

REVIVING THE ENVIRONMENTAL JUSTICE POTENTIAL OF TITLE VI THROUGH HEIGHTENED JUDICIAL REVIEW

Rachel Calvert*

Title VI of the Civil Rights Act has unrealized potential to correct the racialized distribution of environmental hazards. The disparate impact regulations implementing this sweeping statute target the institutional discrimination that characterizes environmental injustice. Agency decisions routinely deny claims that federal funds are contributing to projects that disproportionately pollute minority communities, allegedly in violation of Title VI disparate impact regulations. These dismissals are effectively final, as trends in civil rights jurisprudence have essentially foreclosed would-be litigants' opportunities for meaningful judicial review. Their last remaining avenue for recourse is to trigger an arbitrary and capricious review of agency actions, but the standard judicial deference afforded to agency decisions has made this type of challenge exceedingly difficult to win.

Courts could revive Title VI's environmental justice potential by tailoring their judicial review of agency decisions challenged as arbitrary and capricious. This would entail probing agencies' environmental decisions to ensure conformity with the Civil Rights Act. Such heightened scrutiny would recognize that environmental justice claims engage two areas of law undergirded by different values and analytical techniques. And it would be consistent with courts' existing justifications for scrutinizing particular agency decisions,

* J.D. Candidate, 2019, University of Colorado School of Law; Casenote and Comment Editor, *University of Colorado Law Review*. I would like to thank Jessica Allison for her guidance throughout the publication process. Thanks also to Shelby Krantz and Professor Sharon Jacobs for their invaluable insights as this paper initially took shape, then their generous suggestions for improvement to earlier drafts. I also have the utmost gratitude for all the time contributed by the *Colorado Law Review* staff.

within an administrative law regime normally defined by deference.

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INTRODUCTION

Denver's Elyria-Swansea neighborhood is the most polluted zip code in Colorado.¹ A dense combination of industrial

1. GROUNDWORK DENVER, INC., HEALTHY AIR FOR NORTH DENVER: CARE GRANT FINAL REPORT 1 (Dec. 23, 2008), https://www.epa.gov/sites/production/files/2016-08/documents/colorado_denver_healthy_air_hand_report-508.pdf [https://perma.cc/LFV4-AFB5]. Elyria and Swansea were initially founded and plotted in the late 1800s as two separate settlements near Denver's industrial and railroad

operations and infrastructure developments produces noise pollution and degrades the neighborhood's air, soil, and water. The major polluters include a refinery complex prone to environmental violations, as well as a power plant and a pet food factory known to emit noxious odors—all arranged around several highways cutting through the neighborhood.² Elyria-Swansea and neighboring Globeville are home to a number of Superfund sites, and Elyria-Swansea's soil remains laden with heavy metals like lead and arsenic, despite local advocates' success in shuttering a smelting operation that had contaminated the neighborhood's air and water.³ Meanwhile, Elyria-Swansea features relatively sparse environmental benefits like parks or schools.⁴ This level of industrialization is not typical of Denver—such heavy polluters are nearly twice as common in Elyria-Swansea.⁵ Elyria-Swansea's high concentration of industrial environmental burdens has degraded the health of its

operations. They are now considered a single neighborhood for statistical purposes, but many residents consider the neighborhoods distinct. Although absorbed into Denver in 1902, Elyria-Swansea and Globeville remain physically isolated from the rest of the city by railroads, industrial facilities, and the South Platte River. Letter from Heidi J. McIntosh & Joel Minor, Attorneys, Earthjustice, to Leslie Proll, Director, Office of Civil Rights, U.S. Dept of Transp., et al. 7 (Nov. 15, 2016) [hereinafter Earthjustice Complaint], <https://earthjustice.org/sites/default/files/files/I-70%20Title%20VI%20Complaint.pdf> [https://perma.cc/DV7K-VH7D].

2. GRETCHEN ARMIJO & GENE C. HOOK, HOW NEIGHBORHOOD PLANNING AFFECTS HEALTH IN GLOBEVILLE AND ELYRIA SWANSEA 24 (2014), https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report_9-18-14.pdf [https://perma.cc/PSG8-PJMU] (“The adjacent areas of Commerce City and unincorporated Adams County are heavily industrial as well. A number of local businesses generate odors []: Owens Corning (roofing products manufacturer)[.] Koppers Industries (creosote based wood treatment)[.] Darling International (animal rendering plant)[.] Nestle Purina Pet Care (pet food production)[.] Kasel Industries (pet treats)[.] National Western Stock Show (livestock)[.] Suncor Refinery (oil and gas)[.] Metro Wastewater, and Xcel Energy Cherokee Generating Station.”).

3. Earthjustice Complaint, *supra* note 1, at 7–8.

4. DENVER CITY COUNCIL, ELYRIA & SWANSEA NEIGHBORHOODS PLAN 15 (2015), https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria_Swansea_Neighborhood_Plan.pdf [https://perma.cc/U6SE-56RT] (explaining that only 16 percent of Elyria-Swansea consists of residences, parks, recreation facilities, and schools). There is no grocery store in Elyria-Swansea or Globeville, a community of ten thousand people who must travel twice as far as the average Denver resident to purchase food. ARMIJO & HOOK, *supra* note 2, at 6.

5. ARMIJO & HOOK, *supra* note 2, at 24.

residents: the neighborhood has some of Denver's highest rates of asthma, cancer, heart disease, diabetes, and obesity.⁶

Based on the well-documented public health ramifications of poor air quality, an Elyria-Swansea neighborhood group recently challenged the planned expansion of the portion of I-70 cutting through the neighborhood.⁷ Although predicated on anticipated environmental impacts, the challenge was rooted in civil rights law. Elyria-Swansea is home to one of the highest percentages of Latino residents of any Denver neighborhood, as well as a lower average household income than Denver as a whole.⁸ The Elyria-Swansea I-70 challenge was one of several prominent attempts in recent years to leverage the Civil Rights Act against the concentration of hazardous pollution in low-income and minority areas.⁹ The industry and infrastructure throughout Elyria-Swansea are the types of environmental hazards commonly relegated to lower-income neighborhoods populated by ethnic and racial minority communities.¹⁰

In the late 1980s, southern civil rights activists articulated the interplay between environmental hazards and racial injustice—"environmental racism."¹¹ Credited to Dr. Benjamin

6. *Id.* at 16–17.

7. Earthjustice Complaint, *supra* note 1.

8. ARMIJO & HOOK, *supra* note 2, at 14. The cause-and-effect relationships among property values, neighborhood demographics, and environmental hazards have been studied by a number of scholars, employing a variety of statistical techniques and reaching contradictory conclusions. *See, e.g.*, 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 (1997); Ted Gayer, *Neighborhood Demographics and the Distribution of Hazardous Waste Risks: An Instrumental Variables Estimation*, 17 *J. REG. ECON.* 131 (2000); Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 *YALE J. ON REG.* 195 (1997).

9. *See infra* Part I.

10. Michael B. Jones & Peter J. Jacques, *Responding to Environmental Injustice: The Civil Rights Act and American Federal Institutional and Systemic Barriers to Private Redress of Disparate Environmental Harm*, 9 *FLA. A&M U. L. REV.* 417, 418–19 (2014).

11. Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 2–3 (1995). A note on etymology: because this Comment focuses on a provision of the Civil Rights Act, I use the "environmental racism" term coined by pioneering activists. However, recognizing that low-income people disproportionately experience environmental burdens, and recognizing the dynamic relationship between race and class, I use "environmental justice" where appropriate to describe the contemporary movement for an environmentalism that recognizes both these realities. For a discussion on the role of income and class in the distribution of environmental burdens, see Uma Outka, Comment, *Environmental Injustice and*

Chavis, former executive director of the United Church of Christ Commission for Racial Justice,¹² the phrase recognizes that communities of color disproportionately suffer the effects of environmental degradation.¹³ The correlation between race and toxic exposure tends to be viewed by scholars and advocates, broadly, as a product of institutional racism and, more narrowly, as racial bias effectuated by the law.¹⁴ In his preface to the United Church of Christ's landmark 1987 study of hazardous waste site exposures, Dr. Chavis defined racism as "racial prejudice plus power," articulating similarly sweeping effects of purposeful and unintentional racial discrimination: "Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, *environmental* and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude."¹⁵

the Problem of the Law, 57 ME. L. REV. 209, 246–48 (2005). See also James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 134–37 (1994) (discussing "economic extortion," the allocation of environmental burdens on poor communities, which are characterized by a lack of political clout and are often willing to tolerate environmental degradation in exchange for benefits like civic improvements and jobs).

12. Guana, *supra* note 11, at 2.

13. Colopy, *supra* note 11, at 126–29; Guana, *supra* note 11, at 2–3.

14. Outka, *supra* note 11, at 217–18. "Institutional racism" recognizes that discrimination along racial lines often derives not from intentional actions of a malicious individual, but from our social, political, economic, and legal institutions. *Id.* at 218 n.51. The racial inequity endemic to these institutions is often invisible to those not suffering as a result; as Professor of Ethnic Studies and Geography Laura Pulido explains:

White privilege is so hegemonic that few whites are even cognizant of it. What appears to be natural and fair to whites may be reinforcing the inequality and subordinated status of nonwhites. This level of racism often escapes notice and articulation in favor of more discrete and visible patterns of discrimination.

Laura Pulido, ENVIRONMENTALISM AND ECONOMIC JUSTICE: TWO CHICANO STRUGGLES IN THE SOUTHWEST 18 (1996).

15. Guana, *supra* note 11, at 2 n.1 (emphasis added). Those accused of environmental racism were primarily the purported guardians of environmental health, namely mainstream national environmental organizations and the federal agency charged with regulating polluters. *Id.* at 2–3. Despite many years of environmental justice activism at the local level, it is not clear that either Congress or EPA officials realized that low-income and minority communities would continue to disproportionately suffer environmental burdens after the creation of federal environmental laws and regulations. *Id.* at 3–4, 22–28. Federal lawmakers' ignorance on this point was possibly due to local advocates' exclusion from the national legislative process during the crucial period from the late 1960s

Environmental justice advocates recognize that these institutional dynamics skew pollution along racial and class lines.¹⁶ Lower-income individuals, and especially people of color, experience what has been referred to as a “quadruple exposure effect,” simultaneously suffering the highest rates of exposure on the job, in their homes, and in food and consumer products.¹⁷

These exposure patterns are not reflected in the major 1970s federal environmental laws like the Clean Air Act.¹⁸ During the initial years of implementation, environmental regulators did not account for race or income in their assessments of the health risks posed by pollution.¹⁹ Specifically, their risk assessments were not designed to take into account the health risks associated with exposures to multiple facilities whose emissions accumulate over time and interact synergistically.²⁰ Consistent with the broadly inequitable distribution of pollution, these cumulative and synergistic effects tend to have a disproportionate effect on the health of people of color.²¹

Although Congress neglected to account for these patterns in the initial environmental regimes, civil rights law had more generally acknowledged the injustice of federal funds contributing to discriminatory projects.²² To address this injustice, Title VI of the Civil Rights Act prohibits any recipient of federal funds from discriminating on the basis of race, and its implementing regulations often specifically prohibit federal funds from having even an unintentional disparate impact on racial minorities.²³ Such disparate impacts often demonstrate the

to the early 1980s. *Id.* at 22 n.75 (explaining that major environmental laws were first enacted or substantially revised from the late 1960s to early 1980s, but that grassroots organizations coalescing around environmental racism did not materialize at the national level until the 1980s).

16. Outka, *supra* note 11, at 211.

17. *Id.* (referencing Professor Daniel Faber’s descriptions of the cumulative exposures faced by working class communities and communities of color).

18. See Guana, *supra* note 11, at 22–27.

19. *Id.*

20. *Id.*

21. *Id.*

22. CIVIL RIGHTS DIV., DEPT OF JUSTICE, TITLE VI LEGAL MANUAL § II, <https://www.justice.gov/crt/fcs/T6manual2> (last updated Jan. 25, 2017) [<https://perma.cc/2SRL-PWXH>] [hereinafter DEPT OF JUST. LEGAL MANUAL]; Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (Stevens, J., dissenting).

23. *Sandoval*, 532 U.S. at 293–94 (Stevens, J., dissenting).

sort of institutionalized, racist power dynamics described by Dr. Chavis.²⁴

Title VI provided the basis of Elyria-Swansea residents' civil rights challenge to the planned I-70 expansion, a federally funded project that some predict will significantly degrade the neighborhood's air quality.²⁵ Even given Elyria-Swansea's diversity of industrial emissions, the neighborhood's most significant sources of air pollution are the two highways that have shaped its public health and economic welfare for the past seventy years—I-25 and I-70.²⁶ After rejecting alternative plans for a more modest expansion in whiter, more affluent areas east of Elyria-Swansea, the Colorado Department of Transportation (CDOT) announced it would triple the highway's width in Elyria-Swansea.²⁷ The plan will result in the demolition of fifty-six homes, the displacement of approximately 184 residents, and the exposure of the remaining residents to dangerous and obnoxious odors, dust, and air pollution.²⁸

Elyria-Swansea residents challenged the project as a violation of the federal Department of Transportation's regulations implementing Title VI, which prohibit agency funds from contributing to disparate impact discrimination.²⁹ This challenge was unavailing. The Department of Transportation found that CDOT's highway expansion plan did not violate Title VI, given what the agency perceived as insufficient evidence that the project would have an adverse disparate impact on Elyria-Swansea residents relative to the alternatives.³⁰

24. See Outka, *supra* note 11, at 223–24, 242–46.

25. Earthjustice Complaint, *supra* note 1, at 9–13.

26. ARMIJO & HOOK, *supra* note 2, at 5–6, 8.

27. Earthjustice Complaint, *supra* note 1, at 9–13.

28. *Id.* at 9. Neighborhood residents proposed several alternatives to the plan CDOT eventually adopted. *Id.* at 29–31. It is hard to evaluate the theoretical impacts of these rejected proposals, as CDOT never performed a comprehensive environmental impact analysis on any of these proposed alternatives, dismissing some out of hand without any analysis whatsoever. *Id.* What several of these alternative proposals had in common was that they would displace fewer residents. *Id.*

29. *Id.* at 21–27. For background on residents' challenges to the I-70 expansion as a violation of environmental statutory obligations, see *Zeppelin v. Fed. Highway Admin.*, 293 F. Supp. 3d 1267 (D. Colo. 2017). See also *Sierra Club v. Fed. Highway Admin.*, No. 17-CV-1661-WJM-MEH, 2018 WL 1610304 (D. Colo. Apr. 3, 2018).

30. Irene Rico, Assoc. Adm'r for Civil Rights, Dep't of Transp., Letter of Finding DOT 2017-0095, *CdeBaca v. Colo. Dep't Transp.* 1 (Apr. 12, 2017) [hereinafter Dep't of Transp. Letter of Finding], <https://www.denverpost.com/wp->

In finding that no civil rights violation had occurred, the Department of Transportation relied heavily on environmental statutory obligations.³¹ This approach perhaps reflects the agency's lack of civil rights expertise generally, and it is not an uncommon approach to Title VI disparate impact evaluations. Although dubiously adhering to Title VI, similar agency decisions have received the standard judicial deference when challenged as arbitrary and capricious under the Administrative Procedure Act (APA).³² Combined with trends in civil rights jurisprudence that undermine litigants' ability to challenge such decisions directly, this deference leaves litigants functionally without recourse to enforce Title VI in the courts.

Title VI of the Civil Rights Act was intended to have a sweeping effect on racial discrimination.³³ And in fact, Title VI disparate impact regulations are not ill-suited to addressing environmental racism.³⁴ The idea of disparate impact roughly reflects the institutional dynamics often driving the inequitable distribution of environmental burdens.

content/uploads/2017/04/letter-of-finding-i-70-project.pdf [https://perma.cc/MC9E-2AAE].

31. See discussion *infra* Section II.A.2.

32. See discussion *infra* Section I.B.2.

33. See discussion *infra* Section II.C.

34. Richard Lazarus argues that, at their core, the environmental and civil rights movements are redistributive in nature. Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 853–54 (1992) ("More substantively, both movements are redistributive in their ultimate focus. Civil rights plainly depends on a redistribution of wealth to achieve its ends. Similarly, environmentalism requires a de-emphasis of existing absolutist notions of private property rights in natural resources, because the unrestrained exercise of such rights can create tremendous environmental degradation. Therefore, both movements tend to view, regardless of their legitimacy, those constitutional provisions aimed at preserving the status quo by protecting the existing distribution of private property rights as significant obstacles to the achievement of their desired ends."). For an analysis of how administrative regulations are well-disposed to address structural inequality, see Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 407 (arguing that administrative regulations are prospective in nature—aimed at eradicating inequality generally as opposed to remedying specific harms between individuals). See also Olatunde C. A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1377 (2012). Johnson uses the term "equality directives" (or "equity directives") as a more capacious shorthand to signal a legal regime that does not seek simply to remedy or avoid bias, but to "share federal resources, dismantle long-standing barriers in the distribution of federal funds, promote integration, and further inclusion in policymaking, planning, and services." Although she does not engage the distributive justice discourse, her equality directives resemble distributive justice legal regimes fairly closely.

To reinvigorate the promise of Title VI, I propose that courts adopt a heightened level of scrutiny when evaluating arbitrary and capricious challenges to agencies' Title VI disparate impact determinations in environmental justice cases. Others have observed that environmental justice poses a particular challenge for advocates because it sits at the intersection of two fundamentally incompatible areas of law—environmental and civil rights.³⁵ Were courts to tailor their review of Title VI disparate impact determinations, they could insist that agency analysis remain faithful to the antidiscrimination principles motivating the Civil Rights Act. And their insistence could force agencies to partially resolve the tension between these two areas of law. This resolution should capitalize on the central observation of environmental justice: that racial minorities disproportionately suffer cumulative environmental exposures with long-term health effects due to unjust institutional power dynamics.

Part I explores some failed attempts, so far, to deploy Title VI against environmental injustice. Section A briefly lays out the background and mechanics of disparate impact regulations implementing Title VI. Section B then recites how arbitrary and capricious procedural challenges became the last available mechanism for enforcing these regulations, and describes two attempts to challenge federal actions degrading the health of minority communities.

Part II advocates a more searching review of agency responses to pollution challenged as arbitrary and capricious under Title VI. Section A explains how two agencies failed to engage an environmental justice framework by declining to perform risk assessments that took into account the cumulative and synergistic effects of pollution. These agencies, analyzing distinct Title VI challenges, ignored the key environmental justice insight that these dynamics make pollution affect minority communities more acutely. Section B critiques the agencies' approach as an unfaithful reading of their Title VI statutory mandate. Finally, Section C explains how a more skeptical judicial posture would be consistent with the Supreme Court's and D.C. Circuit Court's justifications for tailored judicial review of agency decisions, which typically entail compensating for lack of agency expertise in the relevant policy area. In the

35. See discussion *infra* Section II.A.

analogous circumstances of Title VI environmental justice challenges, agencies are analyzing the civil rights implications of environmental hazards—a dynamic that strains agency expertise and undermines the efficacy of Title VI as a tool against the hazardous effects of institutionalized racism.

I. FRUSTRATED ATTEMPTS TO DEPLOY TITLE VI AGAINST ENVIRONMENTAL INJUSTICE

Contemporary environmental justice activists rely heavily on private litigation to mitigate the impacts of environmental racism.³⁶ Litigants initially brought environmental justice claims under the Equal Protection Clause of the Fourteenth Amendment, but that strategy was promptly abandoned when plaintiffs could not prove agencies' discriminatory intent.³⁷ Targeting environmental injustice as a result of institutional racism, they turned to Title VI disparate impact regulations.³⁸ However promising Title VI might have been as a tool against environmental racism, its usefulness was short-lived. Courts interpreted the statute narrowly, diminishing the recourse available to communities disproportionately suffering the effects of environmental degradation.³⁹

After explaining the basic regulatory structure that implements Title VI, this Part goes on to show how arbitrary and capricious challenges under the Administrative Procedure Act came to be the last viable way for litigants to enforce Title VI disparate impact regulations. Finally, this Part uses two environmental justice challenges to demonstrate how judicial deference to agency decisions undermines the utility of Title VI as a tool against environmental injustice by failing to scrutinize agencies' civil rights analyses.

36. David J. Galalis, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 63 (2004). Other avenues for recourse include attempts to influence policymaking on the front end, as well as negotiation. *Id.*

37. Lisa S. Core, *Alexander v. Sandoval: Why a Supreme Court Case About Driver's Licenses Matters to Environmental Justice Advocates*, 30 B.C. ENVTL. AFF. L. REV. 191, 192 (2002).

38. *Id.* at 192–93.

39. Galalis, *supra* note 36, at 64, 68–74 (explaining how the Supreme Court grappled with whether Title VI includes a private right of action).

A. *Title VI Background*

Title VI of the Civil Rights Act prohibits federal funding recipients from discriminating on the basis of race, ethnicity, or national origin.⁴⁰ As a practical matter, Title VI was intended to assure federal agencies of their authority to prohibit discrimination by the programs they administered.⁴¹ These goals are reflected in the two mechanical sections of Title VI: Section 601 prohibits discrimination under any federally funded program, and Section 602 directs agencies to implement that directive through rules and regulations.⁴² Pursuant to this delegation of authority to implement Title VI, agencies responsible for administering federal funds promptly adopted disparate impact regulations.⁴³

These regulations reflect the sentiment surrounding the passage of Title VI. The Civil Rights Act of 1964 was “ground-breaking and comprehensive.”⁴⁴ Justice Stevens has described the Title VI legislative history on this point as “lengthy, consistent and impassioned.”⁴⁵ A theme of the floor debate was that Title VI allowed Congress to make a strong statement against racial discrimination separate from its consideration of

40. 42 U.S.C. § 2000d (2012).

41. DEP’T OF JUST. LEGAL MANUAL, *supra* note 22, at § II (explaining the reasons for the enactment of Title VI identified by Senator Hubert Humphrey, the Senate manager of the Civil Rights Act of 1964); 110 CONG. REC. 6554 (1964).

42. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”); § 2000d-1 (“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 2000d of this title 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 the financial assistance in connection with which the action is taken.”).

43. *Alexandar v. Sandoval*, 532 U.S. 275, 293–94 (2001) (Stevens, J., dissenting). The Department of Justice Civil Rights Division coordinates federal compliance with Title VI, per a 1980 executive order. Exec. Order No. 12250, 28 C.F.R. pt. 41 app. a (1980). Coordinating compliance entails approving agency regulations promulgated to implement Title VI. DEP’T OF JUST. LEGAL MANUAL, *supra* note 22, at § II.

44. *Sandoval*, 532 U.S. at 293 (Stevens, J., dissenting).

45. *Id.*

particular federal assistance programs.⁴⁶ In authorizing agencies to implement these lofty goals, Congress indicated its intention that agencies maintain a sensitivity to basic fairness in light of the government's history of discrimination.⁴⁷ Despite these soaring aspirations, environmental justice challenges under Title VI are increasingly difficult as the Supreme Court's administrative and civil rights jurisprudence has posed difficulties for challenges to discrimination in publicly funded projects.⁴⁸

B. Diminished Avenues for Recourse Under the Administrative Procedure Act

The APA has proven an ineffective mechanism for enforcing Title VI disparate impact regulations, in part due to a doctrinal presumption that courts may not review key agency decisions challenged as arbitrary and capricious. This Section lays out the arbitrary and capricious doctrine before describing how it influenced two environmental justice challenges—one involving pesticides in California and one involving the I-70 expansion in Elyria-Swansea. As elaborated in Part II, these two cases illustrate the shortcomings of agency analysis and

46. Applicability of Certain Cross-Cutting Statutes to Block Grants Under the Omnibus Budget Reconciliation Act of 1981, 6 Op. O.L.C. 83, 87–88 (1982) (“The need to settle the issue ‘once and for all’ was a repeated theme of the debate surrounding Title VI.”); *see also* 110 CONG. REC. 7061 (Senator Hart remarked, “We do not take money from everybody to build something, admission to which is denied to some.”); 110 CONG. REC. 6544 (1964) (“Many of us have argued that the issue of nondiscrimination should be handled in an overall, consistent way for all Federal programs, rather than piecemeal, and that it should be considered separately from the merits of particular programs of aid to education, health, and the like. This bill gives the Congress an opportunity to settle the issue of discrimination once and for all, in a uniform, across-the-board manner, and thereby to avoid having to debate the issue in piecemeal fashion every time any one of these Federal assistance programs is before the Congress.”).

47. 110 CONG. REC. 6544 (1964) (Senator Humphrey explained that “Title VI is an authorization and a direction to each Federal agency administering a financial assistance program . . . to take action to effectuate the basic principle of nondiscrimination stated in section 601.”); *see also* 110 CONG. REC. 1521 (1964) (House Judiciary Committee Chairman-elect Emanuel Celler, advocating the passage of the Civil Rights Act as a whole, urged that “[t]he demonstrations and violence of recent months have served to point up what many of us have known for years: That this Nation can no longer abide the moral outrage of discrimination.”).

48. *See* discussion *infra* Section I.B.; *see also* Outka, *supra* note 11, at 223–28.

the need for more rigorous judicial review if Title VI is to be relevant to environmental justice.

Litigants seeking to enforce Title VI disparate impact regulations initially argued that Title VI included an implied right of action.⁴⁹ When the Supreme Court foreclosed that option in *Alexander v. Sandoval*,⁵⁰ litigants turned to Section 1983 of the Civil Rights Act.⁵¹ Section 1983 authorizes a private action in response to a deprivation of federal statutory or constitutional rights,⁵² empowering parties to enforce federal laws against state and municipal actors.⁵³ This approach was, in fact, invited by the *Sandoval* dissent.⁵⁴ Although the Supreme Court has yet to directly address this approach, it has expressed reluctance to find an implied private right of action absent a clear expression of congressional intent.⁵⁵ As a result, circuit courts are split on the question of whether Section 1983 creates a pri-

49. Galalis, *supra* note 36, at 64.

50. 532 U.S. 275 (2001). For an in-depth analysis of this case, see Core, *supra* note 37.

51. Galalis, *supra* note 36, at 64.

52. 42 U.S.C. § 1983 (2012) reads in full:

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, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

53. *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that § 1983 created a cause of action against state actors for violations of federal law); *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658 (1977) (holding that municipal liability is cognizable under § 1983); *see also* *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985) (explaining how the Court established in *Maine v. Thiboutot*, 448 U.S. 1 (1980), that Section 1983 allowed "private parties to enforce federal laws against a special class of defendants—state and municipal actors").

54. *Alexander v. Sandoval*, 532 U.S. 275, 300 (2001) (Stevens, J., dissenting) ("Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.").

55. *Jones & Jacques*, *supra* note 10, at 425–26.

vate right of action to enforce agency regulations generally,⁵⁶ but the apparent trend is that it does not.⁵⁷

Precluded from substantive challenges under Section 602 and Section 1983,⁵⁸ litigants employed the APA to challenge state environmental decisions that had a disparate impact on racial minorities. Seemingly the last remaining avenue for judicial recourse, it has also proven unavailing for plaintiffs.

1. *State Farm* Background and Mechanics

The APA allows courts to set aside agency decisions that are “arbitrary and capricious”—outside the bounds of the agency’s legislatively delegated authority.⁵⁹ In *Motor Vehicle Manufacturers Ass’n v. State Farm*, the Supreme Court directed courts to apply hard-look review to informal agency decisions challenged as arbitrary and capricious, in violation of the APA’s minimum requirements for agency decisions.⁶⁰ Judicial review of agency action has waxed and waned over the course of the twentieth century,⁶¹ and scholars continue to

56. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 936 (9th Cir. 2003) (describing the circuit split as it stood in 2003).

57. *See Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006) (“[T]he rule . . . that a federal regulation alone may create a right enforceable through § 1983, is no longer viable.”); *S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001) (“[W]e hold that a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.”); *Harris v. James*, 127 F.3d 993, 1007 (11th Cir. 1997) (finding the Supreme Court has not held “that federal rights are created either by regulations of their own force or by any valid administrative interpretation of a statute that creates some enforceable right”); *see also Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987) (“An administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute.”).

58. For a more in-depth analysis of litigants’ attempts to launch substantive challenges to Title VI violations, see Galalis, *supra* note 36, at 61–65.

59. 5 U.S.C. § 706(2)(A) (2012) (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall[] hold unlawful and set aside agency action, findings, and conclusions found to be[] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .”).

60. 463 U.S. 29, 43 (1983); Catherine M. Sharkey, *State Farm “With Teeth”: Heightened Judicial Review in the Absence of Executive Oversight* 120–21 (N.Y.U. Sch. L., Public Law & Legal Theory Research Paper Series, Working Paper No. 14–15, 2014).

61. Sharkey, *supra* note 60, at 119 nn.65–66.

disagree over the intended stringency of arbitrary and capricious review.⁶²

Under *State Farm*, the reviewing court examines the administrative record and the agency's explanation:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁶³

A court will not accept an agency's "*post hoc* rationalizations for agency action."⁶⁴ And when an agency's justification for its decision fails on one of these factors, the court "should not attempt itself to make up for such deficiencies" by supplying a "reasoned basis" not offered by the agency.⁶⁵

As something of an extension of *State Farm* analysis, courts defer to agency inaction just as they do agency action.⁶⁶ In *Heckler v. Chaney*, the Supreme Court held that the decision whether to enforce regulations is generally committed to agency discretion.⁶⁷ This presumption is based on the idea that such decisions entail balancing a number of complicated factors peculiar to the agency's area of expertise, including the calculation of whether agency resources are best spent on one given statutory violation over another.⁶⁸ Agency enforcement decisions are only presumptively unreviewable and may be overcome if Congress has provided meaningful "law to apply" through the substantive statute.⁶⁹ "If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law"⁷⁰ This pre-

62. *Id.* at 119–20.

63. *State Farm*, 463 U.S. at 43; *see also* Sharkey, *supra* note 60, at 121.

64. *State Farm*, 463 U.S. at 50.

65. *Id.* at 43.

66. *Heckler v. Chaney*, 470 U.S. 821 (1985).

67. *Id.* at 831–32.

68. *Id.* at 831.

69. *Id.* at 832–35.

70. *Id.* at 834–35.

sumption of unreviewability cuts right to arbitrary and capricious challenges of an agency's failure to adequately enforce its Title VI disparate impact regulations.

2. Judicial Deference to Agency Rejections of Disparate Impact Claims

In two recent environmental justice challenges, EPA decisions were upheld—though scarcely analyzed—because of the high degree of deference accorded to agency determinations. These outcomes are meaningful for Title VI because civil rights doctrines, namely *Sandoval* and the § 1983 cases discussed in Section I.B, foreclose direct litigation under Title VI disparate impact regulations.

a. California Clean Air Act Challenge

In two related cases involving challenges to California's Clean Air Act implementation plan, the Ninth Circuit demonstrated the capacity of *Heckler* to shut down Title VI environmental justice claims. In *El Comite Para el Bienestar de Earlimart v. EPA*, the plaintiffs alleged that the EPA arbitrarily and capriciously approved California's air quality plan without considering whether it would violate Title VI.⁷¹ Under the Clean Air Act, the state must provide "necessary assurances" that no state or federal law would impede the Act's implementation.⁷² The plaintiffs alleged that the approved state implementation plan would disproportionately expose Latino schoolchildren to pesticides, in violation of the agency's Title VI disparate impact regulations and, therefore, in defiance of the Clean Air Act's "necessary assurances" provision.⁷³ Notably, the EPA Office of Civil Rights had found that the state's planned use of methyl bromide constituted a *prima facie* Title VI violation and opted to settle with the state years earlier, in 1999.⁷⁴ Now challenging California's Clean Air Act imple-

71. 786 F.3d 688, 695 (9th Cir. 2015).

72. *Id.* at 692.

73. *Id.* at 695.

74. *Id.* at 700. This finding was in response to the "Angelita C." complaint. For the EPA Office of Civil Rights' response to that complaint, see Letter from Rafael DeLeon, Director, U.S. EPA to Christopher Reardon, Acting Dir., Cal. Dep't of Pesticide Regulation, Title VI Complaint 16R-99-R9 (Apr. 22, 2011), <https://www.>

mentation plan, the plaintiffs submitted evidence during the comment period to demonstrate that pesticide use had not decreased since the EPA's study in response to the 1999 complaint.⁷⁵ California responded with evidence of its compliance with the settlement, and the plan was approved.⁷⁶ The plaintiffs' core argument as to the EPA's Title VI failure was that the agency should have undertaken an "exposure assessment and disparity analysis" like the one it originally used to assess the disparate impact of the methyl bromide registration.⁷⁷ The Ninth Circuit rejected that argument, holding that the EPA's determination as to what assurances are "necessary" under the Clean Air Act is a matter of agency discretion.⁷⁸

The other case challenging California's Clean Air Act implementation plan, *Garcia v. McCarthy*, dealt with the same administrative complaint at issue in *El Comite*, but this time the plaintiffs alleged that the settlement itself was in violation of the EPA's duties under Title VI.⁷⁹ The district court granted the EPA's motion to dismiss for lack of subject matter jurisdiction.⁸⁰ Affirming the district court's decision on appeal, the Ninth Circuit drew from *Heckler v. Chaney* and upheld the EPA's discretion to settle and to determine the scope of its investigation.⁸¹ The court invoked the core logic of *Heckler*—that courts are not necessarily the most appropriate body to police whether agencies "carry out their delegated powers with sufficient vigor."⁸² In addition, the Ninth Circuit upheld the EPA's authority to define the scope of its investigation into alleged Title VI violations.⁸³

Judicial deference to agency disparate impact determinations in these California cases does not bode well for the Elyria-Swansea I-70 challenge. The Elyria-Swansea litigants appear to have exhausted their administrative appeals, and the courts are unlikely to probe the Department of Transportation's deci-

epa.gov/sites/production/files/2016-04/documents/title6-c42211-preliminary-finding.pdf [https://perma.cc/49GR-VJJE].

75. *El Comite*, 786 F.3d at 700.

76. *Id.*

77. *Id.*

78. *Id.*

79. 649 F. App'x 589, 590–91 (2016).

80. *Id.*

81. *Id.* at 591.

82. *Id.*

83. *Id.*

sions to reject their claim. This precedent suggests Title VI is irrelevant to the struggle for environmental justice, absent a shift in doctrine.⁸⁴

b. Elyria-Swansea I-70 Expansion

In 2016, a group of Elyria-Swansea residents challenged the proposed I-70 expansion as a violation of the Department of Transportation's disparate impact regulations.⁸⁵ The challenge was based on several negative impacts, including an increase in air pollution known to cause respiratory illnesses and death.⁸⁶ These respiratory effects are being foisted on one of the most polluted communities in Colorado.⁸⁷ Notably, CDOT failed to assess the effect of this increase in air pollution in conjunction with the array of other emission sources located in the neighborhood.⁸⁸ The neighborhood group's challenge focused on CDOT's narrow assessment of the health risks posed by the I-70 expansion.⁸⁹ However, the Department of Transportation found that the state's plan did not violate Title VI.⁹⁰ Specifically, the agency said there was insufficient evidence that the project would have an adverse, disparate impact on the Elyria-Swansea residents relative to the considered alternatives.⁹¹

As demonstrated by the California Clean Air Act challenge, courts' standard deference to agency discretion undermines what is perhaps the last remaining avenue for judicial recourse for Elyria-Swansea residents. But this standard is not inevitable—courts have tailored their review of agency determinations in circumstances analogous to these environmental justice cases. A more searching review of Title VI challenges on environmental grounds would further congressional intent for Title VI.

84. For the purposes of this analysis, I assume a local court would apply the *State Farm* jurisprudence in a manner roughly consistent with the Ninth Circuit court decisions explained in this Section.

85. Earthjustice Complaint, *supra* note 1, at 1–3.

86. *Id.* at 23.

87. *Id.* at 26.

88. *Id.* at 23–24.

89. *Id.* at 4–5, 23–25.

90. Dep't of Transp. Letter of Finding, *supra* note 30.

91. *Id.*

II. ADVOCATING A MORE SEARCHING JUDICIAL REVIEW OF TITLE VI ENVIRONMENTAL RACISM CLAIMS

Despite federal commitments to environmental justice in the form of executive orders⁹² and internal agency policies,⁹³ outside advocates have had little success inflecting agency environmental decisions with a civil rights perspective.⁹⁴ Professor Tseming Yang attributes some of the struggle to achieve environmental justice legal victories to a fundamental incompatibility between civil rights law and environmental law.⁹⁵ These bodies of law draw their frameworks from their distinct political and theoretical origins, especially with regard to the distribution of social harm.⁹⁶ Where environmental law is designed to protect the collective population from the deleterious actions of individuals or small private groups, civil rights law seeks to protect minority groups against majority oppression.⁹⁷ These perspectives on social harm translate to different methodologies for detecting it. Environmental law emphasizes uniform pollution standards, quantified risk, and neutral require-

92. In response to a series of government and non-governmental reports on environmental injustice, President Clinton signed Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, urging federal agencies to consider environmental justice in their decision-making. Exec. Order No. 12,898, 32 C.F.R. § 651.17 (Feb. 11, 1994), *reprinted as amended in* 42 U.S.C. § 4321 (2012).

93. After the Congressional Black Caucus met with EPA administrators to discuss the environmental impacts on low-income and minority communities that caucus members believed were not ably handled, the EPA established the Environmental Equity Workgroup and issued a report on the disproportionate environmental risk to these communities. Jeanne Marie Zokovitch Paben, *Approaches to Environmental Justice: A Case Study of One Community's Victory*, 20 S. CAL. REV. L. & SOC. JUST. 235, 237 n.13 (1992). During the Obama administration, EPA Administrator Lisa Jackson appointed a Senior Counsel for External Civil Rights to work on resolving the agency's backlog of pending Title VI complaints and to generally reform and evaluate the program. *Id.* at 240–41.

94. See Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 21–22 (2002).

95. *Id.* at 14.

96. For a narration of the distinct theoretical origins of civil rights and environmental law, see Yang, *supra* note 94, at 9–11 (explaining the roots of environmental law in Garret Hardin's *The Tragedy of the Commons* and Rachel Carson's *Silent Spring*), 11–14 (explaining modern civil rights law as flowing from the Supreme Court's approach in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

97. Outka, *supra* note 11, at 216.

ments detached from particularized value judgments.⁹⁸ This paradigm, though, fails to accommodate the environmental justice concern for racialized environmental vulnerabilities of minority communities within the broader collective assessment.⁹⁹ Such an awareness of social inequities is missing from agencies' Title VI disparate impact analyses.

According to the current arbitrary and capricious deference standard, the EPA has been given broad leeway to evaluate the effects of pollution using methodologies that obscure how individuals actually experience pollution.¹⁰⁰ Agencies are monitoring isolated emissions, disregarding cumulative and synergistic effects on individuals.¹⁰¹ As environmental justice advocates have observed, minority communities experience pollution more acutely than white communities.¹⁰² Because of this discrepancy, the modeling that currently justifies findings of no disparate impact—and judicial deference to those choices—does not account for variations in how pollution degrades the health of differently situated people. These variations are the essence of discrimination.

Tailored judicial review of Title VI disparate impact claims could force agencies lacking civil rights expertise to prioritize the disparate health impacts that characterize racial oppression iterated in toxic exposure patterns. This prioritization would avoid the current arbitrary and capricious approach to environmental justice claims under Title VI: analyzing such disparate impact claims under an environmental paradigm that construes discrimination in a way that is inconsistent with civil rights law. Most importantly, tailored review would revive the environmental justice potential of Title VI challenges while preserving the basic power arrangement crafted by Congress in passing the Civil Rights Act.

After examining the courts' failure to analyze environmental justice concerns in the California pesticide and the Elyria-Swansea I-70 challenges in Section A, this Part goes on to ex-

98. *Id.* at 216–17.

99. *Id.*

100. See discussion *infra* Section III.A.1., dissecting the framework deployed by the EPA in the California Clean Air Act challenges.

101. See discussion *infra* Section III.A.1., explaining the EPA's Title VI analysis in the California Clean Air Act challenges, and Section III.A.2, explaining the Department of Transportation's Title VI analysis in the I-70 challenge.

102. See discussion *supra* Introduction.

plain that this perspective is essential to executing the Title VI statutory mandate.

A. *Absence of Environmental Justice Insights in Title VI Pollution Analysis*

Title VI disparate impact analysis often lacks an environmental justice perspective. This is evident both in agencies' dependence on environmental statutory obligations as a benchmark for discrimination and in their failure to perform health assessments that would account for the multiple and cumulative exposures characteristic of environmental racism.¹⁰³ Environmental statutes are at odds with the civil rights framework because they take fundamentally different positions on the distribution of social benefits. Statutes like the National Environmental Policy Act and the Clean Air Act presume a uniform distribution of environmental burdens within their race-neutral analytical structures.¹⁰⁴ Agencies' reliance on these statutes as a benchmark for racial disparities in the distribution of environmental outcomes perpetuates this race-neutral framing.

1. California Clean Air Act Challenge

In the California pesticide challenges discussed in Section I.B.2, the Ninth Circuit Court of Appeals deferred to the EPA's handling of California programs that disproportionately exposed Latino schoolchildren to pesticides. In one instance, the plaintiffs challenged the EPA's settlement of the *prima facie* Title VI violation based on pesticide use around the school.¹⁰⁵ In the other instance, the plaintiffs challenged the state's failure to investigate, as part of its air quality plan, whether pesticide levels had diminished to acceptable levels.¹⁰⁶

In these cases, the agency prioritized an approach emblematic of the environmental paradigm at two key points. The

103. See discussion *infra* Section II.B.

104. For a critique of the Clean Air Act's blind spots—and how they are relevant to racialized distribution of environmental burdens—see Anne E. Carlson, *The Clean Air Act's Blind Spot: Microclimates and Hotspot Pollution*, 65 UCLA L. REV. 1036 (2018). For an explanation of the National Environmental Policy Act's procedural emphasis, see Outka, *supra* note 11, at 237–40.

105. *Garcia v. McCarthy*, 649 F. App'x 589 (2016).

106. *El Comité Para el Bienestar de Earlimart v. EPA*, 786 F.3d 688 (9th Cir. 2015).

first was the EPA's decision to limit its investigation to only one pesticide over five years.¹⁰⁷ The second was the EPA's crafting of the suggested settlement to focus almost exclusively on monitoring that pesticide at the school alone.¹⁰⁸ While the EPA's analyses might facilitate an accurate depiction of exposure to methyl bromide, they do not account for how that pollutant is impacting students with increased susceptibility to negative health impacts from cumulative exposures to other pesticides. This single-minded focus on a single pesticide around the school all but guarantees that any health impacts resulting from multiple and cumulative exposures, encountered at home or elsewhere in the neighborhood, will inform disparate impact assessments during judicial review.

2. Denver I-70 Challenge

In the Denver I-70 case, the Department of Transportation relied almost exclusively on the Clean Air Act's technical framework for modeling acceptable environmental harm in its rejection of the Title VI challenge to the highway expansion.¹⁰⁹ The complaint filed with the Federal Highway Administration (FHWA) Office of Civil Rights (OCR) highlighted some of the deficiencies in the state's approach to devising a plan for I-70 repair and expansion: the state narrowed down the available I-70 repair options and eliminated a range of less discriminatory alternatives,¹¹⁰ and it declined to perform a health assessment for its chosen plan.¹¹¹

107. *Garcia*, 649 F. App'x at 590–91.

108. Agreement Between the California Department of Pesticide Regulation and the United States Environmental Protection Agency (Aug. 24, 2011), <https://www.epa.gov/sites/production/files/2016-04/documents/title6-settlement-agreement-signed.pdf> [<https://perma.cc/PYA8-DPBE>].

109. Dep't of Transp. Letter of Finding, *supra* note 30, at 20–23.

110. Earthjustice Complaint, *supra* note 1, at 13.

111. *Id.* at 11. The state justified its decision not to investigate the project's health impacts on neighborhood residents because, it claimed, the plan it chose would have roughly the same impacts as the other options in consideration at that late stage. Sierra Club et al., Comment Letter Objecting to Approval of Proposed 2017–2020 Colorado State Transportation Improvement Program 5, <http://www.sierraclub.org/sites/www.sierraclub.org/files/sce-authors/u557/STIPcommentsSierraClub,CLF,CGD,etc20160429.pdf> (last visited Dec. 20, 2018) [<https://perma.cc/N794-UW29>]. However, this batch of options was artificially limited to exclude improvements to public transit and highway rerouting options, so the relative health benefits of these diverse proposals were not considered. Earthjustice Complaint, *supra* note 1, at 19–20. This occurred as part of the environmental

The OCR's analysis supplanted its civil rights obligations with environmental ones. It analyzed the I-70 expansion according to the Clean Air Act's race-neutral and broad-scale model, precluding a neighborhood-level assessment that would have provided some insight into I-70's effects on the health of the predominantly Latino neighborhood residents.¹¹² The OCR concluded that because the state's selected highway expansion plan would not upset any of the agency's environmental obligations, it would also not result in a civil rights violation.¹¹³ This conclusion implies that the environmental paradigm driving the Clean Air Act and various other state-pollution air studies captures the institutional-racism dynamics at play in local communities. The state had no statutory mandate to assess the potential neighborhood increase in particulate matter because Denver as a whole had not exceeded the Clean Air Act's guidelines.¹¹⁴ A health impact assessment was not performed as part of the final environmental impact assessment because it was not required by either the National Environmental Policy Act or the Clean Air Act.¹¹⁵ Similarly, the OCR concluded that models of the health impacts of theoretical highways on a national scale adequately predicted the real-life consequences in this neighborhood.¹¹⁶

impact statement process required by the National Environmental Policy Act. See Randy Jensen, Colo. Dep't of Transp. et al., I-70 East Draft Environmental Impact Statement Section & Section 4(F) Evaluation 3–18 (Nov. 2008), http://www.i-70east.com/DEIS/I-70EastDEISSection4FEvaluation_Volume1.pdf [<https://perma.cc/2XUR-7UYR>]. The rejected proposals included some put forth by the community. Earthjustice Complaint, *supra* note 1, at 12. This momentum doomed any possible public health assessment, as the FHWA, in evaluating the state's decision for a potential Title VI violation, concluded that the available health assessment methodologies were not precise enough to calculate the different impacts among the limited set of proposals. COLO. DEP'T OF TRANSP., AIR QUALITY TECHNICAL REPORT: I-70 EAST FINAL ENVIRONMENTAL IMPACT STATEMENT 58–59 (Jan. 2016) [hereinafter FINAL ENVIRONMENTAL IMPACT STATEMENT], http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol2AttJ_Air-Quality.pdf [<https://perma.cc/8DGT-MVPT>].

112. Dep't of Transp. Letter of Finding, *supra* note 30, at 20–22.

113. *Id.*

114. *Id.*

115. Colo. Dep't Transp., I-70 East Final Impact Statement and Section 4(f) Evaluation 7 (Jan. 2016). The Final Environmental Impact Statement does indicate that the same air pollutants are estimated to be on the decline, due to transportation trends unrelated to the planned expansion. *Id.*

116. Dep't of Transp. Letter of Finding, *supra* note 30, at 21 (referring to the Colorado Department of Transportation's Final Environmental Impact Statement (FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 111)). Even those

B. Realigning the Title VI Disparate Impact Analysis with the Civil Rights Act

When an agency conducts its Title VI pollution analysis by allowing an environmental paradigm to entirely displace a civil rights paradigm, the agency condones environmental injustice that is inconsistent with civil rights law. As demonstrated by the agency decisions in the Elyria-Swansea I-70 challenge and the California Clean Air Act challenges, the environmental paradigm accommodates a significant amount of discrimination. If Title VI is to provide a robust tool against environmental racism, it must target the disparate impacts of pollution as they are experienced by individuals. Agencies cannot retain discretion to define discrimination in a way that elides racialized health outcomes.

1. Recognition of Racialized Individual Health Impacts Is Essential to Furthering the Title VI Antidiscrimination Mandate

Essential to environmental discrimination is the observation that minority communities experience pollution in the context of cumulative and synergistic effects.¹¹⁷ Agency application of the Title VI disparate impact provision should assess these dynamics, or otherwise be found arbitrary and capricious—inconsistent with the clear statutory directive not to discriminate. Title VI represents one component of a strong congressional statement against racial discrimination.¹¹⁸ Title

studies limited to Denver's highway ignore the cumulative effects of the myriad environmental hazards located in Elyria-Swansea, only comparing one highway to another. *Id.* at 57–64.

117. See Outka, *supra* note 11, at 231–34 (“Further, environmental laws have typically failed to address the problem of multiple exposures and cumulative effects on health, which are central to environmental injustice . . .”); see also EPA, FRAMEWORK FOR CUMULATIVE RISK ASSESSMENT 1–4 (May 2003), https://www.epa.gov/sites/production/files/2014-11/documents/frmwrk_cum_risk_assmnt.pdf [<https://perma.cc/N28H-NPHM>] (explaining that environmental justice cases, including those deploying Title VI, “have further emphasized the need for a cumulative human health risk assessment methodology”).

118. Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining Discrimination*, 70 GEO. L.J. 1, 4–10 (1981) (explaining the social and philosophical origins of Title VI's core nondiscrimination principle and describing the passage of Title VI as part of a legislative effort, jointly with federal courts, to “end a century of mistreatment of black Americans”).

VI also represents a regulatory approach to the basic idea that federal funds should not perpetuate discrimination.¹¹⁹ For Title VI to provide a robust tool against environmental racism, it must target the disparate impacts of pollution as they are experienced by individuals. This approach would be consistent with the congressional directive that public funds should not entrench discrimination.

Although Congress gave agencies significant freedom in implementing Title VI, this leeway was designed to ensure that Title VI would not interfere with the efficient operation of other administrative programs.¹²⁰ Title VI instructs that implementing regulations should be “consistent with the objectives” of an agency’s underlying federal program.¹²¹ This design was intended to ensure that isolated acts of discrimination would not be the undoing of a congressionally authorized program.¹²² Investing agencies with such expansive authority to craft their own approaches to the implementation of Title VI was a strategic legislative compromise and an acknowledgment that discrimination manifests in diverse and complex ways.¹²³ Although discussions leading up to its passage contemplated that the provision would combat institutional discrimination,¹²⁴ the structure of Title VI reflects a legislative compromise over the scope of what would qualify as prohibited “discrimination.”¹²⁵ By giving agencies capacious authority to determine what constitutes discrimination within the programs they administer, Congress recognized that the precise contours of Title VI’s antidiscrimination principle would vary by agency and by federal project and would not always be entirely self-evident.¹²⁶

In some environmental justice challenges, agencies are approaching disparate impact discrimination using methods characteristic of environmental regimes—but that elide the

119. *Id.*

120. *Id.* at 29–30.

121. *Id.* at 29, 38.

122. *Id.*

123. *Id.* at 24–32.

124. *Id.* at 25–26, 29–30 (explaining the role of “racial imbalance” in Congress’s crafting of its definition of “discrimination”).

125. *Id.* at 29–30.

126. *Id.* at 9 (“Congress realized that the scope of title VI’s antidiscrimination principle clearly would not be self-evident in all contexts, and for that reason affected agencies—not courts—were empowered to adopt ‘rules, regulations, or orders’ to guide their respective programs.”).

racialized health impacts of toxic exposure.¹²⁷ Rather than an engagement of Title VI statutory obligations to detect and prevent discrimination in federal programs, this approach writes discrimination out of existence. A faithful execution of the Title VI nondiscrimination mandate would strive to detect how government policies disperse social burdens according to race at the individual level. Where an environmental justice approach would account for how individuals experience pollution, the environmental paradigm extrapolates individual health impacts, undifferentiated by race, from how pollution impacts the population.¹²⁸ Because such a systemic perspective ignores the racialized dispersal of environmental harms, environmental statutes are therefore an inappropriate benchmark for racial discrimination. Evaluating Title VI claims under a statutory framework that defines harm in a race-neutral way is not a faithful enactment of the Civil Rights Act's antidiscrimination principle—it is a work-around.

2. The Failure of Environmental Law to Account for Racialized Health Effects of Pollution

Agencies' analyses in the California pesticide challenges and the Elyria-Swansea I-70 challenge inappropriately used environmental detection methods as a stand-in for civil rights analysis consistent with Title VI's mandate. Agencies are failing to implement analytical methods that would account for how individuals experience the racialized distribution of environmental burdens, instead drawing their frames of reference and analytical approaches from environmental statutes. In the environmental context, disparate impacts manifest as adverse health impacts arising from toxic exposure. Although environmentally deleterious projects can disproportionately impact minority communities in ways not immediately related to health outcomes, such as displacing people from their homes or

127. See discussion *infra* Section II.B.2.

128. Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3, 19–24 (2000) (explaining the basic components of quantitative risk assessment and how individual risk is extrapolated from broad-scale data analysis); see also Outka, *supra* note 11, at 251–59 (questioning the utility of risk calculations as a tool to combat environmental injustice and characterizing the concept as “central” to the administration of environmental laws).

generating noise pollution,¹²⁹ these negative health outcomes are where environmental law can speak to civil rights claims.

However, environmental law broadly fails to account for the way that these health outcomes are disproportionately foisted upon minority communities as a result of institutional racism. Environmental law's reliance on risk assessment to establish acceptable health standards¹³⁰ obscures the effect of multiple and cumulative exposures on a person's health.¹³¹ This shortcoming of environmental law is particularly acute when the person in question is a person of color, as communities of color are more adversely affected by the failure of risk assessment to track multiple and cumulative toxic exposures.¹³² Bare risk assessment does not adequately capture the risk associated with long-term exposures to even one toxic chemical.¹³³ In addition, synergy among chemicals tends to increase their toxicity.¹³⁴ The most effective disparate impact analysis in service of environmental justice goals would take into account the synergistic effects of multiple toxic exposures in the long term.¹³⁵

Title VI disparate impact regulations should ideally compensate for these shortcomings of the environmental paradigm by focusing agency attention on the ways that minority communities experience toxic exposure. It is impossible to adequately assess the impact of a public project on a minority community when that assessment situates that community in a vacuum, removed from the other cumulative long-term exposures they endure. This is the key to tailored environmental justice review: ensuring that agencies conduct Title VI disparate impact analysis in a way that assesses the on-the-ground health impacts of a public project in the context of multiple and cumulative exposures. The EPA has already acknowledged the

129. For examples, see Earthjustice Complaint, *supra* note 1, cataloging the negative effects anticipated as a result of the I-70 expansion.

130. Outka, *supra* note 11, at 251–59.

131. Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 117–21.

132. *Id.* at 119.

133. Outka, *supra* note 11, at 255.

134. Kuehn, *supra* note 131, at 117–21; *see also* Nina Cedergreen, *Quantifying Synergy: A Systematic Review of Mixture Toxicity Studies Within Environmental Toxicology*, 9 PLOS ONE, no. 5, May 2014; Joe L. Mauderly & Jonathan M. Samet, *Is There Evidence for Synergy Among Air Pollutants in Causing Health Effects?*, 117 ENVTL. HEALTH PERSPECTIVES, no. 1, Jan. 2009.

135. Kuehn, *supra* note 131, at 117–21.

need to conduct cumulative risk assessments, partially in response to Title VI plaintiffs' complaints.¹³⁶ However, the EPA retains discretion to determine when such cumulative analyses are appropriate.¹³⁷

To bring environmental analysis in line with the definition of discrimination motivating the Civil Rights Act, tailored environmental justice review should be aimed at ensuring that agencies are required to conduct analyses, along the lines of what the EPA has already initiated, in Title VI disparate impact challenges. Tailoring judicial review in this manner would not upset the rhythm of disparate impact analysis, where the recipient of federal funds is able to counter an initial finding of disparate racial impact by establishing a substantial legitimate justification for the discrimination.¹³⁸ But when assessing the project's substantial legitimate justification, or whether there are less discriminatory alternatives available, tailored environmental justice review would ensure that the project's particular health impacts on a community are taken into account. This level of review would be a departure from the usual judicial deference to agency modes of analysis.

C. Legal Basis for Tailored Environmental Justice Review

When an agency considers whether a federal project will pollute minority communities in violation of its Section 602 disparate impact regulations, it must assess that environmental question consistently with Title VI of the Civil Rights Act. Under the current legal regime, courts defer to agency assessments of environmental degradation and whether it constitutes disparate impact discrimination in violation of Title VI.¹³⁹ But that need not be the case. Tailored judicial review is not un-

136. EPA, FRAMEWORK FOR CUMULATIVE RISK ASSESSMENT, *supra* note 117, at 1-4 (explaining that the framework was compiled in response to Title VI challenges, as well as an executive order directing agencies to consider multiple and cumulative risk assessments whenever practicable).

137. *Id.* at 5-6.

138. For an explanation of how a substantial legitimate justification for a public project can defeat a Title VI disparate impact claim, see DEP'T OF JUST. LEGAL MANUAL, *supra* note 22, at 30-42.

139. See Galalis, *supra* note 36, at 63-65.

heard of in challenges to agency decisions under the APA.¹⁴⁰ This sort of tailoring is a demonstration of what some commentators have termed “administrative common law,” where courts incorporate more stringent requirements into the APA’s minimal statutory requirements.¹⁴¹ This type of tailored review does not appear to be prohibited by the APA, and others have suggested that tailored review might achieve particular policy benefits by forcing agencies to develop their decision-making records in a particular manner.¹⁴²

Courts already apply heightened scrutiny to administrative decisions that fall outside the agency’s core area of expertise,¹⁴³ consistent with the typical justification for judicial deference—the agency’s technical competence in that policy arena.¹⁴⁴ In the context of *Chevron v. Natural Resources Defense Council*, the courts’ standard deference to agency interpretations of their own enabling statutes gives way to heightened scrutiny when the agency has interpreted a statute outside its core area

140. For example, courts review agencies’ compliance with the procedural requirements of the cross-cutting National Environmental Policy Act. *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (“Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration ‘to the fullest extent possible’ sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.”); *see also* *Shiffler v. Schlesinger*, 548 F.2d 96 (3d Cir. 1977). For further analysis of judicial review tailored to relative agency expertise, *see* *Del. Dep’t of Nat. Res. & Env’tl. Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015), discussed *infra* Section II.C.

141. *See* Sharkey, *supra* note 60, at 124–29. As a professor, Justice Scalia objected to these developments:

The courts have attached many procedural requirements not explicit in the APA. These include the requirements that the agency publish and permit the public to comment on all data and studies on which it intends significantly to rely, and that the agency justify the rule in detail and respond to all substantial objections raised by the public comments.

Id. at 124–25.

142. Sharkey argues that courts should more closely scrutinize the empirical justifications for agency determinations that do not benefit from executive oversight. This more stringent standard, she proposes, would serve an “information-forcing function, prodding agencies to develop and reveal to courts more robust regulatory records—either by buttressing their internal expertise and capacity or by voluntarily submitting to executive oversight.” *Id.* at 104.

143. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1309 (1986); *see also, e.g.,* *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972).

144. *See* Sharkey, *supra* note 60, at 119.

of substantive expertise.¹⁴⁵ For example, in a challenge to the Internal Revenue Service's interpretation of language in the Affordable Care Act (ACA), the Supreme Court deviated from the standard *Chevron* deference in determining the correct reading of the statute.¹⁴⁶ *Chevron* deference is premised on the assumption that Congress implicitly delegated authority to the agency to elucidate a statutory ambiguity through the regulatory process.¹⁴⁷ Instead, the Court determined that the IRS's interpretation of the ACA—a healthcare statute—was a circumstance in which Congress's intent to delegate that authority might appropriately be called into question.¹⁴⁸ Because the IRS's interpretation of key statutory language relied on questions of deep “economic and political significance” central to the ACA, the Court presumed that if Congress had intended to delegate interpretive authority to an agency lacking healthcare expertise, it would have done so explicitly.¹⁴⁹ “It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. This is not a case for the *IRS*.”¹⁵⁰ Following this presumption, the Court declined to extend deference to the IRS, opting instead to analyze the key statutory language *de novo*.¹⁵¹ In doing so, the Court was essentially

145. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (requiring an explicit congressional delegation of authority to interpret a statute outside the agency's area of expertise). The relevant statutory provision in such cases is 5 U.S.C. § 706(2)(C) (2012) (“The reviewing court shall[] hold unlawful and set aside agency action, findings, and conclusions found to be[] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;”); *Burwell*, 135 S. Ct. at 2488 (“When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach ‘is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.’” (citations omitted)).

146. *Burwell*, 135 S. Ct. at 2487–89.

147. *See generally*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

148. *Id.* at 2489. This aspect of the holding was following a case called *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), in which the Court found that Congress's intent to delegate authority might be called into question in some extraordinary circumstances.

149. *Burwell*, 135 S. Ct. at 2489 (quoting *Brown & Williamson*, 529 U.S. at 160).

150. *Id.*

151. *Id.*

applying a more searching review to the IRS's decisions in the healthcare context.

The Supreme Court has set some outer limits to administrative common law, but these could accommodate tailored judicial review, and indeed courts do adjust judicial review in ways that go beyond the APA's minimum procedural requirements. In *Vermont Yankee Nuclear Power Corp. v. NRDC*, the Court prohibited lower courts from imposing additional procedural requirements on agencies beyond what the APA requires.¹⁵² However, the Court's prohibition does not necessarily apply to hard-look review under *State Farm*, which is rooted in the APA's substantive, rather than procedural, provisions.¹⁵³ In hard-look review, courts are free to more closely analyze the reasonableness of agency decision-making without running afoul of *Vermont Yankee's* restriction.¹⁵⁴

In addition, the Court has declined to foreclose the option to eliminate deference in some arbitrary and capricious challenges.¹⁵⁵ In *FCC v. Fox Television Stations, Inc.*, a divided Court debated whether the APA's arbitrary and capricious provision permits heightened scrutiny.¹⁵⁶ Writing for the majority, Justice Scalia declined to subject independent agencies to more searching review;¹⁵⁷ in dissent Justice Breyer proposed careful judicial oversight to compensate for a lack of political accountability.¹⁵⁸ Although resisting the majority's attempt to characterize his proposal as heightened judicial scrutiny, Justice Breyer explained that independent agencies are insulated from political oversight, making a court's role in ensuring reasoned decision-making all the more important.¹⁵⁹ Justice Scalia certainly did not endorse Justice Breyer's articulation of why courts might be justified in more closely reviewing independent agencies' decisions.¹⁶⁰ But as a matter of precedent, Justice Scalia's majority opinion did not hold that the APA prohibits the courts from adjusting their level of oversight of indepen-

152. 435 U.S. 519 (1978); *see also* Sharkey, *supra* note 60, at 125.

153. 463 U.S. 29 (1983); *see also* Sharkey, *supra* note 60, at 125–26.

154. Sharkey, *supra* note 60, at 125–26.

155. *Id.* at 124–29.

156. 556 U.S. 502 (2009).

157. *Id.* at 525–26.

158. Sharkey, *supra* note 60, at 127.

159. *Fox*, 556 U.S. at 547 (Breyer, J., dissenting); Sharkey, *supra* note 60, at 127.

160. *Fox*, 556 U.S. at 523 (opinion of Scalia, J.).

dent agencies.¹⁶¹ Instead, he took note that the APA does not require more stringent oversight in the circumstances at issue.¹⁶² As others have pointed out, this case does not foreclose tailored judicial review in other circumstances.¹⁶³

The D.C. Circuit Court recently demonstrated its willingness to more closely scrutinize an agency's decision-making on matters outside its core area of expertise.¹⁶⁴ At issue in *Delaware Department of Natural Resources and Environmental Control v. EPA* was an agency rule exempting backup generators from emission controls in certain circumstances.¹⁶⁵ The Delaware Department of Natural Resources and Environmental Control alleged the rule was arbitrary and capricious.¹⁶⁶ The EPA justified the rule as an effort to support grid reliability.¹⁶⁷ But the D.C. Circuit Court rejected the EPA's explanation because grid reliability is not the province of the EPA—it is neither a subject of the Clean Air Act nor within the EPA's area of expertise.¹⁶⁸ The court further explained that “[t]here is no indication that either FERC, the federal entity responsible for the reliability of the electric grid, nor NERC, FERC's designated electric reliability organization, was involved in this rulemaking or submitted their views to EPA.”¹⁶⁹ EPA's generator rule, then, was not the “product of agency expertise,” as required by *State Farm*.¹⁷⁰

The same could be said of the EPA's or Department of Transportation's disparate impact determination in the Elyria-Swansea I-70 Title VI challenge. In these circumstances, the agency is applying expertise rooted in a substantive area of law that is at least distinct from civil rights law—and at most fundamentally incompatible with civil rights law. This area of administrative common law establishes that tailored judicial review is consistent with the APA in exactly the circumstance presented when the EPA or Department of Transportation

161. Sharkey, *supra* note 60, at 128.

162. *Id.*

163. *Id.* at 127–28.

164. *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015).

165. *Id.* at 7.

166. *Id.* at 3.

167. *Id.* at 18.

168. *Id.*

169. *Id.*

170. *Id.*

evaluates disparate impact claims, namely regulating outside their core areas of expertise.

In the context of environmental justice, agencies engage in an environmental analysis of pollution and its associated health risks, then make a civil rights determination by comparing those environmental factors to the pollution and health risks experienced by other communities.¹⁷¹ Civil rights and environmental law feature distinct methodologies and assumptions about social harm and how the law should distribute burdens and benefits.¹⁷² Detecting pollution within an environmental framework does not necessarily include a robust methodology for translating those observations to a definition of discrimination consistent with civil rights law. Disparate impact determinations require nuanced evaluations of the health impacts imposed by a federal project. The Department of Transportation's and EPA's narrow risk assessments fail to capture the environmental justice insight that cumulative and synergistic exposures define how pollution is experienced by racial minority communities. Any risk assessment that considers a single project in isolation fails to account for how institutional discrimination is felt. An agency lacking the civil rights expertise to perform this dynamic Title VI disparate impact analysis should forfeit its claim to *State Farm* deference.

Others have argued that *State Farm* itself is susceptible to multiple interpretations, as the Court deferred to agency expertise but also thoroughly investigated the administrative record for evidence of reasoned decision-making.¹⁷³ Either interpretation of *State Farm* suggests that courts might adopt a more skeptical posture toward agency analysis of Title VI challenges in the context of environmental degradation. The latter interpretation of *State Farm* very easily lends itself to more searching judicial review, as it invites the courts to comb through the agency's record of environmental investigation to ensure faithful execution of the Civil Rights Act. This analysis would entail breaking down an agency's process to ensure that they are not defining discrimination based on statutory environmental obligations—effectively excising the concept of disparate impact from their Title VI obligations.

171. See Outka, *supra* note 11, for background on risk assessments.

172. See Yang, *supra* note 94.

173. Sharkey, *supra* note 60, at 123.

CONCLUSION

Tailored judicial review of Title VI challenges to environmental injustice could help revive the environmental justice potential of Title VI while preserving Congress's basic regulatory design. It would allow courts to probe agencies' analyses of environmental benefits and burdens to determine whether they are evaluating disparate health impacts in a manner consistent with the environmental justice insight that institutional racism changes the way minority communities experience pollution. Subject to tailored judicial review, agencies would nevertheless still be free to apply their environmental expertise to detecting the health implications of a particular public project. Rather than divesting agencies of authority to assess the distributional inequities arising from a particular public project, tailored environmental justice review should marshal agencies' environmental analyses and conform them to the Title VI statutory mandate that public funds should not contribute to discriminatory projects. This tailored review would allow disparate impact policy to capitalize on the features of the administrative state that are especially suited toward the environmental justice goal of achieving an equitable distribution of environmental hazards.