles-of-complainants-and-recipients-issue.pdf>. *But see* OFFICE OF ENVTL. JUSTICE, U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014, at 13 (2011) [hereinafter PLAN EJ 2014], <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100DFCQ.PDF?Dockey=P100DFCQ.pdf> ("OECA will . . . make additional efforts to provide information to overburdened communities about enforcement actions that affect those communities, and to provide meaningful opportunities for community input on the remedies sought in those enforcement actions."). The Draft Revised Investigation Guidance also makes clear that "EPA does not represent the complainants, but rather the interests of the Federal government." Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39650, 39672 (proposed June 27, 2000). "[B]ecause the Title VI administrative process is not an adversarial one between the complainant and recipient, there are no appeal rights for the complainant built into EPA's Title VI regulatory process." *Id.*

107. THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 25, at 32–33, 526.

108. *Id.* at 50.

109. *See id.* at 539.

110. DELOITTE REPORT, *supra* note 27.

111. *Id.* at 2.

that all program offices and regions “integrate and address issues of environmental justice in EPA’s programs and policies as part of their day-to-day business.”¹¹² To accomplish this goal, Plan EJ 2014 identifies five broad cross-agency focus areas: incorporating environmental justice into rulemaking; considering environmental justice in permitting; advancing environmental justice through compliance and enforcement; supporting community-based action programs; and fostering administration-wide action on environmental justice.¹¹³ Despite its length and ambitious stated goals, however, the Plan identifies few concrete or meaningful improvements to EPA’s Title VI framework. The subsection on compliance and enforcement centers substantially, if not exclusively, on the two familiar prongs of communication and ex post enforcement.¹¹⁴ In terms of ex ante enforcement, the subsection on permitting processes states that EPA seeks to identify and develop tools to “*support the consideration of* environmental justice during implementation of permitting programs.”¹¹⁵ This language is so weak as to be meaningless, let alone unenforceable.

Despite the lack of effective Title VI enforcement through private litigation or EPA’s complaint and investigation process, the agency has not veered from its current, broken ex post regulatory framework. Given the nature of ex post enforcement and the dismal state of the existing scheme, the status quo simply cannot provide an effective means for Title VI enforcement. This paper continues by questioning EPA’s adherence to the current ex post framework and examining arguments, both in theory and as applied, in support of a shift in focus to ex ante Title VI enforcement mechanisms.

V.

THE CASE FOR EX ANTE REGULATION FOR ENVIRONMENTAL JUSTICE

EPA’s model of ex post complaint resolution has failed to effectuate the agency’s Title VI mandate. Building upon both theoretical justifications and strategic considerations, I argue that environmental justice goals will be better served by an administrative enforcement framework focused on prophylactic ex ante regulation. LULUs should be required to prove compliance with Title VI in a robust and meaningful way before a permit to build, expand, or continue operation is granted.¹¹⁶ Such mechanisms—for prophylactic assurances by LULUs and oversight by EPA—would sit comfortably alongside the existing ex ante requirements enforced by permitting under federal environmental law.

112. PLAN EJ 2014, *supra* note 106, at 5.

113. *Id.* at 4.

114. *See id.* at 13–14.

115. *See id.* at 10 (emphasis added).

116. *See infra* Parts VI & VII for examples from DOT and my own proposal for what might qualify as robust and meaningful.

Parts V(A), V(B), and V(C) continue by making the case for more robust ex ante enforcement based on potential deterrent effects and barriers to efficiency, considerations of equity, and the nature and availability of remedies, respectively. Part V(D) then qualifies these arguments by noting that, although much more reliance on prophylactic regulation is needed, an ideal enforcement scheme should combine both ex ante and ex post mechanisms.

A. Deterrence- and Efficiency-Based Rationales

At its essence, the choice between ex ante and ex post is determined by the relative costs and benefits of an enforcement mechanism—its value as a method for incentivizing a desired outcome in the regulated activity. Generally, the benefits of ex ante regulation include clarity of legal obligations, which may result in fewer inadvertent violations and better compliance.¹¹⁷ But while ex ante regulation buys clarity, precision, and predictability, it does so at the cost of excluding case-specific information that the regulation’s promulgators either did not anticipate or excluded for the sake of simplicity.¹¹⁸ Ex post regulation, in contrast, generally allows for more information to be assessed—often including more up-to-date and case-specific information—that, in turn, comes with higher costs per case.¹¹⁹

Steven Shavell’s analysis of the choice between private ex post liability and public ex ante regulation provides a framework for navigating the relative value of these costs and benefits.¹²⁰ Although his assessment examines private ex post liability—i.e. common law tort litigation, as opposed to a public ex post administrative regime—it serves as a helpful starting point.¹²¹ As a whole, Shavell’s analysis points to the importance of prophylactic regulation in the environmental justice context.

117. Posner, *supra* note 37, at 13.

118. *Id.* at 14.

119. *Id.* at 14–16.

120. See Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271 (1984).

121. In fact, Shavell acknowledges that public enforcement can also come in the form of ex post liability, as in the case of EPA’s complaint investigation framework, which he labels as a “fine.” A fine, he explains, is “identical to liability in that it creates incentives to reduce risk by making parties pay for the harm they cause.” Shavell, *supra* note 61, at 373. As a result, “the fine enjoys essentially the same advantages as liability rules—the private parties balance the costs of reducing risks against the benefits, while society bears administrative costs only when harm occurs” and “suffers from similar disadvantages—inability to pay for harm done dilutes its effectiveness, as does the possibility that violators would escape detection.” *Id.* Essentially, the fine only differs in that it is public in nature. *Id.* As Shavell points out, however, the absence of private enforcement incentives makes imposition of a fine less likely than a private suit. *Id.* In addition, Shavell’s work has been critiqued for failing to account for differences in institutional capacity between agencies and courts and in federalism debates between largely federal regulation and state courts. While other authors have filled this gap, see, e.g., Posner, *supra* note 37, these considerations are not relevant to the environmental justice context and the choice between either ex ante or ex post enforcement by EPA.

Shavell identifies four factors for determining the relative advantages and disadvantages of these two enforcement models.¹²² First, the choice depends on informational disparities.¹²³ Although private parties generally have superior knowledge, the expertise and resources of agency experts may favor ex ante regulation of less- or non-obvious risks of harm.¹²⁴ Where such sophistication is needed, a regulator has the superior ability to access and evaluate relevant scientific knowledge.¹²⁵ This factor remains salient in the public ex post context, at least where an agency like EPA relies on private parties to submit complaints. The salience is somewhat mitigated, however, by the extent to which an agency independently identifies potential violators or conducts independent complaint investigations that rely less on information provided by private parties than would a court overseeing an adversarial process. Ultimately, however, environmental harms involve the kinds of complex risks that favor agency expertise and resources for appropriately sophisticated management, rather than reliance on ex post citizen complaints.

Second, ex ante regulation has an advantage where available ex post assets may be less than the full cost of harm and, as a result, dilute the incentives that would otherwise result from fully internalized costs.¹²⁶ Thus, ex ante regulation is particularly preferred where there is potential for mass harms that can exhaust the assets of even large corporations.¹²⁷ This factor remains just as salient in the context of public ex post enforcement, strongly pointing to the need for prophylactic regulation for effective Title VI enforcement. The effects of modern-day “public harms,” including environmental justice harms, are not only amorphous, but massive, resulting in costs well beyond the solvency of most polluters.¹²⁸ Because insufficient solvency allows polluters to externalize the costs of harm ex post, prophylactic ex ante regulation is required to avoid the underdeterrence that would otherwise stem from such externalities.

122. See Shavell, *supra* note 61, at 359–64. Shavell describes that “[t]ort liability is private in nature and works not by social command but rather indirectly, through the deterrent effect of damage actions that may be brought once harm occurs. Standards, prohibitions, and other forms of safety regulation, in contrast, are public in character and modify behavior in an immediate way through requirements that are imposed before, or at least independently of, the actual occurrence of a harm.” *Id.* at 357.

123. See *id.* at 359.

124. See *id.*

125. See *id.* at 369.

126. See *id.* at 361.

127. See *id.* at 369–70.

128. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 67–68 (1990) (Some regulations are justified as responses to the “problem of irreversibility—the fact that a certain course of conduct, if continued, will lead to an outcome from which current and future generations will be able to recover not at all, or only at very high cost.”); see also Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1041 (1990) (“[O]ne of the most sobering characteristics of modern-day public risks is the permanence of their effects.”).

Third, and also related to the likelihood of externalized costs of harm, ex ante regulation has an advantage where the likelihood that parties will face the threat of suit for harm is low—generally, where harms are widely dispersed or diffuse, take significant time to manifest, or pose difficult questions of causation.¹²⁹ Again, this factor is just as salient in the context of public ex post enforcement and unequivocally points to the importance of prophylactic regulation in the environmental justice context. Environmental harms pose unique challenges that increase the likelihood that costs will be externalized and incentive effects weakened in an ex post system. Such difficulties include polluters that commonly have low or no solvency, harms that manifest in diffuse and delayed forms, and theories of causation that are difficult to legally prove.¹³⁰ These challenges result from both strategic action by those who generate harms and the very nature of litigation and burdens of proof in our legal system. For this reason, environmental harms are often cited as the quintessential externality challenge in need of ex ante regulation.¹³¹ In addition, environmental justice harms are intangible and difficult to quantify, and, as a result, are more easily externalized.¹³² This problem is inherent to the nature of rights and monetization: “[I]t is virtually impossible to imagine an alternative damages measure that could non-arbitrarily convert these types of intangible harms into dollars.”¹³³ As a result, rights violations are systemically underdeterred.¹³⁴ Thus, if anything, the combination of both environmental and civil rights components only strengthens the need for ex ante regulation in the environmental justice context—otherwise, externalized costs distort proper incentives and thwart effective Title VI enforcement.

129. See Shavell, *supra* note 61, at 363.

130. See *id.*

131. See, e.g., SUNSTEIN, *supra* note 128, at 55; Shavell, *supra* note 61, at 366–71 (noting that while these four determinants generally support ex post liability for “typical torts,” they often cut in favor of ex ante regulation for certain activities, including those related to environmental harms).

132. An appropriately broad view of externalities should include moral offenses and injuries to self-respect caused by racial discrimination and environmental degradation. SUNSTEIN, *supra* note 128, at 55 (“[P]rivate conduct has an extraordinarily wide range of external consequences on others, and those consequences often count as injuries, many of which people would be willing to pay to prevent.”). Yet these costs often cannot be quantified, at least satisfactorily. See Posner, *supra* note 37, at 16–17 (listing death, disfigurement, disability, emotional injury, and many forms of environmental damage as examples). “Economists have developed methods of estimating such costs, but they are crude approximations at best to the underlying loss in utility or welfare, and can be elided by ex ante regulation that averts the loss entirely—although a determination of how much to spend on such regulation should, from an efficiency standpoint, depend on an estimate of the cost of the losses that it will avert.” *Id.* at 17.

133. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000).

134. *Id.* at 373 (“[C]alling constitutional violations ‘efficient’ just because the social benefits exceed the compensable costs is potentially quite misleading. In fact, compensable costs are only a fraction of the true social costs. For that reason, a subset of violations that we have been calling ‘efficient’ carry social costs that outweigh social benefits.”).

Fourth, while a liability scheme can target administrative costs at actual or likely harms, preventative measures may in some cases be less costly than remedial ones.¹³⁵ Ex ante regulation has a particular advantage where preventive measures are comparatively cheap—i.e., where low-cost safety devices exist, concealing ex ante noncompliance is difficult, or the regulator is able to use probabilistic methods of enforcement like spot visits and random sampling.¹³⁶ This factor is the most complicated to apply to the public ex post context because it is difficult to determine how the administrative costs of private litigation may compare to a given administrative process for resolving a complaint or remedying a violation ex post. It is difficult to discern how comparative costs and benefits may add up when taken as a whole. However, the strength of the other three factors, particularly the second and third, provide compelling support for a prophylactic regulatory regime. Thus, taken as a whole, Shavell's four factors point to the relative advantages of ex ante prophylactic enforcement of Title VI by EPA.

In addition, the behavioral economics concept of “self-serving bias” suggests that, if anything, the ex ante uncertainty which results from over-reliance on ex post enforcement leads to even more affirmatively undesirable behavior than predicted by traditional economic models.¹³⁷ Self-serving bias is “the phenomenon that individuals are likely to interpret ambiguous information in ways that resound to their benefit,” and thus comes into play where there is significant uncertainty ex ante.¹³⁸ Traditional economic analysis predicts that ex ante uncertainty over legal boundaries will cause some citizens to unknowingly violate the law and chill some desirable behavior from those who “unknowingly overcomply with the law,” with a general tendency toward risk aversion making the latter type of costs more likely than the former.¹³⁹ The self-serving bias, however, suggests the opposite. Uncertainty ex ante will instead trigger self-serving biases and lead to more affirmative undesirable behavior than economic analysis alone predicts.¹⁴⁰ In the environmental justice context this means that polluters, facing ex ante uncertainty under the current ex post model, more often err by violating Title VI than by “overcomplying” in an excess of caution. Thus, the costs of undesirable behavior stemming from an ex post complaint resolution model, with little ex ante certainty, are even higher as a result of self-serving bias.¹⁴¹

135. See Shavell, *supra* note 61, at 364.

136. See *id.* at 370.

137. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 45–50 (2000).

138. *Id.* at 46.

139. *Id.*

140. *Id.*

141. *Id.* at 46–47.

Even more fundamental, ex post enforcement requires that the victim perceive the discrimination.¹⁴² When the harm is invisible to the victim, the existence and nature of ex post remedies become moot.¹⁴³ Discrimination, in various forms and for various reasons, is often difficult to recognize.¹⁴⁴ This is in part due to the psychological tendency to identify one's situation as exceptional, to identify discrimination less frequently when exposed to data on a case-by-case basis, and to be affected by "system justifications" that equate discrimination as a normal and deserved fate.¹⁴⁵ While an administrative ex post enforcement scheme could also function if the agency—rather than victim—perceived the discrimination, this is unlikely to be successful in the environmental justice context without major reforms and funding. Pointing to limited resources and the existing backlog, EPA has relied entirely on Title VI complainants to identify LULUs for investigation—it has not even attempted to supplement complaints with proactive Title VI investigations. Given these limited resources, the existing backlog, the political power of LULUs, and the practical unavailability of remedies, it is unlikely EPA will take a more proactive role in ex post Title VI investigations. Finally, the current state of environmental justice law is the absence of a standard. As a result, legal uncertainty coupled with a complete absence of ex post enforcement has resulted in immense underdeterrence. Legal commands and remedies have a "symbiotic nature."¹⁴⁶ If remedies are themselves weak, clarifying the standards can make them effective.¹⁴⁷ Alternatively, "[s]trong remedies generate substantial deterrence, even with a high level of uncertainty."¹⁴⁸ But where remedies are weak and standards are uncertain, as in the field of environmental justice, underdeterrence will be significant.¹⁴⁹ Thus, the deterrence capability can be improved even where only one of the two prongs is improved.¹⁵⁰ Ex post sanctions, however, fail when courts have a strong ex post bias,¹⁵¹ and sunk costs create a profound ex post bias in environmental justice cases. Thus, efforts to improve the deterrent

142. Kang & Banaji, *supra* note 19, at 1079.

143. *Id.*

144. *See id.*

145. *Id.*

146. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1650 (2012).

147. *Id.* ("[A]ddressing the vagueness of the standard will actually strengthen the effectiveness of the remedies" by ensuring violators do not escape liability due to difficulties posed by legal burdens of proof in the face of uncertainty.).

148. *Id.* at 1649.

149. *Id.* Bar-Gill and Friedman describe how Fourth Amendment jurisprudence has been "plagued by great, not moderate, uncertainty," in part because of the "downward spiral" of ineffective sanctions. *Id.* at 1621–22.

150. *Id.* at 1650.

151. Bar-Gill and Friedman describe this ex post bias in the context of Fourth Amendment jurisprudence and the exclusionary rule. *See id.* at 1622 ("[C]ourts do not have the stomach for suppressing evidence of crime, but that failure to do so creates yet more uncertainty in the law, making deterrence even more of an ephemera.").

effect of the law should focus on the prong that “provides a relatively bright-line rule that can allow ex post sanctions to work”—ex ante certainty through prophylactic regulations.¹⁵²

B. Remedy-Based Rationales

Connecting these theoretical efficiency concerns to a more strategic and applied perspective, the most important differences between ex ante and ex post enforcement by EPA are those in available remedies. At the ex ante stage, injunctive relief and money damages are both realistic options—if construction and operation of an additional LULU in an overburdened community would impose a discriminatory harm, EPA can simply deny the permit or deny federal funding for a project before significant resources are expended (the administrative equivalent to injunctive relief). On the other hand, an ex ante determination of discriminatory harm could create space for a facility to still acquire a permit without violating Title VI by committing to offsets. For example, the LULU could be required to undertake more stringent (and more costly) precautions to further reduce pollution and risks of contamination in order to be allowed to operate. As another example, the LULU could be required to “pay to pollute”—to provide direct monetary payments that could be used to build a hospital, renovate old buildings to remove lead and asbestos, or support another project to ensure the overall discriminatory impact was a net zero or even a net negative for the community. These latter options are controversial and would require extreme care and community input in their development and execution. The important point, however, is that options are available, including the most important option—EPA’s denial of a permit to prevent a LULU from locating or expanding in an overburdened community in the first place.

At the ex post stage, in contrast, these options become practically unavailable, in the case of injunctive relief, or inadequate, in the case of money damages. This is due to the familiar concept of sunk costs and the “sunk cost strategy.”¹⁵³ When assessing the available remedies after a project has violated a statute, courts are often hesitant to issue an injunction where it will result in a “waste” of resources already expended.¹⁵⁴ The more money invested in a project, the greater advantage it has in the equitable balancing used to evaluate the justifications for an injunction.¹⁵⁵ Likewise, in the administrative context, the more sunk costs, the more those costs weigh against an EPA decision to deny or revoke a permit or deny or revoke federal funding. In effect, the sunk costs of a

152. See *id.* at 1647 & n.151 (While “[i]n theory[] standards applied under the current system could be also clarified,” “the ex post bias powerfully pushes towards greater vagueness” in practice.).

153. See generally David E. Cole, *Judicial Discretion and the “Sunk Costs” Strategy of Government Agencies*, 30 B.C. ENVTL. AFF. L. REV. 689 (2002–2003).

154. *Id.* at 693–95.

155. *Id.*

LULU distort its relative position in a cost-benefit analysis.¹⁵⁶ As a result, project promoters may seek to get as much money invested and as much physically accomplished as possible before a project is confronted in a legal forum.¹⁵⁷ Reliance on an ex post enforcement scheme ensures ample time for sunk costs to accumulate before EPA investigates a discriminatory LULU operating in violation of Title VI.

While money damages may be a more realistic outcome, they are also limited. First, money damages are particularly difficult to assess in the context of environmental justice harms because of the nature of both exposure-related health harms and the mental, emotional, and dignitary harms that result from discrimination.¹⁵⁸ These harms are not only difficult to quantify, but chronically undervalued in the legal system, as every first-year law student learns. Finally, where environmental justice harms are large, the same sunk costs problem comes into play—a court will be wary to award a damages amount that would effectively kill a half-started or even fully-functional project, even if that amount is required to compensate victims and internalize costs for adequate deterrence. In the context of agency fines, these problems are only further exacerbated by the political pressures repeat players in LULU industries have over EPA.

And, in fact, these problems have played out in the environmental justice context. EPA's implementing regulations include wide-ranging remedial powers for Title VI enforcement. The Office of Civil Rights has broad powers to obtain compliance informally,¹⁵⁹ in addition to its powers to terminate funding, refuse to award or continue funding, and "use any other means authorized by law to get compliance."¹⁶⁰ EPA has never come close to using these powers to their full potential, however, because it relies on an ex post complaint investigation process in which allows the political feasibility of remedies dwindle as sunk costs mount.¹⁶¹

By the time complainants submit an issue to EPA, the sunk costs are enormous. At least, the LULU has already begun construction or expansion and, in many cases, it has been operating for years or even decades. EPA has neither the political will nor the political power to pull federal funding or revoke a permit from a fully operational LULU that produces a valuable good, provides employment, and pleases shareholders. Particularly where harms are high and

156. See Johnson, *supra* note 68, at 1395 n.263.

157. Zygmunt J.B. Plater, *Environmental Law in the Political Ecosystem—Coping with the Reality of Politics: Eighth Annual Lloyd K. Garrison Lecture on Environmental Law*, 19 PACE ENVTL. L. REV. 423, 444 (2002). This problem has been well documented in the case of the National Environmental Policy Act and judicial review of Environmental Impact Statements, and has limited that statute's effectiveness. See, e.g., COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (1997), <http://www.blm.gov/or/regulations/files/nepa25fn.pdf>.

158. See, e.g., *supra* Part V(A).

159. 40 C.F.R. § 7.120 (2015).

160. 40 C.F.R. § 7.130 (2015).

161. See, e.g., 40 C.F.R. § 7.120 (2015).

costs could cause substantial economic loss or bankruptcy, EPA is also unlikely to impose a fine or negotiate an informal agreement that forces the discriminating entity to adequately internalize costs. Even if EPA recognized the value of compensation to the victims of Title VI violations, therefore, it would be unlikely to use its broad remedial powers to demand an adequate amount. Thus, it is hardly surprising that EPA's almost complete reliance on an ex post enforcement model has, in practice, simply resulted in no enforcement at all.¹⁶² In turn, the lack of enforcement resulting from limited practically available remedies at the ex post stage only exacerbates the theoretical externality and underdeterrence problems described in Part V(A) *supra*.

In addition, sunk costs in an ex post regime create a Catch-22 for environmental justice complainants. Community efforts to block proposed facilities are much more successful than efforts made to close facilities already in operation.¹⁶³ To avoid confronting sunk cost arguments, stress the seriousness of their opposition, and swiftly derail a harmful the project, communities often seek to begin litigation as soon as possible.¹⁶⁴ But because these early cases are more likely to appear premature, they are almost always unsuccessful.¹⁶⁵ In addition to distorting incentive effects, such a defeat can be demoralizing and fruitlessly expensive for communities or their pro bono counsel and pose a danger that the court will issue a ruling damaging to later enforcement efforts.¹⁶⁶ This leaves environmental justice communities with the impossible choice of filing before their claims are ripe or waiting for sunk costs to accumulate and environmental and discriminatory harms to manifest.

C. Equity-Based Rationales

In addition to theoretical and strategic considerations, equity-based rationales similarly favor ex ante regulation and enforcement of prophylactic requirements for environmental justice. Affirmative ex ante regulations can be justified as an effort “to eliminate or reduce the social subordination of various social groups.”¹⁶⁷ In support of this justification, Cass Sunstein critiques those who claim market pressures alone can counteract racism, arguing that these same market pressures can just as easily work to reify institutional social subordination.¹⁶⁸ As opposed to ex post enforcement that relies on market

162. *See supra* Part IV.

163. *See* Bullard, *supra* note 20, at 36.

164. *See* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 25, at 526.

165. *See id.*

166. *See id.*

167. SUNSTEIN, *supra* note 128, at 61.

168. *Id.* at 62–64. For example, customers can exert market pressure to guarantee discriminatory practices will continue just as easily as they can do the same to eliminate them. *Id.* at 62. Furthermore, the embeddedness of ordinary bigotry and stereotyping can provide an economically rational basis for discriminatory decisions by market actors. *Id.* at 62–63. In addition, discrimination creates feedback loops, which the beneficiaries of the status quo take advantage of

pressures to create appropriate incentives, *ex ante* regulations can serve as powerful tools for addressing inequality and injustice.¹⁶⁹

Affirmative *ex ante* regulations can embed equity-promoting requirements within the daily operations of federally funded programs and include ongoing self-evaluation, monitoring, and reporting.¹⁷⁰ Because of this, they bypass the historic dependence on administrative and legal complaints.¹⁷¹ Instead, *ex ante* enforcement of equity-promoting requirements can be implemented through the existing regulatory architecture, drawing on the spending and oversight relationships that exist between the federal government and its grantees.¹⁷² Implemented properly, considerations of civil rights and equity become part of the ongoing, frequent, and pervasive process of receiving and spending federal funds.¹⁷³

Mechanisms that make civil rights and equity prevalent considerations become particularly important when considering the tendency for the law to not only reflect but affect community norms. Borrowing from behavioral economics, “norm compliance” suggests that people’s actions are driven not only by direct utility-maximizing, but also by the indirect utility they expect to enjoy from conforming to community norms.¹⁷⁴ As a result, when a community norm is contrary to a person’s direct self-interest, that person may behave contrary to

opportunities to reduce cognitive dissonance, while victims reduce dissonance by adapting their preferences to available opportunities and responding to market signals that it is less worthwhile for them to develop the skills necessary to compete. *Id.* at 63. Finally, and most fundamentally, “markets incorporate the practices and norms of the advantaged group.” *Id.*

169. *See, e.g.*, Johnson, *supra* note 68, at 1343 (“Through the use of spending, policymaking, and oversight, a regime of equality directives can counter the limitations of adjudication-based civil rights regimes.”). Johnson discusses the potential for advancing equity goals through *ex ante* regulations and enforcement under the rubric of equality directives. Equality directives are characterized by three attributes: they are regulatory in their approach; they establish affirmative and not merely prohibitory requirements; and they impose a pervasive set of duties for federal and state programs. *Id.* at 1366. They can provide “the impetus for changes in policies and programs that alter the very landscape that allows inequality.” *Id.* at 1365. Equality directives have led decision-makers “to change who benefits from public transit and housing programs, to determine where public transit and subsidized housing are located, and to lift zoning and other barriers to housing integration.” *Id.* Thus, “[w]hile the public and private attorney general models of civil rights are fundamentally about enhancing the antidiscrimination apparatus, equality directives have the power to intervene to reverse structural and persistent forms of inequity.” *Id.* at 1372.

“Equality directives implement the goals of disparate impact law, but do so affirmatively and proactively in the planning stages of decisionmaking. They require grant recipients to conduct front-end assessment of impacts, evaluate alternatives, and include groups not normally at the table. This approach thus avoids the back-end problems of court enforcement of disparate impact by incorporating an equity and inclusionary lens before policies and programs are implemented.” *Id.* at 1376.

170. *Id.* at 1369. For instance, all recipients of federal mass transit funds must conduct impact assessments, outreach, and other practices to include minority groups, persons with disabilities, and groups with limited English proficiency. *Id.*

171. *Id.* at 1370.

172. *Id.*

173. *Id.* at 1369.

174. Korobkin, *supra* note 137, at 54.

their self-interest in order to comply with the norm.¹⁷⁵ At a broader scale, the phenomenon of norm compliance gives laws the power to *signal* a particular community norm, creating an added incentive for people who derive an indirect benefit from complying with community norms to obey the law.¹⁷⁶

Considering the effects of norm compliance, ex ante regulations are more likely to affect social norms and reify the importance of environmental justice and equity values.¹⁷⁷ While vague legal requirements that are only given meaning ex post send an unclear signal as to whether specific behaviors comply with or violate community norms, a defined line sends a signal about what behavior meets or does not meet community expectations.¹⁷⁸ A regulatory regime that focuses on ex post enforcement will therefore not only fail to clearly communicate the law, but will miss the opportunity to advance community sensibilities in a more equitable direction.¹⁷⁹

Beyond norm compliance, ex ante requirements also shift the burden of enforcement from vulnerable communities to the entity with the potential to cause environmental harms. A regulatory regime that forces ex ante deliberation and justification can reduce bias and irrationality in outcomes by forcing actors to “stop and think” before intruding on civil rights.¹⁸⁰ At the same time, ex post enforcement actions are resource-intensive, time-consuming, and emotionally draining, creating a high barrier for communities of color that have suffered environmental and civil rights harms. Shifting the burden of compliance onto the regulated entity may also serve as a proxy for the true cost of the entity’s full harm and thus serve as an avenue for better ensuring costs are internalized. Whether viewed under equity principles, in which the burden is shifted from those whose rights are commonly infringed to those at risk of infringing upon them, or principles of cost internalization for optimal deterrence, ex ante enforcement has important advantages particular to the environmental justice and civil rights contexts.

D. The Importance of Both Ex Ante and Ex Post Enforcement

Considering the relative advantages of ex ante enforcement, it nonetheless should not entirely supplant ex post remedies. Neither ex ante nor ex post enforcement alone will “lead[] all parties to exercise the socially desirable levels

175. *Id.*

176. *Id.* at 54–55.

177. *Id.* at 55.

178. *Id.*

179. *Id.* The norm compliance effect, however, works both ways. *Id.* at 55–56. By drawing lines that divide the permissible and impermissible, ex ante regulations may lead to problematic anchoring in light of norm compliance. *Id.* at 56 (“[J]ust as rules can effect citizens’ preferences when they draw precise lines between desirable and undesirable conduct, rules can also effect preferences when the legal boundaries they demarcate do not differentiate perfectly between desirable and undesirable conduct.”).

180. See Bar-Gill & Friedman, *supra* note 146, at 1614.

of care.”¹⁸¹ Instead, EPA should combine both ex ante and ex post enforcement mechanisms to effectively carry out its Title VI mandate.¹⁸² In fact, while Part VI, *infra*, will focus on ex ante regulations in the transportation context, it is important to note that those ex ante regulations are backed up by a comparatively well-functioning ex post enforcement regime.¹⁸³

To be clear, in the environmental justice context there is not much ex post enforcement to supplant. Currently, access to the judicial system simply does not exist for most environmental justice plaintiffs. In addition, EPA has utterly failed to implement a functioning system for complaint resolution. Thus, in the immediate sense, ex ante regulations can at the very least serve an important gap-filler function in light of the absence of viable ex post remedies.¹⁸⁴

Even with a more robust liability scheme, however, the effectiveness of ex post enforcement is always limited by its ability, or inability, to fully internalize the cost of the risk of harm. Ex ante regulation therefore remains important because producers of harm can more easily avoid fully internalizing costs under a primarily ex post regime, even a well-functioning one.¹⁸⁵ Polluters, for example, can avoid internalizing costs in an ex post system by shedding or maintaining reduced solvency.¹⁸⁶ At the same time, it is difficult for ex ante regulation to provide all necessary protections all of the time, as this would

181. Shavell, *supra* note 120, at 271.

182. See Shavell, *supra* note 61, at 365 (A complete scheme “should involve the joint use of liability and regulation, with the balance between them reflecting the importance of the determinants.”); Issacharoff, *supra* note 91, at 380 (identifying “both ex ante and ex post review” as “essential parts of the regulatory model”); see also Johnson, *supra* note 68, at 1371 (explaining that adoption of equality directives does not require wholesale abandonment of more traditional civil rights enforcement mechanisms).

183. After a Title VI complaint was filed seeking to promote access of communities of color to mass transit services, the FTA responded by finding the Los Angeles County Metropolitan Transportation Authority’s reduction of bus service to be in violation of federal law and ordering the agency to remedy the disparities. See Letter from Linda C. Ford, Acting Dir., Fed. Transit Admin. Office of Civil Rights, to Arthur Leahy, Chief Exec. Officer, Los Angeles County Metro. Transp. Auth. (June 27, 2013), <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/lacmta-title-vi-compliance>; see also Johnson, *supra* note 30, at 1318. In addition, in response to a Title VI complaint alleging that the Bay Area Rapid Transit District’s proposed extension failed to adequately serve transit-dependent people of color, the FTA not only found that the extension violated Title VI, but reallocated stimulus funds away from the project. See *BART/Oakland Airport Connector*, PUBLIC ADVOCATES, <http://www.publicadvocates.org/our-work/transportation-justice-issues/bartoakland-airport-connector-oac/> (last visited Oct. 14, 2016); Johnson, *supra* note 30, at 1318; Letter from Peter Rogoff, Adm’r of Fed. Transit Admin., to Steve Heminger, Exec. Dir., Metro. Transp. Comm’n & Dorothy Dugger, Gen. Manager, S.F. Bay Area Rapid Transit Dist. (Feb. 12, 2010), http://www.urbanhabitat.org/files/Feb%2012%20BART%20MTC%20Letter_0.pdf.

184. See, e.g., Issacharoff, *supra* note 91, at 385–87 (“Ex post accountability is the prerequisite for ex ante liberalization” and ex ante regulation becomes the “likely substitute” where ex post liability fails.).

185. See Part V(A) *supra*; see also Shavell, *supra* note 120, at 271, 273 (explaining that ex post liability alone does not create sufficient incentives, either because all parties are not able to pay fully for harm done or are not sued in the first place).

186. See Part V(A) *supra*.

generate prohibitively expensive information-gathering and administrative costs.¹⁸⁷ Furthermore, where uncertainty is high, compliance with an ex ante regulation “is not guaranteed and, in fact, requires the threat of ex post liability.”¹⁸⁸ Thus, it is important for EPA to both implement an ex ante regulatory model and improve ex post mechanisms to ensure appropriate deterrence.

VI.

AN EXAMPLE FOR COMPARISON: DOT’S TITLE VI REGULATORY FRAMEWORK

While EPA’s Title VI regulatory framework has failed to fulfill the agency’s civil rights mandate, other agencies have had more successful implementation. Rather than reliance on ex post court enforcement alone, civil rights attorneys in other areas of law have pushed for prophylactic ex ante Title VI enforcement.¹⁸⁹ This has been especially true in the transportation agencies.¹⁹⁰ The transportation sector has been critical for affirmative regulatory intervention because “decisions concerning the funding and construction of transit and highway development” have played a significant role in “shap[ing] patterns of race, class, and ethnic inclusion” and continue to do so today.¹⁹¹ Ex ante Title VI regulations have been relatively effective in enforcing DOT’s antidiscrimination mandate by harnessing the power of transportation and federal transportation funding to proactively “reshape a segregated and unequal transit landscape.”¹⁹²

DOT’s Title VI framework serves as both a successful example of and model for ex ante Title VI enforcement in the face of pervasive structural racism and discrimination. A comparison of the Title VI regimes established by DOT and EPA bolsters the theoretical analysis described in Part V by demonstrating the advantages of robust prophylactic regulations in practice. In light of these advantages, the DOT program provides a model of ex ante enforcement for EPA to replicate.¹⁹³

187. Shavell, *supra* note 120, at 271, 273 (describing how ex ante regulation alone does not lead to socially desirable levels of care because regulatory authorities do not have perfect information about risks).

188. Bar-Gill & Friedman, *supra* note 146, at 1647 n.150.

189. Johnson, *supra* note 30, at 1296. Johnson argues that focusing solely on private court enforcement undeservedly relegates Title VI “to the margins of civil rights discourse.” *Id.*

190. *See id.* at 1313–14.

191. *Id.* at 1314.

192. *Id.* at 1315.

193. It is difficult to definitively explain why DOT implemented a Title VI enforcement scheme with such a comparatively robust ex ante enforcement component and EPA did not. It may be related to the more culturally ubiquitous history of discrimination in the transportation sector. It may be related to the different regulatory framework under transportation and environmental law more broadly. It may be related to agency staff, culture, or leadership. It may also be related to the fact that DOT has an annual budget roughly ten times the size of EPA’s annual budget. *Compare* U.S. DEP’T OF TRANSP., AGENCY FINANCIAL REPORT: FISCAL YEAR 2014, at 21 https://www.transportation.gov/sites/dot.gov/files/docs/DOT_2014%20final%20AFR.pdf (“The Department’s total net cost of operations for FY 2014 was \$77 billion.”) *with* U.S. ENVTL.

Part VI continues by describing DOT's requirements for ex ante Title VI assurances in state implementation plans and comparing EPA's analogous provisions for state implementation under the Clean Air Act ("CAA").¹⁹⁴ Part VI(A) examines the relevant regulatory language and Part VI(B) details the Federal Transit Administration's ("FTA")¹⁹⁵ Title VI Circular and other informal DOT documents promulgated by the Federal Highway Administration ("FHWA")¹⁹⁶ and FTA.

A. DOT Title VI Regulations

For starters, DOT regulations governing transportation projects require explicit ex ante assurances of Title VI compliance. DOT regulations require that, at least every four years, states submit a State Transportation Improvement Plan ("STIP") to the FHWA and FTA for joint approval.¹⁹⁷ To be approved, the STIP must explicitly certify "that the transportation planning process is being carried out in accordance with all applicable requirements of . . . Title VI of the Civil Rights Act of 1964 . . . and [DOT's Title VI implementing regulations]."¹⁹⁸ Similarly, DOT regulations for Metropolitan Planning Agreements, which are approved as part of STIPs, require that both the state and the Metropolitan Planning Organization periodically certify compliance with Title VI and DOT's implementing regulations.¹⁹⁹

In contrast, EPA's CAA regulations of analogous State Implementation Plans ("SIPs") do not explicitly require Title VI assurances. The Act itself requires that each SIP provide ex ante assurances that implementation will not violate any federal or state law.²⁰⁰ As Title VI is federal law, the CAA ostensibly

PROTECTION AGENCY, AGENCY FINANCIAL REPORT: FISCAL YEAR 2014, at 40, https://www.epa.gov/sites/production/files/2014-11/documents/epa_fy2014_afr.pdf (listing the net cost of operations for FY 2014 as \$8.6 billion). The history of the respective regulations provides little to resolve these questions. Suffice it to say, however, that the regulatory structures did develop quite differently and this article focuses on what those differences might teach us about their relative merits for enforcement.

194. Unfortunately, little case law has discussed these regulations. Nonetheless, the plain language of DOT's regulatory scheme serves as a model for improving EPA regulations for ex ante Title VI enforcement.

195. FTA is one of several agencies within DOT.

196. FHWA is one of several agencies within DOT.

197. 23 C.F.R. § 450.220(a) (2016). States must also submit amendments to a STIP for approval. *Id.*

198. 23 C.F.R. § 450.220(a)(2) (2016).

199. 23 C.F.R. § 450.334(a)(3) (2016) ("For all [Metropolitan Planning Agreements], concurrent with the submittal of the entire [proposal] . . . as part of the STIP approval, the State and the [Metropolitan Planning Organization] shall certify at least every four years that the metropolitan transportation planning process is being carried out in accordance with all applicable requirements including . . . Title VI of the Civil Rights Act of 1964 . . . and 49 C.F.R. part 21.").

200. The provision provides in full:

Each [implementation] plan shall . . . provide necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by

requires compliance with Title VI and its implementing regulations. Thus, in theory, the CAA requires each SIP to provide ex ante assurances that the proposed plan will not result in discrimination in violation of Title VI. However, little legal authority exists beyond this vague plain language of the statute to require specific ex ante assurances of Title VI compliance.²⁰¹ Furthermore, none of EPA's CAA regulations explicitly reference Title VI or EPA's Title VI implementing regulations.²⁰²

DOT's regulations implementing Title VI also contain more robust provisions requiring prophylactic assurances and agency oversight.²⁰³ DOT's implementing regulations condition financial assistance on demonstrated compliance with Title VI. STIPs must include a "statement that the program is (or, in the case of a new program, will be) conducted in compliance with all [Title VI] requirements" and provisions that give a "reasonable guarantee that the applicant and all recipients of Federal financial assistance under such program will comply with all [Title VI] requirements."²⁰⁴ DOT's implementing regulations also mandate periodic review to ensure compliance, while EPA's regulations leave review to the agency's discretion.²⁰⁵

the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (*and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof*).

42 U.S.C. § 7410(a)(2)(E)(i) (2012) (emphasis added).

In 1990 Congress amended the Clean Air Act, significantly altering what had been codified in title 42, section 7410(a)(2)(E)(i) of the United States Code. Prior to amendment, the provision codified in section 7410(a)(2)(E)(i) had related to interstate pollution and National Ambient Air Quality Standards. *See* 42 U.S.C. § 7410(a)(2)(E) (1982); *see also* Michigan v. U.S. Env'tl. Prot. Agency, 213 F.3d 663, 674 (D.C. Cir. 2000) (noting the differences in the amended statute). Thus, I have taken care to limit my research to interpretations of the current provision. Any further research should note these changes to avoid confusion.

201. Based on its plain language, Section 110(a)(2)(E)(i) of the Clean Air Act requires each SIP to include ex ante assurances of compliance with the Title VI mandate. Very little case law, however, has explored what this more specifically requires. Notably, even when courts have discussed Section 110(a)(2)(E)(i) they have declined to interpret its requirements to create strict or stringent constraints. *See, e.g.*, BCCA Appeal Group v. United States Env'tl. Protection Agency, 355 F.3d 817, 830 n.11 (5th Cir. 2003) (finding "no statutory requirement [under Section 110(a)(2)(E)(i)] that the EPA review SIP submissions to ensure compliance with state law" and that EPA was "entitled to rely on a state's certification" unless the SIP clearly violated the law and proof thereof was presented to EPA during the SIP approval process).

202. In contrast, two DOT regulations mandate that states certify, at least every four years, that their transportation plans comply with Title VI and DOT's Title VI implementing regulations. *See* 23 C.F.R. §§ 450.218(a)(2), 450.334(a)(3).

203. DOT's Title VI implementing regulations are codified in title 49, part 21 of the Code of Federal Regulations and are analogous to EPA's implementing regulations codified in title 40, part 7.

204. 49 C.F.R. § 21.7(b) (2015).

205. *Compare* 49 C.F.R. § 21.11(a) (2015) ("The Secretary shall from time to time review the practices of recipients to determine whether they are complying with this part.") *with* 40 C.F.R. § 7.115(a) (2015) ("The [EPA Office of Civil Rights] may periodically conduct compliance reviews.").

Similarly, FHWA regulations demand that state highway agencies provide detailed assurances related to Title VI's antidiscrimination mandate,²⁰⁶ requiring state agency officials and "Title VI Specialists" to conduct annual reviews of all pertinent programs to determine their effectiveness and compliance with Title VI.²⁰⁷ The regulations also explicitly hold the head of each state highway agency responsible for implementing Title VI requirements.²⁰⁸

Additionally, FHWA regulations contain an extensive list detailing the components of a compliant Title VI program. First, a state highway agency must establish a "civil rights unit."²⁰⁹ The agency must adequately staff the civil rights unit, designate leadership within the unit responsible for initiating and monitoring Title VI implementation, and ensure that the civil rights unit leadership has "easy access" to the head of the state agency.²¹⁰

Second, a state agency must develop procedures "for prompt processing and disposition of Title VI and Title VIII complaints,"²¹¹ collection of demographic data of participants in and beneficiaries of state highway programs,²¹² and Title VI reviews of program areas.²¹³ The agency must review state program directives and conduct annual assessments of program effectiveness for "special emphasis" areas.²¹⁴ The agency must also evaluate recipients of Federal-aid highway funds, including "cities, counties, consultant contractors, suppliers, universities, colleges, [and] planning agencies," for compliance with Title VI.²¹⁵

Third, the state highway agency is "responsible for conducting training programs on Title VI and related statutes for State program and civil rights officials."²¹⁶ It must also "[d]evelop Title VI information for dissemination to the general public and, where appropriate, in languages other than English."²¹⁷

206. See 23 C.F.R. § 200.9 (2016).

207. 23 C.F.R. § 200.9(a)(4).

208. 23 C.F.R. § 200.9(a)(3).

209. 23 C.F.R. § 200.9(b)(1).

210. 23 C.F.R. § 200.9(b)(1)–(2).

211. 23 C.F.R. § 200.9(b)(3) (State agencies are required to "[d]evelop procedures for prompt processing and disposition of Title VI and Title VIII complaints received directly by the State and not by FHWA. Complaints shall be investigated by State civil rights personnel trained in compliance investigations. Identify each complainant by race, color, sex, or national origin; the recipient; the nature of the complaint; the dates the complaint was filed and the investigation completed; the disposition; the date of the disposition; and other pertinent information. Each recipient (State) processing Title VI complaints shall be required to maintain a similar log. A copy of the complaint, together with a copy of the State's report of investigation, shall be forwarded to the FHWA division office within 60 days of the date the complaint was received by the State.").

212. 23 C.F.R. § 200.9(b)(4) (requiring state agencies to "[d]evelop procedures for the collection of statistical data (race, color, religion, sex, and national origin) of participants in, and beneficiaries of State highway programs, i.e., relocatees, impacted citizens and affected communities").

213. 23 C.F.R. § 200.9(b)(5).

214. 23 C.F.R. § 200.9(b)(6)–(8).

215. 23 C.F.R. § 200.9(b)(7).

216. 23 C.F.R. § 200.9(b)(9).

217. 23 C.F.R. § 200.9(b)(12).

Fourth, the regulations require annual reporting and submission of updated Title VI implementation plans for approval or disapproval.²¹⁸ State highway agencies must also establish “procedures for pregrant and postgrant approval reviews of State programs and applicants for compliance with Title VI requirements; i.e., highway location, design and relocation, and persons seeking contracts with the State.”²¹⁹

Finally, and most fundamentally, the regulations require that the state highway agency “[e]stablish procedures to identify and eliminate discrimination when found to exist” and “promptly resolv[e] deficiency status and reduc[e] to writing the remedial action agreed to be necessary, all within a period not to exceed 90 days.”²²⁰

In neither its formal regulations nor informal documents does EPA provide this level of detail in explaining its ex ante assurance requirements.²²¹

B. DOT Title VI Circular

In addition to these more robust regulations, administrative guidances promulgated by DOT further demonstrate how EPA could improve ex ante Title VI enforcement. EPA has not published any official Title VI guidances. Instead, EPA has published two “Draft Guidances” that have not been finalized since their proposal in 2000.²²² Furthermore, EPA’s Draft Guidances revolve around the complaint investigation process.²²³ EPA has not proposed, let alone finalized, any guidance regarding prophylactic requirements for Title VI compliance.²²⁴ In light of this, Part VI(B) describes the informal guidance provided by FTA, focusing on the provisions most relevant for informing EPA guidance on ex ante Title VI compliance and agency oversight.²²⁵

218. 23 C.F.R. § 200.9(b)(10)–(11).

219. 23 C.F.R. § 200.9(b)(13).

220. 23 C.F.R. § 200.9(14)–(15).

221. See 40 C.F.R. § 7.10 *et seq.* (2015); see also Part VI(B) *infra*.

222. See Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39650 (proposed June 27, 2000) [hereinafter EPA Draft Title VI Guidance].

223. *Id.* at 39655 (stating that the Draft Guidance is meant to “reduce the likelihood or necessity for persons to file Title VI administrative complaints with EPA alleging either: (1) discriminatory human health or environmental effects resulting from the issuance of *permits*; or (2) discrimination during the permitting public participation process”).

224. Regarding ex ante oversight and compliance, EPA nominally encourages preventive steps by funding recipients, but does not detail how they should be taken. See *id.* at 39656 (“Early, preventive steps, whether under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, are strongly encouraged to prevent potential Title VI violations and complaints.”).

225. Because the FTA’s Title VI Circular provides such a robust and detailed example of administrative guidance, I have not also detailed the several other informal Title VI resources provided by DOT, FTA, and FHWA. However, for those interested in further examination, DOT’s website hosts numerous resources and tools that may provide additional points for comparison.

FTA has issued a Title VI Circular that serves as administrative guidance for prophylactic requirements and ex ante oversight of Title VI compliance.²²⁶ The 130-page Circular is subdivided into chapters and includes numerous appendices. Chapter III of the Circular describes the general requirements and guidelines pertaining to FTA oversight of all funding recipients, while Chapter V details requirements for states in particular. In addition, Chapters VII and VIII of the Circular explain FTA's processes for effecting compliance with Title VI. The Circular appendices include supplemental resources such as checklists for program requirements and reporting, sample forms, and explanatory flow charts.²²⁷

Unlike EPA's Draft Guidances, the FTA Circular details the required contents of the compliance assurances that must accompany applications for financial assistance.²²⁸ As Chapter III of the Circular states, all funding recipients must submit ex ante assurances as part of a compliant "Title VI Program" that include a copy of notices to the public that inform them of Title VI protections and instruct them on how to file a Title VI discrimination complaint; a list of any related Title VI investigations, complaints, or lawsuits filed with the funding recipient; a public participation plan that includes outreach to "minority and limited English proficient populations"; a summary of outreach efforts made since the last Title VI program submission; and a copy of the recipient's plan for providing language assistance to persons with limited English proficiency.²²⁹ In addition, funding recipients that have non-elected planning boards, advisory councils or committees, or similar bodies with membership selected by the recipient, must provide a table depicting the racial breakdown of the membership of those committees and a description of efforts

DOT's internal environmental justice order, published in 2012, is also available on the website. Order 5610.2(a) establishes more generic guidelines for identifying and addressing adverse effects of programs, policies, and activities on low-income and minority communities. *Dep't of Transp. Order 5610.2(a)*, DEP'T OF TRANSP., http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/orders/order_56102a/ (last visited Oct. 15, 2016). In addition, the FHWA website includes training resources, best practices, and an Environmental Justice Case Studies booklet that profiles how various transportation agencies have integrated environmental justice considerations into their activities and decision-making. See *Environmental Justice*, FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/environment/environmental_justice/ (last visited Oct. 15, 2016). The website also includes FHWA's environmental justice order. *Id.* The FTA website includes additional Title VI resources, including reports of all periodic compliance reviews of funding recipients, quick reference guides, and training materials. See *Title VI Compliance Reviews*, FED. TRANSIT ADMIN., http://www.fta.dot.gov/civilrights/12328_5463.html (last visited Oct. 15, 2016). FTA also makes the results of all Title VI Compliance Reviews available on its webpage. *Id.*

226. See FEDERAL TRANSIT ADMIN., FTA CIRCULAR 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (Oct. 1, 2012) [hereinafter FTA CIRCULAR], https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf.

227. See, e.g., *id.* at apps. A–D, L.

228. *Id.* at ch. III-1.

229. *Id.* at ch. III-1 to -3. Depending on whether the recipient is a fixed route transit provider, a state, or a Metropolitan Planning Organization ("MPO"), the recipient may have additional specified reporting requirements. *Id.* at ch. III-3.

made to encourage the participation of minorities on such committees or councils.²³⁰ Furthermore, if the recipient has constructed any facility, such as a vehicle storage or maintenance facility, the recipient must include a copy of the Title VI equity analysis conducted during the planning stage with regard to the location of the facility.²³¹ “Primary” funding recipients must also include a narrative or description of their efforts to ensure that, if they pass funding on to other entities, those funding subrecipients also comply with Title VI.²³²

The Circular not only provides detailed requirements, but a mechanism for consideration and accountability by top decision-making authorities. Ex ante assurances must include a copy of the board resolution, meeting minutes, or similar documentation regarding the Title VI Program as evidence that the board of directors or appropriate governing entity has approved the Title VI Program.²³³ Subrecipients must also submit their own compliant Title VI Programs to the primary recipient, which creates another layer of accountability by ensuring that all tiers of programming and implementation comply with Title VI.²³⁴ Upon receipt, FTA reviews the assurances and proposed Title VI Programs and either “concur[s] or request[s] [that] the recipient provide additional information.”²³⁵ In addition to the requirements described in Chapter III, states must include several other assurances in order to have a compliant Title VI Program.²³⁶ States must provide a demographic profile of the State that identifies the locations of minority populations, demographic maps that overlay the percent minority and non-minority populations at census tract or block group level, and charts that analyze the impacts of the distribution of State and Federal funds for public transportation purposes.²³⁷ States must also provide an analysis of any disparate impacts on the basis of race, color, or national origin and, if so, determine whether there is a “substantial legitimate justification” for the policy and whether there are any less discriminatory alternatives.²³⁸ In addition, states must describe how their transportation planning process identified the needs of minority populations; how the state ensured FTA financial assistance passed to subrecipients in a non-discriminatory manner; and how the state provided assistance to potential subrecipients, including efforts to assist those serving predominantly minority populations.²³⁹ In contrast to the FTA Circular, EPA’s Draft Guidances merely state that funding recipients must assure compliance

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at ch. III-2.

234. *Id.*

235. *Id.*

236. *Id.* at ch. V-1 to -2. Appendix A restates and summarizes these requirements in a “Title VI Program Checklist” for states to follow. *Id.* at app. A-2.

237. *Id.* at ch. V-1 to -2.

238. *Id.*

239. *Id.*

with Title VI, without explaining what compliance requires or how assurances will be assessed.²⁴⁰

For state implementation in particular, the Circular clarifies that FTA and FHWA jointly review STIPs each time they are updated or amended, which includes review of Title VI compliance.²⁴¹ FTA and FHWA thus jointly assess whether states have, for example, analyzed regional demographic data to appropriately identify minority populations; ensured that members of minority communities are provided with full opportunities to engage in the STIP process; taken affirmative actions to eliminate language, mobility, temporal, and other obstacles to full participation; and monitored the activities of all subrecipients with regard to Title VI compliance.²⁴² Because of the details laid out in the FTA Circular, this certification and review process becomes more than a mere rubberstamp by the federal agency.

The FTA Circular also establishes several substantive and procedural standards particular to ex ante regulation of siting. First, during the ex ante planning stages, the recipient must complete a Title VI equity analysis to ensure location is selected without regard to race, color, or national origin.²⁴³ This Title VI equity analysis must include outreach to all people potentially impacted by the siting of facilities, compare the equity impacts of various siting alternatives, and occur before the selection of the preferred site.²⁴⁴ When evaluating potential facility sites, funding recipients must “give attention to other facilities with similar impacts in the area to determine if any cumulative adverse impacts might result.”²⁴⁵ The Circular also requires that analysis be done “at the Census tract or block group . . . to ensure that proper perspective is given to localized impacts.”²⁴⁶ Most importantly, the Circular shifts the burden of proof off of environmental justice communities and onto the funding recipient:

If the recipient determines that the location of the project will result in a disparate impact on the basis of race, color, or national origin, *the recipient may only locate the project in that location if there is a substantial legitimate justification for locating the project there, and where there are no alternative locations that would have a less disparate impact on the basis of race, color, or national origin. The recipient must show how both tests are met*; it is important to understand that in order to make this showing, the recipient must consider and analyze

240. See EPA Draft Title VI Guidance, *supra* note 222, at 39650 (“Entities applying for EPA financial assistance submit an assurance with their application stating that they will comply with the requirements of EPA’s regulations implementing Title VI.”).

241. FTA CIRCULAR, *supra* note 226, at ch. V-2.

242. *Id.* at ch. V-2 to -3.

243. *Id.* at ch. III-11 to -12.

244. *Id.*

245. *Id.*

246. *Id.*

alternatives to determine whether those alternatives would have less of a disparate impact on the basis of race, color, or national origin, and then implement the least discriminatory alternative.²⁴⁷

Finally, the FTA Circular includes relatively detailed standards and procedures for enforcing Title VI compliance.²⁴⁸ All funding recipients must develop procedures for investigating and tracking Title VI complaints filed against them and report information regarding Title VI compliance procedures to FTA.²⁴⁹ FTA regularly conducts compliance reviews, after which it issues a report with a finding of no deficiency, deficiency, or noncompliance.²⁵⁰ If FTA makes a finding of no deficiency, the funding recipient is generally not expected to take any corrective action, although the report may include “advisory comments.”²⁵¹ In contrast, a finding of deficiency is a determination that the recipient has not complied with one or more provisions of the circular.²⁵² If FTA makes a finding of deficiency in a final compliance report, the recipient is required to take corrective action, develop a timeline for compliance, and report on its progress to FTA on a quarterly basis, at minimum, until FTA determines that the recipient has satisfactorily responded to the review’s findings.²⁵³ In the most extreme cases FTA will make a finding of noncompliance.²⁵⁴ If

247. *Id.* (emphasis added).

248. *See id.* at ch. VII-1 to -4.

249. *Id.* at ch. III-4 to -5. For states in particular, the Circular requires that they prepare, maintain, and report if requested, the following:

(a) A record of funding requests received from private non-profit organizations, State or local governmental authorities, and Indian tribes. The record shall identify those applicants that would use grant program funds to provide assistance to predominantly minority populations. The record shall also indicate which applications were rejected and accepted for funding.

(b) A description of how the agency develops its competitive selection process or annual program of projects submitted to FTA as part of its grant applications. This description shall emphasize the method used to ensure the equitable distribution of funds to subrecipients that serve predominantly minority populations, including Native American tribes, where present. Equitable distribution can be achieved by engaging in outreach to diverse stakeholders regarding the availability of funds, and ensuring the competitive process is not itself a barrier to selection of minority applicants.

(c) A description of the agency’s criteria for selecting entities to participate in an FTA grant program.

Id. at ch. V-3.

250. *Id.* at ch. VIII-1.

251. *Id.* “Advisory comments are recommendations that the recipient undertake activities in a manner more consistent with the guidance provided in the pertaining section of the Circular.” *Id.* at ch. VIII-1 to -2.

252. *Id.* at VIII-2(5)(b).

253. *Id.* at VIII-2(6)

254. *Id.* at VIII-2(5)(c) (“Findings of noncompliance are determinations that the recipient has engaged in activities that have had the purpose or effect of denying persons the benefits of, excluding them from participation in, or subjecting persons to discrimination on the basis of race,

noncompliance cannot be corrected informally, FTA may subject the recipient to remedial action or proceedings pursuant to DOT's Title VI regulations.²⁵⁵ Thus, the Circular not only includes descriptive and detailed ex ante assurances, but includes an entire enforcement framework with which to review, assess, and ensure compliance. Such an enforcement mechanism is crucial for effectiveness, as a framework without consequences will not be able to incentivize compliance. In contrast, EPA's Draft Guidances repeatedly emphasize their voluntary nature.²⁵⁶

VII.

CONCLUDING THOUGHTS ON IMPLEMENTATION

Uniontown residents submitted a Title VI complaint to EPA almost four years ago. Their complaint alleged that the Alabama Department of Environmental Management had discriminated against them by reissuing the mega-landfill's permit in 2011 and modifying the permit in 2012 to further expand the disposal area by sixty-six percent (almost 170 additional acres).²⁵⁷ While residents continue to suffer the daily effects of toxic pollution, a product of structural racial inequalities, their complaint has received no answer.

For the residents of Uniontown, what should environmental justice look like? This paper has described the failings of EPA's ex post regime, analyzed theoretical justifications, and identified key components of a comparatively successful model in order to argue that ex ante enforcement—in the form of prophylactic requirements and ex ante compliance review and oversight by EPA—offers one solution. Part VII concludes by examining key concepts for implementation.

First, EPA could improve its regulatory scheme by adopting a more robust ex ante system of prophylactic Title VI requirements, compliance, and oversight. As an initial step, EPA could explicitly incorporate Title VI and its implementing regulations into, for example, its regulations requiring Clean Air Act SIP assurances. DOT's regulations show that this can be achieved by a simple cross-reference and thus function as relatively low-hanging fruit. More broadly, DOT's robust regulatory scheme provides a template for EPA to adopt a

color, or national origin under the recipient's program or activity; upon such determination, FTA will consider the recipient to be noncompliant with Title VI.”)

255. *Id.* The regulations for the relevant DOT proceedings are codified in Sections 21.13, 21.15, and 21.17 of Title 49 of the CFR.

256. *See, e.g.,* EPA Draft Title VI Guidance, *supra* note 222, at 39651 (stating that EPA draft guidelines are “voluntary in nature,” prepared in order “to offer suggestions to recipients about approaches they could use to address potential Title VI issues”); *id.* at 39656 (providing guidance “on the types of activities and approaches that EPA believes [funding recipients] *may wish to consider adopting and implementing* as part of a strategy to address Title VI-related claims and issues that arise in the environmental permitting context” (emphasis added)). *But cf. id.* at 39656 (“[Funding recipients] are not required to adopt such activities or approaches, but outcomes that result from the activities or approaches may be considered in the analysis of Title VI complaints.”).

257. *See* Title VI Civil Rights Complaint, *supra* note 2, at 1, 7.

comprehensive ex ante enforcement system. DOT regulations and guidance documents could serve as a starting point for improving EPA's ex ante Title VI regulations and avoiding overreliance on the reactionary tasks of complaint investigation and ex post enforcement.

In addition, several states have enacted varied environmental justice legislation that may provide both templates and additional insights for developing federal ex ante regulations. Arkansas, for example, passed legislation to create relatively high barriers to concentrating solid waste disposal facilities in low-income and minority communities.²⁵⁸ These barriers include a rebuttable presumption against locating facilities within twelve miles of each other and requirements that facilities provide adequate compensation to host communities.²⁵⁹ With a similar approach to avoiding concentrated harms, Georgia's environmental justice statute limits the number of solid waste facilities that may be sited within a given area and requires facilities to obtain permission from the host city and county government, as well as any local government entity with a border within a half mile of the proposed site.²⁶⁰ As another example of prophylactic regulation, Alabama's anti-concentration statute prohibits more than one qualifying commercial hazardous waste facility from locating within any one county of the state and requires decisionmakers to account for the social and economic impacts of a proposed facility on the affected community, including changes to property values, community perception, and other costs.²⁶¹ The siting law also provides for relatively extensive notice, public comment, and public hearing provisions.²⁶² Delaware's Community Involvement Advisory Council Law established a Community Involvement Advisory Council to serve in an advisory capacity to the state environmental agency and "work to ensure that no community in the state is disparately affected by environmental impacts."²⁶³

More fundamentally, ex ante regulations must be carefully crafted to contain clear and meaningful substantive prophylactic constraints. Procedural improvements requiring ex ante assurances must be linked to meaningful substantive standards defining environmental justice and injustice. Improvements to administrative adjudicative processes alone will not improve the way EPA addresses civil rights concerns—to the extent that substantive

258. BARRY E. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE 159–60 (2009); see Environmental Equity in Siting High-Impact Solid Waste Facilities Law, 1993 Ark. Acts 1263.

259. HILL, *supra* note 258, at 160; see Environmental Equity in Siting High-Impact Solid Waste Facilities Law, 1993 Ark. Acts 1263.

260. HILL, *supra* note 258, at 165; see Anti-Concentration Law for Solid Waste Facilities, GA. CODE ANN. § 12-8-25 (2003).

261. HILL, *supra* note 258, at 169; see Anti-Concentration Hazardous Waste Law, ALA. CODE § 22-30-5.1 (2003).

262. HILL, *supra* note 258, at 169; see ALA. CODE § 22-30-5.1.

263. HILL, *supra* note 258, at 171–72; see DEL. CODE ANN. tit. 29, § 8016A (2001).

regulatory requirements are hostile to or do not allow the consideration of discrimination or equity concerns, changing the process of decision-making ultimately accomplishes little.²⁶⁴ As Yang explains, “merely facilitating the assembly of proof of environmental injustice cannot change the underlying substantive legal requirements necessary for making out a claim.”²⁶⁵ Therefore ex ante assurances, to provide meaningful protections, must assure environmental justice in substance.

For this reason, the models described above would be improvements compared to the current state of EPA’s Title VI enforcement, but less than ideal. DOT regulations rely on detailed and robust procedural requirements, but largely stop short of establishing substantive requirements. Furthermore, while the several state statutory reforms discussed *supra* provide substantive requirements, they have had little impact in practice—as a reminder, Uniontown and its mega-landfill are located in Alabama. One reason may be because the standards they establish are only rough proxies that do not account for cumulative impacts across polluting industries and pollutable mediums.

In contrast, a true substantive prophylactic environmental justice standard would set a health-based ceiling of cumulative impacts above which we are unwilling to allow exposure even for the most overburdened communities. While such a standard would likely be politically unpopular, at least with some polluters, it would not present insurmountable technical difficulties. EPA has already undertaken extensive environmental risk assessments and has significant expertise in understanding the health effects of numerous contaminants. Risk characterizations, therefore, already exist for particular contaminants in particular mediums, both as they describe aggregate population risk and maximum individual risks.

The challenge is developing a method for translating individual and varied risk characterizations into a characterization of cumulative impact. One method could be to identify canary pollutants and create an index that reconciles differing health threats to make them comparable. X amount of pollutant P might equal one point on the index, while Y amount of pollutant Q might equal two points on the index. A standard could then be set by selecting a total index number to serve as the environmental justice ceiling. This ceiling would then create a clear and meaningful substantive constraint for prophylactic requirements and ex ante oversight. A landfill applying for a permit renewal or

264. Yang, *supra* note 16, at 221–22. For example, while disclosure for its own sake accomplishes little, disclosure becomes an effective enforcement tool when used “to increase the exposure of potential misconduct and to incentivize deterrence [with credible threats of enforcement for failure to achieve an established standard].” Issacharoff, *supra* note 65, at 120. In his assessment of the Voting Rights Act, Issacharoff recommends that the federal government compel states to disclose alterations of voting rules or practices, while noting that the “key to a disclosure regime is not simply the transparency of the information provided, but its utility in promoting follow-on enforcement.” *Id.*

265. See Yang, *supra* note 16, at 158.

expansion, for example, would have the burden of assuring that its operation would not cause the environmental justice index to raise above the established ceiling. If the landfill failed to make this demonstration, the state agency would then deny its application.

Ultimately, any of these proposals to improve environmental justice protections would require continued political advocacy to initiate and shape implementation, both at and beyond the federal level.²⁶⁶ Once strengthened ex ante regulations are in place, effective implementation requires advocates and lawyers to “be poised to participate in planning, evaluating data, comparing practices of state and local grantees, highlighting effective reforms, and decrying shortcomings.”²⁶⁷ Otherwise, advocates risk losing what is gained to paper compliance, rubber stamping, and decreased enthusiasm and support from civil society groups traditionally interested in rights enforcement.²⁶⁸ Complete realization of Title VI’s potential for protecting environmental justice communities “depends on lawyers and other groups filing lawsuits and complaints, engaging in rulemaking and lobbying, conducting policy reviews, analyzing data, and participating in planning and design.”²⁶⁹ This also requires not losing sight of the important role that ex ante enforcement will continue to play—to be successful, prophylactic requirements must be backed up with ex post enforcement.

Relatedly, EPA must have increased support and funding to ensure that government oversight and implementation is possible. Currently, underfunding and understaffing limits EPA’s ability to carry out its Title VI duties.²⁷⁰ Private advocacy groups therefore have an important role to play in explaining the benefits of proactive ex ante regulation, pushing for expansion where appropriate, and advocating for greater funding, implementation, and oversight.²⁷¹

Finally, because environmental justice issues are ultimately the product of systemic inequalities, advocates must recognize that long term solutions require systemic remedies, including “stricter enforcement of laws against housing discrimination, more serious efforts to achieve residential integration, changes in the process of siting low and moderate income housing, changes in programs designed to aid the poor in securing decent housing, greater regulatory protection for those neighborhoods that are chosen to host LULUs, and changes in

266. Johnson, *supra* note 30, at 1331–32.

267. *Id.* at 1332.

268. Johnson, *supra* note 68, at 1401.

269. See Johnson, *supra* note 30, at 1332; see also Levinson, *supra* note 133, at 417 (“[G]overnment behavior responds to political, not market, incentives. Constitutional remedies will influence government behavior only insofar as they manage to shape these political incentives.”).

270. See THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 25, at 539.

271. See, e.g., Johnson, *supra* note 68, at 1401.

production and consumption processes to reduce the number of LULUs needed.”²⁷²

Ex ante regulation for environmental justice is therefore not a panacea. But it will better enable the federal government to prevent and mitigate environmental justice harms, even within fundamentally unequal and systemically unjust social structures. In addition, ex ante regulation may serve as a model for addressing problems related to structural racism and racial inequality beyond the environmental justice context. Primary reliance on ex post enforcement may have reached its limits in addressing the forms of intentional discrimination it was meant to target. While ex post enforcement will necessarily continue to play an important role, a shift to more prophylactic regulation may provide a better solution for addressing what remains pervasive today—implicit bias and structural forms of discrimination. In the fight for equality and justice for all, we should look for new opportunities to prevent discrimination from manifesting in the first place.

272. Been, *supra* note 16, at 1392.