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Shifting the Burden of Proof in Discrimination Cases to Pursue Environmental Justice

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Like most processes having to do with environmental justice, the burden of proof is a phenomenon best explained through stories. Consider the small agricultural town of Kettleman City, California, a San Joaquin Valley community which is 95% Latino and 40% monolingual Spanish speakers.[2] The town is home to the largest toxic waste disposal site west of Alabama, a landfill which was created in the late 1970s by Chemical Waste Management, Inc. (or ChemWaste) without local residents' knowledge, and much less, consent.[3] When ChemWaste announced in 1988 that they intended to build a toxic waste incinerator at the dump site in Kettleman City, the town's county, Kings County, issued an Environmental Impact Report (EIR).[4] Eventually, given an insufficient Spanish translation of the EIR which they also felt did not directly address the community's safety concerns with being located near the dump, a community group known as El Pueblo decided to sue Kings County, a result of strong community engagement and willpower.[5] But when they got to court, what exactly was El Pueblo required to prove?

What happens on the plaintiff side in environmental justice cases like these is a flurry of (often rushed) scientific research, emotional and psychological trauma of digging up

[1] Morris, H. (2022). Photo from "Top 10 Environmental Law Decisions of 2021." *UC Davis*. Accessed at https://www.ucdavis.edu/news/top-10-environmental-law-decisions-2021.
[2] Cole, L.W. & Foster, S.R. (2001) "PREFACE: We Speak for Ourselves: The Struggle of Kettleman City." *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*. NYU Press. Accessed at https://www.jstor.org/stable/j.ctt9qgj6v.4.
[3] Ibid.
[4] Ibid.
[5] Ibid.

environmental discrimination and health hazard details, and the need to find a perfect stance in order to prove that tangible and specific harm has been done. The Kettleman City lawsuit ended successfully, with the judge ruling that the EIR "had not sufficiently analyzed the toxic waste incinerator's impacts on air quality and on agriculture in the San Joaquin Valley, and, most importantly, that the residents of Kettleman City had not been meaningfully included in the permitting process."[6] What won El Pueblo the case was not proven scientific information about how exactly the toxic waste incinerator would harm their health, nor was it proof that ChemWaste sited the facility in a community of color in an act of environmental racism. Rather, the victory was legally credited to the technicality of procedures that needed to be followed to ensure public participation, and the conclusion that the Spanish-speaking population was not provided fair information about the incinerator.[7]

While public participation is crucial to government decision-making, El Pueblo did not actually win the case on the grounds of the environmental injustice that was occurring. Like many environmental justice advocates and lawyers, El Pueblo took a roundabout route, and while they were successful in preventing the toxic waste incinerator from being built, what if Kings County's EIR was perfectly completed, and what if residents were considered in the permitting process? El Pueblo would have had to sue on the grounds that the toxic waste incinerator would be harmful to the community's health, or that they were discriminated against in the permitting process, taking on the burden to prove either of these instances. And for risk assessment of public health hazards, El Pueblo would be in charge of obtaining (and/or outsourcing the production of) all the scientific information and demonstrating that injury could occur. Likely, in this case, the incinerator would have been built anyway. How can we ensure that those who deserve justice, can obtain it?

The Problem

1. The Burden of Proof

Here lies the issue of the burden of proof. The term refers to the responsibility of one party in a court case to prove that its allegations are correct.[8] In the majority of private right of action cases in the United States, the burden of proof is on the plaintiff, meaning that the party who is suing must prove that they are correct, often "beyond a reasonable doubt."[9] In cases of environmental hazards, this might look like a community proving that there is a direct causation between a harm, like a toxic chemical, and a health outcome, like cancer.

Arguments against where the burden of proof lies, especially in environmental cases, are historically well-backed and contain a wide range of components. Scholars notably cite the

[6] Cole, L.W. & Foster, S.R. (2001) "PREFACE: We Speak for Ourselves: The Struggle of Kettleman City."
[7] Ibid.
[8] (2022) "Evidentiary Standards and Burdens of Proof in Legal Proceedings." *Justia*. Accessed at https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/.
[9] Ibid.

precautionary principle, which asserts that even if there is not full scientific certainty about if harm will occur, one should anticipate the threats of serious harm and take proactive steps to ensure that any harm is not caused.[10] In theory, the precautionary principle argues in favor of reversing the burden of proof, because even though a harm may not necessarily be scientifically proven at a given time, the party which has control over the perturbation of that harm—in these cases, industry or manufacturers—should take the necessary steps to ensure that that harm is not actually executed.[11] The precautionary principle pushes for a more proactive approach, especially in terms of risk assessment, and is one of the most foundational aspects of the argument to shift the burden of proof in environmental public health cases.

Knowledge of the risk is another significant component of the argument to place the burden of proof on the defendant in environmental cases. Environmental lawyer James Olson argues that defendants generally have more scientific knowledge and technical expertise on the substances they are releasing into the environment, whether that be through air or water pollution or another form of contamination.[12] In this light, it simply makes more sense to have those with more scientific information to be required to prove that their actions are not harmful to the plaintiff. Environmental justice advocates also argue that it is backwards and inefficient to have community groups or citizens be responsible for explaining and proving all of the harms caused unto them, when they may not necessarily be well-educated in the environmental science and public health spheres.[13] Since manufacturers should know their products and their actions inside out, *they* should be the ones required to produce evidence when serious questions of public health and potential for harm arise. There is also the moral argument that since manufacturers cause the risk, they should have the responsibility to disclose information about it, and take actions to reduce it. As Joel Tickner in his 1999 book on the precautionary principle notes, "shifting the burden of proof moves toward ameliorating some of the knowledge asymmetries concerning toxic substances, because it would place the onus of producing information or generating knowledge on the manufacturer who is probably in the best position to address issues about the effects of its substances."[14]

Tickner extends this argument further and brings the market into play. He argues that shifting the burden of proof to the defendant gives the defendant the incentive to reduce harm in order to avoid paying costs or losing profits of their business-as-usual actions being prohibited from the market in some way.[15] With this approach, manufacturers would have to prove that their product and actions are not causing direct harm to the plaintiff so as to not "suffer from the loss of the substance from commerce or at least have it regulated more stringently."[16] This market

[10] Tickner, J. (1999) *Protecting Public Health and the Environment: Implementing the Precautionary Principle*, ch. 4: "Asymmetric Information, Precautionary Principle, and Burdens of Proof."
[11] Ibid.
[12] Olson, J.M. (1990) "Shifting the Burden of Proof: How the Common Law can Safeguard Nature and Promote an Earth Ethic." *Lewis & Clark Law School Environmental Law Journal*, vol. 20, no. 4, pp. 891-915. Accessed at https://www.jstor.org/stable/43265949.
[13] Tickner, J. (1999) ch. 4: "Asymmetric Information, Precautionary Principle, and Burdens of Proof."
[14] Ibid.
[15] Ibid.
[16] Ibid.

argument uses an incentive approach to explain how it would look if the burden of proof were flipped to the side of the defendant, where they have to be more proactive actors in the situation and contribute to the scientific understanding of the issue at play.

Finally, when it comes to environmental justice cases, actual direct causation proof is not always available. For instance, the predominantly Black and low-income community of Hyde Park in Augusta, Georgia struggled for years in the 1990s and early 2000s in their efforts to prove that chemical exposure was the direct cause of certain health outcomes in the community.[17] This was due to the fact that professional scientists from the Environmental Protection Agency (EPA) could only examine the effects of one chemical at a given time to an individual, while in reality, the diverse and heterogeneous community of Hyde Park was experiencing confounding effects of chemical contamination, and other socioeconomic conditions such as disparities in healthcare and varying proximities to highways and other high-polluting areas.[18] Thus, in Hyde Park, as well as other environmental justice cases, putting the burden of proof on the community entailed disseminating their power and agency to the EPA, an external presence, in order to have professional scientific standing, and oversimplifying and distorting the research process to the causational effects of one chemical on one health outcome at a given time.[19] This final argument against the burden of proof shows that direct causation of hazard to harm is not always the most effective and holistic approach to showing what is happening to a community.

The late environmental justice scholar Luke Cole notes how backwards the system is: "this is a reactive situation. You have to have a body count, you have to have people who have been seriously harmed. Which is not a good kind of preliminary step to have to take. 'You know, I'm sorry you haven't been injured badly enough. Go out and get injured, then we'll bring a lawsuit.'"[20] This quote alone shows us why the burden of proof needs shifting—to prevent injury from occurring and secure justice for all.

2. The Civil Rights Act of 1964

Historically, the main avenue of pursuing environmental justice in both state and federal courts is through Title VI of the Civil Rights Act of 1964.[21] Title VI states:

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[17] Checker, M. (2007) "But I Know It's True": Environmental Risk Assessment, Justice, and Anthropology. *Human Organization*, 66(2), 112–124.
[18] Ibid.
[19] Ibid.
[20] Cole, L.W. (2008) "Environmental Justice and the Three Great Myths of White Americana." *Hastings West-Northwest Journal of Environmental Law & Policy*, vol. 14, no. 1, pp. 573-585.
[21] Gordon, H. and K.I. Harley. (2005) Environmental Justice and the Legal System. Chapter 10 in *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement*, edited by D. Pellow and R.J. Brulle. MIT Press, pp. 153-170.

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[22]

For example, an environmental justice lawsuit which uses Title VI might look like a community group suing a state government to enjoin them from issuing a permit which would allow a polluting facility to operate in close proximity to a neighborhood that hosts predominantly people of color. In this case, the community group would argue that they are being discriminated against by a federally-funded institution by incurring disproportionate health outcomes on the neighborhood of color, going against Title VI. This case may seem solid, especially if polluting facilities are already in operation in the vicinity, but there are many issues with using this argument in court.

The main issue with Title VI of the Civil Rights Act in terms of environmental justice implications is that it does not explicitly address the distinction between intentional discrimination and discrimination from disparate impact.[23] Intentional discrimination is best understood along the lines of *a racist person did this racist thing*, while disparate impact discrimination is seen as *this action has a racist outcome*. In fact, the majority of environmental justice cases fall under the umbrella of discrimination from disparate impact, where an action of one party incurs discriminatory outcomes, even if an intent to discriminate by the perpetrator is not proven.[24] Scholars Holly Gordon and Keith Harley note that intentional discrimination is more difficult to prove than disparate impact discrimination; for instance, proving that an industrial facility was intentionally placed in a community to cause discrimination is nearly impossible.[25] And, since Title VI does not differentiate between intentional and disparate impact discrimination, the basis for environmental justice advocates being able to succeed in court under this standing is rocky, unreliable, and historically unsuccessful.

Along the same lines, to this day, the EPA has never made a formal finding that any institution receiving federal funding has violated Title VI, so the pursuit of environmental justice under the Civil Rights Act has also proven unsuccessful on the agency level.[26] Additionally, there is no strong precedent for environmental justice advocates to rely on while pursuing justice in court; Gordon and Harley note, "there is no environmental version of *Brown v. Board of Education*."[27] In the absence of meaningful and relevant precedent and no explicit denouncement of disparate impact discrimination, environmental justice advocates rarely succeed in court under Title VI, even when they have no choice but to rely on it.

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[22] Civil Rights Act of 1964. (7/2/1964) Enrolled Acts and Resolutions of Congress, 1789-2011. General Records of the United States Government, Record Group 11. Accessed at https://www.archives.gov/milestone-documents/civil-rights-act.
[23] Gordon, H. and K.I. Harley. (2005) Environmental Justice and the Legal System.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.

3. *The Sandoval Decision*

Not only is there no environmental *Brown v. Board*, there was actually a Supreme Court decision which made it even *more* difficult to use Title VI in environmental justice cases. In 2001, a citizen with the last name Sandoval sued the Alabama Department of Public Safety on the basis of Title VI of the Civil Rights Act.[28] Sandoval argued that he was discriminated against because Alabama did not offer the drivers' license test in Spanish, his native language, and since these tests were funded by the federal government, they fell under Title VI.[29] In April of 2001, the Supreme Court decided in *Alexander v. Sandoval* that Title VI did not provide actors protection against discrimination from disparate impact; Title VI only protected people against intentional discrimination.[30] Since the language of the drivers' license test was discriminating against Sandoval via disparate impact and not intentionally, he could not secure protection against discrimination under Title VI.

While *Alexander v. Sandoval* has nearly nothing to do with environmental justice, it set an important precedent that has impacted environmental justice advocacy in the courts in many ways. Since 2001, no private actor has successfully sued under Title VI for an environmental justice claim of discrimination from disparate impact, because the precedent that the *Sandoval* case set is now ingrained federally.[31] The decision has made it immensely difficult for environmental justice advocates to succeed in court, especially because intentional discrimination relating to environmental injustices is usually not proveable.

Options for Action

There are many ways to address the burden of proof and discrimination claim issues with environmental justice, and these could be accomplished in the courts, through Congress, or in the states. This section addresses three of the possible options for action as we are confronted with a problem as grand as this one.

1. *Overturn Sandoval*

The first clear solution is to overturn *Alexander v. Sandoval* (2001). In *Sandoval*'s dissent, written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, Stevens writes that the majority's decision "is the unconscious product of the majority's profound distaste for implied causes of action rather than an attempt to discern the intent of Congress that enacted Title VI of the Civil Rights Act of 1964."[32] Stevens argues that the majority did not interpret Title VI in the way Congress intended it to be interpreted, especially considering its time in the

[28] *Alexander v. Sandoval,* 532 U.S. 275 (2001). Accessed at https://supreme.justia.com/cases/federal/us/532/275/.
[29] *Alexander v. Sandoval,* 532 U.S. 275 (2001).
[30] Ibid.
[31] Gordon, H. and K.I. Harley. (2005) Environmental Justice and the Legal System.
[32] *Alexander v. Sandoval,* 532 U.S. 275 (2001).

middle of the Civil Rights Movement when groups around the country were fighting for equality and justice and the abolishment of racial disenfranchisement, segregation, and discrimination.[33] Justice Stevens also comments on the broader objective of the Civil Rights Act in his dissent: "It is self-evident that, linguistic niceties notwithstanding, any statutory provision whose states purpose is to 'effectuate' the eradication of racial and ethnic discrimination has as its 'focus' those individuals who, absent such legislation, would be subject to discrimination."[34] The dissenters argue that ending discrimination was the main goal of the Civil Rights Act, and to pick apart its language and focus on the distinction between intentional and disparate impact is unnecessary, too narrow of an approach, and does not respect the intentions of the Congress which passed the legislation.

The path to overturn *Alexander v. Sandoval* (2001) would involve a private action suit to argue for protection from discrimination by disparate impact under Title VI that would have to travel all the way up to the Supreme Court. Actually overturning *Sandoval* would involve the Court practicing more judicial restraint, less of a laissez-faire approach, and overturning precedent which has existed for more than two decades. The complications of overturning the decision are indeed notable, but if accomplished, advocates could use Title VI for the purposes of environmental injustice and discrimination claims that cannot be proved as intentional.

Another path to overturning *Sandoval* could be through Congress, since legislation passed by both houses of Congress and approved by the President can override Supreme Court decisions.[35] A historical example of this option for action is seen in the override of *Dred Scott v. Sandford* (1857) by the ratification of the 13th and 14th Amendments, which made slavery illegal and gave equal protection to citizens under the law.[36] If Congress passed a law that overrode the decision of *Alexander v. Sandoval* (2001), that law could also overturn the precedent and allow environmental justice advocates to have a more effective path towards pursuing justice under Title VI.

2. *Amend the Civil Rights Act*

Amending the Civil Rights Act of 1964 is another way to solve the issue of the *Sandoval* precedent and the difficulties that face environmental justice advocates succeeding in court under Title VI claims. As Justice Stevens argued, only using Title VI to protect citizens from intentional discrimination is not what the Civil Rights Act was originally intended to do. Rather, we should place the act in the time it was written, consider the Congress which passed it, and honor those intentions in order to actually fight against discrimination in the United States. The

[33] *Alexander v. Sandoval,* 532 U.S. 275 (2001).
[34] Ibid.
[35] (2022) "Dred Scott v. Sandford (1857)." *National Archives: Milestone Documents*. Accessed at https://www.archives.gov/milestone-documents/dred-scott-v-sandford#:~:text=The%20decision%20of%20Scott%20v,citizens%20of%20the%20United%20States.
[36] Ibid.

Act need not be picked apart and overly examined for linguistic loopholes, as the majority did in the *Sandoval* decision.

This solution involves amending Title VI of the Civil Rights Act so that it explicitly states that federally funded programs are prohibited from discriminating against any person, *whether that be intentionally, arising out of disparate impact, or any other indirect form of discrimination*. These language specifications would make it more effective for environmental justice advocates to sue on the basis of Title VI in court, and the amendment would also automatically override the *Sandoval* decision by listing disparate impact discrimination under Title VI as well. Congressional action could also be a way to skirt around obstacles with the current conservative-leaning Supreme Court, which will be discussed later.

Additionally, modern environmental justice scholarship and what is termed "critical environmental justice" is focused on changing the system as a whole, rather than simply pressuring it from the outside.[37] This idea of transformative justice is a main focus of critical environmental justice thought today.[38] In amending the Civil Rights Act, and also in pursuing environmental justice in the federal government as a whole, we should go beyond equality and fairness and focus more on justice, in order to be cognizant of today's time and transform the system so that it works better for everyone, not just the politically or economically powerful. Transformative justice, which involves restructuring the ways procedures and systems function, would give more power and agency back to the individual and the community so as to further pursue justice, support grassroots movements, and give voice to the often invisible groups of people.

3. *Shift the burden of proof in discrimination cases in the states*

If federal action is too ambitious, or might take a long time to get moving, we can always address the burden of proof in the states. Shifting the burden of proof alleviates the need for any kind of discrimination claim in the first place, because the plaintiff would not be required to prove that they were discriminated against or harmed. This could take the form of state governments passing a law which requires state courts to shift the burden of proof in certain cases, where the defendant will have to prove that they did not discriminate against or cause harm to the plaintiff. As argued before, the burden of proof falling on the plaintiff in environmental justice cases is unfair, ineffective, and often leaves marginalized groups with less power than they initially had.[39]

Interestingly, the political will to shift the burden of proof does exist in the states. An example is the recently proposed Massachusetts House Bill (H.1616) which proposes that when a plaintiff is harmed, the defendant (often a manufacturer) must prove that they did not recklessly

[37] Pellow, D.N. (2018) Critical Environmental Justice Studies. Chapter 1 in *What is Critical Environmental Justice?* Cambridge, MA: Polity Press, pp 1-33.
[38] Ibid.
[39] Gordon, H. and K.I. Harley. (2005) Environmental Justice and the Legal System.

place lead in consumer products.[40] In this case, the plaintiff would still have a small burden of proving that they were harmed in some way by filing a lawsuit, but the scientific research and legal arguments then fall on the side of the defendant.[41] This shifting of the burden of proof in the states is most possible when it addresses significant and specific public health hazards, like lead poisoning coming from consumer products. And, if successful, state law can always be spread to other states and could eventually be adopted into federal law. So, even though this option for action is on more of a smaller scale and less far-reaching as the proposed federal initiatives are, it is still a beneficial solution that would entail tangible results in specific states which take the action. State action also avoids many of the obstacles involved with attempting to make change in the federal government.

Anticipated Obstacles

Obstacles that are anticipated, and potential ways to overcome them, are just as important to note as are the solutions to fix the issue in the first place.

1. *The current Supreme Court*

At this present moment, overturning *Alexander v. Sandoval* does not seem to be a promising option for action. The recent growth of conservative justices on the Supreme Court, and other conservative judges in state and circuit courts, make the idea of overturning *Sandoval* seem fairly ambitious. The current Supreme Court has previously expressed a lack of judicial restraint in prominent environmental cases like *West Virginia v. the Environmental Protection Agency* (2022), where the Court ruled that the EPA did not have the power to regulate greenhouse gas emissions in any industry under the Clean Air Act, utilizing the "economic and political significance" aspect of the major questions doctrine.[42] In *West Virginia v. EPA*, the Court decided against stricter regulations on businesses to promote laissez-faire ideals and ensure as little economic interference as possible.[43] Especially today, when the Supreme Court is stacked with far-right justices like Kavanaugh and Coney Barrett, politics have overshadowed the purpose of the Court, which is to provide non-partisan interpretation of the Constitution. When justices like these remain in one of the most powerful positions in government, it hinders the ability of the public to pursue justice in a meaningful manner and use the institutions and the techniques which should be there to support them.

A common argument against the life terms of Supreme Court Justices is to have each justice serve 18 years on the Court instead. Just last year, Congressman Hank Johnson of Georgia

[40] LeBoeuf, D.H.A. (2023) "An Act Enhancing Justice for Families Harmed by Lead." MA Bill H.1616. Accessed at https://malegislature.gov/Bills/193/H1616.
[41] Ibid.
[42] *West Virginia v. Environmental Protection Agency*, 597 U.S. (2022). Accessed at https://www.oyez.org/cases/2021/20-1530.
[43] Ibid.

introduced the Supreme Court Tenure Establishment and Modernization (TERM) Act, which would establish an 18-year term limit for all Supreme Court Justices, and have regular appointments to the Court every 2 years by the President.[44] TERM partly comes from the sentiment against the fact that "five out of the six conservative justices on the bench were appointed by presidents who lost the popular vote," as Rep. Johnson states.[45] Adjustments like this to the Supreme Court would make it more fair and balanced, and allow for the interpretation of legislation to be prioritized, rather than politics. In fact, three-fourths of Americans are against the lifelong terms of Supreme Court Justices.[46] Passing TERM could help the Supreme Court get to a place where it is possible to overturn *Sandoval* and secure the rights of all people to be free from discrimination.

2. *Uneven state performance*

An obstacle that could arise from shifting the burden of proof in the states is that this will likely result in uneven state performance, where each state will have differing court procedures in when and how the burden of proof is shifted. Some states, like Massachusetts with the current House Bill to shift the burden of proof in certain cases involving lead in consumer products, will take more initiative than others, which leaves a varying, non-uniform distribution of burden of proof across the country. This will result in some states having more just and fair practices than others.

However, when the Congressional will exists, uneven state performance can be fixed at the federal level by taking state law and adopting it into federal law. This would make the burden of proof the same in every state court across the country—which is where the majority of lawsuits happen, anyways. Congressional adoption of state law also shows how a large, federal action can have small-scale implications in the states. Passing federal legislation to shift the burden of proof in certain cases would solve the issue of uneven state performance and ensure that everyone in the U.S. has the same opportunity to get justice if harmed.

3. *Congressional gridlock*

Finally, a clear obstacle that persists when considering federal legislative action is the Congressional gridlock and political polarization we see in both the House and the Senate today. Political polarization comes from widespread ideological divergence that causes stark

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[44] Johnson, H. (team) (2022) "Rep. Johnson Introduces Supreme Court Justice Term Limit Measure to Restore Balance, Legitimacy for SCOTUS." *Hank Johnson: Congressman for Georgia's 4th District.* Press Release. Accessed at https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-introduces-supreme-court-justice-term-limit-measure-restor

[45] Ibid.

[46] Johnson, H. (team) (2022) "Rep. Johnson Introduces Supreme Court Justice Term Limit Measure to Restore Balance, Legitimacy for SCOTUS."

partisanship and little room for compromise.[47] In terms of environmental policy, when Congress is stuck in gridlock, there is a general dissatisfaction with the little progress being made on prominent issues, and this causes a shift in policy-making towards other means of governance, such as the courts, the states, through executive orders, and other initiatives.[48] Political scientists argue that combatting Congressional gridlock involves finding common ground through productive and analytical debate, rather than keeping everything rooted in the current political climate and picking sides.[49] Perhaps the Congress that is elected next could be more likely to move away from the current model of divisive partisanship and towards policymaking that is more productive and supports the actions outlined in this paper, such as amending the Civil Rights Act or adopting state legislation on shifting the burden of proof.

Another obstacle that could also make Congressional action in support of shifting the burden of proof difficult is the relationship between the government and industry, especially in terms of lobbying. Environmental justice scholar Nadia Kim notes that the government and industries have a "cozy partnership" that tends to leave citizens at risk of "environmental racism and classism," as some government officials are swayed by powerful industry interest groups.[50] This idea, yet again, shows that environmental justice is often about political and economic power, and as Luke Cole notes, governments respond to power—which is often in industry.[51] Industry presence in government is yet another reason why Congressional gridlock needs to be addressed and compromises need to be made, and also provides another opportunity for states to take the initiative by shifting the burden of proof in state courts, to show that the federal government would be advised to do the same.

Final Thoughts

To conclude, any of these proposed options for action could be useful, and though there are obstacles to be anticipated and enemies of justice to address, responsible environmental governance proves a way around these issues. Both the precautionary principle and critical environmental justice scholarship argue in favor of shifting the burden of proof and protecting all people against discrimination, and our legal system should reflect these ideals. Congressional, state, or judicial action is necessary in order to provide a more successful means of achieving environmental justice. "Go out and get injured, then we'll bring a lawsuit" is simply not the way the system should function.[52]

Finally, it is important to note that in environmental justice theory today, there exists the sentiment that when advocates succeed in court and get some kind of settlement for the injury,

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[47] Vig, N., M. Kraft and B. Rabe (2021). *Environmental Policy: New Directions for the Twenty-first Century* (11 ed.), CQ Press. pp. 4-35.
[48] Ibid.
[49] Ibid.
[50] Kim, N. (2021) Refusing Death: Immigrant Women and the Fight for Environmental Justice in LA. Stanford, CA: *Stanford University Press* [Introduction and Chapter 1: pp. 1-5 & 35-72].
[51] Cole, L.W. (2008) "Environmental Justice and the Three Great Myths of White Americana."
[52] Ibid.

this should not be referred to as a "victory" because someone has still been harmed, and that damage in itself is irreversible. Though that toxic waste incinerator did not end up being built in Kettleman City, California, residents of the town still faced a multitude of harms—ongoing racial and ethnic profiling, lack of respect for their opinions, and the deeming of their community as dispensable. What happened in Kettleman City is the kind of environmental and societal trauma that can psychologically and emotionally persist for generations. The Kettleman City case was not a "victory" nor a "success"; rather, it is a prime example of how the current systems of injustice and environmental harm can impact a community when the legal system and discrimination laws are not on their side.

Shifting the burden of proof to the defendant brings the focus back to the environmental justice community's voice, power, agency, and aspirations. Rather than being centered on damage and harm, our justice system should function to preserve everyone's right to fair treatment and a safe and healthy environment. By shifting the burden of proof, the system will give power to the community, instead of victimizing marginalized groups of people and leaving them with damage as their only defining characteristic. With reconstructing environmental policy and exposing the inner workings of the government and legal systems as a whole, we can make meaningful progress towards ensuring environmental justice for all people.

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