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EMINENT DOMAIN AND ENVIRONMENTAL JUSTICE: A NEW STANDARD OF REVIEW IN DISCRIMINATION CASES

Catherine E. Beideman*

Abstract: Government takings of private land for public purposes are permitted by the United States Constitution. Recently, more takings have occurred that largely benefit private individuals rather than the general public. The land taken for private benefit has primarily been that of low-income and minority individuals. Similarly, toxic waste sites are most often placed in low-income and minority neighborhoods. The modern environmental justice movement helps to shed light on why low-income and minority property owners are targeted in this way. The U.S. Supreme Court should adjust its analysis of both takings cases and environmental justice cases to account for the inability of the victims of these government actions to prove discriminatory intent. Without this adjustment, the blatant disparate impact of these decisions will continue to disproportionately burden low income and minority individuals.

Introduction

In recent years, citizen groups have made numerous attempts to resist efforts of local and state governments to take private property for public use. Each of these cases involves a similar pattern: government condemns land for public use, and homeowners subsequently claim that the attested public use is not justifiable or that the compensation offered as remittance for their loss is not sufficient. An equally important—although less frequently acknowledged—similarity between these eminent domain cases is that the condemned land is typically owned by low-income or minority citizens who live in economically depressed areas, while the “public use” to which the land is dedicated often benefits

3 See Kelo, 843 A.2d at 510; Poletown, 304 N.W.2d at 465 (Ryan, J., dissenting).
middle or high-income citizens and/or politically favored groups or corporations.\textsuperscript{4}

Taking from the poor to give to the rich is not a new issue in environmental law, and the environmental justice movement was founded in part to oppose this trend.\textsuperscript{5} For many years, toxic waste sites and pollution hot-spots have been located in poor and minority areas where residents do not have the political or economic clout to protest effectively.\textsuperscript{6} As a result, most U.S. citizens now living on or near environmental toxins belong to low-income and minority groups.\textsuperscript{7}

Typically, environmental justice cases address the location of undesirable environmental hazards such as toxic waste sites.\textsuperscript{8} However, taking the land of low-income minority groups in order to transfer ownership to private businesses or developers under a public use theory raises equally substantive environmental justice issues as does the discriminatory siting of environmental hazards.\textsuperscript{9}

Part I of this Note discusses recent cases and scholarship on the government’s power of eminent domain. Part II reviews the history of the environmental justice movement in the United States and how this case law has evolved. Part III compares recent eminent domain cases with the framework established by current environmental justice theories. Finally, Part IV argues that a new standard should be developed that will take into account the realities of environmental and land use injustice in an effort to equalize the effect of both environmental hazards and takings on different demographic groups.

\textbf{I. EMINENT DOMAIN: HISTORY & RECENT DEVELOPMENTS}

The constitutional power to take, or condemn, private land for public use has long been recognized as essential to the smooth operation of both the federal and state governments.\textsuperscript{10} However, the Fifth Amendment of the U.S. Constitution provides specific limitations on

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\textsuperscript{4} See Poletown, 304 N.W.2d at 462 (Fitzgerald, J., dissenting); 769 Assocs., 800 A.2d at 93.
\textsuperscript{7} Colopy, supra note 5, at 130–34; Knorr, supra note 6, at 71; Yang, supra note 5, at 5–6.
\textsuperscript{8} See Knorr, supra note 6, at 71–72; Yang, supra note 5, at 5–6.
\textsuperscript{9} See Colopy, supra note 5, at 135 (discussing discriminatory impact of siting decisions).
\end{flushleft}
how and when a seizure of land may occur.\textsuperscript{11} Specifically, the government may only take land for public use, and when land is taken, just compensation must be paid to the rightful owner.\textsuperscript{12} The Fifth Amendment’s due process requirement is another limitation on the government’s ability to take land through the power of eminent domain.\textsuperscript{13}

As sovereign or quasi-sovereign entities, state and local governments may use eminent domain, but these seizures are similarly constrained by the Fifth Amendment through the application of the Fourteenth Amendment to state actions.\textsuperscript{14} Thus, the public use and just compensation provisions of the Fifth Amendment are the main constraints on the government’s ability to take property from private citizens.\textsuperscript{15} The due process limitation is less frequently invoked, but is still a fundamental constraint on the government’s power.\textsuperscript{16}

A. The Public Use Limitation to Government Takings

The main limit on the government’s ability to take private property is that the property must be used for a proper public purpose after it is taken from its original owner.\textsuperscript{17} This doctrine has undergone expansion and liberalization in meaning since its inception.\textsuperscript{18} There are at least two interpretations of public use: use by the public and use for public advantage.\textsuperscript{19} The latter interpretation is more expansive and includes anything that “tends to enlarge resources, increase industrial energies . . . [and] manifestly contributes to the general welfare and the prosperity of the whole community.”\textsuperscript{20} Courts have moved increasingly away from the former view toward the latter be-

\textsuperscript{11} See U.S. Const. amend. V.
\textsuperscript{12} See id.
\textsuperscript{13} See 1A Nichols on Eminent Domain § 4.3 (Julius Sackman ed., 3d ed. 2005) [hereinafter 1A Nichols].
\textsuperscript{15} See U.S. Const. amend. V; Durham, supra note 2, at 1277–78; 1A Nichols, supra note 13, § 4.3.
\textsuperscript{16} 1A Nichols, supra note 13, § 4.3.
\textsuperscript{18} Kelo, 843 A.2d at 524–25.
cause “use by the public” is too narrow and requires condemned land to be used directly by the public.\textsuperscript{21}

Under the “use by the public” interpretation, land taken from an individual must be used by many and must be common to all.\textsuperscript{22} This interpretation is typically employed by the courts in the absence of legislative intent to the contrary.\textsuperscript{23} When there is no apparent legislative intent, courts are more likely to “sustain the rights of the property owner against the public.”\textsuperscript{24} However, when legislative intent suggests using the broader construction of public use, courts have done so.\textsuperscript{25}

Some state courts have recently accepted the expanded definition of public use: “The test of public use is not how the use is furnished but rather the right of the public to receive and enjoy its benefit.”\textsuperscript{26} Increasingly, various state courts—and even federal courts, including the Supreme Court—have allowed government takings that directly benefit private interests because they have the potential to benefit the community at large via increased economic activities.\textsuperscript{27} This is not the traditional narrow view of public use, but it has become the widely accepted view, mostly due to broad statutory interpretations of takings laws to which the courts give great deference.\textsuperscript{28} Under the broader view, any use that could be perceived to have a public purpose shall be permitted.\textsuperscript{29} Anything that would tend to increase the economic activities of an area or “promote the productive power” of any community is included as a public use.\textsuperscript{30} This has now become the prevailing interpretation of public use.\textsuperscript{31}

One of the most cited examples of a court allowing the government to take private property and give it to another private interest is the infamous case of \textit{Poletown Neighborhood Council v. City of Detroit.}\textsuperscript{32} In

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\item \textsuperscript{21} \textit{Kelo}, 843 A.2d at 524–25; Klemetsrud, supra note 19, at 785.
\item \textsuperscript{22} See 2A Nichols, supra note 20, § 7.02[2].
\item \textsuperscript{23} See id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} See id. § 7.02[2], [3].
\item \textsuperscript{26} Kelo, 843 A.2d at 525.
\item \textsuperscript{27} Id. at 510; Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 460–61 (Mich. 1981) (Fitzgerald, J., dissenting); Twp. of W. Orange v. 769 Assocs., 800 A.2d 86, 91 (N.J. 2002).
\item \textsuperscript{28} See Kelo, 843 A.2d at 555; 769 Assocs., 800 A.2d at 93; 2A Nichols, supra note 20, § 7.02[3]; Klemetsrud, supra note 19, at 786.
\item \textsuperscript{29} 2A Nichols, supra note 20, § 7.02[3].
\item \textsuperscript{30} Id.
\item \textsuperscript{31} See id.
\item \textsuperscript{32} 304 N.W.2d 455; see William Epstein, \textit{The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack}, 4 PACE L. REV. 231, 231–36 (1983); Ralph
\end{itemize}
\end{footnotesize}
this case, the City of Detroit condemned a large tract of land which was home to a tight-knit interracial community of lower and middle class African-Americans and immigrants, largely from Poland. The land was condemned in order for the city to provide General Motors with a large piece of land on which to build a new factory. Without this land, General Motors threatened to leave Detroit, taking with it all the jobs that go along with operating a large automobile factory. At the time, Detroit was steeped in an economic crisis and faced higher unemployment levels than the rest of the country. To prevent General Motors from leaving, the city offered it a piece of land in politically disenfranchised Poletown.

The majority in Poletown determined that the increase in jobs and economic development for Detroit was enough to find that there was a public use for the land that was given to General Motors. The court noted that “[t]he power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community.” The majority even went so far as to say that the benefit derived by General Motors through operating this multimillion dollar facility, which was subsidized by the city, is “merely incidental” to the public purpose of economic development. What the majority failed to note, however, is that the “public cost of preparing the site agreeable to . . . General Motors [was] over $200 million” while General Motors was required to pay the city only $8 million for the land.

Poletown laid the groundwork for other courts around the country to find it acceptable for governments to take private land through eminent domain for the benefit of private enterprises. The Poletown court


33 Epstein, supra note 32, at 234; Nader & Hirsch, supra note 32, at 217–18.
34 Poletown, 304 N.W.2d at 460–61 (Fitzgerald, J., dissenting); see Nader & Hirsch, supra note 32, at 218.
35 See Poletown, 304 N.W.2d at 460 (Fitzgerald, J., dissenting).
36 Id. at 465 (Ryan, J., dissenting).
37 See id. at 467–68 (Ryan, J., dissenting); Epstein, supra note 32, at 234; Nader & Hirsch, supra note 32, at 218.
38 Poletown, 304 N.W.2d at 459–60.
39 Id. at 459.
40 Id.; see Nader & Hirsch, supra note 32, at 219.
41 Poletown, 304 N.W.2d at 469 (Ryan, J., dissenting).
clearly took the view that anything that would enlarge the resources of
the community was a public purpose.43

Similarly, in Township of West Orange v. 769 Associates, a dispute arose
over an action by the township to condemn part of 769 Associates’
property for use as a road to provide ingress and egress to a third
group’s housing development.44 769 Associates claimed that this taking
violated the constitutional requirement that any land taken by eminent
domain be for the public use.45 The trial court rejected their claim, but
the appellate division found that the proposed use of the land did viol-
ate the public use clause and was thus unconstitutional.46 The appel-
late division decided that the “primary purpose of the proposed rightofway . . . is to serve the private interest” of the developer.47 On appeal,
the Supreme Court of New Jersey reversed the appellate division’s deci-
sion and found that the intended use as a road to a housing develop-
ment satisfied the constitutional requirement that the land be for pub-
lic use.48 The court commented on the expansive definition of public
use: “Given the broad definition of ‘public use,’ it is not essential that
the entire community or even any considerable portion of the commu-
nity directly enjoy or participate in the condemned property for the
taking to constitute a ‘public use.’”49 The ruling implied that even
when a private party benefits from an eminent domain action, the pub-
lic use requirement is not violated.50 The New Jersey court accepted the
rationale of the Poletown majority and determined that taking land from
private citizens for the primary benefit of another private entity fits
within the purview of the public use clause.51

There has been a backlash to these decisions recently, specifically in County of Wayne v. Hathcock.52 In this case, a court in Michigan, where
Poletown was decided, found an eminent domain action unconstitutional because it was not for the public use.53 This case involved an
eminent domain action by Wayne County against the owners of nine-

43 See Poletown, 304 N.W.2d at 465 (Ryan, J., dissenting); 2A Nichols, supra note 20, § 7.02[2], [3].
44 800 A.2d at 88.
45 Id. at 89.
46 Id. at 89–90.
47 Id. at 90.
48 Id. at 88.
49 Id. at 91.
50 769 Assocs., 800 A.2d at 91.
52 684 N.W.2d 765, 770 (Mich. 2004); 2A Nichols, supra note 20, § 7.02[2].
The county determined that it needed these parcels, spread out over a thousand-acre tract, for the completion of “Pinnacle Project,” a state-of-the-art business and technology park. The county had already purchased a vast majority of the land and needed these last few parcels to complete the project. The homeowners claimed that the eminent domain action was unconstitutional because Pinnacle Project “would not serve a public purpose.”

In this instance, the Michigan Supreme Court determined that the proposed use was not public in nature, and thus could not be upheld under constitutional scrutiny. The court noted that although there was legislative intent for a broad interpretation of the public use requirement, the court is not required to defer to the legislature on this issue. The court also noted that a stricter interpretation of the public use requirement was necessary to ensure the continued security of private property ownership. This overturned the previous ruling in Peltow and utilized the narrower interpretation of the public use requirement.

Despite this shift in the Michigan Supreme Court’s eminent domain jurisprudence, the Supreme Court of the United States held, in Kelo v. City of New London, that land could be taken from private citizens to create a waterfront hotel and business area consisting primarily of private industries. This planned business area would also contain new homes once the homes of the old owners were removed. With this decision in the summer of 2005, the Supreme Court accepted the broader definition of public use, and recognized that private land may be taken for what is not, by traditional definition, a public use.

The definition accepted by the Court allows anything which could be deemed to have a “public purpose” to meet the public use requirement. Allowing land to be taken for a “public purpose” grants much

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54 Id. at 770–71.  
55 Id. at 770.  
56 Id. at 771.  
57 Id.  
58 Id. at 788.  
59 2A Nichols, supra note 20, § 7.02[2].  
60 Id.  
61 See Hathcock, 684 N.W.2d at 788.  
63 Id. at 2659.  
64 Id. at 2668.  
65 See id. at 2663.
more deference to the local or state government in deciding what constitutes an appropriate use for the land.\textsuperscript{66} The Supreme Court has found that this deference is warranted in eminent domain cases.\textsuperscript{67} The Court also specified that an economic development project satisfied the conditions of a public purpose for the land and was thus an acceptable result under the public use doctrine.\textsuperscript{68}

Economic development projects were deemed acceptable by the Court because “promoting economic development is a traditional and long accepted function of government.”\textsuperscript{69} The City of New London claimed that the project would lead to the creation of new jobs and increased tax revenue for the city.\textsuperscript{70} The city hoped to “coordinate a variety of commercial, residential, and recreational uses of land with the hope that they will form a whole greater than the sum of its parts.”\textsuperscript{71} The Supreme Court upheld the statute which authorized the use of eminent domain as an appropriate means for achieving the public purpose of economic development.\textsuperscript{72}

B. The Just Compensation and Due Process Limitations to Government Takings

A further constitutional limitation to the government’s power of eminent domain is that for all private land taken by the government, the previous owner must be paid just compensation.\textsuperscript{73} The just compensation limitation requires the government to pay a fair price for the land it takes through eminent domain.\textsuperscript{74} There has been much debate on what constitutes fair payment to an owner who does not want to part with their property in the first place.\textsuperscript{75} The consensus is that compensation for land taken by the government is a natural and absolute right.\textsuperscript{76}

\begin{footnotesize}
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\item See id.
\item See id.
\item \textit{Kelo}, 125 S. Ct. at 2665.
\item Id.
\item Id.
\item See id.
\item U.S. Const. amend. V; 3 Nichols on Eminent Domain § 8.03 (Julius Sackman ed., 3d ed. 2005) [hereinafter 3 Nichols].
\item Nader & Hirsch, \textit{supra} note 32, at 207.
\item 3 Nichols, \textit{supra} note 73, § 8.03.
\end{enumerate}
\end{footnotesize}
This right has been viewed both in terms of a natural right and as a constitutional right.\textsuperscript{77} 

An individual has a basic right to remuneration if his land is seized by the government in an eminent domain action.\textsuperscript{78} This right would exist even without a specific provision in the U.S. Constitution requiring just compensation.\textsuperscript{79} Since the eighteenth century, American courts recognized a natural right to own and keep property.\textsuperscript{80} This natural right prevents the government from taking property from individuals without compensation.\textsuperscript{81} 

In addition to this natural right guarantee, the Constitution also ensures that just compensation will be paid when the government exercises its eminent domain power.\textsuperscript{82} It is widely understood that the Constitution provides a cause of action for individuals to recover from the government if their land has been taken or damaged, and no compensation has been provided.\textsuperscript{83} These claims are typically referred to as inverse condemnation suits.\textsuperscript{84} The Constitution, however, does not provide a private right of action when a plaintiff claims that the compensation paid was not adequate.\textsuperscript{85} 

Along the same lines, the Constitution imposes two other limitations on exercises of eminent domain: due process and equal protection.\textsuperscript{86} The Fifth Amendment states that “no person shall be deprived of life, liberty, or property without due process of law.”\textsuperscript{87} This limitation was extended and applied to the states through the Fourteenth Amendment.\textsuperscript{88} The right of the individual not to be deprived of his private property is in conflict with the right of the government to take land through eminent domain.\textsuperscript{89} This conflict is resolved by the Due Process Clause, placing the burden on the government to satisfy the

\textsuperscript{77} Id. § 8.01[1], [2].  
\textsuperscript{78} Id. § 8.01[1].  
\textsuperscript{79} See id.  
\textsuperscript{80} Erwin Chemerinsky, Constitutional Law: Principles and Policies 585 (2d ed. 2002).  
\textsuperscript{81} See id.  
\textsuperscript{82} 3 Nichols, supra note 73, § 8.01[2].  
\textsuperscript{83} Id.  
\textsuperscript{84} Id.  
\textsuperscript{85} Id.  
\textsuperscript{87} U.S. Const. amend. V.  
\textsuperscript{88} Id. amend. XIV, § 1, see Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).  
\textsuperscript{89} 1A Nichols, supra note 13, § 4.1–4.3.
conditions of due process before acting.\textsuperscript{90} Thus, there is a presumption in favor of private property rights, and it is the government’s duty to satisfy the requirements of due process before a taking may be considered legitimate.\textsuperscript{91}

Plaintiffs have also attempted to bring claims based on a theory that the government has violated their civil rights under 42 U.S.C. § 1983—as well as their right to equal protection under the Constitution—by condemning land in a mostly minority neighborhood.\textsuperscript{92} Section 1983 and the Equal Protection Clause ensure that anyone who unlawfully violates the rights of any member of society, particularly through discrimination, shall be liable to the injured party.\textsuperscript{93} However, the intent requirement for a finding of discrimination has typically prevented this type of claim from being successful.\textsuperscript{94}

These two constitutional arguments are invoked less frequently because of the more specific clause in the Fifth Amendment prohibiting the seizure of private property unless it is for public use and with just compensation.\textsuperscript{95} As long as the acting government entity fulfills these constitutional requirements by taking property only for public uses, paying just compensation, and not violating due process or equal protection, it may take land from private citizens.\textsuperscript{96}

\textsuperscript{90} Id. § 4.3. Courts have found that while the government’s right of eminent domain and an individual’s right to private property can be diametrically opposed, the Constitution has resolved this issue in favor of the individual by requiring the government to satisfy due process limitations before deprivations of private property will be permitted. Id.

\textsuperscript{91} See id.

\textsuperscript{92} Case Comment, Civil Rights—Urban Renewal—Allegation of Conspiracy To Use Eminent Domain Power for Racially Discriminatory Purpose in Urban Renewal Programs Does Not State a Federal Claim Under Civil Rights Act, 42 U.S.C. § 1983, 81 Harv. L. Rev. 1568, 1568 (1968) [hereinafter Case Comment, Civil Rights]; see Green Street As’n v. Daley, 373 F.2d 1 (7th Cir. 1967). The court in Green Street Ass’n dismissed the plaintiff’s equal protection claim because the plaintiff failed to assert that the taking was not for public use, in addition to their equal protection claim. Id. Plaintiffs cannot bring equal protection claims for economic discrimination; therefore these claims are typically brought under a theory of racial discrimination. Chemerinsky, supra note 80, at 648–49.

\textsuperscript{93} U.S. Const. amend. XIV, § 1; 42 U.S.C. § 1983 (2000). Section 1983 states:

\begin{quote}
Every person, who, under color of any statute, . . . 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.
\end{quote}


\textsuperscript{94} See Case Comment, Civil Rights, supra note 92, at 1568–69.

\textsuperscript{95} See id. at 1568.

\textsuperscript{96} See Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001); Nader & Hirsch, supra note 32, at 207–08.
C. Purposes of Limiting the Government’s Power of Eminent Domain

The reason for limiting the ability of the government to take land in particular circumstances, and only when certain conditions are met, is to prevent specific groups of individuals from bearing “public burdens which, in all fairness and justice, should be borne by the public as a whole.”\(^\text{97}\) Requiring that the land taken be for a public use or public benefit is an attempt to prevent the government from taking land to help its friends or political allies at the expense of its enemies or those who do not have the power to protest effectively.\(^\text{98}\) The just compensation limitation requires the government to pay for land it takes in an effort to make the original owner whole after the government action.\(^\text{99}\)

While complete compensation for emotional loss is not always possible—for instance, with the taking of a family home with sentimental value—this limitation attempts to prevent gross injustice.\(^\text{100}\) The just compensation requirement ensures that one person or group is not responsible for subsidizing a public project.\(^\text{101}\)

The due process limitation is in place to protect individuals from the arbitrary exercise of government powers.\(^\text{102}\) Limiting the power of the government to take private land also protects the fundamental constitutional right to private property.\(^\text{103}\) The right of the government to take private property is required for the smooth functioning of the government.\(^\text{104}\) However, the value that the Constitution places on private property rights requires these limitations on the power of the government to ensure that the government’s eminent domain authority does not undermine the constitutional right to own property.\(^\text{105}\)

Unfortunately, poor and minority populations still tend to bear the burden of eminent domain actions, despite these safeguards.\(^\text{106}\) Typically, when the government decides to take private land for redevelopment, the targeted communities have little political influence and are

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\(^{97}\) Palazzolo, 533 U.S. at 618 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

\(^{98}\) See Nader & Hirsch, supra note 32, at 207.

\(^{99}\) See 3 Nichols, supra note 73, § 8.06.

\(^{100}\) See id.

\(^{101}\) See id. § 8.01[2].

\(^{102}\) 1A Nichols, supra note 13, § 4.4.

\(^{103}\) See Nader & Hirsch, supra note 32, at 208.

\(^{104}\) See Kohl v. United States, 91 U.S. 367, 371–72 (1875); Nader & Hirsch, supra note 32, at 207.

\(^{105}\) See Kohl, 91 U.S. at 371–72; Nader & Hirsch, supra note 32, at 207–08.

\(^{106}\) See Gallagher, supra note 68, at 1837–38; David M. Herszenhorn, Residents of New London Go to Court, Saying Project Puts Profit Before Homes, N.Y. Times, Dec. 21, 2000, at B5.
II. ENVIRONMENTAL JUSTICE: HISTORY & RECENT DEVELOPMENT

Minorities and the poor in the United States are much more likely than middle and upper class white populations to be exposed to environmental hazards where they live. Studies of this phenomenon have found that “[t]hree out of every five African-Americans and Latinos live in communities with uncontrolled toxic waste sites.” Neighborhoods that contain hazardous waste incinerators have eighty-nine percent more people of color than average neighborhoods. Overall, poor and minority populations bear the burden of environmental hazards within the United States.

Traditionally, the environmental movement was focused on “wilderness and species preservation issues, [which] have had little relevance for poor and minority communities” in the United States. It took longer to bring the effects of environmental racism and environmental injustice into the main stream, but this doctrine has now been accepted, and there have been legislative efforts and judicial cases that attempt to rectify this injustice. The desire to achieve equality in bearing environmental hazards has been termed environmental justice.

Though originally the environmental justice movement centered on exposure to toxic waste sites, the doctrine has its parallel in the issues surrounding eminent domain.

107 See Gallagher, supra note 68, at 1837–38; Herszenhorn, supra note 106, at B5.
108 See Nader & Hirsch, supra note 32, at 217–18 (discussing the Poletown decision’s effect on a politically disenfranchised community); Gallagher, supra note 68, at 1837–38.
110 Colopy, supra note 5, at 130.
111 Id. at 131.
112 Id. at 133; Knorr, supra note 6, at 71.
113 Yang, supra note 5, at 6.
114 See Knorr, supra note 6, at 72; Pinney, supra note 109, at 360–61.
A. Evolution of the Environmental Justice Movement

The environmental justice movement is a relatively recent development compared to other social justice movements. In the 1970s, the environmentalist movement sprung out of the success of the civil rights movement a decade earlier. In the early 1980s, issues associated with environmental justice gained attention with the Warren County protest.

In 1982, Warren County was chosen by the State of North Carolina to house a toxic landfill. The landfill was to hold 32,000 cubic yards of polychlorinated biphenyl, a highly hazardous chemical. Officially, Warren County—specifically the town of Afton—was chosen because it was a secure site for the toxics. Upon closer examination, however, it was determined that the site was too close to the nearby water table, and thus was not appropriate for a toxic waste site. The residents of Warren County argued that their county had been chosen not because it provided the safest location, but because it was politically disenfranchised and thus would not be able to challenge the placement effectively.

Warren County was the poorest county in the State of North Carolina and its population was sixty-five percent African-American. The situation eventually gained national attention when civil rights groups and environmental leaders joined the protest. The protest was unsuccessful in preventing the placement of the site in Warren County, but it did bring national attention to the issues of environmental justice.

Congressman Walter E. Fauntory, a participant in the protest, commissioned the General Accounting Office to do a study to determine whether there was a relationship between the location of hazardous waste facilities and the racial and economic circumstances of com-

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116 See Knorr, supra note 6, at 73–74.
117 Id.
118 Colopy, supra note 5, at 140–41; Knorr, supra note 6, at 74; Pinney, supra note 109, at 355–56.
119 Pinney, supra note 109, at 356.
120 Collin, supra note 115, at 132; Yang, supra note 5, at 5.
121 Pinney, supra note 109, at 356.
122 Id.; see Collin, supra note 115, at 132.
123 Pinney, supra note 109, at 356.
124 Id.
125 Id.
126 See id. at 356–57.
communities who are chosen to house them. The report found that of four off-site hazardous waste landfills within the eight-state region of the U.S. Environmental Protection Agency’s (EPA) Region IV—the region to which Warren County belongs—three were located in predominantly African-American communities. Despite the fact that African-Americans only accounted for twenty percent of the population of the region, hazardous waste landfills were much more likely to be found in African-American communities. Similarly, the report found that of the people living in areas with hazardous waste landfills, between twenty-six and forty-six percent were living below the poverty line. These statistics presented a very strong correlation between race, socio-economic status, and the placement of hazardous waste landfills.

At the time of this study, some claimed that the sites had not been populated by minorities at the time of the siting, but that the placement of a toxic waste facility lowered property values and thus encouraged higher proportions of poor and minority people to move into those areas. Congressman Fauntory’s study found, however, that the proportion of African-Americans living at each of the four sites studied actually decreased between the time that the facility was placed in the area and the time the study was conducted. His research defeated the so-called “market dynamics” theory, which stated that the communities were composed of minorities because the waste facility was located there, not that the waste facility was located in the area because the community was composed of minorities.

After Fauntory’s study, citizen groups began calling for further investigation into the phenomenon, and the United Church of Christ undertook a major study in 1987 to determine the relationship between race, class, and environmental hazards. The results of this study were equally staggering: the final report showed that poor people of all races were more likely than middle and upper class groups to live near haz-

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127 Collin, supra note 115, at 132; Pinney, supra note 109, at 357; Yang, supra note 5, at 5.
128 Pinney, supra note 109, at 357; Yang, supra note 5, at 5.
129 Yang, supra note 5, at 5.
130 Pinney, supra note 109, at 357.
131 See Collin, supra note 115, at 132.
133 See id.
134 Id.
135 Id. at 1393; Collin, supra note 115, at 133; Pinney, supra note 109, at 358.
ardous waste sites.\textsuperscript{136} Even more significant, however, is that the study found race to be “the single most significant factor associated with the location of licensed or abandoned hazardous waste facilities.”\textsuperscript{137} It also determined that the probability that the sites were located so close to African-American communities by chance was one in ten thousand.\textsuperscript{138}

A 1992 study by the \textit{National Law Journal} looked at government enforcement of environmental laws at Superfund toxic waste sites.\textsuperscript{139} Approximately 1200 sites were studied, and the journal concluded that penalties incurred for violating environmental laws at sites with the greatest white population were 500 times higher than penalties incurred at sites with the greatest minority population.\textsuperscript{140} Similarly, the study found that for all laws aimed at protecting citizens from pollution, penalties for violations were forty-six percent higher in white communities compared to minority communities.\textsuperscript{141} Also, a study done in Houston, Texas, found that “although African-Americans made up only [twenty-eight percent] of the Houston population in 1980, six of Houston’s eight incinerators . . . and fifteen of seventeen landfills were located in predominantly African-American neighborhoods.”\textsuperscript{142} Thus, not only are hazardous waste sites located more frequently in minority neighborhoods, those that are located in predominantly white neighborhoods are more strictly regulated to the benefit of nearby populations.\textsuperscript{143}

Some commentators have noted that poor and minority communities are often economically coerced into accepting environmental hazards as a way to make revenue for the community.\textsuperscript{144} Low-income, minority neighborhoods have been found to be “more likely to tolerate environmental dangers in the hope that the facilities will generate economic benefits.”\textsuperscript{145} When alternative ways of procuring these benefits are not available to these communities, they often have no choice but to “accept the facilities that no one else wants.”\textsuperscript{146} When environmental hazards are forcibly placed in low-income communities, these commu-

\begin{itemize}
\item\textsuperscript{136} Collin, \textit{supra} note 115, at 133.
\item\textsuperscript{137} Id.; Pinney, \textit{supra} note 109, at 358.
\item\textsuperscript{138} Collin, \textit{supra} note 115, at 133.
\item\textsuperscript{139} See Yang, \textit{supra} note 5, at 6.
\item\textsuperscript{140} Id.
\item\textsuperscript{141} Id.
\item\textsuperscript{142} Been, \textit{supra} note 132, at 1395.
\item\textsuperscript{143} See \textit{id.} at 1399; Collin, \textit{supra} note 115, at 133; Yang, \textit{supra} note 5, at 6 (addressing the penalties imposed upon nonconforming sites in communities of different racial compositions).
\item\textsuperscript{144} See Colopy, \textit{supra} note 5, at 135.
\item\textsuperscript{145} Id.
\item\textsuperscript{146} Id.
\end{itemize}
nities are also compelled to sacrifice their own well-being in exchange for exiguous economic benefits.147

Recently, EPA has tried to rectify this disparity in treatment.148 First, EPA formed a working group to determine whether it had been “insensitive to socio-economic concerns affecting both minority and low-income neighborhoods.”149 Upon finding that they had been insensitive to these concerns, EPA formed the Office of Environmental Equity—now the Office of Environmental Justice—in order to “implement environmental justice initiatives.”150 Additionally, two environmental justice bills were introduced in Congress—although not passed—and President Clinton issued Executive Order Number 12,898 stating “each Federal agency shall make achieving environmental justice part of its mission.”151

B. Cases Litigated Under an Environmental Justice Theory

The history of the environmental justice movement is key to understanding the issues in some of the seminal environmental justice cases.152 In most cases, communities seek to enjoin the placement of a waste facility near their neighborhoods using an equal protection theory.153 The plaintiffs, however, usually do not prevail because they lack proof of the defendant’s intent to discriminate.154

One of the earliest environmental justice cases was *Bean v. Southwestern Waste Management Corp.*155 This case involved a claim by a predominantly African-American community against the Southwestern Waste Management Corporation contesting the decision of the Texas Department of Health to grant a permit to the defendants to locate a Type I solid waste facility near their community.156 Specifically, this facility was to be located “within 1,700 feet of a predominantly African-American high school and only slightly farther from an African-American residential neighborhood.”157

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147 See *Been*, supra note 132, at 1399; *Colopy*, supra note 5, at 155; *Yang*, supra note 5, at 6.
148 *Pinney*, supra note 109, at 360.
149 *Id.*
150 *Id.*
151 *Id.* at 360–61.
152 *See id.* at 356–59.
153 *See Collin*, supra note 115, at 134–39; *Colopy*, supra note 5, at 147.
154 *See Collin*, supra note 115, at 138; *Colopy*, supra note 5, at 147.
156 *Id.* at 674–75; *Colopy*, supra note 5, at 147.
157 *Colopy*, supra note 5, at 147; *see Bean*, 482 F. Supp. at 677.
The plaintiffs claimed that the location of the facility violated their constitutionally guaranteed equal protection rights. To prove this assertion, the court noted that the plaintiffs “must show not just that the decision to grant the permit [allowing the facility] is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race.” The court found that the evidence offered by the plaintiffs did not demonstrate an intent to discriminate against them. Thus, the plaintiffs did not meet their burden for securing a preliminary injunction against the placement of the facility.

To win the injunction, the plaintiffs would have had to demonstrate that they were substantially likely to succeed on the merits of their claim of purposeful discrimination, but the court found such likelihood was lacking. The court did note, however, that had it been the court’s decision to grant the permit in the first place, it would not have done so. Similarly, the court expressed sympathy towards the plight of the plaintiffs and called the decision to place the facility near their school and neighborhood both “unfortunate and insensitive” and “insensitive and illogical.” Although the court sympathized with the plaintiffs, it still found that the plaintiffs had not satisfied their burden of proving that the government officials had the requisite discriminatory intent.

A more recent example of an environmental justice case is R.I.S.E., Inc. v. Kay. This case also involved an equal protection claim by a group of plaintiffs who asserted that a county siting decision was discriminatory. Since the proposed solid waste landfill would affect both whites and African-Americans living in the vicinity of the site, a racially heterogeneous community organization brought the case. As evidence, the group offered information about three other landfills in the area, sited in communities with at least ninety-five percent African-American populations. Once again, the court found that the plain-
tiffs did not meet their burden of establishing that the government officials had intentionally discriminated against minority groups. The court held: “[T]he Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups.” Rather, the only behavior prohibited by the Equal Protection Clause was purposeful discrimination on the basis of race.

The intent requirement has also been a major hindrance to plaintiffs in other cases raising environmental justice claims. In NAACP v. Gorsuch, the court stated that there was “not one shred of evidence that race has . . . been a motivating factor” in the siting decision. Scholars have noted that the intent requirement facilitates implicit racism by ensuring that only the most blatant cases of discrimination will be found to violate the Equal Protection Clause.

The controlling case on intent to discriminate is Village of Arlington Heights v. Metropolitan Housing Development Corp., which held that disproportionate impact is not sufficient to find discrimination. Thus, based on this precedent, it is almost impossible for plaintiffs in cases of environmental justice to effectively prove discrimination despite clear disparate impact.

III. THE INTERSECTION OF EMINENT DOMAIN AND ENVIRONMENTAL JUSTICE

The issues surrounding cases of environmental injustice are strikingly similar to those surrounding government takings. First, residents in areas targeted for both the siting of environmental hazards and for government takings for economic improvement are more likely to be low-income and minority. Second, the government justifies its action in both instances by potential economic improvement for a

\[170\] R.I.S.E., Inc., 768 F. Supp. at 1150; Colopy, supra note 5, at 148.
\[172\] Id.
\[173\] Colopy, supra note 5, at 149.
\[174\] Id.
\[175\] Id.
\[176\] Id.
\[177\] Supra note 115, at 139.
\[179\] See id.
\[180\] See Collin, supra note 115, at 133; Colopy, supra note 5, at 135; Epstein, supra note 32, at 235.
Finally, the remedy left open to the victims—judicial intervention—is unsatisfactory because the standard used to review these cases makes it impossible for the courts to enforce and protect the rights of the victimized population against discrimination. The similarities between these two types of cases call for the creation of a new judicial standard which would encompass both environmental justice and eminent domain cases. It is socially desirable to do away with the discriminatory intent standard for environmental justice cases and to support a new standard that could be used to examine the discriminatory effect of both environmental hazard sitings and eminent domain actions. This new standard would create a rebuttable presumption of the defendant government’s discriminatory intent, and then allow the government to demonstrate that its decision was not motivated by an intent to discriminate.

A. Victimization of Low-Income and Minority Populations

The homeowners and residents targeted for both takings actions and environmental hazard sitings are typically politically isolated, low-income, and minority groups. Local governments choose these groups to bear the brunt of these decisions because they “lack the resources and access to political decisionmakers” necessary to defend themselves against such decisions. In contrast, local governments are very unlikely to decide to place a toxic waste facility in the middle of a high-income suburb, or to decide to condemn a street of waterfront mansions in order to build a hotel and conference center.

Just as environmental hazards are much more likely to be located in communities comprised of low-income and/or minority populations, to a slightly less noticeable extent, the same is true of commu-

180 See Colopy, supra note 5, at 135; Epstein, supra note 32, at 235; Gallagher, supra note 68, at 1839.
182 See Bean, 482 F. Supp. at 680 (requiring a standard of purposeful discrimination); Collin, supra note 115, at 133; Colopy, supra note 5, at 135; Epstein, supra note 32, at 235.
184 See Colopy, supra note 5, at 135; Gallagher, supra note 68, at 1837; Herszenhorn, supra note 106.
185 Colopy, supra note 5, at 135.
186 See id.; Gallagher, supra note 68, at 1837; Herszenhorn, supra note 106.
187 Been, supra note 132, at 1905; Yang, supra note 5, at 5–7; see supra Part II.A and accompanying notes.
ties targeted for governmental takings when the targeted area includes personal homes, and the reason for the taking is economic redevelopment.\textsuperscript{188} Similar to the siting of environmental hazards, when large economic redevelopment projects are involved, the land to be used for these endeavors is typically found in low-income, politically disenfranchised areas.\textsuperscript{189} However, there are cases where land has been seized from private companies for questionable public purposes, but these cases typically do not involve large economic development projects.\textsuperscript{190}

Poletown Neighborhood Council v. City of Detroit and Kelo v. City of New London are demonstrative of the cases where a large group of homes, typically comprising an entire neighborhood, is condemned by the government and the land is then given to private developers in hopes of future economic benefits for the greater community.\textsuperscript{191} In these cases, minority or low-income neighborhoods were chosen to sacrifice their homes for the good of the larger community to which they no longer belong.\textsuperscript{192} These cases parallel the environmental justice cases where hazardous facilities are sited in low-income or minority areas in an effort to prevent effective political opposition.\textsuperscript{193}

Typically, low-income and minority groups have less political influence than wealthier groups.\textsuperscript{194} This makes them more susceptible to undesirable government action, which often comes in the form of siting environmental hazards and eminent domain actions.\textsuperscript{195} The fact that similar groups are targeted both in cases of environmental injustice and in cases of unfair takings demonstrates that a similar legal framework could be established to review governmental decisions in both cases.\textsuperscript{196}

B. Justification of Public Benefit

In many cases, poor neighborhoods are the target of hazardous environmental sitings and eminent domain actions because it is claimed

\textsuperscript{188} See Nader & Hirsch, supra note 32, at 218; Gallagher, supra note 68, at 1837–38.

\textsuperscript{189} See Nader & Hirsch, supra note 32, at 218; Gallagher, supra note 68, at 1837–38.

\textsuperscript{190} See, e.g., Twp. of W. Orange v. 769 Assocs., 800 A.2d 86, 88 (N.J. 2002).


\textsuperscript{192} See Nader & Hirsch, supra note 32, at 218; Gallagher, supra note 68, at 1837–38.

\textsuperscript{193} Been, supra note 132, at 1406; Nader & Hirsch, supra note 32, at 218.

\textsuperscript{194} See Colopy, supra note 3, at 135.

\textsuperscript{195} See id.

that these government actions will provide some benefit to the greater community.\textsuperscript{197} Typically, this benefit comes in the form of economic advantages reaped by the community at large.\textsuperscript{198} In both cases, the desire for economic improvement or development leads government officials to sacrifice the health or property rights of the residents most affected by the decision.\textsuperscript{199}

Although these government decisions have similar results, they are often motivated by dissimilar factors.\textsuperscript{200} Sometimes, local governments will decide to site an environmental hazard in its jurisdiction because it has few other ways of bringing in revenue.\textsuperscript{201} In this sense, communities may be coerced into accepting environmental hazards because of their economic situation.\textsuperscript{202} Some have argued against allowing payments to communities that host landfills and hazardous waste facilities because these payment systems “take unfair advantage of the existing unequal distribution of wealth.”\textsuperscript{203}

When the decision is in the hands of the local government, it is able to weigh the options and at least make a choice for the community.\textsuperscript{204} Local governments may agree to site a hazardous facility that no one else wants in order to “raise revenue for schools, roads, and other public necessities.”\textsuperscript{205} In a “small, poor, and mostly minority community” in Mobile, Alabama, the owners of a local landfill helped the community to install air conditioning in the local school and establish an educational fund.\textsuperscript{206} The economic benefits of this siting decision were tangible to the community, and even those most affected by proximity to the site were able to reap the benefits in their schools.\textsuperscript{207}

On the other hand, there are some cases where the community has no voice in the siting decision and the local government makes a decision with absolutely no sensitivity to local needs.\textsuperscript{208} In \textit{Bean v. South-}

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\item\textsuperscript{197} See Colopy, supra note 5, at 135; Epstein, supra note 32, at 235; Gallagher, supra note 68, at 1839.
\item\textsuperscript{198} See Kelo v. City of New London, 125 S. Ct. 2655, 2659 (2005); Colopy, supra note 5, at 135; Gallagher, supra note 68, at 1839.
\item\textsuperscript{199} See Colopy, supra note 5, at 135; Epstein, supra note 32, at 235.
\item\textsuperscript{200} See Colopy, supra note 5, at 135; Epstein, supra note 32, at 235.
\item\textsuperscript{201} Colopy, supra note 5, at 135.
\item\textsuperscript{202} See id. at 135–36.
\item\textsuperscript{203} Id. at 136.
\item\textsuperscript{204} See id. at 135–36.
\item\textsuperscript{205} Id. at 135.
\item\textsuperscript{206} Id.
\item\textsuperscript{207} See Colopy, supra note 5, at 135.
\item\textsuperscript{208} Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979) (noting that siting decisions were insensitive, but intent could not be proven).
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west Waste Management Corp., the government decided to place a solid waste facility, which would presumably bring some benefit to the wider community, in a predominantly African-American neighborhood approximately 1700 feet away from a predominantly African-American school.209 Despite the fact that the court itself noted that this decision was both “unfortunate and insensitive,” the court ultimately found that it must defer to the legislature’s decision because the plaintiffs were unable to prove discriminatory intent.210

Eminent domain cases are similar: the government makes a decision about the economic well-being of the community as a whole.211 However, in these cases the burdened portion of the community is unable to reap the benefits of the economic improvement.212 In this instance, the groups most affected by the eminent domain will not have the opportunity to benefit from the economic improvements since their relocation is a prerequisite for development.213 It is unlikely that the citizens of the “ramshackle waterfront neighborhood” of New London, “one of Connecticut’s poorest cities,” will have the opportunity to benefit from the waterfront hotel, conference center, and eighty new homes planned for the area once the current residents vacate.214

The desire for economic rejuvenation of depressed areas is a reasonable goal for any local government; however, economic development at the expense of the poorest and most vulnerable portions of a community is unreasonable.215 When a local government decides to host an environmental hazard, their object is to gain the economic benefits and resources available to communities of wealthier citizens with more political clout.216 Eminent domain actions seek to physically destroy the unwanted and economically depressed areas of a community and replace them with profitable hotels and factories, despite the effects on the local community and local homeowners.217

The justification of public benefit works with varying degrees of success.218 Both in eminent domain and environmental justice cases,

209 Id. at 677.
210 Id. at 680.
211 See Herszenhorn, supra note 106.
212 See id.
213 See Gallagher, supra note 68, at 1838; Herszenhorn, supra note 106.
214 See Gallagher, supra note 68, at 1837–39; Herszenhorn, supra note 106.
215 See Colopy, supra note 5, at 135.
216 See id.
governments claim that the benefits of the project will outweigh the costs.\footnote{219} One of the leaders of the New London development plan reportedly announced: "We all need to sacrifice."\footnote{220} However, the sacrifices demanded by this type of redevelopment plan are inequitable, as are the burdens borne by communities who are either forced or coerced into accepting environmental hazards for the purposes of economic improvement.\footnote{221}

Since the government justifies its decisions in both environmental siting situations and eminent domain circumstances in similar ways, the same judicial standard may be used for reviewing these decisions.\footnote{222} The intent of economic improvement is a valid one, but courts should not continue to consider it valid when the action has a clearly disproportionate impact on a particular group or groups within the community.\footnote{223}

C. Inadequacy of the Current Judicial Standard

Eminent domain cases can fit within the judicial framework established by environmental justice cases and be litigated under a similar constitutional theory.\footnote{224} Since these two types of cases have so many similarities, it is possible that the victims of eminent domain actions could use the theories behind environmental justice cases to more fully articulate their legal claims against unjust takings.\footnote{225} The current legal standard of intentional discrimination used in environmental justice cases is unsatisfactory, however, and a new standard should be developed to encompass both environmental justice and eminent domain actions.\footnote{226}

The residents of Poletown could have made a claim that the decision to tear down their homes and build a car factory to benefit the City of Detroit was discriminatory and violated their Fifth Amendment

\footnote{219} See Herszenhorn, supra note 106.
\footnote{220} Id.
\footnote{221} See Gallagher, supra note 68, at 1837–38; Herszenhorn, supra note 106.
\footnote{224} See Case Comment, Civil Rights, supra note 92, at 1568.
\footnote{225} Id.
rights.\textsuperscript{227} In order to prove this, the plaintiffs would have had to demonstrate that there was a discriminatory result, and that the government based its actions on discriminatory intent.\textsuperscript{228} The plaintiffs would not have to prove that discrimination was the only motivating factor, or even a primary one,\textsuperscript{229} but they would have to prove specific intent or motivation to discriminate in order to succeed on the merits of their claim.\textsuperscript{230} Proving intent in these circumstances is practically impossible in the absence of an incriminating document outlining a discriminatory intent, especially since the government is able to claim economic improvement as a presumptively valid intent.\textsuperscript{231} Evidence of past and current disparate impact on low-income or minority groups has not been considered sufficient in these cases to prove discrimination.\textsuperscript{232}

The African-American residents of King and Queen County tried to demonstrate city planners’ discriminatory intent in locating a landfill in their primarily African-American community based on evidence of previous disparate impact.\textsuperscript{233} The proposed site was to be in a community with an approximately two-thirds African-American population, when the population of the county was fifty percent white and fifty percent African-American.\textsuperscript{234} The plaintiffs proved that one of three other landfills in the county was in an area where approximately ninety-five percent of the population living in the immediate vicinity of the landfill was African-American.\textsuperscript{235} The other two were in areas where a full one hundred percent of the people living within a mile or half-mile radius of the sites were African-American.\textsuperscript{236} Despite this evidence that African-American communities in the county were clearly over-burdened with their share of landfills, the court found no motive or specific intent to discriminate, and dismissed the plaintiffs’ complaint accordingly.\textsuperscript{237}

The residents of areas targeted for condemnation proceedings could use these same types of suits to draw greater attention to their

\textsuperscript{227} See E. Bibb, 706 F. Supp. at 884; Bean, 482 F. Supp. at 675.
\textsuperscript{228} E. Bibb, 706 F. Supp. at 884.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{232} R.I.S.E., Inc., 768 F. Supp. at 1148–49.
\textsuperscript{233} Id. at 1148.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 1149–50.
plight and to frame the issue as a type of environmental justice. The similarities between the types of people targeted—and the reasoning behind the judicial decisions—in both environmental injustice and eminent domain cases make this possible, and would allow for plaintiffs to draw attention to their cause even if their suits are unsuccessful.

IV. THE NEW STANDARD: DOING AWAY WITH DISCRIMINATORY INTENT

A new standard should be developed for evaluating discriminatory governmental actions in environmental justice and eminent domain cases. Because takings may have a discriminatory effect similar to sittings of environmental hazards, a new standard which fully encompasses both of these situations should be considered.

Early on, plaintiffs challenging eminent domain actions undertaken for the purpose of urban redevelopment attempted—unsuccessfully—to use section 1983 of the Civil Rights Act to claim violation of equal protection and discrimination based on race. Plaintiffs in environmental justice cases often invoke section 1983 also, but to similar effect. Section 1983 of the Civil Rights Act is the best alternative for these cases, and should be open to plaintiffs in both circumstances to claim discrimination. The standard used to judge violations of this section of the Civil Rights Act should similarly be adjusted to allow plaintiffs to recover in cases that result in clear discrimination, but where it is impossible to prove intent or motive to discriminate.

The pertinent provision of the Civil Rights Act states:

Every person who, under color of any statute, . . . 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.

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239 See id.; Case Comment, Civil Rights, supra note 92, at 1568–69.
242 See Case Comment, Civil Rights, supra note 92, at 1568–69.
244 See 42 U.S.C. § 1983 (2000); Case Comment, Civil Rights, supra note 92, at 1568–70.
Plaintiffs have used this language to claim that the defendant governments have violated their rights to equal protection in a racially discriminatory fashion, and that they therefore have the right to a civil remedy—typically an injunction—against the defendants.\textsuperscript{247} Historically, courts have not upheld these claims, in part due to the requirement that the plaintiffs prove a motive or intent for discrimination on the part of the government officials.\textsuperscript{248}

Claims under section 1983 would be better able to address the concerns of plaintiffs in eminent domain cases whose homes are taken and given to private interests under the auspices of economic redevelopment.\textsuperscript{249} Since courts have recently demonstrated an unwillingness to question legislative decisions about what constitutes “public use” of taken land, an equal protection claim under the Civil Rights Act could give plaintiffs a second weapon in their judicial arsenal for use against unjust takings.\textsuperscript{250} If this tactic were permitted, plaintiffs in eminent domain cases could move beyond the fact that courts are permitting private land to be taken for mostly private purposes and claim discrimination based on socioeconomic status and race.\textsuperscript{251}

Courts have previously decided that these civil rights claims are not valid in eminent domain cases.\textsuperscript{252} Typically, this decision is reached because plaintiffs have the opportunity to state their claims in condemnation proceedings.\textsuperscript{253} The decision to prohibit civil rights claims fails to take into account the fact that while land might be taken for a stated public purpose and with compensation, some of these takings might still be blatantly discriminatory.\textsuperscript{254} Allowing plaintiffs to assert civil rights claims in eminent domain cases that result in discrimination advances the same purposes as allowing plaintiffs in environmental cases to bring a civil rights claim.\textsuperscript{255}

Permitting plaintiffs in condemnation proceedings to bring civil rights claims is not wholly sufficient to ensure that discrimination will

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  \item \textsuperscript{247} See Bean, 482 F. Supp. at 675; Case Comment, Civil Rights, supra note 92, at 1568–69.
  \item \textsuperscript{248} See, e.g., Bean, 482 F. Supp. at 675; Case Comment, Civil Rights, supra note 92, at 1568–70.
  \item \textsuperscript{249} See 42 U.S.C. § 1983.
  \item \textsuperscript{251} See Kelo, 843 A.2d at 510; Poletown, 304 N.W.2d at 460–61.
  \item \textsuperscript{252} Case Comment, Civil Rights, supra note 92, at 1568–70.
  \item \textsuperscript{253} Id. at 1568.
  \item \textsuperscript{254} See Poletown, 304 N.W.2d at 460–61; see also R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1148–49 (E.D. Va. 1991).
  \item \textsuperscript{255} See R.I.S.E., Inc., 768 F. Supp. at 1148–49; Poletown, 304 N.W.2d at 460–61.
\end{itemize}
not take place.\textsuperscript{256} A new standard of review for both eminent domain and environmental justice cases needs to be developed to ensure that discrimination is effectively avoided.\textsuperscript{257} The controlling case on this subject, \textit{Arlington Heights v. Metropolitan Housing Development Corp.}, held that “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”\textsuperscript{258} Specifically, the court stated that although “[d]isproportionate impact is not irrelevant . . . it is not the sole touchstone of an invidious racial discrimination.”\textsuperscript{259} This decision requires that plaintiffs prove that the government officials operated with an intent or motive to discriminate against the plaintiff in order to succeed.\textsuperscript{260}

The intent standard, which is still in use, makes it practically impossible to prove racial discrimination with the resources available to plaintiffs.\textsuperscript{261} If the goal of the Equal Protection Clause is to prohibit racial discrimination, a new, less strict standard needs to be applied to these cases.\textsuperscript{262} In the absence of this new standard, cases of obvious discrimination will go unchecked because of the inability of plaintiffs to effectively prove discriminatory intent.\textsuperscript{263}

In many recent environmental justice cases, equal protection claims have not been successful.\textsuperscript{264} The result in many environmental justice cases is inequitable, and the same inequitable outcome would likely result in eminent domain actions if plaintiffs had been permitted to bring equal protection suits.\textsuperscript{265} In one environmental justice case, the plaintiffs were able to prove that of four landfills placed in a county with an equal percentage of white and black residents, all four were placed in areas with a majority of African-American residents, and three were placed in areas with ninety-five percent or more African-American residents.\textsuperscript{266} Despite this overwhelming finding of disparate impact, the

\begin{footnotesize}
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\item[256] See \textit{R.I.S.E., Inc.}, 768 F. Supp. at 1148–49.
\item[257] See \textit{id.; Kelo}, 843 A.2d at 510; Case Comment, \textit{Civil Rights, supra note 92, at 1568–70.}
\item[259] \textit{Id.}
\item[260] \textit{Id.}
\item[261] See, e.g., \textit{R.I.S.E., Inc.}, 768 F. Supp. at 1149.
\item[264] See, e.g., \textit{R.I.S.E., Inc.}, 768 F. Supp. at 1149.
\item[266] \textit{R.I.S.E., Inc.}, 768 F. Supp. at 1148.
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\end{footnotesize}
court was forced to conclude that no discrimination existed because of the plaintiffs’ inability to prove intent.\(^{267}\)

In the case of *Green Street Ass’n v. Daley*, the court found that plaintiffs could not even bring an eminent domain case under the Civil Rights Act.\(^{268}\) In this case, groups of plaintiffs claimed that the decision to take their homes to facilitate an urban renewal project was discriminatory because eighty-five percent of the affected homeowners were African-American, and that the reason for the taking was to create an African-American-free zone between a new shopping mall and the residential neighborhood.\(^{269}\) The court found that because the plaintiffs did not claim that discrimination was the sole purpose of the decision to take their homes, a lawsuit based on a discrimination theory could not be permitted.\(^{270}\) Although the plaintiffs claimed that the “actual purpose” of the action was discriminatory, their discrimination suit was thrown out in the absence of proof of intent and “sole purpose.”\(^{271}\)

These two cases are indicative of cases in which there is an obvious disparate impact on minority and low-income communities.\(^{272}\) However, up to this point, courts have been unwilling to find evidence of disparate impact sufficient to prove discrimination.\(^{273}\) The courts should begin to allow evidence of disparate impact to prove discrimination in these cases.\(^{274}\) If disparate impact evidence were permitted to conclusively demonstrate discrimination, the evil that the Equal Protection Clause and Civil Rights Act aim to prevent would be much more effectively limited.\(^{275}\) According to the court in *Arlington Heights*, the Equal Protection Clause is focused on eliminating “invidious discrimination.”\(^{276}\) Invidious racism and discrimination, however, cannot be eliminated when the current judicial standard makes it impossible for plaintiffs to prove discrimination.\(^{277}\)

The court also notes in *Arlington Heights* that the judiciary must be deferential to the legislature in its decision to condemn homes—and

\(^{267}\) Id. at 1149.

\(^{268}\) 373 F.2d 1, 7 (7th Cir. 1967); Case Comment, *Civil Rights*, supra note 92, at 1568.

\(^{269}\) Case Comment, *Civil Rights*, supra note 92, at 1568.

\(^{270}\) Id.

\(^{271}\) Id.


\(^{274}\) See, e.g., id.


\(^{277}\) See, e.g., R.I.S.E., Inc., 768 F. Supp. at 1148–49.
presumably to site toxic waste facilities in communities—unless the plaintiffs can show discriminatory purpose. If plaintiffs are unable to show discriminatory purpose, the courts must defer to the stated intent of the legislature. This presents plaintiffs with a composite and difficult problem as it is almost impossible for plaintiffs to prove the requisite intent; in the absence of their ability to do so, the courts are required to defer to the stated intent of the legislature. This essentially gives the government free reign to state a purpose of public benefit for any project that has discriminatory intent or impact. Plaintiffs are then unable to prove otherwise because of their virtually insurmountable burden of proof.

Nonetheless, intent is clearly an important aspect of any governmental decision. However, if plaintiffs are able to demonstrate a significant disparate impact, the government should then be required to prove that its intent was specifically non-discriminatory. This type of “burden-shifting” mechanism has been used in cases where it has been determined that the burden of proof on plaintiffs is too high. Proving intent to discriminate in environmental justice and eminent domain cases places too high a burden on the plaintiff, and if the plaintiff can demonstrate significant disparate impact, then the court must shift the burden to the defendant and allow it the opportunity to prove it had only legitimate, non-discriminatory intent. Insulating the government from judicial scrutiny by making it impossible to prove discrimination sacrifices the rights of some for the benefit of others.

Conclusion

Eminent domain actions involving the transfer of property from private citizens to other private interests under the auspices of eco-

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278 See Arlington Heights, 429 U.S. at 265.
279 See id.
280 See id.
283 See Summers v. Tice, 199 P.2d 1, 5 (Cal. 1948).
284 See id.
285 See id.
nomic growth or development raise the same discrimination concerns as environmental justice cases. Both takings and environmental justice cases often involve targeted groups of low-income minority citizens who bear the brunt of the government’s desire to stimulate economic activity at any cost. These groups are left without an appropriate judicial remedy because of the requirement that plaintiff groups prove that local government officials acted with an intent to discriminate.

Since it is nearly impossible for plaintiffs to meet this high standard, governments are not held accountable for the disparate impact their actions have on low-income and minority groups. Although our nation has come far in its fight against racism, if governments are allowed to continue to disproportionately burden minority groups with unjust land use decisions, neither economic, political nor social equality will ever be realized. The courts need to adopt a new standard for judging these cases. Courts should look not only at the intent of the government officials, but also at the historical impact of similar governmental decisions in the same area, and how those decisions have affected the group, or groups, in question. Once these issues are taken into account by the courts, it will be much more likely that minority communities will enjoy the protections guaranteed to them by the Constitution.