ROOT AND BRANCH: THE THIRTEENTH AMENDMENT AND ENVIRONMENTAL JUSTICE

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"[The Thirteenth Amendment] abolishes slavery . . . root and branch. It abolishes it in the general and the particular. . . . Any other interpretation belittles the great amendment and allows slavery still to linger among us in some of its insufferable pretensions."[1]

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[1] CONG. GLOBE, 42nd Cong., 2d Sess. 728 (1872) (statement of Sen. Charles Sumner).

INTRODUCTION

In 1978, the state of North Carolina found itself in need of a new hazardous waste landfill.[2] The landfill was needed to dispose of tons of soil that were contaminated—intentionally—by the Ward Transformer Company, which had sought to avoid the strictures of federal hazardous waste regulation by paying someone to simply spray PCB-contaminated oil along North Carolina roadsides in the middle of the night.[3] The company was caught and company officials prosecuted.[4] But the soil contaminated by these midnight activities had to go somewhere. That "somewhere" was Warren County—poor, rural, and mostly African American and Native American.[5]

Borrowing from the civil rights movement playbook, Warren County residents organized and resisted.[6] For two weeks, residents blocked access to the site.[7] In scenes reminiscent of the previous decade's acts of civil disobedience, nonviolent protestors blocked landfill traffic and were dragged away by state troopers.[8] The protests did not stop the landfill, and tons of PCB-contaminated soil were entombed in Warren County.[9] But despite that failure, Warren County, and similar actions, succeeded in another respect: environmental lawyers were moved to think anew about their project, to reflect on the racial, economic, and other forms of inequity in the distribution of environmental harms. Environmental justice entered the discourse of environmental law.

Forty years since the birth of the environmental justice movement, environmental injustice persists:

- A Michigan civil rights commission investigation confirms the role of "systemic racism" in the Flint water disaster.[10]

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[2] This seminal event in the history of environmental justice is detailed in JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 38–39 (3d ed. 2010).

[3] United States v. Ward, 676 F.2d 94, 95 (4th Cir. 1982); *A Watershed Moment for Environmental Justice—the Warren County PCB Protests*, N.C. DEP'T. NAT. CULTURAL RES. (Feb. 26, 2013), https://www.ncdcr.gov/blog/2013/02/26/a-watershed-moment-for-environmental-justice-the-warren-county-pcb-protests [https://perma.cc/J4BW-HADE].

[4] *Ward*, 676 F.2d at 97.

[5] SALZMAN & THOMPSON, *supra* note 2, at 39.

[6] *See id.*

[7] *See id.*

[8] *55 Arrested in Protest at a Toxic Dump in Carolina*, N.Y. TIMES (Sept. 16, 1982), https://www.nytimes.com/1982/09/16/us/55-arrested-in-protest-at-a-toxic-dump-in-carolina.html [https://perma.cc/B84A-NK8C].

[9] SALZMAN & THOMPSON, *supra* note 2, at 39.

[10] MICH. CIVIL RIGHTS COMM'N, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT 2 (2017) ("We are not suggesting that those making decisions related to this crisis were racists, or meant to treat Flint any differently because it is a community primarily made up by people of color. Rather, the disparate response is the result of systemic racism

- In Africatown, Alabama, a community founded in the 1860s by kidnapped west-Africans, continues to struggle against the effects of decades of industrial contamination.[11]
- EPA scientists find that African Americans continue to be exposed to significantly more particulate pollution than whites.[12]
- Researchers find that people of color make up a disproportionate share of those living near U.S. hazardous waste facilities.[13]

Four decades after Warren County, the state of environmental justice in the United States remains a disappointment. Why?

One reason is the failure to identify a viable constitutional root for environmental justice doctrine. Early environmental justice advocates quickly discovered that equal protection's hostility to disparate impact claims was a significant doctrinal problem because environmental injustice actions are often about correcting institutional, systemic patterns of discrimination, rather than demonstrably overt racism.[14] Time and again over four decades, this "disparate impact problem" stymied environmental justice efforts.[15]

Over the same time period, a resurgence in federalism has resulted in additional theoretical hurdles for pursuing environmental justice under federal law. In the equal protection realm, the federalism problem takes the form of *City of Boerne v. Flores*, in which the United States Supreme Court used concerns about federalism and Congressional overreach at the expense of local control to justify limiting Congress's power to independently define the meaning of "equal protection."[16] Since the mid-1990s, federalism has also become more of a concern under the Commerce Clause, traditionally another major source of authority for civil rights legislation.[17] This is especially the case in regulatory areas regarded as traditional state functions, arguably including the kind of land use decisions often involved in environmental justice disputes.[18] These federalism considerations further complicate reliance on equal protection and the Commerce Clause as bases for environmental justice action.

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that was built into the foundation and growth of Flint, its industry and the suburban area surrounding it. This is revealed through the story of housing, employment, tax base and regionalization which are interconnected in creating the legacy of Flint.").

[11] *See* Lauren Zanolli, *'Still Fighting': Africatown, Site of Last US Slave Shipment, Sues over Pollution*, GUARDIAN (Jan. 26, 2018), https://www.theguardian.com/us-news/2018/jan/26/africatown-site-of-last-us-slave-ship-arrival-sues-over-factorys-pollution [https://perma.cc/96C5-HEWF].

[12] Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 480 (2018).

[13] Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENVTL. L. 371, 373 (2008).

[14] *See* cases discussed *infra* Part II.

[15] *See* cases discussed *infra* Part II.

[16] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[17] *See* discussion of *Lopez* and related cases *infra* Section III.B.

[18] *See* discussion of *Lopez* and related cases *infra* Section III.B.

Confronted with these difficulties and a disappointing track record, this essay uses Warren County's fortieth anniversary to reexamine a question that has not been addressed for decades: Whether the Thirteenth Amendment might provide a fertile environment for a flourishing law of environmental justice?[19] This essay argues that the answer is yes, for several reasons.

First, despite assertions to contrary, the Supreme Court has never foreclosed pursuit of disparate impact litigation under the Thirteenth Amendment as it has under equal protection.[20] This essay argues that the Court should not do so, based on the Thirteenth Amendment's constitutionally distinct substantive equality approach and its origins in the mission of antisubordination of African Americans.

Second, the Thirteenth Amendment holds advantages over equal protection and the Commerce Clause as a source of authority for environmental justice legislation. Compared to Equal Protection, the Court has never applied *Boerne*-style federalism limits to the Thirteenth Amendment, nor should it do so. States' rights arguments are particularly dubious in the Thirteenth Amendment context, and the amendment's original intent (expressed by the amendment's authors) confirms that there is no valid federalism-based apology for perpetuating the badges and incidents of slavery such as those arising in environmental justice cases.

Compared to the Commerce Clause, the Thirteenth Amendment presents a cleaner basis for federal involvement in what might otherwise be regarded as purely local land use decisions. Current Commerce Clause doctrine requires Congress to identify to a court's satisfaction a "substantial effect" on interstate commerce; no such showing is required under the Thirteenth Amendment.[21] Moreover, protecting "traditional state functions" from Congressional intrusion—or, in a phrase, states' rights—can hardly be a legitimate basis for objecting to Congress's Thirteenth Amendment power, given the necessity for and history of that amendment.[22]

This essay is organized in four parts. Part I will describe how environmental justice's distributive justice vision was at odds with environmental law's positivist, proceduralist core, and how that difference helps to account for the difficulties that followed. Part II will describe one of those difficulties: the disparate impact problem and the considerable drag it has imposed on equal-protection-based efforts to pursue environmental justice. Part III will take up the potential federalism issues arising under the equal protection clause and

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[19] Marco Masoni's groundbreaking piece, *The Green Badge of Slavery*, appears to be the first work to address the Thirteenth Amendment's potential in environmental justice cases. Marco Masoni, *The Green Badge of Slavery*, 2 GEO. J. ON FIGHTING POVERTY 97, 98 (1994). Since Masoni's work, both *Boerne* and *Lopez* have changed the legal landscape with respect to federalism aspects of civil rights law, as discussed in *infra* Part III.

[20] *See infra* Section IV.A.

[21] *See* discussion *infra* Part IV.

[22] *See infra* note 145.

Commerce Clause, respectively. Part IV will explain the advantages that a Thirteenth Amendment approach may hold over these equal protection and Commerce Clause paths in relation to the disparate impact problem and the federalism problem.

I. ENVIRONMENTAL JUSTICE AND TRADITIONAL ENVIRONMENTAL LAW: SUBSTANCE VERSUS FORM

Before Warren County, environmental law discussions were dominated by a debate between two perspectives, which Professor Salzman labels "environmental rights" and "utilitarianism and cost-benefit analysis."[23] Environmental rights envisioned a human right to a clean environment (the anthropocentric model) or, more controversially, the "right" of nature itself to be free of degradation (the ecocentric model).[24] The role of the law in either case was to secure these rights (either to humans or to the environment).[25] In contrast, the utilitarian/cost-benefit lens viewed environmental problems in law-and-economics terms: environmental problems were market failures and the role of the law was to correct those failures.[26] As Professor Salzman explains, "Supporters of strong environmental laws emphasized environmental rights, while those more sympathetic to economic concerns argued for greater consideration of costs; virtually no one asked how environmental harms or regulatory costs were distributed."[27]

Warren County and other early environmental justice actions sought to approach environmental law from a different perspective by introducing the substantive equality discourse associated with the civil rights movement.[28] Environmental scholars began to take up a new perspective that is variously described as: "the civil rights aspects of environmental law"[29]; "environmental racism"[30]; "the demands of poor and minority communities for equitable environmental enforcement and facility siting"[31]; and "the proper distribution of

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[23] *See* SALZMAN & THOMPSON, *supra* note 2, at 29, 34.

[24] *See id.* at 30–31.

[25] *See id.* at 31.

[26] *Id.* at 32–33. Another lens—"sustainable development"—focuses on questions of intergenerational fairness. For example, the 1992 Earth Summit defined sustainable development as development "that meets the needs of the present without compromising the ability of future generations to meet their own needs." Environmental issues are thus analyzed in terms of this balance between present and future human needs. *Id.* at 33.

[27] *Id.* at 38.

[28] For examples of other early environmental justice protests, see Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NRDC (Mar. 17, 2016), https://www.nrdc.org/stories/environmental-justice-movement [https://perma.cc/HTS6-TVB6].

[29] ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT: CASES AND MATERIALS 16 (4th ed. 2016).

[30] SALZMAN & THOMPSON, *supra* note 2, at 40.

[31] KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS ON THE PRACTICE AND PURPOSES OF ENVIRONMENTAL LAW 28 (3d ed. 2007).

environmental amenities, the fair correction and retribution of environmental abuses, the fair restoration of nature, and the environmentally fair exchange of resources."[32]

Today, the central focus of environmental justice is distributional justice. Professor Michael B. Gerrard provides a straightforward definition of environmental justice that captures this focus: "minority and low-income individuals, communities, and populations should not be disproportionately exposed to environmental hazards, and . . . they should share fully in making the decisions that affect their environment."[33] EPA's current definition similarly focuses on providing a meaningful role in environmental decision-making and a substantively equitable distribution of environmental harms:

> *Environmental justice (EJ)* is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.
> *Fair treatment* means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.[34]

But while environmental justice has developed conceptually, it has yet to gain much foothold in environmental law itself. Professor Tarlock observes that American environmental law is largely procedural and contains little in the way of "substantive, non-positivist" principles.[35] In contrast, environmental justice's focus on distributional justice is distinctly "substantive"—to people living near a landfill site, siting procedures are less important than the very substantive reality of living next to a landfill. This characteristic of environmental justice leads directly to the first and most intractable problems confronting the development of environmental justice law: the disparate impact problem.

II. ENVIRONMENTAL JUSTICE AND THE DISPARATE IMPACT PROBLEM

Just around the time of Warren County, the United States Supreme Court decided in cases like *Washington v. Davis*[36] and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[37] that equal protection claims under the Fourteenth Amendment require evidence of discriminatory intent, not

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[32] Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1, 27 (1991).

[33] Michael B. Gerrard, *Preface to the Second Edition*, *in* THE LAW OF ENVIRONMENTAL JUSTICE xxxiii (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

[34] *Learn About Environmental Justice*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [https://perma.cc/2YNV-QXY3] (last visited Feb. 9, 2019) (emphasis added).

[35] Dan Tarlock, *Is a Substantive, Non-Positivist United States Environmental Law Possible?*, 1 MICH. J. ENVTL. & ADMIN. L. 159, 161 (2012).

[36] Washington v. Davis, 426 U.S 229, 240–42 (1976).

[37] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

just disparate impact.[38] Of course, many environmental justice claims are necessarily based on evidence of disparate impact rather than overt discrimination.[39] As a result, equal protection claims based on environmental injustice have proved very difficult to sustain.

One of the most widely cited examples of this difficulty is *R.I.S.E. v. Kay*.[40] Like the events of Warren County, *R.I.S.E.* involved community resistance to the siting of a new landfill.[41] At trial on its equal protection claims, the plaintiff community group proved that in a county populated evenly by whites and blacks, twenty-one of the twenty-six families living along the road leading to the new landfill were black.[42] The plaintiffs further showed that the county had sited three other landfills in predominantly black areas.[43] Based on this evidence the district court expressly found that "placement of landfills in King and Queen County from 1969 to the present has had a disproportionate impact on black residents."[44] Despite this finding, the district court upheld the county's decision because plaintiffs had failed to prove that this particular siting choice was the product of intentional racial discrimination.[45] "To the contrary," the court concluded, "The Board appears to have balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner."[46] The Fourth Circuit affirmed in an unpublished opinion.[47]

Other siting cases have led to similar results, with plaintiffs prevailing only in exceptional circumstances where evidence of disparate impact is strong enough that a jury might infer discriminatory intent.[48] The disparate impact

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[38] *See* Philip Weinberg, *Equal Protection*, *in* THE LAW OF ENVIRONMENTAL JUSTICE 3, 6–10 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008). The Court's more recent opinions invalidating race-conscious measures that benefit racial minorities bear some kinship to these cases, in the sense that such measures seek to achieve substantive, rather than formal or procedural, equality. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 253–54 (2003); Grutter v. Bollinger, 539 U.S. 306, 315–16 (2003); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 752–53 (4th ed. 2011). *But see* Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 590 (1983) ("Holding that Title VI does not bar such affirmative action if the Constitution does not is plainly not determinative of whether Title VI proscribes unintentional discrimination in addition to the intentional discrimination that the Constitution forbids.").

[39] *See* Philip Weinberg, *Equal Protection*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 38, at 11.

[40] The case is discussed numerous works on environmental justice, including Masoni, *supra* note 19, at 110–13.

[41] R.I.S.E. v. Kay, 768 F. Supp. 1144, 1147–48 (E.D. Va. 1991).

[42] *Id.* at 1148.

[43] *Id.*

[44] *Id.* at 1149.

[45] *Id.* at 1149–50.

[46] *Id.* at 1150.

[47] R.I.S.E. v. Kay, 977 F.2d 573 (4th Cir. 1992).

[48] For example, in *Miller v. City of Dallas*, plaintiffs' claims survived summary judgment where the record showed that that zoning and landfill siting decisions in a community with a

problem has thus "severely limited the ability of plaintiffs to utilize the courts to take action against perceived environmental injustices."[49] And this problem extends beyond constitutional claims to affect statutory and administrative civil rights actions as well.

For example, disparate impact considerations have derailed environmental justice efforts under Title VI of the Civil Rights Act of 1964, including an EPA administrative process that was specifically intended to target environmental justice claims.[50] In 1983, a badly fractured Supreme Court held that proof of discriminatory intent is required in order to recover compensatory relief section 601 of Title VI.[51] The Court left open the possibility of pursuing disparate impact claims under section 602, which authorizes federal agencies to adopt regulations addressing racially discriminatory effects.[52] But after a number of agencies adopted such regulations, the Supreme Court in 2001 delivered another blow by holding that section 602 did not provide a private cause of action for litigants to seek direct judicial enforcement.[53] As a result of these cases, the only viable path for Title VI disparate impact claims was through administrative adjudication.[54]

Unfortunately, that administrative adjudication process as it relates to environmental justice has foundered on the disparate impact problem. According to a 2016 report by the United States Commission on Civil Rights, in the nearly 300 Title VI complaints that have come before the EPA since 1993, the agency has *never* made a formal finding of discrimination.[55] The commission found that this reluctance traces directly to the disparate impact problem:

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98 percent minority population were tainted by a history of racial segregation and other policies from which a jury could infer discriminatory intent. Miller v. City of Dallas, No. Civ.A. 3:98–CV–2955–D, 2002 WL 230834, at *1, *6 (N.D. Tex. Feb. 14, 2002).

[49] *See* Michael B. Gerrard, *Preface to the Second Edition*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 33, at xxxv.

[50] For more on prospects for using Title VI in environmental justice cases, see Bradford C. Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE 23, 23–24 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

[51] *See* Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 584 (1983).

[52] *Id.* at 601–02 ("To ensure that this intent would be respected, Congress included an explicit provision in § 602 of Title VI that requires that any administrative enforcement action be 'consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.' 42 U.S.C. § 2000d-1. Although an award of damages would not be as drastic a remedy as a cutoff of funds, the possibility of large monetary liability for unintended discrimination might well dissuade potential nondiscriminating recipients from participating in federal programs, thereby hindering the objectives of the funding statutes.") (citing Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 633 F.2d 232, 261–62 (2d Cir. 1980)).

[53] *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

[54] Bradford C. Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 50, at 24.

[55] U.S. COMM'N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 40 (2016).

> Despite its regulatory authority to withdraw financial assistance from recipients, the Office of Civil Rights has long "avoided [pursuing] civil rights complaints alleging discrimination based on disparate impact for fear that the agency would lose such a case if challenged in court, even though almost all the Title VI complaints over the last two decades are based on the theory."[56]

Judicial hostility to disparate impact claims has thus plagued the environmental justice movement from its birth forty years ago to the present.

III. ENVIRONMENTAL JUSTICE AND THE FEDERALISM PROBLEM

In the face of the difficulties described above, some argue that Congress should adopt legislation specifically tailored to the needs of environmental justice claims rather than trying to repurpose existing civil rights authorities.[57] This section explores potential federalism-based objections to pursuing such new and specific environmental justice legislation under two traditional sources of federal civil rights legislation: the Fourteenth Amendment and the Commerce Clause.

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[56] *Id.* (quoting *Jackson Shuffling of Key EPA Civil Rights Office State Sparks Criticism*, 30 INSIDEEPA.COM (2009)). In the absence of effective federal environmental justice legislation, environmental justice action at the federal level has been mostly limited to executive action. Yet even the marquee federal environmental justice measure, President Clinton's Executive Order No. 12,898, has not lived up to expectations. Order 12,898 directs certain federal agencies, including EPA, to "make achieving environmental justice part of [their] mission[s] by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). But an assessment of the impact of the executive order concluded that although it had "a major impact on how agencies integrate environmental justice issues into their activities," the "challenge of fulfilling the order's goals remains unfinished." Bradford C. Mank, *Executive Order 12,898*, *in* THE LAW OF ENVIRONMENTAL JUSTICE 101, 142–43 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008). During the reign of President George W. Bush, the director of EPA's Office of Environmental Justice opined that the environmental justice concerns at the heart of the order could not serve as the basis for substantive decisions because "use of racial classifications as a basis for making decisions would raise significant legal issues" akin to those raised in cases involving race-conscious affirmative action measures. *Id.* at 117–18 (citation omitted). Finally, the fact that an executive order—rather than a statute—is the marquee environmental justice measure is itself telling. In fact, Congress has never passed environmental justice legislation. Representative John Lewis introduced an environmental justice bill in 1992; decades later, that bill has yet to pass. H.R. 5326, 102d Cong. (1992). A smattering of state legislatures have taken tentative steps in the direction of environmental justice. *See* BARRY E. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE 160, 164, 166, 168, 169, 171, 173 (2d ed. 2012) (describing environmental justice laws in Arkansas, Louisiana, Georgia, Kentucky, Alabama, Delaware, and California).

[57] Senator Cory Booker has authored a bill to reverse *Sandoval*; it is not likely to pass anytime soon. Brentin Mock, *Cory Booker's New Bill Has a "Snowball's Chance in Hell" of Passing*, MOTHER JONES (Nov. 14, 2017, 6:00 AM), https://www.motherjones.com/environment/2017/11/corey-bookers-new-bill-has-a-snowballs-chance-in-hell-of-passing/ [https://perma.cc/6C97-A9GD].

A. *Fourteenth Amendment Equal Protection and Federalism:* City of Boerne

A useful starting point for thinking about federalism's relationship to equal protection is Dean Chemerinsky's division of Supreme Court equal protection precedent into two modes or perspectives: the "nationalist perspective" and the "federalist perspective."[58] The nationalist perspective is illustrated by *Katzenbach v. Morgan*, which concerned Congress's ability under the Fourteenth Amendment to regulate the use of state literacy tests for voting.[59] Prior to *Katzenbach*, the Supreme Court had upheld such tests against equal protection challenge.[60] In response, Congress adopted provisions of the Voting Rights Act prohibiting a specific kind of literacy test aimed at people from Puerto Rico.[61] New York challenged the law, arguing that Congress lacked the authority to *independently* redefine this kind of literacy test as an equal protection violation.[62] In other words, the state argued that Congress's powers under the Fourteenth Amendment were essentially limited to providing remedies for equal protection violations identified by the judiciary.[63]

The *Katzenbach* court disagreed and held that Congress was not limited "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."[64] Instead, the Court explained, the framers of the Fourteenth Amendment intended Congress to have "the same broad powers expressed in the Necessary and Proper Clause" that would apply to other Congressional powers.[65]

The contrasting "federalist perspective" on this question is reflected in *Boerne*, which came three decades after *Katzenbach* and largely displaced it.[66] The case emerged from the aftermath of *Employment Division v. Smith*, which held that neutral laws of general applicability were not subject to heighted review under the Free Exercise clause.[67] Relying on its Fourteenth Amendment powers, Congress responded to *Smith* by adopting the Religious Freedom Restoration Act (RFRA).[68] The RFRA provided that neutral laws of general applicability that substantially burdened free exercise of religion were prohibited unless narrowly tailored to achieve a compelling governmental interest.[69]

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[58] CHEMERINSKY, *supra* note 38, at 299.
[59] *See* Katzenbach v. Morgan, 384 U.S. 641, 643 (1966); *see also* CHEMERINSKY, *supra* note 38, at 299–300.
[60] *See* Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53–54 (1959).
[61] *Katzenbach*, 384 U.S. at 652.
[62] *Id.* at 348–49.
[63] CHEMERINSKY, *supra* note 38, at 300.
[64] *Katzenbach*, 384 U.S. at 648–49.
[65] *Id.* at 650.
[66] *See* City of Boerne v. Flores, 521 U.S. 507, 528 (1997); *see also* CHEMERINSKY, *supra* note 38, at 301, 303.
[67] *See* Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990).
[68] *Boerne*, 521 U.S. at 512.
[69] *Id.* at 515–16.

The case thus featured a pattern of judicial and legislative action roughly analogous to *Katzenbach:* the Supreme Court interpreted a constitutional protection narrowly (free exercise, in this case), and Congress responded by independently redefining that right more broadly. Despite these similarities, the *Boerne* court struck down this portion of RFRA, and, in so doing, it departed from *Katzenbach* in two important ways.

First, the Court flatly held that "Congress does not enforce a constitutional right by changing what the right is."[70] This conclusion stands in stark contrast to *Katzenbach's* observation that Congress's powers go beyond "the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional . . . ."[71] Justice Kennedy explained the need for this rule by invoking *Marbury v. Madison* and the need for judicial supremacy in constitutional interpretation, lest the Constitution fall to "a level with ordinary legislative acts."[72]

Second, the Court jettisoned *Katzenbach's* deferential Necessary and Proper Clause standard of review and replaced it with a novel form of heightened scrutiny.[73] According to Justice Kennedy, Congressional action under the Fourteenth Amendment requires "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[74] Justice Kennedy explained that this heighted scrutiny was necessary to protect the states from laws like RFRA, whose "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[75] This "test," ostensibly rooted in federalism, enables courts to second-guess Congressional "intrusions" into the state sphere. It apparently operates as a kind of sliding scale: when the historical record of discrimination is strong, Congress is freer to act; and when evidence is weak, Congressional authority becomes more uncertain. Applied to the facts of *Boerne*, the Court concluded that Congress failed to meet the proportionality and congruence test because the record did not (in the Court's view) reveal a long (enough) history of religious intolerance in state law.[76]

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[70] *Id.* at 519.

[71] Katzenbach v. Morgan, 384 U.S. 641, 649 (1966).

[72] *Boerne*, 521 U.S. at 529.

[73] *Id.* at 519–20.

[74] *Id.* at 520.

[75] *Id.* at 532.

[76] *Id.* at 534–35. Dean Chemerinsky notes several problems with the holding. For example, the Ninth Amendment provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." As Dean Chemerinsky observes, this strongly suggests that the Constitution is a floor—not a ceiling—on protectable liberties. CHEMERINSKY, *supra* note 38, at 304. Even so, the Supreme Court has expressed interest in expanding the principle to the Fifteenth Amendment. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–03 (2009); *see also* Rick Hasen, *The Curious Disappearance of* Boerne *and the Future Jurisprudence of Voting Rights and Race*,

Boerne thus poses a variety of potential barriers for effective federal environmental justice legislation based on equal protection. Like similar constitutional tests that measure rights against historical pedigree, *Boerne* privileges Congress's ability to solve old problems over its power to take on new ones.[77] To the extent that environmental justice is characterized as a novel extension of equal protection, it bumps up against *Boerne's* proscription on Congressional definition of new rights.[78] It is also unclear whether a historical record of environmental injustice could be assembled in a manner that would satisfy a court's sense of "proportionality" and "congruence." On one hand, unequal distribution of environmental harms is nothing new; on the other, the notion of land use planning (let alone environmental siting procedures) post-dates slavery by decades. Finally, the disparate impact problem described above might be understood as a subspecies of the larger *Boerne* problem, for any effort to define equal protection as including freedom from disparate impact arguably would be "changing what the right is," in the words of *Boerne*.[79]

B. *The Commerce Clause and Federalism:* Lopez, Morrison, and Raich

At least in theory, there is no constitutional problem with disparate impact measures under the Commerce Clause.[80] But the Supreme Court's reintroduction of Tenth Amendment-tinged federalism concerns with Congressional overreach and "traditional state functions" in the 1990s does give rise to potential arguments about the constitutionality of environmental justice measures, especially those involving matters such as zoning and siting of environmentally noxious land uses.[81]

In 1995, the Court in *United States v. Lopez* sought to restore what it saw as an eroding "distinction between what is truly national and what is truly local" in Commerce Clause analysis.[82] From the New Deal until the 1990s, Congress's authority to legislate under the Commerce Clause had been subject to a

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SCOTUSBLOG (Jun. 25, 2013, 7:10 PM), http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/ [https://perma.cc/perma.cc/3JK8-8C59].

[77] In this sense, the *Boerne* test begins to resemble the problematic "traditional state functions" test adopted in *Nat'l League of Cities v. Usery*, 426 U.S. 833, 849–52 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), rejected in *Garcia*, and revived in *Lopez*. *See infra* Section III.B.

[78] *See Boerne*, 521 U.S. at 519. The disparate impact problem might be understood as an extension of this principle: to define equal protection as including freedom from disparate impact would be "changing what the right is," to use the phraseology of *Boerne*.

[79] *Id.*

[80] U.S. CONST. art. I, § 8, cl. 3; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[81] *See* United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

[82] *Id.* at 567–68 (majority opinion); *see also* BOB ROBERTS (Paramount Pictures 1992) (noting song "Times Are Changing' Back"). *Cf.* Billy Bragg, *The Times They Are A-Changing Back*, YOUTUBE (Jan. 23, 2017), https://www.youtube.com/watch?v=0K7gyTQuuls [https://perma.cc/JQP5-4YL8].

deferential, rational basis test.[83] That test was summarized in *Heart of Atlanta Motel v. United States*, in which the Court upheld the prohibition on discrimination in public accommodations in the Civil Rights Act of 1964: "The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."[84] The Court dismissed states' rights arguments with the quip, "[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[85]

The *Lopez* court replaced this deferential test with a more restrictive bricolage assembled from bits of Gilded Age and New Deal Commerce Clause doctrine. The case involved a challenge to a federal law making it a crime to possess a firearm in a school zone.[86] The Court struck down the law and along with it the Commerce Clause interpretation that had prevailed since 1937.[87]

The *Lopez* version of the Commerce Clause begins with a three-category sorting hat[88] exercise:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate . . . those activities that substantially affect interstate commerce.[89]

Of course, the hard cases fall into the third category, and there Congress' authority is measured according to four[90] (or five[91]) considerations.

The first (often outcome determinative) consideration is whether the regulated activity is "economic" in nature.[92] If it is, then Congress may rationally conclude that interstate commerce is substantially impacted by aggregated in-

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[83] *Lopez*, 514 U.S. at 557.

[84] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); *see also* CHEMERINSKY, *supra* note 38, at 266–67 ("These decisions reflect the breadth of Congress's commerce power, but they are not surprising under the doctrines developed since 1937.").

[85] *Heart of Atlanta Motel*, 379 U.S. at 258 (quoting United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949)).

[86] *Lopez*, 514 U.S. at 551.

[87] *Id.* at 567–68.

[88] *See id.* at 558–59; J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 117–18 (1997).

[89] *Lopez*, 514 U.S. at 558–59 (citations omitted).

[90] *Id.* at 560–64.

[91] In addition to these considerations, the Court has indicated that it will consider whether the challenged measure is part of a broader and comprehensive regulatory regime. *Id.* at 561 ("Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"); *see also* Gonzales v. Raich, 545 U.S. 1, 28 (2005).

[92] *Lopez*, 514 U.S. at 559–60.

dividual economic conduct.[93] If it is not, then the legislation in question faces additional questions: Does the legislation contain jurisdictional language to limit its reach to interstate commerce?[94] Is it justified by findings or other evidence showing sufficiently direct causation, or is that causal chain too attenuated and indirect?[95] Does the federal law regulate in an area traditionally regulated by the states?[96]

This last consideration reveals most clearly the activist federalism components of modern Commerce Clause analysis. Just a few years earlier, the Court had rejected as unworkable the idea that the Tenth Amendment shields "traditional" state functions from federal law.[97] Then-justice Rehnquist promised in his dissent that the traditional-state-function concept would rise again.[98] In *Lopez*, Chief Justice Rehnquist made good on that promise:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[99]

These Commerce Clause revisions raise two yellow flags for environmental justice. First, the revised analysis has already proven hostile to civil rights. The *Lopez* majority's treatment of *Heart of Atlanta* is telling: A landmark civil rights case that had been about Congress' broad Commerce Clause authority over the substantial, national, negative impacts of racial discrimination was recast as an unexceptional case about Congress's power to regulate roads.[100] More acutely, the Court's very next application of the *Lopez* framework was to strike down civil rights legislation aimed at deterring violence against women.[101] In *United States v. Morrison*, the Court invalidated the Violence Against Women Act on grounds that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[102] The Court perceived grave dan-

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[93] *Id.* at 560.

[94] *Id.* at 561–62.

[95] *Id.* at 562–64.

[96] *Id.* at 564.

[97] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.").

[98] *Id.* at 580 (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.").

[99] *Lopez*, 514 U.S. at 564.

[100] *Id.* at 558 (citing *Heart of Atlanta* as an example of Congress's power to regulate channels of interstate commerce).

[101] United States v. Morrison, 529 U.S. 598, 601 (2000).

[102] *Id.* at 613.

ger to state sovereignty should Congress be permitted to conclude that violence against women substantially affects interstate commerce: "Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."[103] Of course, this would also seem to be potentially true of racial discrimination in public accommodation and, more importantly for our present purposes, Warren County-style environmental justice claims challenging local land use determinations.

A second warning flag is planted very close to the first, in the way *Lopez/Morrison* refetishized localism.[104] One way to understand the Court's transmutation of *Heart of Atlanta* into a case about interstate highways is that this conversion permits the Court to treat the Civil Rights Act of 1964 as if it does not regulate purely local activity on the basis of its impact on interstate commerce (which it plainly does). That kind of magical thinking becomes even more necessary when dealing with something as intensely local as a challenge to a city land use decision. It might well be possible to use a similar categorical maneuver—for example, to argue that Congress can regulate the environmental justice aspects of landfill siting because landfill space is an article of interstate commerce and therefore within the regulable category of things and people in interstate commerce.[105] But at a minimum it seems likely that any efforts to use Commerce Clause authorities to regulate local land use decisions raising environmental justice issues will have to contend with the current doctrine's hostility to federal intrusion into areas of traditionally local regulation.

As this discussion suggests, resurgent activist federalism in the courts creates additional uncertainties about pursuing environmental justice by means of equal protection or the Commerce Clause. *Boerne* makes it less certain that Congress would be permitted to legislate on environmental justice under the Fourteenth Amendment, especially in a way that dispenses with the intent requirement, because such legislation may be characterized as novel and "changing what the right is."[106] Meanwhile, on the Commerce Clause side of things, *Lopez* and *Morrison* arm courts with the ability to second guess Congressional determinations concerning substantial impact on interstate commerce, a capability some courts may feel especially compelled to use when traditional, local control of land use is at stake. Together, these federalism developments further complicate pursuit of environmental justice through the usual constitutional routes.

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[103] *Id.* at 615–16.

[104] *See Lopez*, 514 U.S. at 567–68.

[105] *Cf.* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (treating landfill space as an article of interstate commerce under the Dormant Commerce Clause doctrine).

[106] City of Boerne v. Flores, 521 U.S 507, 519 (1997).

IV. THE THIRTEENTH AMENDMENT AND PROSPECTS FOR ACHIEVING ENVIRONMENTAL JUSTICE

This part explains how the Thirteenth Amendment can serve as an additional, more promising source of authority for environmental justice action because it is not—and should not be—subject to the disparate impact and federalism problems described above.

A. The Thirteenth Amendment and Disparate Impact

This section first demonstrates that current Supreme Court precedent *does not* impose an intent requirement on Thirteenth Amendment claims. It then argues that such a requirement *should not* be imposed in light the original intent of the amendment's authors to eradicate the vestiges of slavery including its "badges and incidents." Having disposed of the intent issue, this section concludes with a discussion of how the Thirteenth Amendment's historical concern with denied property rights as one such "badge and incident" is a promising basis for pursuing environmental justice.

1. Supreme Court Precedent Does Not Impose an Intent Requirement for Thirteenth Amendment Claims.

At least one widely noted constitutional treatise (cited frequently throughout the rest of this essay) opines that "the Thirteenth Amendment requires proof of a discriminatory purpose," based on the United States Supreme Court's decision in *City of Memphis v. Greene*.[107] This section argues that this conclusion misperceives *Greene's* actual holding and reasoning, both of which left the viability of disparate impact claims under the Thirteenth Amendment unresolved.

Greene involved a challenge to the city's decision to close a road linking a black neighborhood to a white neighborhood.[108] City officials defended the decision on grounds of public safety and reducing "traffic pollution," but some black residents saw it differently and challenged the closure under the Thirteenth Amendment and 42 U.S.C. § 1982, which was adopted under that amendment.[109] Reminiscent of *R.I.S.E.*, the district court found that the closure would "have disproportionate impact on certain black citizens" and that the traffic diverted would be "overwhelming [sic] black."[110] Nevertheless, the district court ruled against the black residents, in part because they had not proved discriminatory intent or purpose.[111] The Sixth Circuit reversed, finding that the

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[107] CHEMERINSKY, *supra* note 38, at 728 n.135 (citing City of Memphis v. Greene, 451 U.S. 100 (1981)).

[108] *Greene*, 451 U.S. at 102.

[109] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2012); *Greene*, 451 U.S. at 102.

[110] *Greene*, 451 U.S. at 110.

[111] *Id.* at 107–08.

black residents could show that the closing was a "badge of slavery" without having to show that similar applications by black neighborhoods had been rejected.[112] The Supreme Court reversed the Court of Appeals and ruled in favor of the city, finding that "a review of the justification for the official action challenged in this case demonstrates that its disparate impact on black citizens could not [be] fairly characterized as a badge or incident of slavery."[113]

Lifted from its context, this isolated statement could imply that "justification for the official action" (i.e., purpose or intent) rather than disparate impact, is the proper constitutional focus under the Thirteenth Amendment.[114] But that is not what the *Greene* Court actually held. To the contrary, the majority expressly disavowed any intention of "confront[ing] prematurely the rather general question whether either [section] 1982 or the Thirteenth Amendment requires proof of a specific unlawful purpose . . . ."[115] The Court stated plainly:

> To decide the narrow constitutional question presented by this record *we need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself*. We *merely* hold that the impact of the closing of West Drive on nonresidents of Hein Park is a routine burden of citizenship; it does not reflect a violation of the Thirteenth Amendment.[116]

The outcome in *Greene* thus did not turn on the question of discriminatory intent. Instead, as the quote above suggests, it turned on the absence of evidence of constitutionally cognizable injury in what the Court took to be a fairly routine road closure. Throughout the opinion, Justice Stevens dismisses the plaintiffs' asserted injuries as de minimis, observing for example that the "closing has not affected the value of property owned by black citizens, but it has caused some *slight inconvenience* to black motorists."[117] The Court says that such inconvenience does not compare with the "odious practice the Thirteenth Amendment was designed to eradicate"[118] and goes on to reject "the symbolic significance of the fact that most of the drivers who will be inconvenienced by the action are black."[119]

In fact, Justice Stevens's focus on insufficiently serious injury, rather than inadequate evidence of intent, led Justice White to write a testy concurring

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[112] Greene v. City of Memphis, 610 F.2d 395, 400–02 (6th Cir. 1979).

[113] CHEMERINSKY, *supra* note 38, at 728–29 n.135.

[114] *Id.*

[115] *Greene*, 451 U.S. at 120.

[116] *Id.* at 128–29 (emphasis added).

[117] *Id.* at 119 (emphasis added).

[118] *Id.* at 128.

[119] *Id.* In this respect, the matter begins to look more like a case about Article III standing. *Cf.* Allen v. Wright, 468 U.S. 737, 755–56 (1984) (holding "abstract stigmatic injury" associated with government's failure to enforce discrimination laws, without more, is not a cognizable injury), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

opinion in which he takes the majority to task for ducking the intent question.[120] Justice White observed:

> Without explicitly saying so, the Court of Appeals necessarily held that a violation of § 1982 could be established without proof of discriminatory intent. The petition for a writ of certiorari sought review of that precise point. We granted review to answer the question presented in the petition for a writ of certiorari. The parties in their briefs proceeded on the same assumption. *However, instead of answering the question which was explicitly presented by the findings and holdings below*, raised by the petitioners, granted review by this Court and briefed by the parties, the Court inexplicably assumes the role of factfinder, peruses the cold record, rehashes the evidence, and sua sponte purports to resolve questions that the parties have neither briefed nor argued.[121]

Justice White's criticism of the majority opinion thus reinforces the conclusion that *Greene* simply did not decide the question of intent.

As final confirmation of this point, the Court itself subsequently reiterated that *Greene* did not create an intent requirement under the Thirteenth Amendment.[122] In *General Building Contractors Association v. Pennsylvania*, the Court held that although the Civil Rights Act of 1866 requires proof of discriminatory intent as a matter of statutory interpretation, it was not necessary to determine the same question with respect to the interpretation of the Thirteenth Amendment.[123] The Court stated that it "need not decide whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose, or indeed whether it accomplished anything more than the abolition of slavery," and cited *Greene*.[124]

In short, a close review of precedent shows that the Court has *not* found an intent requirement under the Thirteenth Amendment. The next section explains why the Court should decline future invitations to do so.

2. The Thirteenth Amendment Should Not Include an Intent Requirement.

Having established above that the Supreme Court *has not* required proof of discriminatory intent in Thirteenth Amendment claims, this section argues that it *should not* do so. An intent requirement is inappropriate to Thirteenth Amendment analysis because the Thirteenth Amendment differs in fundamental ways from equal protection analysis. Critically, the Thirteenth Amendment has a substantive and not merely formal goal—the goal of undoing the subordi-

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[120] The city of Memphis's brief described the question presented as "Whether a violation of 42 U.S.C. § 1982 and the Thirteenth Amendment to the United States Constitution can be established without a showing of racially discriminatory intent or purpose." Brief for Petitioners at 4, City of Memphis v. Greene, 451 U.S. 100 (1981) (No. 79-1176), 1980 WL 339373, at *4.

[121] *Greene*, 451 U.S. at 129–30 (White, J., concurring) (emphasis added).

[122] *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 378, 390–92 n.17 (1982).

[123] *Id.* at 390–92 n.17.

[124] *Id.*

nation of African Americans in America. That anti-subordination goal includes dismantling of the badges and incidents of slavery, among them the disabilities imposed on African American property rights.

Statements by the amendment's supporters lend support to the idea that the amendment was intended to go beyond slavery and address racial subordination. The day after the amendment's ratification, Senator Lyman Trumbull, senate author of the amendment, spoke on the Senate floor to urge Congress to adopt implementing legislation, "lest by local legislation or a *prevailing public sentiment* in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom."[125] Shortly thereafter, Trumbull introduced what would become the Civil Rights Act of 1866, stating, "This measure is intended to give effect to that declaration and secure to all persons within the United States *practical freedom*. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect[.]"[126] In subsequent debates on the act, Trumbull stated, "I have no doubt that, under [section 2 of the Thirteenth Amendment] we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing."[127]

Senator Wilson of Massachusetts similarly stated that the Thirteenth Amendment "obliterat[ed] the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it."[128] And Senator Charles Sumner stated that the amendment abolished slavery "root and branch . . . in the general and the particular . . . in length and breadth and then in every detail . . . . Any other interpretation belittles the great amendment and allows slavery still to linger among us in some of its insufferable pretensions."[129]

These anti-subordination themes are also a long-standing feature of Thirteenth Amendment jurisprudence, starting (unlikely as it may seem) with the *Civil Rights Cases* of 1883.[130] There, the Supreme Court held that none of the Civil War amendments authorized the expansive antidiscrimination provisions

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[125] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431 (1968).

[126] *Id.* (emphasis added).

[127] *Id.* at 440. Notably, the Act included a clause providing that "all persons born in the United States and not subject to any foreign power . . . are hereby declared to by citizens of the United States," thereby overturning the conclusion that Dred Scott was not a citizen. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (2012)); *see also* Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 282 (2010).

[128] William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1339 (2007).

[129] *Id.* at 1343.

[130] *See* Civil Rights Cases, 109 U.S. 3, 24 (1883); *see also* CHEMERINSKY, *supra* note 38, at 294–97.

of the Civil Rights Act of 1875.[131] But along the way, the Court recognized that the Thirteenth Amendment authorizes Congress to reach state and private conduct not only to eradicate slavery, but to eradicate "all badges and incidents of slavery."[132]

Although the phrase "badges and incidents of slavery" does not appear in the Thirteenth Amendment itself,[133] Professor Mason McAward's research links it to continued legal and social subordination of former slaves. Around the time of the amendment's ratification, "incidents" was apparently understood to refer to the legal restrictions accompanying slavery itself, such as laws prohibiting slaves from owning property.[134] The term "badges" had a less settled meaning.[135] Sometimes it was just a synonym for "incidents" (legal disabilities) so that a freed slave was no longer marked by the "badges" of slavery.[136] Sometimes it referred to the inescapability of skin color.[137] But crucially, sometimes it was used to refer to government or private acts that would "mark [freed slaves] as a subordinate brand of citizens."[138]

Subordination is also a vital theme in the Court's landmark Thirteenth Amendment decision *Jones v. Alfred H. Mayer Company*. In *Jones*, the Court applied rational-basis review to uphold the constitutionality of the Civil Rights Act of 1866, now codified as 42 U.S.C. § 1982, and its application to racial discrimination in private home sales.[139] The Court cited with approval Senator Trumbull's declaration that the purpose of the law was to ensure that "*all* the badges of servitude . . . be abolished."[140] The Court observed that the congressional debates on the law were "replete with references to private injustices against Negroes" and that to the "Congress that passed the Civil Rights Act of 1866, it was clear that [property rights] might be infringed not only by 'State or local law' but also by 'custom or prejudice.' "[141]

The *Jones* Court also noted that it had previously upheld the statute's application to racially restrictive covenants that "covered only two-thirds of the lots of a single city block" in Washington, D.C.[142] The Court observed that "[a]lthough the covenants could have been enforced without denying the general right of Negroes to purchase or lease real estate, the enforcement of those

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131 *Civil Rights Cases*, 109 U.S. at 25.

132 *Id.* at 20.

133 U.S. CONST. amend. XIII.

134 Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 570–78 (2012).

135 *Id.* at 570, 575–78.

136 *Id.* at 578.

137 *Id.* at 576.

138 *Id.* at 578.

139 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41, 443 (1968).

140 *Id.* at 424–26 n.31.

141 *Id.* at 423, 427 (citation omitted).

142 *Id.* at 418 (discussing Hurd v. Hodge, 334 U.S. 24 (1948)).

covenants would nonetheless have denied the Negro purchasers 'the same right as is enjoyed by white citizens [to buy property].' "[143] The Court concluded:

> Just as the Black Codes, enacted after the Civil War . . . were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[144]

Justice Douglas's concurrence echoes the anti-subordination themes of the majority:

> The true curse of slavery is [that it] produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave. Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.[145]

As this record shows, the Thirteenth Amendment was intended by its authors to serve an anti-subordination purpose. This purpose, in turn, justifies concluding that intent has no useful role to play in Thirteenth Amendment analysis.[146] As Professor Zietlow explains, there are significant differences between the "formal equality" that has come to characterize equal protection and the "anti-subordination" roots of the Thirteenth Amendment.[147] Most importantly, anti-subordination is "not neutral" but necessarily involves recognition of disparate impact and race-conscious decision-making in ways not toler-

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[143] *Id.* (quoting *Hurd*, 334 U.S. at 34).

[144] *Id.* at 441–43.

[145] *Id.* at 445 (Douglas, J., concurring). The *Jones* court held that § 1982 (and the Thirteenth Amendment) reach private conduct. This absence of a state action requirement speaks to the federalism issue as well, in that the lack of a state action requirement is that it is, in a way, an assertion of the absoluteness of the Thirteenth Amendment's reach. The Fourteenth Amendment's state action requirement immunizes private discrimination and state discrimination that fails to meet the formal requirements of the Court's state-action tests; the Commerce Clause's traditional state function element might insulate local land use decisions from Congressional action. But the Thirteenth Amendment contains no such safe harbors. Everyone—private citizens, states, local governments, public/private hybrids—is subject to the same injunction. Congress therefore should have maximum latitude to identify and eradicate the badges and incidents of slavery, including acts that have a disproportionate environmental impact.

[146] *See* McAward, *supra* note 134, at 617 ("[T]here is no reason to think that the concept of the badges and incidents of slavery contains an intent requirement."); *see also Jones*, 392 U.S. at 439–40 ("[T]he majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of *positive legislation* that was embodied in the 1866 Civil Rights Act.") (emphasis added).

[147] Zietlow, *supra* note 127, at 266–67 ("[T]he Thirteenth Amendment is facially based on an anti-subordination model because [it provides] . . . a positive guarantee against both race discrimination and the exploitation of workers . . . . This ban on slavery and involuntary servitude clearly is not neutral because it gives workers rights against their masters. It aims to destroy a hierarchical system and to empower those that suffered under that system.").

ated by equal protection analysis.[148] While a system of formal equality arguably requires an intent element to distinguish between "equal" and "unequal" treatment, a system of substantive equality with a substantive goal of ending the subordination of a specific group has no need of an intent requirement.[149] Instead, the actions can be judged on the substantive basis of whether they perpetuate subordination. For these reasons, the absence of an intent requirement makes the Thirteenth Amendment a potentially more effective path to pursuing environmental justice claims founded on disparate impact and historical subordination.

3. Anti-Subordination, Property Rights, and Environmental Justice

The discussion above explains why intent should not be a factor in Thirteenth Amendment claims. This section completes the argument by explaining how environmental injustice can be viewed as a badge and incident of slavery while at the same time avoiding complaints of doctrinal overreach.

A predictable objection to treating environmental injustice as a badge and incident of slavery is that it is an overreach, pushing the phrase beyond anything its authors could have had in mind. In response, it is worth noting that modern environmental regulation is not as novel as it might seem; environmental law has common law precursors[150] and as early as 1899 Congress had made it a misdemeanor to pollute or alter navigable waters without a permit.[151] Even so, there is sense to Professor Carter's observation that "[i]f the Thirteenth Amendment is to realistically mean anything . . . it cannot mean everything."[152] Accordingly, he has proposed that determining whether a particular practice amounts to a badge or incident of slavery should rest on two considerations designed to limit and bound the concept: "(1) the connection between the class to which the plaintiff belongs and the institution of chattel slavery, and (2) the connection the complained-of injury has to that institution."[153]

Applying Professor Carter's limiting test, it is clear that many environmental justice claims will meet the first prong. Many of today's examples of environmental injustice are traceable to the historical subordination of African Americans. Thus, today, we see that African Americans are exposed to significantly more particulate pollution.[154] Racially discriminatory redlining in Flint,

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148 *See id.* at 266.

149 *See* Masoni, *supra* note 19, at 108 ("Therefore, in the context of environmental discrimination, the search for intent, or intent by way of impact, is potentially misleading and irrelevant.").

150 *See* ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 62–65 (3d ed. 2000).

151 Rivers and Harbors Appropriation Act of 1899, ch. 425 § 10, 30 Stat. 1151 (1899) (codified as amended 33 U.S.C. § 403 (2012)).

152 Carter, *supra* note 128, at 1378.

153 *Id.* at 1366.

154 Mikati et al., *supra* note 12, at 480.

Michigan in the 1930s ensured that 2014's water disaster hit a city that is disproportionately African American.[155] The district court in *R.I.S.E.* acknowledged the disparate impact of the county's landfill siting on African Americans.[156]

Second, environmental justice claims are tied to the institution of slavery by virtue of the denial of property rights to African Americans in slavery and for decades thereafter.[157] The ties between slavery and property ownership are made clear from the fact that Congress's first act under the Thirteenth Amendment was to guarantee to all citizens "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."[158] Cases like *Jones* and *Hurd* confirm this connection between slavery and property rights.[159] As Justice Douglas put it, "Enabling a Negro to buy and sell real and personal property is a removal of one of many badges of slavery."[160] Property ownership brings with it dignity and respect. As James Ashley, author of the Thirteenth Amendment in the House of Representatives, observed: "Wherever the negro is free and is educated and owns property, you will find him respected and treated with consideration . . . ."[161] Given the centrality of property rights to the meaning of "badges and incidents," it is no stretch at all to conclude that disproportionate siting of landfills in areas disproportionately African American has the potential to reverse such social gains, not only by devaluing real property but also by signaling that society devalues—that is, subordinates—the residents themselves.[162]

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[155] Dustin Dwyer, *See the Maps from the 1930s that Explain Racial Segregation in Michigan Today*, ST. OPPORTUNITY (June 27, 2014), http://stateofopportunity.michiganradio.org/post/see-maps-1930s-explain-racial-segregation-michigan-today [https://perma.cc/4B7M-8REF]. An obvious question that follows is whether environmental justice protections under the Thirteenth Amendment are just for African American people, or whether other groups are similarly protected. That question is beyond the scope of this essay, but Carter sketches ways in which his test would be satisfied upon a showing that the group in question has been subjected to conduct with "an intimate connection to the societal structures both supporting and created by slavery." Carter, *supra* note 128, at 1372.

[156] R.I.S.E., Inc. v. Kay, 768 F. Supp. 1141, 1144 (E.D. Va. 1991).

[157] *See* Masoni, *supra* note 19, at 105 ("A specific aspect of race-based environmental discrimination that may be susceptible to being labeled as a badge and incident of slavery is land use discrimination.").

[158] 42 U.S.C. § 1982 (2012).

[159] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 418–20 (1968).

[160] *Id.* at 444 (Douglas, J., concurring).

[161] Chas. S. Ashley, *Governor Ashley's Biography and Messages*, *in* 6 CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA 148, 153 (1907).

[162] On this point, it is worth noting that had the *Greene* litigants presented better evidence of property impacts, the outcome might well have been different. *See* City of Memphis v. Greene, 451 U.S. 100, 117–18 (1981) (discussing weakness of property value evidence).

B. The Thirteenth Amendment and Federalism

Perhaps the best argument for rejecting federalism-based limits on the Thirteenth Amendment is original intent: as the historical record shows, states' rights arguments were considered and rejected during the amendment's ratification.

Opponents of the amendment argued that "it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State," yet the amendment was adopted anyway—signaling that its adopters intended to subordinate federalism itself to racial anti-subordination.[163] Anticipating *Boerne* decades before it was decided, Senator Trumbull, senate author of the Thirteenth Amendment, stated during legislative debate on the Civil Rights Act of 1866: "Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end."[164]

Trumbull's statement is more than forceful rhetoric; it is an argument about constitutional law based on Justice Marshall's declaration in *McCulloch v. Maryland:* "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[165] Similarly, Representative Wilson of Iowa, speaking on behalf of the Civil Rights Act of 1866, drew upon that declaration when he said:

> The end is legitimate . . . because it is defined by the Constitution itself. The end is the maintenance of freedom . . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality.[166]

In this sense, the very existence of the Thirteenth Amendment and its substantive objectives predetermined the answers to *Boerne's* "proportionality and congruence" questions. Unlike *Boerne*, where the record of state-sanctioned religious intolerance was too thin for the Court's liking, there can be no question about whether there exists an adequate historical record of slavery and its badges and incidents.[167] Therefore, Congressional power under the Thirteenth Amendment is at its maximum—that is, coextensive with its power under the Necessary and Proper Clause. This understanding is validated by the *Jones* court's observation that "[s]urely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what

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[163] *Jones*, 392 U.S. at 439.

[164] CONG. GLOBE, 39th Cong., 1st Sess. 321–22 (1865).

[165] McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 421 (1819).

[166] *Jones*, 392 U.S. at 443–44.

[167] See discussion *supra* Section III.A.

are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[168]

This reasoning is further reinforced by a series of recent lower court rulings[169] examining constitutionality of the Matthew Shepard and James Byrd, Jr., Hate Crimes Act of 2009, which was adopted under section two of the Thirteenth Amendment.[170] In each of these cases, the court refused to extend *Boerne* to the Thirteenth Amendment and rejected arguments under other federalism precedents like *Lopez* and *Morrison* aimed at limiting the Thirteenth Amendment's reach.[171]

In *United States v. Beebe*, the court set forth several reasons why federalism did invalidate the act.[172] First, the court found "nothing in the language of *City of Boerne* that indicates that it silently intended to do something as sweeping as displacing the centuries-old standard of *McCulloch v. Maryland* and overruling . . . *Jones*."[173] The court instead determined that "*Jones* set forth the proper standard under which courts should analyze the constitutionality of legislation enacted pursuant to Section Two of the Thirteenth Amendment: review for rationality."[174]

Second, the court rejected the defendants' federalism arguments under the Tenth Amendment as refracted by *Lopez* and *Morrison*.[175] The defendant argued that regulation of hate crimes was an improper intrusion into "the province of the states."[176] But the court determined that "when Congress passed Section Two of the Thirteenth Amendment and expressly delegated to Congress power to enforce the ban on slavery, *the states could no longer claim any reserved exclusive power over this area*."[177] The court distinguished *Lopez* and *Morrison* as cases in which the links between the regulated conduct (gun possession and violence against women, respectively) and interstate commerce

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168 *Jones*, 392 U.S. at 440.

169 *See* United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013); United States v. Beebe, 807 F. Supp. 2d. 1045, 1049 (D.N.M. 2011), *aff'd sub nom.; see also* United States v. Cannon, 750 F.3d 492, 505 (5th Cir. 2014); United States v. Metcalf, No. 15–CR–1032-LRR, 2016 WL 827763, at *3 (N.D. Iowa Mar. 2, 2016); United States v. Henery, 60 F.3d. 1126, 1128 (D. Idaho 2014).

170 18 U.S.C. § 249(a) (2012). The act includes among its findings that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2835–36 (2009).

171 *Beebe*, 807 F. Supp. 2d. at 1057.

172 *Id.* at 1058.

173 *Id.* at 1049; *see also Cannon*, 750 F.3d at 505 (upholding Shepard/Byrd Act against federalism challenge); *Metcalf*, 2016 WL 827763, at *3.

174 *Beebe*, 807 F. Supp. 2d. at 1048.

175 *Id.* at 1057.

176 *Id.*

177 *Id.* (emphasis added).

"were very attenuated."[178] "In contrast, [the Shepard/Byrd Act's] link to the Thirteenth Amendment is far tighter, because . . . it targets directly a badge of slavery. Therefore, the Tenth Amendment does not come into play."[179]

Finally, the court observed that "it is unclear that the Tenth Amendment's federalist concerns limit the Thirteenth Amendment to the same extent that they limit the Commerce Clause, because unlike the Commerce Clause, the Thirteenth Amendment was passed after the Tenth Amendment and enacted a direct command on the states and individuals alike."[180]

CONCLUSION

This essay demonstrates that the Thirteenth Amendment holds significant advantages over Equal Protection and Commerce Clause authorities when it comes to pursuing environmental justice. The Thirteenth Amendment's anti-subordination purpose means that discriminatory intent is not required for a viable environmental justice claim. And the amendment's authors made clear that they brooked no federalism-based objections to Congress's reach under the amendment, making it more suited to legislative solutions aimed at environmental justice.

Forty years after Warren County, the time has come to find a new path towards environmental justice. As this essay demonstrates, one path that deserves greater exploration lies through the Thirteenth Amendment.

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[178] *Id.*

[179] *Id.*

[180] *Id.* at 1057 n.7 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976)) ("[H]olding that Section Five of the Fourteenth Amendment, unlike the Commerce Clause, limited Eleventh Amendment immunity because the framers of the Civil War Amendments intended to expand Congress' powers, 'with the corresponding diminution of state sovereignty' ").