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THE "RIGHT" RIGHT TO ENVIRONMENTAL PROTECTION: WHAT WE CAN DISCERN FROM THE AMERICAN AND INDIAN CONSTITUTIONAL EXPERIENCE

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INTRODUCTION

The best legal mechanism to protect the environment remains a complex and contentious issue. Many normative questions with practical implications remain. Should the legal response be in the foundational document of most legal systems, the Constitution? If so, should a Constitution create a specific right to environmental protection, or are statutory responses to address environmental problems adequate?[1] If one considers environmental protection globally, both constitutional and legislative responses to environmental protection prevail. Yet, neither alone is adequate. Environmental legislation may not cater to individual rights, especially when legislated from a utilitarian platform. A constitutional right to environmental protection can protect individuals from environmental harm, but does not necessarily correlate to better or stronger environmental protection. Consider the examples of the United States and India.

The U.S. Constitution does not explicitly provide a right to environmental protection, nor has the judiciary recognized a right to environmental protection. Environmental protection is driven

1. *See* Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1 (1992) (collecting cases that have rejected the argument that there is a constitutional right to environmental protection in the United States.); THOMAS MORE HOBAN & RICHARD OLIVER BROOKS, GREEN JUSTICE 49 (2d ed. 1996).

by congressional legislation, under the Commerce Clause. The executive branch enforces appropriate legislation, as well as any Presidential Executive Orders. The judiciary enters the field as an arbiter of disputes relating to legislative and executive action.[2] While the judiciary also plays a predominant role through tort law, those cases do not create a specific right to environmental protection, but only provide limited remedy, to the extent an environmental harm can be redressed under existing tort law doctrines.[3] Although some state constitutions specifically articulate a right to environmental protection,[4] legislative and executive action predominate federal environmental protection.

The Indian Constitution, on the other hand, has been interpreted by the Supreme Court to include a right to clean and healthy environmental conditions.[5] The Indian Supreme Court propped up its position through two interpretative stints. First, the Indian Supreme Court lowered the standing requirement under Article 32,[6] which enables Indians to invoke a court's writ jurisdiction to redress violations of fundamental rights or irrevocable constitutional rights.[7] Second, it interpreted the right to life under Article 21 of the Indian Constitution to include a right to environmental protection.[8] In India, legislative and executive measures are also prevalent, but are generally criticized for lax

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2. Hodel v. Indiana, 452 U.S. 314, 323–34 (1981). In this case, Justice Marshall upheld the federal government's authority to pass the Surface Mining Control and Reclamation Act of 1977 under the Commerce Clause, and noted: "[i]t is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality. . . .' A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *See also* Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 339–40 (1990); William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1 (1997).

3. For a brief summary on the role of tort law in environmental cases, see ZYGMUNT J.B. PLATER, ROBERT H. ABRAMS, ROBERT L. GRAHAM, LISA HEINZERLING, DAVID A. WIRTH AND NOAH D. HALL, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 69–71 (4th ed. 2010).

4. *See infra* Section II.B.

5. *See infra* Section III.A.2.

6. INDIA CONST. art. 32.

7. *See infra* Section III.A.2.

8. *See infra* Section III.A.2.

enforcement. Tort remedies, like in the United States, are limited to redressing environmental harms within narrowly defined tort law doctrines.

The question then becomes which country's experience makes the more compelling case: India's recognition of a constitutional right to environmental protection or the U.S. legislative approach to protect the environment. Given that environmental protection laws are more robust in the United States than in India, the answer would seem to be the latter.[9] This, however, is not necessarily the case. The answer instead depends on whether the objective is only to achieve environmental protection in a utilitarian sense or whether the objective is broader—maximizing environmental protection to all individuals.

Despite relatively stronger environmental protection laws in the United States, there remains a distributive problem, as not all Americans are equal beneficiaries of environmental protection laws. The environmental justice movement in the United States underscores this issue. Some Americans, primarily because of their race or economic status, bear a disparate burden of environmental problems and/or enjoy lesser benefits from environmental protection laws.[10] To redress the problem, environ-

9. According to the Yale Environmental Performance Index, the United States is ranked number twenty-six in the world for its environmental performance, with a 3.84 percent improvement over a ten-year period, whereas India is ranked number 141, with its environmental performance decreasing by 0.52 percent in the past ten years. ANGEL HSU ET AL., 2016 ENVIRONMENTAL PERFORMANCE INDEX, YALE CTR. FOR ENVTL. L. & POL'Y 18–19 (2016), http://epi.yale.edu/sites/default/files/2016EPI_Full_Report_opt.pdf. The regional analysis for both countries are different. *Id.* at 113. Although a country's rank in the report does not attribute a better ranking to better environmental laws, there is a correlation between effective environmental laws and better environmental conditions, even if regulation alone may not always be the only, or even the best, means of achieving environmental protection. *See, e.g.*, DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 19–20 (7th ed. 2006).

10. Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1003–04 (1993); Jennifer Wolch, John P. Wilson & Jed Fehrenbach, *Parks and Park Funding in Los Angeles: An Equity-Mapping Analysis*, 26 URB. GEOGRAPHY 4 (2005). *See generally* CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE A. O'NEILL, ENVIRONMENTAL JUSTICE 35–71 (2d ed. 2009) (collecting articles that document environmental justice problems in the United States).

mental justice advocates have framed the issue of disparate environmental protection as a violation of the Equal Protection Clause of the Fourteenth Amendment, claiming that states have denied equal protection of environmental laws to some Americans.[11] According to judicial interpretation of the Equal Protection Clause, however, a petitioner must prove intentional discrimination to succeed in a Fourteenth Amendment petition. This standard of proof has not only diminished the ability of environmental justice advocates to get redress from unequal environmental protection under the Equal Protection Clause, but also under corresponding legislation of Title VI of the Civil Rights Act, specifically § 601, due to the judiciary's application of the intent requirement.[12] The American judiciary's interpretation has resulted in environmental justice being primarily addressed under broadly worded executive orders that do not provide any private cause of action.[13] The current environmental justice movement in the U.S. demonstrates that robust environmental laws are no substitute for an enforceable right to environmental protection. Then, can the creation or recognition of a constitutional right to environmental protection resolve this problem? Not necessarily, as it would depend on the nature of the right.

Let us consider, again, the example of India. Per judicial interpretation, a right to environmental protection is integral to the negative right to life. A right to life, however, will not necessarily address the environmental justice problem or unequal environmental protection. Indeed, in India, although the judiciary's expansive interpretation has made a healthy environment a constitutional right, not all Indians are able to equally enjoy it. Not only are there few cases in which the Court has even recognized a constitutional right to environmental protection, but also, some of these decisions have an unequal impact. One example is the case of *Almitra Patel and Anr. v. Union of India and Ors*,[14] where the Indian Supreme Court focused on slum dwellers, to the exclusion of other residents, in addressing the problem of

11. *See infra* Section II.B.

12. Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2012); Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2012).

13. *See infra* Section II.B.

14. Almitra H. Patel v. Union of India, (1998) 2 SCC 416, http://judis.nic.in/supremecourt/imgs1.aspx?filename=13504.

waste disposal in New Delhi.[15] Also, because the right to life in both the Indian and the U.S. Constitutions is a negative right, it can be limited by due process of law. Thus, a constitutional right to environmental protection, as part of a right to life alone, is not adequate and will not address the environmental injustice problem. Thus, what should be the "right" right to environmental protection?

The American and Indian experiences, in framing environmental protection as a constitutional right, provide valuable lessons for mapping the critical components of a right to environmental protection. America's experience with the environmental justice movement demonstrates that even robust environmental protection laws may not protect all individual rights equally. The Indian experience, on the other hand, demonstrates that failure of the legislative and executive branches can be somewhat counteracted by judicial intervention. It also shows that symbolic and creative interpretation can promote meaningful protection of fundamental constitutional rights. Therefore, an effective right to environmental protection should incorporate and/or supplement at least the following three rights: 1) the right to life, 2) the right to equal protection under environmental laws, and 3) the right to judicial review and access to courts.

While normatively desirable, these rights need not be articulated in the Constitution, as constitutional amendments or expansive interpretation of constitutional provisions could present practical difficulties. In the United States, any change to the Constitution would require a constitutional amendment, which, under Article V,[16] requires a supermajority vote of the legislative branch, making constitutional amendments extremely difficult.[17] Given the history of the judiciary's interpretation of the Equal Protection Clause, it is unlikely that the U.S. Supreme Court will interpret it to redress unequal protection under environmental laws, nor is it likely that the U.S. Supreme Court will recognize a right to healthy environmental protection under the

15. *See infra* Section III.B.

16. U.S. CONST. art. V.

17. JEB RUBENFELD, FREEDOM AND TIME 175 (2001) (noting that Article V's super-majoritarian vote requirement to amend the Constitution "creates a process very difficult to negotiate.").

Fourteenth Amendment. In at least two decisions,[18] the U.S. Supreme Court has signaled that constitutional due process protection does not extend to negligent deprivation of rights. Therefore, since environmental justice claims focus on disparate impact, rather than intentional discrimination, it is unlikely that the U.S. Supreme Court will interpret the Fourteenth Amendment to recognize a constitutional right to equal environmental protection, absent intentional discrimination. It is equally unlikely that the Indian Supreme Court will frame the right to environmental protection as a matter of equal protection under the Indian Constitution. Given these challenges to creating or incorporating a constitutional right to environmental protection, were a country able to strengthen the three core rights that are central to protecting an individual right to environmental protection without a formal constitutional amendment or judicial interpretation of existing rights, say by legislative action, then a pre-occupation with form should not overshadow the substance of the efforts to realize the right to environmental protection.

Viewed from this lens, it is not so much the existence of a constitutional right to environmental protection, but its impact that is relevant. Robust environmental protection laws could signal that a government is effectively performing its function to protect individual rights guaranteed under the Constitution. Then, the legal manner in which, or the branch of government through which, the right to environmental protection is guaranteed and enforced becomes less relevant. Conversely, weak and/or ineffective environmental protection, whether to all citizens at large or a discrete group of individuals, signals the need to establish and/or reinforce the right to environmental protection, be it within the normative frame of a right to life, to equal protection under law, and/or access to the judiciary by facilitating standing. So long as it substantially protects critical fundamental individual rights from environmental harms, the "right" right to environmental protection can be reinforced even outside the constitutional text.

The article proceeds as follows. Part I will describe the environmental justice problem in the United States. It will discuss the problem of disparate environmental impact faced by certain sections of the American populace and some obstacles to redress

18. Daniels v. Williams, 474 U.S. 327, 332–34 (1986); Davidson v. Cannon, 474 U.S. 344, 348 (1986).

the problem under the Equal Protection Clause, particularly in light of the U.S. Supreme Court's interpretation of the Equal Protection Clause in landmark cases, including *Washington v. Davis*[19] and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*,[20] requiring proof of either intentional discrimination or of a discriminatory purpose in enacting and/or enforcing laws that have a disparate impact.[21] It will then analyze the impact of the U.S. Supreme Court's decision in *Washington v. Davis* on subsequent legal challenges brought by environmental justice advocates to unequal protection laws under §§ 601 and 602 of Title VI of the Civil Rights Act. This discussion will demonstrate that, despite relatively robust environmental laws, unequal environmental protection in the U.S. strains the constitutional right to equal protection. Part II will then discuss the role of the Indian judiciary in strengthening access to judicial review and in recognizing a right to environmental protection as part of the right to life under Article 21 of the Indian Constitution. It will then explain the contextual importance of the Indian Supreme Court's interpretation of the Indian Constitution to promote environmental protection in India, as well as the limits of the Court's interpretation in guaranteeing effective and equal environmental protection. This Part will illustrate, through the Indian experience, that a constitutional right to environment, as a concomitant of the right to life, is incomplete and inadequate in securing equal environmental protection. Finally, Part III will propose that an effective right to environmental protection should reflect, and be informed by, the following three constitutional rights, which are incorporated in most contemporary constitutions: 1) the right to life, 2) the right to equal protection of the laws, and 3) the right to judicial review.

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19. Washington v. Davis, 426 U.S. 229, 239 (1976). The issue in the case was whether hiring and promotion policies of the District of Columbia's police department discriminated against black officers and violated the Equal Protection Clause of the Fifth Amendment. *Id.*

20. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). Plaintiffs in this case challenged the Village of Arlington Height's refusal to rezone a land parcel to allow multi-family residence for low and moderate-income housing as a violation of the Equal Protection Clause, arguing that the purpose of the refusal was to discriminate against racial minorities and not to protect property values, as claimed by the village authorities. *Id.*

21. *Id.*

I. ENVIRONMENTAL PROTECTION AND THE U.S. CONSTITUTION

The history of modern environmental law in the United States can be traced back to the 1970s. As environmental problems increased, so did legal intervention. Propelled by a combination of severe pollution, the resulting adverse health impacts, and a strong popular resistance, the legislature and executive branches enacted and enforced a series of environmental protection laws.[22] Even as environmental protection laws gained traction, a new problem emerged in the 1980s. Certain groups were bearing a greater share, an unfair and unjust share, of environmental harm than others. Environmental laws, however, at best ignored and at worst promoted, this unequal or disparate environmental impact.[23] Thus began the environmental justice movement, despite the significant progress in creating environmental protections laws and administrative mechanisms to mitigate environmental pollution and degradation.

A. Understanding the Environmental Justice Problem

In the United States, the 1980s was a period that witnessed a robust expansion of the civil rights movement, including Native American rights, which percolated to the issue of environmental protection.[24] Research revealed that some groups of people had to endure more environmental pollution than others.[25] The Government Accountability Office and the United Church of Christ

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22. *See generally* A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871, 876–80 (1992); Richard J. Lazarus, *The Greening of American and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 77–79 (2001).

23. *See generally* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 789–90 (1993); Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 624 (2006).

24. RECHTSCHAFFEN ET AL., *supra* note 10, at 3. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF ENVIRONMENTAL JUSTICE (2001). Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice*," 47 AM. U. L. REV. 221, 261–64 (1997). [hereinafter Kaswan, *Bridging the Gap*].

25. RECHTSCHAFFEN ET AL., *supra* note 10, at 3–4; Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 4–8 (2002).

Commission for Racial Justice released reports that demonstrated a correlation between exposure to environmental pollution, race, and/or low-income.[26] Studies showed that while more hazardous waste sites were located closer to minority and low-income communities, the Environmental Protection Agency (EPA) made fewer efforts to clean up pollution in these communities.[27] Subsequent case studies demonstrated that the environmental justice problem persisted, despite legal intervention,[28] partially because civil rights were not factored into the environmental law-making process.[29] This problem persists.

Environmental injustice in the United States has manifested in the following ways: siting of hazardous waste facilities, including treatment, storage, and disposal facilities; exposure to industrial activities and other environmental harms such as pesticides and contaminated fish; toxic release inventory facilities; disasters such as Hurricane Katrina; and disparate access to environmental benefits such as transportation, public parks and

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26. *See* U.S. GEN. ACCOUNTING OFF., GAO-RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), http://archive.gao.gov/d48t13/121648.pdf; 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), http://uccfiles.com/pdf/ToxicWastes&Race.pdf.

27. RECHTSCHAFFEN ET AL., *supra* note 10, at 36–39.

28. Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 826–27 (1998) (discussing the environmental justice problem in Chester County, Pennsylvania.); Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REG. 195, 213–14 (1997) (documenting environmental justice problems in St. Louis metropolitan area, but praising legislative efforts in Wisconsin).

29. Yang, *supra* note 25; RECHTSCHAFFEN ET AL., *supra* note 10, at 42–43; Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 931 (1992) (providing statistics establishing disparate environmental impact on certain classes of people.); Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121, 125–34 (1994). *But see* Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 19–21 (presenting data to show that, in the case of African Americans, the disproportionate siting of polluting facilities was a result of market dynamics, calling for policy to be crafted accordingly).

open spaces, environmental cleanup, and, more recently, safe drinking water.[30] Environmental injustice has been attributed to several causes, from market dynamics to the legal framework, including, notably, environmental protection laws.[31] Land use and zoning laws disparately affect minority communities either by encouraging discriminatory site selection for locally unwanted land use, such as hazardous waste disposal and manufacturing activities, or by affecting urban renewal policies.[32] Market dynamics can also affect site selection, from project developers wanting to locate polluting projects in communities where resistance and costs associated with such resistance is lowest, to minority communities moving into polluted areas because of lower housing cost.[33]

Environmental protection laws, although relatively robust and well-developed, have exacerbated environmental justice problems in several ways. These include, primarily, by failing to provide mechanisms to mitigate discrimination during the decision-making process, by excluding minority communities that may be affected by centralized decision-making, or by concluding bargains that do not take into account disparate effects on minority communities, be it pollution control laws or siting decisions.[34]

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30. RECHTSCHAFFEN ET AL., *supra* note 10, at 35–71 (collecting published studies that establish the various ways in which minority and low-income communities suffer from environmental harms). A more recent example is the drinking water contamination problem in Flint, Michigan. David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 NW. U. L. REV. ONLINE 93, 95–96 (2017).

31. Been, *supra* note 10.

32. RECHTSCHAFFEN ET AL., *supra* note 10, at 73–81; Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 507–16 (1992); Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DEN. U. L. REV. 1, 76–85 (1998).

33. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1387 (1994); Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 81–82 (1996); RECHTSCHAFFEN ET AL., *supra* note 10, at 81–92.

34. Lazarus, *supra* note 23, at 812–22; Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 642–54 (1992); RECHTSCHAFFEN ET AL., *supra* note 10, at 93–102; Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 4, 12–14 (1998); Kaswan, *Bridging the Gap*, *supra* note 24.

Racism is also a broader underlying cause that is often attributed to environmental injustice in the United States, resulting in minority communities bearing unfair shares of environmental harm.[35] The environmental justice movement in the United States is a vivid illustration of the inadequacy of elaborate environmental protection laws in delivering to all Americans an equal right to environmental protection. This state of affairs begs the question whether creating or recognizing a constitutional right to environmental protection can redress the problem. In considering this question, Part II will discuss India's experience with recognizing a constitutional right to environmental protection.

B. Constitutional Law and Environmental Justice

The relationship between constitutional law and environmental protection in the United States was initially limited to the question of whether Congress had authority, under the Constitution, to legislate on environmental matters. As the judiciary has consistently held, Congressional authority to enact environmental protection legislation lies in Article I of the Commerce Clause, which authorizes Congress to legislate on matters that affect interstate commerce, including environmental protection.[36] The environmental justice movement changed this paradigm by framing environmental protection as a discrimination problem that triggered the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, Section 1, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.[37]

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35. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349 (1987) (arguing that environmental justice is a result of unconscious racism, which should be considered when interpreting the discriminatory purpose doctrine).

36. For an overarching discussion on environmental regulation, the dormant Commerce Clause, and its critique, see generally Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003). *See also* Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1290–93 (1997).

37. U.S. CONST. amend. XIV, § 1 (emphasis added).

The anti-discriminatory language of the Fourteenth Amendment became central to environmental justice advocates' efforts to seek redress for disparate environmental harm suffered by certain communities.[38] Their central argument was that laws allowing, even facilitating, locally undesirable land use (LULUs) in certain communities constituted a violation of the Equal Protection Clause because the laws were discriminatory.[39] Judicial interpretation of the Equal Protection Clause, however, has made efforts to seek redress under the Fourteen Amendment nearly impossible.

The seminal and paradigm shifting case on the Equal Protection Clause is considered to be *Washington v. Davis*.[40] In this case, where black police officers challenged a test for promotion, the Supreme Court held that discriminatory impact alone was insufficient to establish a violation of the Equal Protection Clause, finding that plaintiffs also had to prove discriminatory purpose or discriminatory intent.[41] In subsequent cases, the Supreme Court fleshed out the meaning of discriminatory purpose. In *Vill. of Arlington Heights*,[42] the Court held that plaintiffs could establish discriminatory purpose by showing that race had been "a motivating factor in the decision."[43] It expounded the following four non-exhaustive factors, in addition to disparate impact, to help determine whether the law had a discriminatory purpose: 1) historical background to the decision-making process, 2) historical background to the decision, 3) any departure from normal substantive factors and procedures, and 4) legislative or administrative history.[44]

The Supreme Court further tightened the definition of discriminatory purpose in *Personnel Admini'r of Massachusetts v.*

38. *See generally* Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387, 408 (1999) [hereinafter Kaswan, *Environmental Laws*].

39. *Id.*

40. *See* Washington v. Davis, 426 U.S. 229 (1976).

41. *Id.* at 242 and 245 (noting, "to the extent those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.").

42. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

43. *Id.*

44. *Id.* at 267–68.

Feeney.[45] The Court held that the mere fact that the legislature acted with the intent to pass a challenged legislation, and that it could have foreseen that as a natural consequence of the law, a particular class would be disadvantaged, was not adequate proof of discriminatory purpose.[46] Plaintiffs had to prove that a law was passed, at least in part, "*because of*" the discriminatory effect it would have on a particular class and not "*in spite of*" such discriminatory effect.[47] This is a hard standard to meet, except in certain municipal level cases.[48]

R.I.S.E. v. Kay illustrates the difficulty in proving intent under the *Feeney* standard.[49] In *R.I.S.E.*, plaintiffs challenged the decision of King & Queen County, Virginia, to permit construction of a landfill in an area that hosted several other such landfills, on the ground that the decision impacted black communities disparately, in violation of the Equal Protection Clause.[50] Although sympathetic to the plaintiffs claim, the court held that plaintiffs had failed to meet the legal requirement for establishing a violation of the Fourteenth Amendment—proof of discriminatory intent or discriminatory purpose.[51] The court agreed that "the historical placement of landfills in predominantly black communities was 'an important starting point'" to show discriminatory intent.[52] The court held, however, that evidence of the administrative steps taken by the county revealed "nothing unusual or suspicious," and only reflected efforts by the County's Board of

45. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). The plaintiff challenged a Massachusetts law that gave veterans employment preferences, claiming that the law naturally worked against women and thus violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

46. *Id.* at 278–79.

47. *Id.* at 279.

48. RECHTSCHAFFEN ET AL., *supra* note 10, at 481. *E.g.*, Ammons v. Dade City, 783 F.2d 982, 988 (11th Cir. 1986); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Swati Prakash, *Racial Dimensions of Property Value Protection under the Fair Housing Act*, 101 CAL. L. REV. 1437, 1475–80 (2013) (discussing the scope of the Fourteenth Amendment's application.); Kaswan, *Environmental Law*, *supra* note 38, n. 96. *See generally* Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 963–65 (1993).

49. *See* R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991).

50. *Id.* at 1147–48.

51. *Id.* at 1149–50.

52. *Id.* at 1149.

Supervisors to balance "the economic, environmental, and cultural needs of the County in a responsible and conscientious manner."[53] It also noted that the Equal Protection Clause did not "*impose an affirmative duty to equalize the impact of official decisions on different racial groups*. Rather, it merely prohibit[ed] government officials from intentionally discriminating on the basis of race."[54] The court held that plaintiffs failed to establish intentional or purposeful discrimination.[55]

Encumbered by the difficult standard of proof required to successfully establish a violation of the Equal Protection Clause, environmental justice advocates began pursuing an alternative venue—§§ 601 and 602 of Title VI of the Civil Rights Act.[56] Section 601 prohibits discriminatory practices in programs that receive federal funding.[57] Section 602 authorizes federal government agencies to enforce § 601.[58] Although Title VI of the Civil Rights Act does not explicitly provide for a private remedy, the judiciary has interpreted Title VI to allow a private remedy.[59] As discussed below, environmental justice advocates have brought environmental justice claims under both provisions. The Supreme Court's interpretation of the Equal Protection Clause, however, has also shadowed remedies under §§ 601 and 602 claims. A plaintiff bringing a claim under § 601 must establish

53. *Id.* at 1150.

54. *Id.* at 1150 (emphasis added).

55. *Id.* at 1150.

56. Civil Rights Act of 1964 §§ 601, 602, 42 U.S.C. § 2000d, § 2000d-1 (2012).

57. According to § 601, "[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." *Id.*

58. Section 602 reads in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d, § 2000d-1 (2012).

59. *See* Cannon v. Univ. of Chi., 441 U.S. 667, 694–99 (1979); Alexander v. Sandoval, 532 U.S. 275, 294–95 (2001) (Stevens, J., dissenting).

discriminatory intent or discriminatory purpose, as governed by *Washington v. Davis* and *Arlington Heights*.[60] As with Equal Protection Clause cases, statistics of racial composition and other circumstantial evidence could demonstrate facially evident disparate impact,[61] but could not prove discriminatory intent or purpose.

The decision in *Bean v. Sw. Waste Mgmt. Corp.*,[62] is illustrative of the difficulty in proving intent. Plaintiffs sought a preliminary injunction against the construction of a Type I solid waste facility permitted by the Texas Department of Health, on the ground that it discriminated against a minority population.[63] After considering the statistical data presented, the court concluded that the permit did not establish a pattern of discrimination in placing waste sites in certain neighborhoods, especially because the statistics for initial permits for other waste sites showed that—46.2 to 50 percent of the waste sites were located in census tracts "with less than [a] 25% minority population *at the time they opened*."[64] The court also decided that later permitting statistics did not prove discriminatory purpose, as a comparable number of solid waste sites were located in Anglo neighborhoods and because the decision to locate some facilities close to the Houston shipping channel appeared to be motivated by efficiency considerations rather than by an intent to discriminate.[65] The *Bean* decision demonstrates that the Supreme Court's reading of discriminatory intent or discriminatory purpose into the Equal Protection Clause has percolated to § 601 as well.

Remedies under § 602 present a separate challenge for plaintiffs with respect to standing. Section 602 authorizes federal agencies to pass regulations to enforce § 601.[66] Pursuant to § 602, the EPA has passed regulations prohibiting disparate impact in environmental decision-making.[67] Plaintiffs invoking the

60. *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

61. S. Camden Citizens in Action v. N.J. Dep't Envtl. Prot., 145 F. Supp. 2d 446, 491 (D.N.J. 2001).

62. Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979).

63. *Id.* at 675.

64. *Id.* at 677 (emphasis added).

65. *Id.* at 680–81.

66. Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2012).

67. Part of the EPA regulation effectuating § 601 reads: "[a] recipient [of federal funding] shall not use criteria or methods of administering its program

EPA regulation do not have to prove discriminatory intent or discriminatory purpose, because the regulatory language covers discriminatory effects.[68] Following the Supreme Court's decision in *Alexander v. Sandoval*[69] and its application in *South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*,[70] however, environmental justice advocates cannot challenge actions that have disparate impact under EPA regulations or other disparate impact regulations passed under § 602, as discussed below.

In *Alexander v. Sandoval*, petitioner, a representative in a class-action lawsuit, challenged an Alabama Public Safety Department's decision to administer state driver's license exams in English only, claiming that it violated the Department of Justice's anti-discriminatory regulation passed under § 602, proscribing discriminatory impact.[71] The Supreme Court addressed whether a Title VI regulation that prohibited disparate impact could create a private right of action for acts violating the regulation.[72] The majority held that § 602 regulations did not create a private cause of action, reasoning that such a reading would confer a right to sue for disparate impact under Title VI, contrary to Supreme Court decisions holding that, in order to receive a remedy under Title VI, a plaintiff must prove discriminatory intent or discriminatory purpose.[73] The Court also noted that allowing a private right of action under a § 602 disparate impact regulation, which essentially gives effect to § 601, would prohibit acts that were permissible under § 601—(i.e., acts that have disparate impact.)[74] A private action under a § 602 disparate impact regulation could only be sustained by the "independent force of § 602."[75] The Supreme Court held that Congress had not intended to create an independent private cause of action under § 602 because, unlike § 601, the Court observed that § 602 had no "rights-creating" language, but merely addressed federal

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which have the effect of subjecting individuals to discrimination because of their race." 40 C.F.R. § 7.35(b) (2016).

68. *Id.*

69. Alexander v. Sandoval, 532 U.S. 275, 285 (2001).

70. S. Camden Citizens in Action v. New Jersey Dep't. Envtl. Prot., 145 F. Supp. 2d 446, (D.N.J. 2001).

71. *Alexander,* 532 U.S. at 278–79.

72. *Id.* at 279.

73. *Id.* at 285–91.

74. *Id.* at 281–82.

75. *Id.* at 275–81.

agencies granting funds.[76] It reiterated that Congress did not intend to create a private cause of action under Title VI, absent intentional discrimination. The Court, however, noted in dicta that regulations passed under § 602 were valid, even if they proscribed actions that had disparate impact, which were permitted under § 601.[77] The Supreme Court's decision in *Sandoval* impacted the decision in *South Camden*,[78] an environmental injustice case.

In *South Camden*, environmental justice plaintiffs challenged a permit issued by the New Jersey Department of Environmental Protection (NJDEP) to a cement company.[79] Plaintiffs claimed that the NJDEP's decision to permit the cement plant in a neighborhood that was within a non-attainment zone under the Clean Air Act, and which housed 91 percent colored residents with a disproportionately high incidence of asthma, disparately impacted a minority community, in violation of the EPA regulations under § 602.[80] Defendant NJDEP argued that because it had complied with the Clean Air Act and relevant provisions, there was no violation of EPA regulations under § 602.[81] The court decided on the discriminatory impact claim, as well as whether § 602 created a private right to sue.[82] The court found for the environmental justice plaintiffs on both counts, ruling that the NJDEP had failed to consider discriminatory effect during the permitting process.[83] It also noted that there was an implied private cause of action under § 602.[84] Following the Supreme Court's decision in *Sandoval*, however, the District Court modified the decision in *South Camden* to conform to the Supreme Court's decision.[85] The District Court reversed its order

76. *Id.* at 276–77.
77. *Id.* at 281–83.
78. *S. Camden Citizens in Action*, 145 F. Supp. 2d at 505.
79. *Id.* at 450–52.
80. *Id.* at 451, 453–70.
81. *Id.* at 464.
82. *Id.* at 472–73.
83. *Id.* at 501–02.
84. *Id.* at 473.
85. *See id.* at 508–10.

granting injunctive relief under § 602. Instead, it granted injunctive relief under § 1983 of the Civil Rights Act,[86] per Justice Steven's dissenting opinion.[87] The Third Circuit, however, reversed the decision to grant injunctive relief,[88] and the Supreme Court denied certiorari on appeal.[89]

In rejecting the enforceability of a § 602 disparate impact regulation under § 1983, the Third Circuit in *South Camden* held that the "EPA's disparate impact regulations [could] not create a federal right enforceable through §1983," since it "[could] hardly be argued reasonably that the right alleged to exist in the EPA's regulations, namely to be free of disparate impact discrimination in the administration of programs or activities receiving EPA assistance, can be located in either section 601 or section 602 of Title VI."[90] In other words, recognizing the right to enforce § 602 disparate impact regulations under § 1983 would indirectly remove the intentional or purposeful discrimination requirement under §§ 601 and 602, contrary to the Supreme Court's decisions.[91]

As such, the Supreme Court, in other decisions not related to environmental justice, has held that to enforce a law under § 1983, the law should clearly create a private right of enforcement. For instance, in *Blessing v. Freestone*,[92] a case involving Title IV-D of the Social Security Act, the Supreme Court set out

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86. Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2012). § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in an action at law, suit in equity, other proper proceedings for redress. . . .

Id. (emphasis added).

87. 42 U.S.C. § 1983 (2012).

88. S. Camden Citizens in Action v. N.J. Dep't. Envtl. Prot., 274 F.3d 771, 788 (3d Cir. 2001).

89. S. Camden Citizens in Action v. N.J. Dep't. Envtl. Prot., 122 S. Ct. 2621 (2002).

90. *S. Camden Citizens in Action*, 274 F.3d at 788.

91. *Id.*

92. Blessing v. Freestone, 520 U.S. 329, 340–41 (1997).

a three-part test to determine whether a federal statute established a private right of action under § 1983.[93] The Court held as follows:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right allegedly protected by the statute is not 'so vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory terms.[94]

In *Gonzaga Univ. v. Doe*,[95] a case relating to the Family Educational Rights and Privacy Act (FERPA),[96] the Supreme Court held that to create a private right of action, FERPA should have been "phrased in terms of the persons benefitted."[97] The Court decided that since FERPA did not have "individually focused rights-creating language," it did not create a private cause of action.[98] These decisions signal that enforcing § 602 regulations under § 1983 will be difficult.

Given that relief under the Fourteenth Amendment is limited to intentional discrimination, that remedy under § 601 of Title VI is limited to intentional discrimination by entities receiving federal funding, that there is no private right of action under § 602, and that § 1983 can be invoked only if a § 602 disparate impact regulation also creates a private right of action, environmental justice advocates' ability to achieve a constitutional right to equal environmental protection in the United States is nearly foreclosed. The executive branch has filled this void and the issue of environmental justice is now primarily addressed by the executive branch.

In 1992, the EPA established a department on environmental justice and launched several initiatives to address the problem of environmental justice.[99] In 1994, President Bill Clinton signed an Executive Order on Environmental Justice ("EJ Executive

93. *Id.*
94. *Blessing*, 520 U.S. 329, at 340.
95. *See generally* Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).
96. 20 U.S.C. § 1232(g) (2012 & Supp. 2015).
97. *Gonzaga Univ.*, 536 U.S. at 274.
98. *Id.*
99. Lazarus, *supra* note 23.

Order") requiring all federal agencies to integrate environmental justice into their decision-making.[100] A Presidential Memorandum accompanying the EJ Executive Order also required the EPA to ensure that programs and activities receiving EPA funding would comply with Title VI of the Civil Rights Act of 1964,[101] by directing the EPA to ensure that recipients of federal funding did not directly or indirectly discriminate on the basis of race, color, or national origin.[102] The EPA has since undertaken several initiatives in an effort to incorporate justice concerns into its decision-making process.[103] In 1998, the EPA adopted a "standard definition" of environmental justice as follows:

> The fair treatment of people of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no population should be forced to shoulder a disproportionate share of exposure to the negative effects of pollution due to lack of political or economic strength.[104]

The EPA's efforts are in line with broader administrative reforms that seek to decentralize the decision-making process and make it more inclusive.[105] Yet, the changes at the administrative level do not fully address environmental justice problems because, among other reasons, the formula for equitable risk distribution remains elusive.[106] As one scholar put it, missing still is "the identification of a core set of normative goals—including

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100. Exec. Order No. 12,898, 3 C.F.R. § 859 (1995).

101. Civil Rights Act of 1964, §§ 601, 602, 42 U.S.C. § 2000d, § 2000d-1 (2012).

102. Memorandum from William Clinton, President of the United States, Memorandum for the Heads of All Departments and Agencies, Subject: Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994), https://www.epa.gov/sites/production/files/2015-02/documents/clinton_memo_12898.pdf.

103. *See generally Environmental Justice*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/environmentaljustice (last visited Apr. 26, 2017).

104. *Id.*

105. Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459 (2002) (evaluating the changes in decision-making processes to accommodate environmental justice concerns).

106. *See, e.g.*, Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103 (arguing that the quantitative risk assessment procedure in the EPA places a disproportionate burden of environmental pollution on minority communities.); MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION (2012).

procedural and distributional justice. . . ."[107] That core set of normative goals missing is the right to equal environmental protection. The question is whether a constitutional right to environmental protection, as in the case of India, can remedy the problem of environmental injustice.

II. ENVIRONMENTAL PROTECTION AND THE INDIAN CONSTITUTION

Environmental problems in India are of Himalayan proportions, ranging from ecosystem degradation to pollution and great vulnerability to climate-change induced disasters, such as droughts and floods.[108] Although the Indian government has promulgated several environmental protection laws since the 1970s, severe environmental problems persist, as India straddles the dueling interests of economic development and environmental protection.[109] Millions of Indians are exposed to injuries from environmental problems. The general ineffectiveness of environmental statutes in addressing environmental problems in India has led to judicial challenges through the public interest litigation (PIL) mechanism, and the judiciary has interpreted the Article 21 protection of right to life in the Indian Constitution to include environmental protection. The Indian judiciary's jurisprudence on environmental protection has resulted in the creation of a special statutory environmental tribunal, or the National Green Tribunal (NGT) under the National Green Tribunal Act (NGTA).[110] The Indian Supreme Court's recognition of a constitutional right to a healthy environment, however, does not address the issue of disparate environmental impact, leaving the right to equal protection unarticulated. India's experiences, as discussed below, demonstrate how environmental protection, as a concomitant of the right to life, is not sufficient.

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107. Foster, *Environmental Justice in an Era of Devolved Collaboration*, *supra* note 105, at 498.

108. CTR FOR SCI. AND ENV'T, INDIA'S STATE OF ENVIRONMENT REPORT (2016) (on file with author).

109. *Id.*

110. National Green Tribunal Act, No. 19 of 2010, http://lawmin.nic.in/ld/P-ACT/2010/The%20National%20Green%20Tribunal%20Act,%202010.pdf.

A. Constitutional Law and Environmental Protection in India

Environmental laws in India are comparable to environmental laws in the United States, in that there is framework law on environmental law and several issue-specific laws, such as the Air Pollution Control Act. Indian environmental protection laws, however, have not provided statutory standing to bring civil actions to enforce individual rights in courts.[111] The scope of remedies under tort law are also limited to damages and injunctions, which do not address environmental problems in a comprehensive manner.[112] The Indian Supreme Court's interpretation of constitutional provisions on standing to invoke the Court's writ jurisdiction and on fundamental rights, however, has created alternative venues for civil remedies.[113]

1. The Supreme Court's Interpretation of Constitutional Provisions on Standing and Right to Life

Under Article 32 of the Indian Constitution, a citizen whose fundamental constitutional rights have been violated can file a writ petition before the Indian Supreme Court, or High Courts.[114] Article 32 reads, in part, that, "[t]he right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by this Part is guaranteed." Socio-economic conditions, notably poverty and illiteracy, impeded the full realization of Article 32 by Indians. Not until it was catalyzed by the press did the judiciary acknowledge that India's legal system had failed to provide justice to the "common man."[115] The Indian judiciary addressed the problem by whittling away some of the formal requirements for invoking the Court's jurisdiction, nota-

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111. SHYAM DIVAN & ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 132–33 (2d ed. 2001). Polluters, now have standing to sue a polluter under § 19 of the Environmental (Protection) Act, 1986, § 49 of the Water Act, and § 43 of the Air Act. *Id.*

112. DIVAN & ROSENCRAZ, *supra* note 111, at 88–89; Municipal Council, Ratlam v. ShriVardhichand, (1981) 1 SCR 97.

113. *Id.* at 123.

114. Article 32 provides: "Remedies for enforcement of rights conferred by this Part [referring to the Fundamental Rights section of the Indian Constitution]. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." INDIA CONST. art. 32.

115. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 112–15 (1985).

bly removing the requirement that only persons injured by a fundamental right violation had standing to file a writ of habeas corpus.[116] Starting with *Calcutta Gas Co. (Prop.) Ltd. v. State of W. Bengal*,[117] the Indian Supreme Court created epistolary jurisdiction, which allows representative standing and citizen's standing under Article 32.[118]

The Supreme Court, notably Justice P.N. Bhagawati in numerous cases,[119] held that on matters of public interest or social concern, any individual having an interest in the subject-matter could petition the Court to enforce constitutional rights on behalf of a large number of persons, "who [were] poor, ignorant, or in a socially or economically disadvantaged position."[120] The key requirement was that the letter had to be filed "by or on behalf of . . . a class of deprived or disadvantaged persons."[121] The Supreme Court reasoned that since Article 32(1) did not explicitly limit the right to file a writ petition to any specific person or proceeding, it was justified in its interpretation.[122] The Court expanded the right to allow public interest litigants to file a writ petition to enforce a public duty, even absent a specific legal injury to the petitioner.[123] The Court strengthened representative or citizen standing by relaxing procedural requirements as well, finding that anyone could invoke Article 32 jurisdiction of the Supreme Court by simply writing a letter to the Court, with the Court having discretion to treat a letter as a writ petition.[124] The

116. DIVAN & ROSENCRAZ, *supra* note 111, at 134–41.

117. Calcutta Gas Company (Prop.) Ltd. v. State of West Bengal, AIR 1962 SC 1044, 1047; DIVAN & ROSENCRANZ, *supra* note 111, at 127.

118. *Id.* at 134–41.

119. Gupta v. Union of India, AIR 1982 SC 149 ¶¶ 14, 17, 25; People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473, 1483; Fertilizer Corp. v. Union of India, AIR 1981 SC 344 ¶ 23; Nakara v. Union of India, AIR 1983 SC 130 ¶ 64.

120. People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473, 1483.

121. M.C. Mehta v. Union of India (*Shriram 2*), (1987) 1 SCR 819, 829.

122. Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802 [hereinafter *Bandhua*].

123. Fertilizer Corp. v. Union of India, AIR 1981 SC 344, ¶ 23; S.P. Gupta v. Union of India, AIR 1982 SC 149, 194; Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494, 99 (1987).

124. Rural Litigation and Entitlement Kendra, Dehra Dun v. State of Uttar Pradesh, AIR 1988 SC 2187, 2195 (India); *Bandhua*, AIR 1984 SC 802, 848; M.C. Mehta v. Union of India (*Shriram 2*), (1987) 1 SCR 819, 820.

Indian Supreme Court has also commenced a practice of establishing *ad hoc* fact-finding committees in deciding PIL cases.[125] The Court primarily expanded the rules on *locus standi* to redress governmental violations of fundamental rights and to enforce accountability of government officials.[126]

The Indian Supreme Court has also interpreted the Article 21 right to life expansively. Under Article 21, read with Article 13, laws that "take away or abridge" the right to life and personal liberty are void.[127] Article 21 provides that, "[n]o person shall be deprived of his life or personal liberty except according to procedure established by the law."[128] Although Article 21 provides a negative right—"no person shall be deprived of life. . . ."—without specifically using the phrase "right to life," the Indian Supreme Court has interpreted Article 21 to include a positive right to environmental protection.[129] The Supreme Court, in reasoning that the right to life should mean more than "mere animal existence," and should include the right to live with human dignity and decency,[130] has read into the right to life numerous other rights, including the right to legal aid, speedy trial, shelter, human dignity, as well as environmental protection.[131]

The Court has substantiated its decisions to discern a right to a healthy environment within the Indian Constitution by refer-

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125. DIVAN & ROSENCRAZ, *supra* note 111, at 133–34.

126. Ramsharan v. Union of India, (1989) 1 SCC Supp. 251 ¶ 15.

127. Article 13 of the Indian Constitution provides: "[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." INDIA CONST. art. 13.

128. INDIA CONST. art. 21.

129. DIVAN & ROSENCRAZ, *supra* note 111, at 123.

130. Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981), 2 SCR 516, 528–29 (India). The court observed:

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

Id. at 529.

131. *See generally* DURGA DAS BASU, CONSTITUTIONAL LAW OF INDIA 133 (Bhagabati Prosad Banerjee & B.M. Gandhi eds., 8th ed. 2009, reprint 2011) (collecting cases on Article 21 and the rights included in the Article).

ring to provisions in the Directive Principles of State Policy section of the Constitution, specifically Articles 47 and 48-A, as well as Article 51-A (g), which provides the fundamental duties of citizens.[132] Under Article 51-A (g), citizens have a fundamental duty to protect the environment.[133] Article 47 states that the state has a primary duty to safeguard public health, while Article 48-A addresses environmental protection specifically and provides that, "[t]he State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country."[134] Through its interpretation of Articles 32 and 21, in conjunction with the directive principles and fundamental duties sections, the Indian Supreme Court has facilitated access to the judiciary and recognized a constitutional right to environmental protection.

2. Articles 32 and 21 and Environmental Protection

The Indian Supreme Court's broad interpretation of standing and the right to life has benefited environmental protection advocates. One of the earliest environmental PIL case is *Rural Litig. and Entitlement Kendra, Dehradun v. State of Uttar Pradesh*,[135] in which a non-governmental organization initiated a PIL through a letter to the Indian Supreme Court, documenting the adverse effects of illegal limestone quarrying in the Mussorrie-Dehradun area.[136] The letter alleged a violation of mining laws by the state of Uttar Pradesh, arguing that illegal mining caused deforestation and run off to the detriment of villages and villagers living in the hills, as well as caused hazardous conditions to people and animals in the forest region, resulting from roads constructed for quarrying operations.[137]

The Supreme Court accepted the petition and set up an expert committee to prepare a report for the Court on the issue.[138] The Court's decision in favor of the petitioners, however, turned an unenforceable constitutional duty, Article 51-A, which states that citizens and the Indian government have a fundamental

132. INDIA CONST. arts. 47, 48-A, 51-A(g).

133. INDIA CONST. art. 51-A(g).

134. INDIA CONST. arts. 47 and 48-A.

135. Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh, (1987) 1 SCR 641 (India).

136. *Id.* at 641–42.

137. *Id.* at 643–52.

138. *Id.*

duty to preserve and protect the ecology, into a positive right.[139] The Court acknowledged the government's dual interest in economic development and ecological protection, but found that the mining operations had long term impacts on both the local residents and the residents in the broader Himalayan region, and ultimately ordered the government to cease some mining operations.[140] *Dehradun* was a decisive case for invoking Article 32 jurisdiction through the PIL mechanism to address environmental problems.

Public interest litigants have successfully invoked the Supreme Court's Article 32 jurisdiction to address numerous environmental problems, including pollution of the River Ganga,[141] pollution of the Taj Mahal,[142] air pollution in the Delhi metropolitan area,[143] water pollution from effluents released by tanneries,[144] and ecologically detrimental diversion of a river.[145] Access to courts via a PIL action, however, is not unlimited, as courts will only consider *bona fide* public interest petitions.[146] In *Subhash Kumar v. State of Bihar*,[147] a petitioner brought a PIL action, claiming that Tata Iron and Steel Company was releasing untreated sludge/slurry effluents into the river Bokaro, which not only created a public health threat but also rendered the water unusable for a variety of purposes, such as drinking and irrigation.[148] The petitioner argued that the controlling administrative agency, the State of Bihar Water Pollution Control Board, had failed to regulate the pollution under the Water Pollution Act, and that it had permitted several entities to collect the

139. INDIA CONST. art 51-A.

140. Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh, *supra* note 124, at 646E.

141. M.C. Mehta v. Union of India, (1988) 2 SCR 530 [hereinafter *Ganga Pollution Case*], https://indiankanoon.org/doc/59060/.

142. M.C. Mehta v. Union of India, (1997) 2 SCC 393 [hereinafter *Taj Case*].

143. M.C. Mehta v. Union of India, (1998) 6 SCC 63 (1998) [hereinafter *Delhi Pollution Case*].

144. Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647.

145. M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India) [hereinafter *Kamalnath Case*].

146. Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

147. Subhash Kumar v. State of Bihar, (1991) 1 SCR 5 (India) [hereinafter *Subhash Kumar*].

148. *Id.*

sludge water in exchange for a fee.[149] The petitioner sought interim relief from the pollution, as well as an order permitting the petitioner to collect the sludge. In rejecting the petition, the Supreme Court held that it would only accept PIL petitions filed by persons "genuinely interested in the protection of society on behalf of the community . . . not to satisfy . . . personal grudge and enmity."[150]

While Article 32 of PIL has facilitated it, the key to the creation of a constitutional right to environmental protection in India has been the judiciary's expansive interpretation of the Article 21 right to life to include the right to environmental protection in numerous cases. The Article 21 right to life now includes the right to a clean River Ganga, the right to clean air in the metropolitan Delhi region, and the right to preserving the Taj Mahal. Not only has the Supreme Court incorporated environmental protection within the right to life, but it has also ordered the Indian government to take corrective measures towards enforcing the rights recognized in each case, such as introducing new emission standards to address air pollution in New Delhi from mobile sources,[151] preparing a plan to clean up the River Ganga, and relocating tanneries to reduce pollutants threatening the Taj Mahal.[152] Even in *Subhash Kumar*, a case in which the Supreme Court rejected a PIL petition, the Court reiterated that Article 21 includes a right to environmental protection and observed as follows:

> Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.[153]

In recent years, the Indian Supreme Court has included several less traditional environmental problems within Article 21.

149. *Id.*
150. *Id.*
151. M.C. Mehta v. Union of India, (1998) 6 SCC 63 [hereinafter *Delhi Pollution Case*].
152. M.C. Mehta v. Union of India, (1997) 2 SCC 393 [hereinafter *Taj Case*].
153. *Subhash Kumar,* 1 SCR at 7.

In *In re Noise Pollution Case*,[154] the Supreme Court held that Article 21's fundamental right included the right to protection from noise pollution.[155] The Court observed that the Article 21 right to protection of life guaranteed the right to live with dignity, including "all the aspects of life which go to make a person's life meaningful, complete and worth living."[156] The Court also observed that, "[a]nyone who wishe[d] to live in peace, comfort and quiet within his house had a right to prevent the noise as pollutant reaching him."[157] After considering noise control legislation in the United Kingdom, the United States, and China, the Supreme Court issued a series of directions to the pollution control agencies to regulate noise pollution effectively.[158]

The Indian Supreme Court has also indicated that the right to environmental protection under Article 21 can be invoked against private corporations engaged in a state enterprise. In *M.C. Mehta v. Union of India*,[159] ("*Shriram 2*") the Supreme Court of India, addressing the question whether the protection of fundamental rights, from state action under Article 12[160] could be enforced against a corporation, observed that corporate status should not shield an entity from constitutional action for a violation of fundamental rights when the corporation's actions were significantly controlled by the government, such as to "vi-

154. In this case, petitioner, Mittal, requested that the Supreme Court order the government to enforce and review noise pollution laws, which prohibited the use of loud speakers during night hours, except during religious holidays. *In Re Noise Pollution Restricting Use of Loudspeakers,* (2005) 1 SCR Supp. 624, http://judis.nic.in/supremecourt/imgs1.aspx?filename=27047.
[hereinafter Noise Pollution case]. The petition, triggered by a suicide committed by a thirteen-year-old girl after being raped, alleged that the girl's pleas for help were not heard because of the loud noise from the speakers at the time of the rape. *Id.* The petitioner argued that failure to enforce noise control laws resulted in the harm. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. M.C. Mehta v. Union of India, (1987) 1 SCR 819 [hereinafter *Shriram 2*].

160. Article 12 states, "[i]n this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." INDIA CONST. art. 12.

tally affect public interest," or when the corporation was essentially an instrumentality or agency of the state.[161] Citing to *Ajay Hasia v. Khalid Mujib*,[162] Justice Bhagawati held that constitutional rights:

> [S]hould not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The Courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities to the basic obligation of fundamental rights.[163]

The Supreme Court also considered whether Shriram industries, the respondent in *Shriram 2*, was a state under Article 12, thus subject to judicial scrutiny under Article 32.[164] The Court concluded that because Shriram's purpose was to promote a particular industry, pursuant to government policy, and it produced hazardous chlorine gas that could potentially "invade the right to life of large sections of people," it could be subject to constitutional checks and limitations.[165] Due to time constraints, however, the Supreme Court did not decide whether the respondent could be considered a state.[166]

In *Shriram 2*, the Supreme Court also signaled that its authority under Article 32 was not limited to issuing directions, orders, or writs to enforce fundamental rights. It held that the judiciary has "all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights."[167] The Court observed that under Article 32, it could award compensation in "appropriate cases," or cases where:

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161. *Shriram 2*, 1 SCR at 831, 832. The Court also cited to its decision in Sukhdev v. Bagatram, holding that "[i]nstitutions engaged in matters of high public interest or public functions are by virtue of the nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions." *Id.* at 834.

162. Ajay Hasia v. Khalid Mujib, (1981) 2 SCR 79 (India).

163. *Shriram 2*, 1 SCR at 835–36.

164. *Id.*

165. *Id.* at 839.

166. *Id.* at 839.

167. *Id.* at 822.

> [I]nfringement of the fundamental right [was] gross and patent, that is, incontrovertible and ex-facie glaring and either such infringement [was] on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressing on account of their, poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the Civil Courts.[168]

The Supreme Court did not decide on this matter either, but its obiters in *Shriram 2* are important signals about the judiciary's willingness to provide relief against environmental harms under Article 21.[169]

In *Virendra Gaur & Ors v. State of Harayana*,[170] petitioners challenged a municipality's decision to allocate land initially earmarked to create an open space for recreational use of young residents under an unimplemented scheme for building a charitable school or Dharmashala, on the ground, among others, that it violated their constitutional right to environmental protection.[171] The Indian Supreme Court agreed with the petitioners and elucidated the constitutional position on environmental protection.[172] Referring to Articles 47, 48-A, and Article 51-A(g), in conjunction with Article 21, the Court held:

> The word 'environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance. It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21.

168. *Id.*
169. *Id.* at 841–42.
170. Virendra Gaur v. State of Harayana, (1994) 6 SCR Supp. 78 (India), https://indiankanoon.org/doc/27930439/.
171. *Id.*
172. *Id.*

> Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence, [p]romoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a *constitutional imperative* on . . . State Government and the municipalities . . . to ensure and safeguard proper environment. . . .[173]

State High Courts have also steadily expanded the right to environmental protection under Article 21. In two cases, *Mohd. Salim v. State of Uttarakhand*[174] *& Others* and *Lalit Miglani v. State of Uttarakhand*,[175] the High Court of Uttarakhand (the "High Court"), exercising its paren patrie jurisdiction, has conferred juridical status on non-human entities—the rivers Ganga and Yamuna and the Himalayan ecosystem, including glaciers and forests—holding that such entities are entitled to protection under the Indian Constitution.[176] In *Law Soc'y of India & Ors. v. Fertilizers and Chems, Travancore*,[177] the High Court of the State of Kerala, faced with a PIL case in which petitioners challenged the improper storage of 10,000 tons of ammonia, granted relief to petitioning residents by directing compliance with pollution control legislation.[178] Relying on Article 21, read in conjunction with Article 51(g), the court observed, in part, "[w]e are

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173. *Id.* (emphasis added).

174. Mohd. Salim v. State of Uttarakhand, Writ Petition (PIL) No. 126 of 2014 [hereinafter *Salim*] (on file with author).

175. Lalit Miglani v. State of Uttarakhand, Writ Petition (PIL) No. 140 of 2015 [hereinafter *Miglani*] (on file with author).

176. *Salim*, *supra* note 174, ¶ 19; *Miglani*, *supra* note 175, at 61. The High Court in *Salim* held that:

> The River Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of there rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna.

Id.

177. Law Society of India v. Fertilizers and Chemicals Travanacore, AIR 1994 (Ker.) 308, https://indiankanoon.org/doc/1577991/.

178. *Id.*

dealing with a case of environmental pollution, which involves a larger dimension of a morbid violation of the fundamental right under Article 21 of the Constitution of India. . . ."[179] It further noted, "[d]eprivation of life under Article 21 of the Constitution of India comprehends certainly deprivations other than total deprivation. The guarantee of life is certainly more than immunity from annihilation of life. Right to environment is part of the right to life."[180]

Through its interpretations of constitutional provisions, the Indian judiciary has become such an important branch of government in advancing environmental protection that in 2010, the Indian legislature passed the NGTA to exclusively decide environment-related cases.[181] Yet, despite the Indian Court's jurisprudence on Article 21 and environmental protection, the American experience in regard to environmental justice begs the question of whether a right to life is an adequate constitutional protection against environmental harms, or whether the right to life can also protect against environmental injustice.

B. Environmental Justice: The Missing Constitutional Right in India

Environmental injustice, understood here as disparate exposure of some communities to environmental harms primarily because of their race or low-income status, is an underexplored issue in India, even though it is prevalent. The Indian Supreme Court's expansive constitutional jurisprudence remains inadequate because it advances the broader goal of environmental protection rather than equal environmental protection. The judiciary's decisions could even inadvertently exacerbate environmental injustice.

1. The Problem of Invisibility of Environmental Justice in India

There is environmental injustice in India. Consider the disparate protection offered to rural and tribal communities under conservation and land reform laws. There is documentation that

179. *Id.*

180. *Id.* As an interesting side note, the Court referred to the U.S. Supreme Court's decision in the snail darter case, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978), in its decision.

181. *See discussion supra* Part II.

during the British rule, forest laws that granted control of forest resources to the government were detrimental to the social, economic, and cultural needs of certain classes of people, notably tribal communities and nomad communities belonging to about 200 castes.[182] A prominent Indian environmentalist, Anil Agarwal, noted that:

> Government control over forests has definitely meant a reallocation of forest resources away from the needs of local communities and into the hands of urban and industrial India. . . . India has nearly 200 castes engaged in pastoral nomadism, which add up to nearly 6 percent of India's population . . . land reforms and development programmes, which have promoted expansion of agriculture to marginal lands, have steadily led to an erosion of grazing lands. The Rajasthan Canal is a fine example of a government programme that has transformed extensive grazing and into agricultural lands. No effort was made by the government to ensure that the nomads who used these grazing lands earlier would benefit from the canal on a priority basis. In almost every village, the panchayat lands traditionally used as gaucher lands, have been encroached upon by powerful interest groups and privatised. Nomadic groups have been increasingly impoverished over the last 30 years and an ever-increasing number is being forced to give up their traditional occupation to become landless labourers or urban migrants.[183]

Environmentalists in India have argued that conservation laws in India have impoverished tribal and rural communities for the benefit of "industrialists and the urban rich."[184] As one scholar noted, "[t]he proof [of impoverishment] is in the fact that rural poverty and disparity in wealth have increased in actual

182. Anil Agarwal, *Politics of Environment-II, in* CENTER FOR SCIENCE AND ENVIRONMENT, THE STATE OF INDIA'S ENVIRONMENT 1984–85: THE SECOND CITIZEN'S REPORT 362 (Anil Agarwal & Sunita Narain eds., 1986); excerpted in DIVAN & ROSENCRANZ, *supra* note 111, at 13–14; for a discussion of the link between social justice and the environmental movement from the 1970s on, see, S. Ravi Rajan, *A History of Environmental Justice in India*, 7 ENVTL. JUST. 117 (2014).

183. Agarwal, *supra* note 182.

184. Chhatrapati Singh, *Common Property and Common Poverty: India's Forests, Forest Dwellers and the Law* 1 (1986), *excerpted in* DIVAN & ROSENCRANZ, *supra* note 111, at 16–17.

monetary terms, not merely in terms of the number of poor people."[185] The environmental justice issue, in regard to conservation laws, has been mitigated to some extent by conservation laws that recognize the right of certain indigenous communities to access forest resources. For example, § 65 of the Indian Wildlife (Protection) Act, 1972, recognizes traditional hunting rights of scheduled tribes.[186] More notably, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act) (TRA), passed in 2006, requires forest and wildlife administrators to record rights of all forest-dwellers and establish the scientific necessity for relocation before displacing forest-dwelling communities to create protected areas under conservation laws.[187] The TRA provides a consent process and guidelines for resettlement to ensure that all displaced families receive proper compensation.[188] The actual implementation of the TRA mandates, however, does not address the unjust consequences of conservation policies felt by a certain class, tribal, and other forest dwellers.[189] Further, environmental justice concerns, with respect to other environmental problems, are not as well-documented or redressed under the law.

Consider two prominent issues: the Narmada dam project and the Bhopal gas leak. The Narmada Dam project was conceived as a solution to water sharing disagreements over the Narmada

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185. *Id.* at 17–18.

186. The Indian Wildlife (Protection) Act, No. 53 of 1972, http://www.moef.nic.in/sites/default/files/wildlife1l.pdf. This wildlife law is a conservation law that generally prohibits hunting certain species. *Id.*

187. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, No. 2 of 2007, http://www.forests.tn.nic.in/legislations/graphics/The%20Scheduled%20Tribes%20&%20Traditional%20Forest%20Dwellers%20ACt%202006.pdf.

188. *Id.*

189. Ghazala Shahabuddin & Padmasai Lakshmi Bhamidipati, *Conservation-induced Displacement: Recent Perspectives from India*, 7 ENVTL. JUST. 122, 128–29 (2014) (documenting the implementation of the TRA and observing that, apart from the adequacy of the law, the enforcement has failed to implement the law correctly and has perpetuated inequity in the conservation process.); U.S. DEPT. OF STATE, INDIA 2014 HUMAN RIGHTS REPORT 57–58 (2014), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dlid=236638 (reporting that tribal groups are often uncompensated for their land and not included adequately in the decision-making process as required under law.); INDIAN INDEP. PEOPLE'S TRIBUNAL, REPORT ON SARDAR SAROVAR PROJECT, CANALS OF INDIRA SAGAR & OMKARWESHWAR AND JOBAT DAM PROJECT (2010).

River between the states of Madhya Pradesh, Maharashtra, and Gujarat.[190] The benefits from dam construction, mainly to the State of Gujarat, were energy production and water for irrigation.[191] At issue was an inter-state water sharing dispute, to resolve which the Government of India established a tribunal.[192] This tribunal established an administrative authority, the Narmada Control Authority, to compulsorily acquire lands that would be submerged by the dam construction activities and to rehabilitate dislocated residents, roughly 200,000 persons from about 40,000 families—a number that varied greatly from the inception of the process in the 1960s to the dispute settlement stage in the 1980s.[193] The displacement was environmental injustice writ large, with most rural and numerous tribal or *Adivasi* communities being displaced, primarily for the benefits that would accrue mainly to urban and industrial communities, and to some states more than others.[194] Under existing land acquisition laws, however, displaced persons who did not own land—primarily those engaged in non-agricultural activities, such as fishing, river bed cultivation, and boating, as well as *Adivasis*, who did not have a culture of property rights and were essentially considered encroachers under existing law—received no compensation, nor did families who initially remained undocumented.[195] As such, an accurate quantification of all the losses is nearly impossible.[196]

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190. Philippe Cullet, *The Sardar Sarovar Dam Project: An Overview, in* THE SARDAR SAROVAR DAM PROJECT: SELECTED DOCUMENTS 4–7 (Philippe Cullet ed., 2007); Suyoggothi, *The Story of Narmada Bachao Andolan: Human Rights*, ESSENTIAL THINKERS BLOG (Oct. 13, 2013), https://essentialthinkers.wordpress.com/2013/10/13/the-story-of-narmada-bachao-andolan-human-rights/.

191. INDIAN INDEP. PEOPLE'S TRIBUNAL, *supra* note 189, at 22–23.

192. Inter-State Water Disputes Act, No. 33 of 1956 (India). The Narmada Water Disputes Tribunal.

193. Cullet, *supra* note 190, at 20–21; Philippe Cullet, *Human Rights and Displacement: The Indian Supreme Court Decision on Sardar Sarovar in International Perspective,* 50 INT'L & COMP. L. Q. 973, 974 (2001) [hereinafter Cullet, *Human Rights*].

194. *See generally* INDIAN INDEP. PEOPLE'S TRIBUNAL, *supra* note 189, at 56–60, 73–75; Cullet, *Human Rights*, *supra* note 193, at 973.

195. *See generally* Cullet, *supra* note 190, at 21; Komala Ramachandra, 19 Harv. Hum. Rts. J. 275, 276–78 (2006); Thomas R. Berger, *The World Bank's Independent Review of India's Sardar Sarovar Projects*, 9 AM. U. J. INT'L L. & POL'Y 33, 41–2 (1993).

196. S. JAGADEESAN & M. DINESH KUMAR, THE SARDAR SAROVAR PROJECT, 235–56 (2015). Although authors report that the Narmada Dam has promoted

A report by an independent tribunal comprised of retired Supreme Court judge, Justice A.P. Shah and others, reported as follows:

> Neither land, not livelihood, nor appropriate compensation, nor house plots, not rehabilitation sites have been ensured to the PAFs [Project Affected Persons], in full measure, as per their entitlements. There are also serious concerns of noncompliance with regard to environmental measures such as the compensatory afforestation, fisheries etc. The MoEF [Ministry of Environment and Forests] Expert Committee had in fact blacklisted Jobat for vilations in 1995, but there was hardly any monitoring thereafter. Over all these years, MoEF could have, but failed to monitor effectively, leading NVDA to displace such a large number of families without rehabilitation affecting their right to life.[197]

Strict action, as per law, must be taken against any persecution of the *Adivasis* or corruption in the R&R [relocation and rehabilitation] process.[198]

The Bhopal gas leak tragedy occurred in 1984, when methyl isocyanate leaked from a Union Carbide India Limited's (UCIL) pesticide plant and injured/killed roughly 150,000 people, some suffering chronic injuries ranging from cancer and tuberculosis to anorexia and depression.[199] Not all residents of Bhopal, however, were equally affected. The UCIL plant abutted several slums, inhabited by some of the state's poorest citizens, even though other characteristics of the community such as gender or caste distribution were not well-documented.[200] Yet, several victims were not compensated because of their inability to meet the requirements.

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sustainable development in the long run, they acknowledge that the effect of rehabilitation of displaced persons is harder to quantify, especially given the fact that there was no effective rehabilitation plan before commencement of the project. *Id.*

197. INDIAN INDEP. PEOPLE'S TRIBUNAL, *supra* note 189, at 17–18.

198. *Id.*

199. Armin Rosencranz, Shyam Divan & Antony Scott, *Legal and Political Repercussions in India*, *in* LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL 44–64 (Sheila Jasanoff ed., 1994); DOMINIQUE LAPIERRE & JAVIER MORO, FIVE PAST MIDNIGHT IN BHOPAL: THE EPIC STORY OF THE WORLD'S DEADLIEST INDUSTRIAL DISASTER 55 (2002).

200. *See generally* Sheila Jasanoff, *Introduction: Learning from Disaster*, *in* LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL 1 (Sheila Jasanoff

The Indian government passed the Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985, under which the Indian government was designated as the exclusive legal representative of the victims.[201] The Indian government settled the lawsuit against Union Carbide for approximately $4 million USD. Several victims, however, remain uncompensated because they could not provide legal proof of injury or a certification of injury.[202] In a country with a large population of illiterate and poor citizens, requiring any legal documentation without proper support mechanisms, especially given the time lapse is essentially a denial of a legal remedy.

Even laws passed after the Bhopal gas leak accident failed to address environmental justice problems. No mechanism was established to identify vulnerable groups or to fairly assess and redress potential injustice. In 1986, the Indian legislature passed the first comprehensive environmental legislation, the Environmental Protection Act ("EP Act"),[203] which authorizes the Indian government to regulate activities in the interest of protecting the environment, as well as coordinating the functions of central and state administrative authorities.[204] The central government has promulgated several laws and rules under the EP Act, authorizing the Union Ministry for Environment and Forests (MoEF), to regulate polluting industries, to set

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ed. 1994) (observing, "[t]he victims of disasters represent, in a sense, the ultimate excluded community from the standpoint of negotiating the design of technology.").

201. *Id.*

202. Marc Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 274 (1985); Rajan, *supra* note 182, at 119; Jamie Cassels, *Outlaws: Multinational Corporations and Catastrophic Law*, 31 CUMB. L. REV. 311, 311 (2001); Alan Taylor, *Bhopal: The World's Worst Industrial Disaster, 30 Years Later*, ATLANTIC (Dec. 2, 2014), http://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/; JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL 11–13 (1993).

203. The Environment (Protection) Act, No. 29 of 1986, http://lawmin.nic.in/ld/P-ACT/1986/The%20Environment%20(Protection)%20Act,%201986.pdf.

204. Under Section 3(1) of the EP Act, the Central government can "take all measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution." *See generally* DIVAN & ROSENCRANZ, *supra* note 111, at 66–67.

standards for managing hazardous wastes, and to establish environmental impact assessment programs.[205] Yet, the ineffective administration of environmental laws has triggered lawsuits to enforce the laws, without addressing environmental justice issues.[206]

To be sure, general demographics in India present unique challenges to defining a discrete group in the context of environmental justice. The magnitude of environmental problems obscures environmental justice issues. It is not, however, impossible to identify some discrete groups, such as tribal communities and low-income groups. In India, a significant percentage of people live *below* the poverty line—about 22 percent in 2011, even though India's per capita income, at about $1600 USD, is much lower than the U.S. per capita income of $56,000 USD.[207] Caste or class could be another criteria, as certain classes of people are exposed to wastes on a regular basis, but only certain people work in hazardous industrial activities and only a certain class of people are involved in the dangerous activity of dismantling ships or cleaning sewage.[208] As discussed below, legal interven-

205. DIVAN & ROSENCRANZ, *supra* note 111, at 66–70.

206. *Id.* at 1–2. The authors note: "[t]he law [in India] works badly, when it works at all. The legislature is quick to enact laws regulating most aspects of industrial and development activity, but chary to sanction enforcement budgets or require effective implementation." *Id.*

207. GOV'T OF INDIA PLANNING COMM'N, PRESS NOTE ON POVERTY ESTIMATES 2011–12, 3 (2013), http://planningcommission.nic.in/news/press_pov2307.pdf; *World Development Indicators: Table 1.1 Poverty Rates at National Poverty Lines*, WORLD BANK, http://wdi.worldbank.org/table/1.1# (last visited Apr. 28, 2017); GNI *Per Capita, Atlas Method*, WORLD BANK, http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=IN (last visited Apr. 28, 2017) (indicating that India's 2015 GNI per capita was $1,590 USD).

208. Samuel D. Permutt, *The Manual Scavenging Problem: A Case for The Supreme Court of India*, 20 CARDOZO J. INT'L & COMP. L. 277, 280 (2011); M.N. Parth, *A Dirty, Dangerous Job: Impoverished Dalits Clean Sewers and Dig Through Waste by Hand Despite a Ban on the Unhealthful Method*, L.A. TIMES (July 4, 2014, 5:00 AM), http://www.latimes.com/world/asia/la-fg-india-sewers-20140704-story.html; Priya S. Gupta, *Judicial Constructions: Modernity, Economic Liberalization, and the Urban Poor in India*, 42 FORDHAM URB. L.J. 25, 54 (2014) (analyzing how slum dwellers are being increasingly "blamed" for poor environmental conditions.); *At Work and At Risk: Cleaning a Manhole for a Mere Rs 300*, INDIAN EXPRESS (June 6, 2016, 5:06 AM), http://indianexpress.com/article/cities/chandigarh/at-work-and-at-risk-cleaning-a-manhole-

tion has failed to fully redress the injury suffered by such communities. Even a cursory examination of the scope of exclusion of certain communities from remedies under land reform laws flag the problem of environmental injustice in India.

2. The Right to Environmental Protection Does Not Address Environmental Justice Problems

Despite the prevalence of environmental justice problems in India, legal remedy is limited. PILs were designed to promote protection of constitutional rights of vulnerable Indians. As the Supreme Court noted in *Sheela Barse v. Union of India & others*:

> The proceedings in a public interest litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory, of sizeable segments of the society, which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert—and quite often not even aware of—those rights.[209]

The Indian judiciary has also been sensitive to the effects of its decision on certain communities. For example, in the Taj case, the Court's order to relocate polluting tanneries that were close to the Taj Mahal included orders to facilitate, relocate, and/or compensate some workmen who would be affected by the order.[210] In the Delhi pollution case, in ordering the government to take a series of emissions control measures, the Supreme Court noted the benefits of reduced air pollution to residents at large.[211]

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for-a-mere-rs-300-manual-scavengers-chandigarh-2836743/; Charlie Campbell, *India's 'Untouchables' Are Still Being Forced to Collect Human Waste by Hand*, TIME (Aug. 24, 2014), http://time.com/3172895/dalits-sewage-untouchables-hrs-human-waste-india-caste/. *See also* Smita Narula, *Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255, 268–70 (2008) (arguing that there is a correlation between poverty and the caste system in India that results in inequality comparable to the race-based inequality in the United States.); Raghav Gaiha et al., *Has Anything Changed? Deprivation, Disparity, and Discrimination in Rural India*, 14 BROWN J. WORLD AFF. 113, 117 (2008) (arguing that the link between poverty and caste persists in India).

209. Sheela Barse v. Union of India (1988) 2 SCC 226.

210. *Taj Case*, *supra* note 152. The Court ordered the displaced industries to either re-hire existing workers or, when workers chose not to relocate, then to pay them compensation. *Id.*

211. *Delhi Pollution Case*, *supra* note 151.

In several other cases, PIL has directly or indirectly addressed problems of India's vulnerable communities. For example, the Supreme Court's order to relocate industries polluting the Ganga river aimed at cleaning up the river for Indians across the board,[212] in *M.C. Mehta v. Union of India* (child labor case), the Supreme Court's order to protect the rights of children in hazardous industries, and in *Indian Council for Enviro-Legal Action v. Union of India & Others*,[213] the Court's order to enforce the Indian Coastal Zone Management Act, which protected the livelihood of the fishing community, as well as the local ecology.[214] There can be little doubt that in some of its decisions, the Indian Supreme Court, through the PIL process, protected the rights of vulnerable Indian communities.

There remains, however, a serious concern whether PIL has become diluted,[215] and whether the Supreme Court can ensure equal environmental protection under Article 14 of the Indian Constitution.[216] Consider *Almitra Patel and Anr. v. Union of India and Others*.[217] In *Almitra*, Ms. Patel petitioned the Indian Supreme Court to intervene in the problem of sewage and waste management in New Delhi.[218] In addressing the issue, the Indian Supreme Court not only condemned poor administrative action by the pollution control boards but also the municipalities for allowing slums to grow and the slum dwellers for causing hygiene problems.[219] The Court ordered the Delhi municipality

212. M.C. Mehta v. Union of India, (1988) 2 SCR 530, https://indiankanoon.org/doc/59060/ [hereinafter *Ganga Pollution Case*].

213. Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446.

214. *Id.*

215. Surya Deva, *Public Interest Litigation in India: A Critical Review,* 28 CIV. JUST. Q. 19, 35–40. (2009).

216. Article 14 of the Indian Constitution states, "[e]quality before law: The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India." INDIA CONST. art. 14. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. INDIA CONST. art. 15.

217. Almitra H. Patel v. Union of India, (1998) 2 SCC 416 [hereinafter *Almitra*]. Following the initial decision, the NGT has issued a series of orders to the MoEF to file progress reports on waste management in India. *Id.* The information is available at http://www.indiaenvironmentportal.org.in/category/44413/thesaurus/almitra-h-patel-others/.

218. *Id.*

219. *Id.*

authorities to clean up and eventually clear the slums.[220] While the case reaffirms the Indian judiciary's commitment to promoting environmental protection through PIL, the Court's focus on slum dwellers as contributors to the problem, as opposed to other communities of people, demonstrates inattention to potential environmental justice concerns as well.

The *Virendra Gaur* case[221] is another example that the Supreme Court could focus on the environmental protection aspects of a PIL, to the exclusion of equal protection implications. In *Virendra Gaur*, the petitioners challenged the allocation of disputed land for a charitable building construction.[222] The Court held that even though the law in question permitted use of the space allocated for other compelling public use, such a purpose was not established in the case.[223] While the Court's finding of absence of a compelling public purpose exception appears reasonable in light of the facts, especially that the municipality had acquired land from residents for such use, the Court's overwhelming engagement with the constitutional right to environment, combined with its non-engagement with balancing different competing interests, is a sign that equal protection or concerns for certain vulnerable communities could become secondary to the right to environmental protection.

Moreover, the larger concern in the environmental justice context is one of equal protection of environmental laws. Providing access to the judiciary, while critically important, will not ensure equal protection. Even in cases like the *Shriram* case, where the Supreme Court recognized the impact of relocation on workers, considering the impact on communities affected by a decision, or ordering the government to install pollution control measures does not mean that all communities will benefit from environmental protection clauses. For example, in *G. Sundarajjan v. Union of India & Others* [hereinafter Kudankulam nuclear power plant],[224] petitioner filed a PIL, challenging the Indian government's decision to locate a nuclear power plant along the coast line of a village, Kudankulam, on several grounds, including safety concerns from radiation and nuclear waste disposal,

220. *Id.* at 4.
221. Virendra Gaur v. State of Harayana, (1994), 6 SCR Supp. 78 (India).
222. *Id.*
223. *Id.*
224. G. Sundarrajan v. Union of India, (2013) Civil Appeal No. 4440 (India).

threat to marine life and biodiversity, and violation of environmental impact laws, particularly that a new environmental impact assessment was required following India's conclusion of an agreement with Russia after environmental clearance was issued.[225] Although the Supreme Court of India, in reviewing the matter, reiterated its jurisprudence on environmental protection under Article 21 of the Indian Constitution, it decided that locating the nuclear power plant at that spot would not violate Article 21.[226] The Court held that:

> While balancing the benefit in establishing . . . [the nuclear power plant], with the right to life and property and the protection of environment including marine life, we have to strike a balance, since the production of nuclear energy is of extreme importance for the economic growth of our country, alleviate poverty, generate employment etc. While setting up a project of this nature, we have to have an overall view of *larger public interest rather than smaller violation of right to life* guaranteed under Article 21 of the Constitution.[227]

The Supreme Court's reasoning, putting the larger public interest above an Article 21 violation, speaks volumes about the treatment given by the Court to environmental justice and Article 21. Undeniably, siting decisions, and environmental protection policies generally require a careful balancing, with nuclear power often being viewed as an answer to India's dire energy infrastructure and a pawn in reducing India's poverty. The larger question, however, is whether such balancing can be read as a carte blanche for allowing violations of Article 14. The Kudankulam nuclear power plant case implies just that, thus highlighting the absence of environmental justice considerations even in the PIL process. The Supreme Court's approach in the Kudankulam nuclear power plant case addressing the tension

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225. *Id.*

226. *Id.*

227. *Id.* ¶ 175 (emphasis added). In allowing the construction of the nuclear plant to proceed, the Court reasoned that the problem was one faced by all countries, such as Britain, the United States, and Canada, all of which had favored development policies. *Id.* The Court dismissed the petition, even after recognizing that the hot water released would exceed what was permitted under existing rules, that Russia would not accept spent nuclear fuel, and that the government had not yet devised a plan for permanent disposal of nuclear waste. *Id.*

between environmental protection and social justice[228] raises the question what a constitutional right to environmental protection entails.

III. THE "RIGHT" RIGHT TO ENVIRONMENTAL PROTECTION

The U.S. and Indian experiences discussed above illustrate that a right to environmental protection matters, not only to protect the environment, but also to prevent violations of constitutionally guaranteed rights. Recognition of a right to environmental protection, as a concomitant of constitutional rights, is essential to preserve some fundamental norms of a society.[229] Moreover, the experiences in the two jurisdictions can help construct what a right to environmental protection entails. A right to environmental protection should reflect, or, if it is read in existing constitutional rights, be informed by, at least three other rights, namely, 1) the right to life, 2) the right to equal protection under environmental laws, and 3) the right to judicial remedy. Each right is normatively and practically important and is considered separately below.

A. The Right to Life and Environmental Protection

The expansion of the right to life to include a healthy environment or other components is normatively intuitive, as evidenced by the interpretation of constitutional provisions in different jurisdictions. Several countries now recognize a healthy environment as integral to the right to life. Remarkably, the Indian judiciary, which is credited for its innovative interpretation of the constitutional right to life to include a healthy environment, drew inspiration from the U.S. Supreme Court's decision in *Munn v. People of Illinois*.[230] The Court observed:

> By the term 'life,' as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by

228. Balakrishnan Rajagopal, *Pro-Human Rights, but Anti-poor? A Critical Evaluation of the Indian Supreme Court From a Social Movement Perspective*, 8 HUM. RTS. REV. 157 (2007); Rajan, *supra* note 182, at 117.

229. *See* S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 J. L. & POL'Y 29, 60 (2001).

230. Munn v. Illinois, 94 U.S. 113 (1877). *See also* Normawati Binti Hashim, *Constitutional Recognition of the Right to Healthy Environment: The Way Forward*, 105 PROCEDIA—SOC.& BEHAV. SCI. 204 (2013).

> the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited . . . if its efficacy be not frittered away by judicial decision.[231]

The Indian Supreme Court echoed the *Munn* decision in *Kharak Singh v. State of Uttar Pradesh*,[232] later expanding the philosophy of this interpretation in other cases to include the right against pollution by tanneries and pollution affecting the Taj Mahal.[233] This normative approach is important not only because it brings environmental protection outside the exclusive realm of the legislature and the executive but also because, through the operation of *stare decisis*, decisions recognizing a right to environmental protection, binds an entire judicial system to interpret violations of rights due to environmental pollution from the lens of a fundamental right to life. In India, for example, High Courts have followed the Supreme Court's interpretation and recognized the right to environmental protection as part of the right to life.[234]

The right to life in India, like in the United States, cannot be deprived without due process of law,[235] which, in the context of fundamental rights, includes substantive due process.[236] An interpretation of the right to life, as inclusive of a right to environmental protection, would strengthen environmental protection in several ways. For example, in the United States, a violation of the right to environmental protection, as interpreted under Article 21, would be subject to heightened scrutiny, and only narrowly tailored infringement would be deemed constitutional.

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231. *Munn v. Illinois*, 94 U.S. 113, at 142.

232. Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295 (India).

233. M.C. Mehta v. Union of India, (1997) 2 SCC 393.

234. For a discussion of the permeation of constitutional environmental rights and norms into High Courts, see Raghav Sharma, Note, *Green Courts in India: Strengthening Environmental Governance?*, 4 L. ENV'T & DEV. J. 52, 69–70 (2008).

235. The language of Article 21 and Article 14 of the Indian and U.S. Constitutions, respectively, provide that "[n]o person shall be deprived of their right to life . . . except by due process of law." INDIA CONST. art. 21; U.S. CONST art. 14.

236. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 427 (2010). For a discussion of "procedure established by law," in India, see DAS BASU, supra note 131, at 134–35.

Environmental protection, as a concomitant of the right to life, would strengthen the normative framework for environmental protection, reduce arbitrariness in decision-making, and provide a concrete foundation for enacting laws to protect the environment. Even though environmental laws in the United States are relatively robust, recent efforts by environmental plaintiffs to establish that the U.S. government has a constitutional duty to protect American youth from climate change under the public trust doctrine flags the gap in the existing legal structure and signals the importance of incorporating environmental protection into constitutional rights.[237]

Recognizing a right to environmental protection, as a subset of the negative right to life, could also provide American environmental justice advocates with an alternative to the Equal Protection Clause. Environmental justice advocates, facing the nearly insurmountable test of proving intentional discrimination under the current judicial standard to qualify for protection under the Equal Protection Clause, could seek redress, under an alternative constitutional provision of the Fourteenth Amendment, the Due Process Clause.[238] The Due Process Clause proscribes states from depriving "any person of life, liberty or property, without due process of law."[239] While this article does not explore this idea fully,[240] arguably environmental justice advocates could claim that environmental laws with siting procedures that place high burden of environmental harm impinge on the procedural due process guarantee in relation to life, liberty or property. Of course, such an argument would be limited by the Court's cautious approach to the Fourteenth Amendment's Due Process Clause, but may be worth exploring.[241] Treating environmental protection on par with a negative constitutional right to life, liberty or property can thus be normatively and

237. Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL'Y 634, 675–78 (2016). *See* discussions *infra* Section III.C.

238. U.S. Const. amend. XIV, § 1.

239. *Id.*

240. The author will be discussing this issue in a separate article.

241. For a general discussion of the scope of the Due Process Clause, see Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1110–14 (1984); 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW §17.2 (5th ed. 2012).

practically significant. The normative attraction to reading environmental protection as a part of a fundamental right to life can be evidenced in the number of countries that have followed a similar approach, from Nigeria and other African nations, to countries in Asia and Latin America.[242] Also, several constitutions, including those of South Africa, Costa Rica, Hawaii, and Massachusetts,[243] specifically confer a separate right to a clean environment.[244] This demonstrates that reading an environmental protection into the right to life is not inconceivable.

B. The Right to Equality

Even the creation of a specific right to environmental protection may not imply a right to equal environmental protection. Consider Article XI of the Constitution of the State of Hawaii, which states that, "[e]ach person has the right to clean and healthful environment, as defined by laws relating to environmental quality including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings."[245] The Constitution of South Africa has a similar provision and states as follows:

> Every person has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote

242. For a discussion on all the countries that have adopted the right to environment as part of a right to life, see Kaniye S.A. Ebeku, *Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria*: Gbemre v. Shell *Revisited*, 16 REV. EUR., COMP, & INT'L ENVTL. L. 312, 312–15 (2007).

243. For a comprehensive discussion on state constitutions that provide a right to clean environment, see NICHOLAS A. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY § 3.07 (2017).

244. S. AFR. CONST. sec. 24 (1996); COSTA RICA CONST. art. 50, amended by Law No. 7412 art. 1, June 3, 1994; HAW. CONST. art. XI, § 9; MASS. CONST. art. XCVII. For a comprehensive list and discussion of countries and U.S. states that provide/recognize a constitutional right to environmental protection, see also Ebeku, *supra* note 242; Brandl & Bungert, *supra* note 1.

245. HAW. CONST. art. XI.

> conservation and; (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[246]

The language in most other constitutions is similar, with none specifically mentioning the issue of equal protection.[247] Yet, as the American experience with environmental justice demonstrates, equal protection under environmental laws is a distinct issue that is not automatically addressed by passing environmental laws. The Indian judicial experience, despite the Supreme Court explicitly interpreting Article 21 to include a right to environmental protection with a view to advance social justice, does not guarantee equal protection. Yet, equal protection is a fundamental constitutional right and its violation, by denial of equal environmental protection under laws is just that, a violation of a fundamental constitutional right. A right to environmental protection is meaningful only when such a right is equally distributed in any society.

The actual realization of equal protection of environmental laws, however, is an onerous challenge. The American experience with environmental justice, specifically the difficulty in proving intent or purposeful discrimination, is an important predicator. The Indian experience in proving that an environmental law violates the constitutional right to equality will likely be similar. Article 14 of the Indian Constitution mirrors the Equal Protection Clause of the U.S. Constitution.[248] Article 15 of the Indian Constitution is comparable to Title VI of the Civil Rights Act, § 601, in that it prohibits discrimination *solely* on the basis of religion, race, caste, sex, and place of birth, but does not include income-based discrimination.[249] Similar to § 602 of Title VI of the Civil Rights Act, the Indian Supreme Court has interpreted Article 15 to include state actions that are facially neutral, but have a discriminatory impact.[250] There are, however, some differences. The Indian courts have not explicitly

246. S. AFR. CONST. sec. 24 (1996).

247. For a sampling of various constitutional law texts, see Ebeku, *supra* note 242.

248. INDIA CONST. art. 14; U.S. CONST. amend XIV.

249. INDIA CONST. art. 15(1).

250. DAS BASU, *supra* note 131, at 65 (citing to State of Bombay v. Bombay Education Society, (1955) SCR 568, a case in which the Court held that a law limiting admission to English schools to students whose spoken language was English violated the Constitution (then Article 29), because the law would, in

read into either Article 14 or 15 an intent requirement.[251] Thus, the prevalence of PIL, combined with the explicit prohibition of certain types of discrimination within the Indian Constitution, alleviate challenges such as the limits to bringing a private cause of action under § 602 of Title VI that prevail in the American environmental justice jurisprudence. The Indian judiciary has also held that procedural laws can violate equal protection guaranteed under Article 14, meaning that all citizens have equal procedural rights.[252] Reading this interpretation of Article 14 with the prohibition of discriminatory impact under Article 15, an environmental justice plaintiff in India could arguably challenge discriminatory permitting procedures. More broadly, the Indian Supreme Court has recognized that principles of natural justice should apply to administrative orders.[253]

The actual application of Article 14 or Article 15 to environmental protection matters in India will likely be as cumbersome as it has been in the United States. For example, few cases have been brought under Article 15, primarily because petitioners must prove that the discrimination was "*only*" on the grounds of race, religion, or caste.[254] The task of proving that a law was passed, or a state action taken, *only* to discriminate is tantamount to requiring intent under the Equal Protection Clause. The Indian Supreme Court has also held that a challenge to the administration of a law under Article 14 would fail, unless the plaintiff proved that an administrative official or body acted intentionally to injure the plaintiff.[255]

Even if one were to overcome specific doctrinal constraints and proceed to the merits of a claim before a judiciary, there still remains the question of actual implementation. What courts can do to redress inequality has vexed the judiciaries, both in the United States and in India. In both jurisdictions, the judiciary

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effect, limit admission to non-Asiatic students and discriminate on religious grounds).

251. *Id.* at 41. While the author notes that intentional discrimination by an administrative agent enforcing a non-discriminatory law is untenable, there is no requirement that a legislation was passed with the intent to discriminate.

252. Lachmandas v. State of Bombay, 1952 SCR 710, 726 (India); DAS BASU, *supra* note 131, at 37.

253. DAS BASU, *supra* note 131, at 45.

254. *Id.* at 65.

255. Irani v. State of Madras, (1962) 2 SCR 169 (India).

has introduced forms of affirmative action to redress the problem of unequal opportunity, and in both jurisdictions, the remedy remains controversial.[256] For example, as in the United States, the Indian Supreme Court has interpreted Article 14 to allow reasonable classification. Keeping in mind the objective of a statute, the Court has approved of classifications for geographical and historical reasons.[257] The Court has also held that there is a presumption of reasonable classification and constitutionality of a law, which can be rebutted by showing discriminatory impact in its implementation.[258]

In India, unequal treatment alone is not a violation of Article 14, unless the discrimination is unreasonable. According to the Supreme Court, "if Legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a *well-defined class*, it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons;" rather, the discrimination must be unreasonable.[259] Given the similar interpretative approaches taken by the Indian and American judiciary with respect to the constitutional right to equal protection, such as recognition of reasonable classification of a law, claiming a constitutional right to equal protection under the Indian Constitution may well resemble the American experience.

The difficulty in penetrating Article 14 to seek equal environmental protection does not imply the absence of an inequality problem with respect to environmental protection. It is not a reason to exclude equal protection from a right to environmental protection. The fact that some communities around the world face disparate environmental impacts is a testimony to the failure of governmental institutions to deliver on the promise of equal protection under the Constitution. It also raises questions of whether the right to environmental protection can be achieved

256. For a broad discussion of the constitutional right to equal protection, see Nicole Lillibridge, *The Promise of Equality: A Comparative Analysis of the Constitutional Guarantees of Equality in India and the United States*, 13 WM. & MARY BILL RTS. J. 1301 (2005).

257. DAS BASU, *supra* note 131, at 36; Mohanlal v. Man Sing, AIR 1962 SC 73 (India); Bhaiyalal v. State of M.P., AIR 1962 SC 981 (India).

258. DAS BASU, *supra* note 131, at 34–35.

259. *Id.* at 35–36.

without equal protection, and if so, how the judiciary should reconceive current doctrinal interpretation to address the problem.

C. The Right to Access to Courts

In the United States and India, both common law systems, the judiciary has been pivotal in upholding the constitutional validity of environmental protection—the United States through the Commerce Clause and India through the recognition of an Article 21 right to environmental protection.[260] In the context of a right to environmental protection, however, both the Indian and the American experiences highlight the continuing importance of the right to judicial review. In India, PIL, which was founded on a vision of delivering social justice, demonstrates the significant difference that judicial intervention can make in addressing problems that the legislative and executive branches of the government have not addressed effectively. Add to that the creation of the NGT, which proves the perceived efficacy of the judiciary, both in the eyes of the public and the legislature. The resulting vision is that access to courts is a critical component of the right to environmental protection. Several other countries have a similar experience, where courts have recognized a constitutional right to environmental protection and/or where special environmental courts have been established.[261]

For the most part, the U.S. experience is no different in terms of the role of the judiciary and the importance of constitutional doctrines to pursue remedies against environmental harms. The most notable current example is the case of *Juliana v. United States*.[262] In *Juliana*, environmental plaintiffs, who included youth aged 8–19, argued that President Obama and other executive agencies violated their substantive due process rights to life, liberty, and property, as well as their constitutional obliga-

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260. *See supra* INTRODUCTION.

261. For example, Australia and New Zealand have established special environmental law courts. Sharma, *supra* note 234, at 60–62.

262. Juliana v. United States, No. 6:15CV01517(TC), 2016 WL 6661146 (D. Or. Nov. 10, 2016). Proceedings in this case are ongoing. For a comprehensive overview of all relevant proceedings and related judicial actions, see http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2016/20161110_docket-615-cv-1517_opinion-and-order-1.pdf.

tion to hold certain natural resources in trust for the people under the public trust doctrine.[263] Although the matter has not proceeded on its merits, the District Court of Oregon did not dismiss the case for lack of subject matter jurisdiction.[264] The case is currently pending on appeal before the United States Court of Appeals for the Ninth Circuit, but even if the plaintiffs lose on appeal, the case leaves no doubt of the judiciary's pivotal role in protecting the right to environmental protection, especially when contentious issues have not been adequately addressed by the other branches of the government.[265] The U.S. Supreme Court's extension of standing to U.S. states in *Massachussets v. EPA*[266] is another facet of the importance of access to courts. Recognizing that states have standing to bring an action was critical to this climate change litigation, which sought EPA action to reduce emissions from automobiles.[267]

The American experience, with respect to environmental justice, also highlights the importance of access to judicial review in a different way. The Supreme Court's decision in *Sandoval* is an example of this. The U.S. Supreme Court's interpretation of § 602 of Title VI to exclude private actions, especially when considered in light of the impediment of proving intent to succeed in an action under the Equal Protection Clause and § 601 of Title VI, has largely foreclosed judicial redress against environmental injustice. Absent appropriate legislative measures to safeguard against unequal protection under environmental laws, this situation, faced by environmental justice plaintiffs, implies that a right to environmental protection cannot be fully realized without access to the judiciary. Of course, the right to judicial review does not imply a right for environmental plaintiffs to win every single case. In the Indian example, for instance, the outcome in

263. *Juliana*, 2016 WL 6661146, at *1. For a full discussion on the lawsuit, see Wood & Woodward, *supra* note 237.

264. *Id.*

265. Climate change litigation is another example. *See, e.g.*, Michael C. Blumm & Mary C. Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. (forthcoming 2017), https://ssrn.com/abstract=2954661; David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 76–77 (2012); Hari M. Osofsky, *Is Climate Change "International"? Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585, 603–14 (2009).

266. 549 U.S. 497, 521 (2007).

267. *Id.* at 504.

cases involving the Narmada dam or the Kudankulam nuclear power plant may have been exactly the same if the Court had considered the issue from the lens of a constitutional right to equal protection. Yet, the judiciary can, and has, filled many a legal void. A right to fair judicial access should, therefore, be an integral and indispensable part of the right to environmental protection.

CONCLUSION

In most modern legal systems of the world, rights, with all the complexities integral to the concept, are steps towards realizing justice. Rights are inherently problematic, most particularly individual rights. The realization of one person's rights may infringe on another person's rights. The right to develop one's property may interfere with the right of another to preserve air quality. The right to have a clean environment may interfere with the same right of another, after all the waste needs to be dumped some place, and the entire planet is not yet a desert. These complex problems cannot be solved by eliminating rights, but instead by balancing competing rights through legal doctrines. In countries like the United States and India, the mechanisms for addressing competing interests is located in the Constitution. Through doctrinal principles and norms, as well as the distribution of power among the legislative, executive, and judiciary branches, the Constitution of these two countries institutionalizes rights. When faced with environmental harms, without effective legislative intervention, their citizens have turned to the Constitutions to vindicate rights they perceived were violated by state action or inaction.

In the case of India, state failure to address environmental problems caused such severe harm, especially in some cases, that the Indian Supreme Court carved out a right to a healthy environment as part of a fundamental constitutional right to life. How could Indians fully realize their right to life without clean air or water? In the United States, citizens turned to the Constitution as well. With relatively robust environmental laws, however, the redress that environmental plaintiffs sought under the American Constitution was not through the right to life, which would likely only promote better environmental laws. American environmental justice advocates sought equal protection to environmental laws, a right not to be discriminated against or treated differently from other Americans. Unlike the Indian

courts, however, the American judiciary's jurisprudence on the Equal Protection Clause of the Fourteenth Amendment, requiring plaintiffs to prove intentional or purposeful discrimination, has not only effectively foreclosed a constitutional remedy to environmental justice plaintiffs, but it has also almost eliminated a private remedy against unequal protection of environmental laws. This interpretation has also trickled down to statutory equal protection provisions under § 601 of the Civil Rights Act. The judiciary's interpretation of § 602 of the Civil Rights Act, rejecting a private cause of action, has precluded an alternative venue for seeking remedies. Moreover, upon a closer look, even the Indian Supreme Court's pioneering jurisprudence on public interest litigation, which seeks to provide judicial access to the country's poorest and most vulnerable citizens and promote social justice, is not immune from environmental justice concerns. The Indian Supreme Court has, in some cases, favored the larger interest of the public over the violation of constitutional rights of some communities or discrete groups, without examining the issue from the perspective of the constitutional right to equal protection.

These two comparative experiences in the United States and India compel one overarching conclusion: for those outside the reaches of environmental protection legislation, environmental harm is a threat to their rights, the traditional protection of which in modern constitutional societies is found in the Constitution. Whether it is articulated as a threat to the right to life or to equal protection, citizens view environmental harm as an infringement of their existing constitutional rights. The experience in the two common law systems demonstrates that when one claims a right to environmental protection, it is not merely a right to protect the environment. It is also a right to protect the environment in a manner that equally benefits all citizens, and more importantly, that does not discriminate among citizens when allocating environmental burdens. This task cannot be accomplished by any single branch of government. The environmental justice movement in the United States and the PIL/constitutional jurisprudence in India demonstrate that the judiciary is indispensable to realizing constitutional rights. Thus, not only should a right to environmental protection be recognized, but the right to environmental protection should also reflect and promote, at least, three integral rights: 1) the right

to life, 2) the right to equal protection of the laws, and 3) the right to judicial review.

The articulation of a right to environmental protection, with all three components integrated, however, does not have to take any particular form. A country can enact legislation articulating these rights or amend the Constitution to include a right to environmental protection and specify what such a right would entail, so long as the right to environmental protection is realized. Whatever the form, acknowledging a right to environmental protection serves some important functions. One, if we accept that a system of rights is integral to a constitutional form of governance, then a right to environmental protection cannot legitimately be excluded from such a system, and thus, any legal action should be guided by the fact that environmental protection laws serve an important purpose, that of upholding and/or preventing the violation of the Constitution. Two, existing constitutional rights cannot be fully realized if they are not applied to environmental protection as well. Passing laws to address environmental problems will not by itself guarantee the protection of all constitutional rights, as some constitutional rights, such as the right against the denial of equal protection, may require more than passing environmental laws. Three, on constitutional interpretation, the judiciary is the final arbiter. Thus, unless citizens have access to courts and to a fair opportunity to have their problems considered on their merits, the right to environmental protection, with all of its constitutional implications, cannot be fully realized. The "right" right to environmental protection is more than a mere right to environmental protection, it includes the right to life, the right to equal protection, and the right to judicial access.