

Environmental Justice Suits Under the Fair Housing Act

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I. INTRODUCTION

In recent years, the environmental movement has grown away from a focus only on the protection of natural resources in the wild and toward an awareness of the importance of protecting and improving urban environments as well. In the courtroom setting, traditional activism generally involved naturalists opposing development or pollution of previously untouched wilderness.¹ Contemporary activism, however, runs the gamut from naturalists suing to prevent the clear cutting of a bird sanctuary to citizens suing to halt discriminatory practices in siting decisions for toxic industries.² The expanded focus of current environmental activism

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1. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978).

2. See *Baton Rouge Audubon Soc. v. Sandifer*, 702 So. 2d 997 (La. Ct. App. 3d Cir. 1997) (seeking an injunction against the Parish Police Jury removing all trees and brush in a bird sanctuary); Marcia Coyle, *Governor v. Students in \$700M Plant Case*, NAT'L L.J., Sept. 8, 1997, at A1 (seeking to prevent the siting of a polyvinyl chloride plant in their town, citizens allege

may be viewed as a union of the environmental movement and the civil rights movement; a union that holds promise both for environmental and civic justice activists.

The environmental and civic justice movements have substantially different origins. However, despite different focuses historically, the cross-pollination of the two movements not only revitalizes each with new ideas and activists, but also provides each with new tools with which to fight for their goals. This Article seeks to illuminate one area in which the cross-pollination of the environmental and urban justice movements may prove helpful. Specifically, the article examines the potential usefulness of the Fair Housing Act as a tool against degradation of the urban and natural environment by industrial development. Attention has recently focused on the Fair Housing Act as a possible weapon in the environmental protection arsenal, and a realistic assessment of its strengths and weaknesses is necessary before attorneys urge their clients to hang their hats and limited resources on Fair Housing Act claims.

The Article begins, in Part II, with a brief examination of the roots of the environmental and urban justice movements and the eventual melding of the two. Part III introduces a community in northern Louisiana which is faced with a highway development plan that poses both rural and urban threats and that raises further issues of racial and economic injustice. Part IV examines several statutes which have traditionally been used to contest similar development projects and the drawbacks that citizens face in suits brought under these statutes. Part V examines racial justice statutes and their use in opposing proposed development. Part VI then analyzes the Fair Housing Act as a potential tool for otherwise-disenfranchised citizens seeking to protect their environment from careless and harmful development projects.

II. INDUSTRIALIZATION AND ANOMIE

Towards the end of the nineteenth century, increasing concerns about industrialization and its effects on health and communities led to the formation of numerous conservation and civic reform movements.³ Americans worried that mechanization and urbanization

violations of Clean Water Act, Clean Air Act, and Presidential Directives on Environmental Justice).

3. See Daniel Joseph Singal, *Towards a Definition of Modernism*, 39 AM. Q. 7, 10 (1987); see also John Higham, *The Reorientation of American Culture in the 1890s*, in *THE ORIGINS OF MODERN CONSCIOUSNESS* (John Weiss ed., Wayne State Univ. Press 1965) (noting that

deprived them of the health and vigor they associated with a more rural lifestyle. As “a belief developed that modern bourgeois existence had become . . . ‘over-civilized,’” a need developed “to heighten and savor all varieties of experience.”⁴ Many Americans, most visibly Theodore Roosevelt, sought to reinvigorate themselves through increased contact with the great outdoors and improved physical health through sportsmanship.⁵ Early environmentalists, such as John Wesley Powell, the first head of the U.S. Geological Survey, and Carl Schurz, President Lincoln’s Secretary of the Interior and a lifelong conservationist, first introduced conservationist principals to the American republic. Schurz struggled to protect natural resources by creating national parks, such as Yellowstone National Park in Wyoming and Adirondack Park in New York.⁶ Powell sought to introduce major governmental control into the development of western lands.⁷ Painters such as Frederic Church and Albert Bierstadt memorialized this idealized grand American landscape at approximately the same time.

Within cities, the same desire to revitalize the self in the industrialized era motivated movements for increased green spaces and healthier urban environments. Frederick Law Olmstead designed city parks as recreational areas intended to counteract the anomie and perceived physical delicacy of modern city dwellers.⁸ He and his architectural firm designed numerous city parks in the 1890s, including such famous parks as Central Park in New York City and Audubon Park in New Orleans.⁹ At the same time, civic activists sought to improve urban conditions through government intervention, legislation, and charitable institutions such as Hull House in Chicago.¹⁰ To the extent that the environmental movement and the civic reform movement arose from the same disaffection with modern life and sought to address that ambivalence through improved health and greater contact with nature, the movements were coterminous.

Americans began to strain against the rigid restrictions of Victorian life by seeking vitality in many different aspects of their lives).

4. Singal, *supra* note 3, at 10.

5. *See id.*

6. *See* CELIA CAMPBELL-MOHN ET AL., ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY § 1.2(C)(1), at 14-15 (1993).

7. *See id.*

8. *See* WITOLD RYBCZYNSKI, CITY LIFE 124-26 (Scribner 1995). Olmstead felt that his parks were a “crucial antidote to the nervous, inhospitable city.” *Id.* at 125.

9. *See id.*

10. *See* JANE ADDAMS, TWENTY YEARS AT HULL-HOUSE (Signet Classic 1981) (1910); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 241-42 (1961).

However, the leaders of the two movements were seldom the same individuals, and a certain degree of mutual distrust developed. Conservationists were loath to become involved in the discomfiting issues of civil rights, and Progressives placed battles for human living conditions above those for natural environments.¹¹ While Conservationists established a national park system, Progressives established charitable houses where the abandoned and poor might live,¹² and sought to pass legislation imposing standards in areas such as construction and labor.¹³ The conservation and civic justice worlds remained miles apart literally and in their objectives until the 1960s.

In the 1960s, the civil rights movement, after years of struggle and steadfast effort, successfully achieved greater civic participation in legislation and politics for disenfranchised minorities. The environmental movement capitalized on the civic participation requirements of laws introduced as a result of the civil rights movement to further its own agenda.¹⁴ The environmental movement also discovered a sense of community with the civil rights movement, and perhaps discovered that, as Albert Schweitzer expressed, “[a] man is ethical only when life, as such, is sacred to him, that of plants and animals as that of his fellow men, and when he devotes himself helpfully to all life that is in need of help.”¹⁵ Such an ethic of interconnection entered the environmental movement, and the influence of such thinking has since pervaded much environmental activism.

A combination of a civil rights and an environmental perspective offers a potentially powerful tool in the environmental justice movement. The citizen participation and impact consideration requirements contained in many current environmental and urban development statutes offer ways to influence planned projects such as urban renovation, highways, and siting of major industrial or municipal facilities. More importantly, however, a combination of environmental and civil rights claims, especially those within the Fair Housing Act (FHA), may provide minority communities with some protective armor against urban development that threatens to destroy their neighborhoods.¹⁶ Nonetheless, the weaving together of

11. See CAMPBELL-MOHN, *supra* note 6, § 1.2(D), at 18.

12. See *id.* § 1.2(D), at 18-23.

13. See ADDAMS, *supra* note 10, *passim*.

14. See CAMPBELL-MOHN, *supra* note 6, § 1.2(H), at 31.

15. *Id.* § 1.2(H)(1), at 32 (quoting ALBERT SCHWEITZER, *OUT OF MY LIFE AND THOUGHT* 158 (1949)).

16. See Fair Housing Act of 1968, 42 U.S.C. §§ 3601-19 (1997).

environmental and FHA claims is delicate work and a tenuous armor in clumsy hands. Earlier articles on this subject have argued too blithely the strength of a Fair Housing claim, without paying sufficient attention to the legislative history of the FHA. A more finely woven approach to the FHA, embedded in current environmental understandings, is necessary if the statute is to successfully offer expanded protection to minority communities. Without environmental justice, civil rights suffer great setbacks. Civil rights issues are now central in many environmental disputes, including the controversy surrounding the construction of a new stretch of highway in Shreveport, Louisiana.

III. LEDBETTER HEIGHTS, LEADBELLY, AND THE HIGHWAY

Considering legal claims in a vacuum is often a futile exercise. Creation of a new legal rule seems like an easy thing until it is held up to the harsh light of reality. A case, drawn from a real set of facts, forces theory to confront reality. Such a confrontation highlights the weaknesses in a claim and demonstrates at which point a legal theory may have stretched a statute beyond its possible interpretations. Thus, to examine the practical reality of analyzing problems of environmental degradation and racial injustice through the lens of one statute, this Part of the Article introduces a community in northern Louisiana involved in an ongoing development dispute.

The Shreveport, Louisiana Interstate 49 highway extension project (Shreveport I-49 project) gives rise to an interplay between historic preservation, environmental, and urban development issues, and provides a helpful example with which to analyze the viability of different procedural and substantive claims. Interstate 49 extends in a north-south direction from Lafayette, Louisiana to Shreveport, Louisiana.¹⁷ City officials in Shreveport, particularly the Shreveport Chamber of Commerce, intend to extend I-49 from Shreveport to the Arkansas state line, creating a continuous north-south freeway route stretching from Lafayette through Kansas City to Canada.¹⁸ Proponents of development suggest that the construction of such a

17. See DEMOPULOS & FERGUSON ASSOCS., CORRIDOR STUDY: NORTH-SOUTH EXPRESSWAY EVALUATION OF INTERSTATE 20 TO INTERSTATE 220, CADDO PARISH 1 (Aug. 1996) (on file with author). See Appendix for a map of the proposed project.

18. See *Member Policy Initiatives and Requests for Highway and Transit in the ISTE A Reauthorization: Hearings Before the Subcomm. on Surface Transp. of the House Comm. on Transp.*, 105th Cong. 1629-34 (March 13, 1997) [hereinafter *Hearings*] (testimony of Arlena Acree, Chairperson, Shreveport Chamber of Commerce).

straight route will increase use throughout the I-49 corridor.¹⁹ In order to create such a straight throughway, officials hope to add a section of highway connecting I-49 between Interstate 20 and Interstate 220.²⁰ Interstate 20 and Interstate 220 connect in Shreveport like legs of a triangle, and the third, missing leg of the triangle is the proposed I-49 inner-city segment in Shreveport. A currently-planned northern extension of I-49 begins after I-220 in Shreveport, but the southern leg of I-49 ends at Interstate 20 in Shreveport.²¹ The planned inner-city segment would allow highway travelers to go straight through Shreveport rather than around, saving approximately nine miles from an inner-city route over I-20 and I-220 or two miles from a different inner-city route on US route 71.²² The proposed segment of I-49 would pass through a relatively rural area, including a flood plain from Cross Bayou,²³ and would bisect a predominantly minority, low-income urban neighborhood, Ledbetter Heights.

Ledbetter Heights consists of several historically unique and diverse neighborhoods: Allendale, St. Pauls Bottoms, and West End.²⁴ These neighborhoods were joined and renamed in 1980 as Ledbetter Heights to reflect the increasingly homogenous nature of the community and to ease tensions regarding the historic names of the neighborhoods. These tensions included disagreement regarding whether or not the appellation "Bottoms" was demeaning and whether or not it was appropriate for a predominantly African-American neighborhood to take its name from the plantation of former Governor Henry Watkins Allen.²⁵ Despite the official name change, however, many locals continue to refer to some or all of the areas by their historical names. These neighborhoods were part of the city of Shreveport when it incorporated in the 1830s.²⁶ Rapid development

19. *See id.*

20. *See id.*

21. *See* DEMOPULOS & FERGUSON, *supra* note 17, at 2.

22. *See id.* at 9. US 71 is the recommended route with travel time for that short section estimated at 16-18 minutes with speeds averaging 39-46 mph. *See id.*

23. *See id.* at 24.

24. *See* Eric Brock, *For Historic and Moral Reasons, Allendale is Worth Preserving*, SHREVEPORT TIMES, April 3, 1993, at A2; Telephone interview with Eric Brock, Consulting Urban Planner and Historian, and Columnist, SHREVEPORT TIMES (April 9, 1997); Interviews with Sister Margaret McCaffrey, Chair, Christian Service Program, in Shreveport, La. (August 2, 1996; April 4, 1997); SIERRA CLUB LEGAL DEFENSE FUND, COMMENTS AT THE ISTE A REAUTHORIZATION REGIONAL MEETING (July 30, 1996) (on behalf of Christian Service Program of Shreveport, La., opposing the Inner-city Segment of I-49) (on file with Sierra Club Legal Defense Fund); Henry Chase, *A Novel and Poetic View of Louisiana*, AM. VISION, Aug. 18, 1996, at 44; Alysha Stingley, *Designation Gives Shotgun Homes a Leg Up*, BATON ROUGE ADVOCATE, Feb. 21, 1995, at 8B.

25. *See* Brock, *Historic and Moral Reasons*, *supra* note 24.

26. *See* sources cited *supra* note 24.

of these areas began in approximately 1845 and continued through 1900.²⁷ Although most construction began just after the Civil War and continued through the 1890s, a handful of ante-bellum buildings remain in the area. Nonetheless, the majority of housing that would be impacted by an inner-city segment of I-49 is of late-Nineteenth century vintage.²⁸ Ledbetter Heights, which was added to the National Register of Historic Places in 1984, contains a historic district in which 465 properties were identified in the early 1980s as architecturally or historically significant.²⁹ Many of the homes in Ledbetter Historic District were renovated in the late 1980s. Although these homes were allowed to deteriorate in the early 1990s, they are currently being renovated again. I-49 would skirt the northern edge of the historic district, but would subject it to increased traffic and concurrent noise and air pollution.

The cultural community occupying Ledbetter Heights has changed significantly since its inception. Originally, when it was established at the beginning of the Nineteenth Century, much of the area was occupied by northern and western Europeans. In the 1890s, Italians, Greeks, and eastern European Jews moved into the area. Although each culture left an imprint architecturally and historically, the African-American community has dominated the neighborhood since the 1930s and 1940s.³⁰

Ledbetter Heights boasts that it is home to both the “oldest continuously operating African-American restaurant in the United States” and Antioch Baptist Church, built in 1903, designed by N.S. Allen, and serving the oldest African-American congregation in Shreveport.³¹ Of the African-Americans who have called the Ledbetter Heights neighborhoods home throughout the years, the most famous is blues songwriter and singer, Huddie Ledbetter, better known as “Leadbelly,” for whom the community is named. Leadbelly was born in Shiloh, Louisiana in 1889, but moved to the big city of Shreveport when he was only fifteen to begin a musical career that would span decades and give an early voice to the civil rights movement.³² He sang not only traditional southern blues, but also songs about the plight of industrial workers.³³ Despite its rich history,

27. See Brock, *Historic and Moral Reasons*, *supra* note 24.

28. See *id.*

29. See Stingley, *supra* note 24.

30. See Brock, *Historic and Moral Reasons*, *supra* note 24.

31. Chase, *supra* note 24.

32. See *Weekend Edition: Leadbelly's Blues*, Douglas Brinkley (National Public Radio broadcast, Mar. 23, 1997) (on file with author).

33. See *id.*

however, Ledbetter Heights continues to struggle with poverty, crime, and drug abuse.³⁴

In 1969, Ledbetter Heights gained a defender and a champion. Sister Margaret McCaffrey, affectionately known as “Sister Margaret,” came to Shreveport at the request of a friend, Father Murray Clayton. In 1970, she formed the organization which is now the Christian Service Program (“Christian Services”).³⁵ In 1982, Christian Services became an independent, nonprofit group and, in 1983, opened the doors of Hospitality House, serving meals to those in need.³⁶ Christian Services currently supports not only Hospitality House, but also a shelter for men, a shelter for women, a center for clothing drop off and resale, several independent living units, and a building out of which a charitable medical services program operates.³⁷ Throughout the years, Christian Services and the Ledbetter Heights communities have actively sought to preserve and improve their homes and their communities. When Sister Margaret died in February of 1998, Father Clayton took over the management of Christian Services, seeking to carry on the mission of Sister Margaret.³⁸ Under Sister Margaret’s leadership, the community drew together to protest plans by the city Chamber of Commerce to build the inner-city segment of I-49. Over one thousand residents signed a petition opposing the inner-city segment of the I-49 proposal.³⁹ In 1997, many neighbors attended a rally sponsored by Pax Christi, also opposing the proposed segment.⁴⁰ The community’s racial composition and its opposition to a largely white, upper-level city government’s plans, along with the proximity of natural resources such as the bayou and historical resources such as the historic district, raise issues which might be addressed through several federal statutes, including the Fair Housing Act.

Obtaining funds for the I-49 inner-city segment has occupied Shreveport city officials since the inception of the project. In 1987, the federal government provided planning funds in the amount of \$1,500,000 for planning, right-of-way acquisition, and construction of

34. See Brock, *Historic and Moral Reasons*, *supra* note 24.

35. See Interviews with Sister Margaret McCaffrey, *supra* note 24.

36. See *id.*

37. See *id.*

38. See Telephone Interview with Father Murray Clayton, Chair, Christian Services Program, Shreveport, La. (Jan. 12, 1998).

39. See Interviews with Sister Margaret McCaffrey, *supra* note 24.

40. See Associated Press Political Service, Feb. 14, 1995; Letter from Sister Margaret McCaffrey, Chair, Christian Service Program, to United States Senator John Breaux 1 (July 22, 1996) (on file with author); sources cited *supra* note 24.

the I-20 to I-220 segment.⁴¹ In 1991, the Intermodal Surface Transportation and Efficiency Act provided \$29,600,000 for the I-49 project.⁴² Because of opposition from the community and a demand for an environmental impact statement specifically addressing the inner-city segment of I-49, the segment did not move beyond the planning stages.⁴³ Despite city and state officials' efforts, the reauthorization of the Intermodal Surface Transportation and Efficiency Act, called the Transportation Equity Act for the Twenty-First Century (TEA-21), did not specifically fund the inner-city segment of I-49 as a high-priority project.⁴⁴ Nonetheless, Shreveport did receive \$2,186,047 under TEA-21 for highway projects.⁴⁵ Shreveport city officials' enthusiasm suggests that they will continue to work towards construction of the inner-city segment.⁴⁶ As various stages of the process arrive, the community should be aware of its options for ensuring that the project goes forward with their needs and wishes taken into account, or that the project does not go forward if a satisfactory compromise cannot be reached. The statutes reviewed below provide the community with tools, bargaining power where negotiations may still occur, and legal power if bargaining is ineffective.

IV. DOTTING THE "I" AND CROSSING THE "T"

The numerous issues raised by a project such as the I-49 extension trigger several federal statutes with procedural requirements intended to ascertain that such issues receive adequate consideration in the planning process.⁴⁷ Many of the procedural requirements include a public participation component.⁴⁸ The procedural formality and citizen participation required by such statutes provide two tools for communities facing unwanted developmental intrusion. Communities may require that federal agencies, or local agencies receiving federal money, adhere carefully to the formal requirements

41. See Shreveport Chamber of Commerce, *Federal Government Relations: Top Issues* (visited Oct. 10, 1998) <<http://www.shreveportchamber.org/fednews.html>>.

42. See *id.*

43. See *Hearings*, *supra* note 18 (testimony of Ms. Acree).

44. See U.S. Department of Transportation (visited Oct. 10, 1998) <<http://www.dot.gov>>.

45. See *id.*

46. See *Hearings*, *supra* note 18 (testimony of Ms. Acree); Greater Shreveport Chamber of Commerce (visited Oct. 10, 1998) <<http://www.shreveportchamber.org>>.

47. See 49 U.S.C. § 303(a) (1997) (requiring consideration of alternatives in the construction of highways); 42 U.S.C. § 4321 (1997) (requiring consideration of potential environmental impacts); 36 C.F.R. § 800.5 (1997) (requiring impact assessment for potentially affected historic sites).

48. See CAMPBELL-MOHN, *supra* note 6, § 3.1(D), at 88-91.

of the statutes, ensuring at least some degree of consideration of community needs.⁴⁹ The communities may also, using public participation requirements such as notice and comment, make their own voices heard in the planning process.⁵⁰ This Article reviews three federal statutes generally relevant to highway construction projects in urban areas. The statutes focus on civil and environmental interests. The National Environmental Policy Act provides the most expansive protection, requiring an environmental assessment or environmental impact statement at the start of the planning process and allowing for a period of public comment in certain situations.⁵¹ The Highway and Transportation Titles of the United States Code require formal consideration of alternative routes or projects before federal highway projects go forward,⁵² as well as impact statements such as those required by NEPA.⁵³ Finally, the National Historic Preservation Act requires impact assessment for historic areas potentially affected by development.⁵⁴ While the three statutes overlap in their requirements and the fulfillment thereof, separate consideration here allows for an analysis of the stringency of their requirements.

A. National Environmental Policy Act

The National Environmental Policy Act (NEPA or “the Act”) seeks to create a national policy “encourag[ing] productive and enjoyable harmony between man and his environment.”⁵⁵ The Act seeks a balance between development and preservation; one should not be achieved at the expense of the other.⁵⁶ The Act also seeks to “coordinate environmental planning among federal agencies” and, therefore, imposes its environmental analysis and planning requirements on all federal agencies.⁵⁷ The Act provides expansive coverage in that projects by any federal agency may trigger its application. The kind of agency action that will trigger application of the Act’s requirements, however, is substantially more limited.

NEPA’s protective reach extends to all resources in “man’s environment,” including aesthetic, historic, and cultural resources.⁵⁸

49. *See id.*

50. *See id.*

51. 42 U.S.C. §§ 4321-4370d (1997); *see also* 40 C.F.R. § 1502 (1997).

52. 49 U.S.C. § 303(c)(1) (1997).

53. *See* 23 U.S.C. § 128 (1997); 49 U.S.C. § 303.

54. 16 U.S.C. §§ 470-470x-6 (1997).

55. 42 U.S.C. § 4321.

56. *See id.*

57. CAMPBELL-MOHN, *supra* note 6, § 3.1(B), at 82; *see also* 42 U.S.C. § 4332.

58. *See* 42 U.S.C. § 4332(A); 40 C.F.R. § 1508.8 (1997).

It is perhaps the only federal statute that explicitly recognizes the link between the procedural duties of the government and the environmental duties.⁵⁹ However, NEPA's protection is triggered only by the commencement of "major Federal actions significantly affecting the quality of the human environment."⁶⁰ The regulations define "major Federal action" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility."⁶¹ Actions potentially subject to federal control and responsibility are typically one of four kinds: (1) "adoption of official policy," (2) "adoption of formal plans," (3) "adoption of programs," and (4) "approval of specific projects."⁶² However, while projects financed or regulated by federal agencies are considered federal actions, projects only assisted with general revenue sharing funds from the federal government are not.⁶³

Whether an action has a "significant effect" proves an even more difficult question than whether it is a major federal action. Furthermore, the regulations provide few guidelines for defining "significant effect". First, the guidelines note that a project will be considered as "affecting the quality of the human environment"⁶⁴ if it will, or simply "may[,] have an effect on" that environment.⁶⁵ The regulations then define "effects" to include those "caused by the action," whether they occur at the same time and place or occur at a later date or at a more removed distance, but are "still reasonably foreseeable."⁶⁶ Effects and impacts include those which are "ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."⁶⁷ However, effects sufficient to trigger an assessment must be beyond those that are solely "economic or social."⁶⁸ *Vieux Carré Property Owners, Residents, and Associates v. Pierce* explains that NEPA contains no "hard and fast definition of 'significant' effect . . . [and] the courts have struggled to give it . . . meaning."⁶⁹ In order to determine whether an action significantly affects the human environment and

59. See 42 U.S.C. § 4332(A).

60. *Id.* § 4332(C).

61. 40 C.F.R. § 1508.18.

62. *Id.*

63. See *id.*

64. 42 U.S.C. § 4332(C).

65. 40 C.F.R. § 1508.3.

66. *Id.* § 1508.8.

67. *Id.*

68. *Id.* § 1508.14.

69. 719 F.2d 1272, 1279 (5th Cir. 1983).

therefore requires an Environmental Impact Statement (EIS), each federal agency begins with a determination, according to its own regulations implementing NEPA, of whether or not the project is (1) one which “[n]ormally requires” an EIS or whether or not (2) the project meets the definition for a categorical exclusion from the requirements of NEPA.⁷⁰ If the project does not qualify for a categorical exclusion or is one which “[n]ormally requires” an EIS, the agency must complete an environmental assessment (EA), a sort of trial run impact assessment.⁷¹ Based on the EA, the federal agency determines either that there will be no significant impact, in which case it prepares a finding of no significant impact (FONSI), or it determines that there will be a significant impact, in which case it commences preparation of an EIS.⁷²

NEPA regulations specify at least four components that an EIS must include. First, the EIS must include a statement of the purpose of the proposed project.⁷³ Second, it should outline “the environment of the area(s) to be affected or created by the alternatives under consideration.”⁷⁴ Third, the EIS must include an in-depth analysis of the known environmental impacts of the proposed project, as well as possible environmental effects, any irreversible effects, and “the relationship between [local] short-term uses of man’s environment and the maintenance and enhancement of long-term productivity.”⁷⁵ Fourth, the EIS should describe and analyze alternatives to the proposed project,⁷⁶ as well as mitigation for the impacts of the proposed project.⁷⁷ A cost-benefit analysis may be incorporated by reference if it is “relevant to the choice among environmentally different alternatives,”⁷⁸ but the regulations make clear that “the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations.”⁷⁹ The goal of

70. See 40 C.F.R. § 1501.4(a). A categorical exclusion excludes an entire group of actions from NEPA coverage because an agency determines that such actions do not “individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4.

71. See 40 C.F.R. § 1501.4(b).

72. See *id.* §§ 1501.4(c)-(e).

73. See *id.* § 1502.13.

74. *Id.* § 1502.15.

75. *Id.* § 1502.16.

76. *Id.* § 1502.14. (“This section is the heart of the environmental impact statement.”).

77. See *id.*; *id.* § 1502.16.

78. *Id.* § 1502.23.

79. *Id.* Whether such a disclaimer is effective in practice, considering the current political favor in which cost-benefit analyses bask, is questionable. See generally Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Sting or Market*

the EIS is to set out, in clear terms, the potential effects of and possible solutions for such effects of large federal projects.⁸⁰

Once a draft EIS is prepared, the federal agency must circulate it to interested agencies and parties.⁸¹ The lead agency must invite other federal agencies with expertise or interest in the project, applicants and the public to comment on the draft. The regulations even require that the agency “affirmatively solicit[] comments from those persons or organizations who may be interested or affected.”⁸² An agency may respond to comments received from other agencies, applicants, or interested parties in one of five ways.⁸³ First, the agency may modify the proposal, and evaluate any alternatives not previously analyzed.⁸⁴ Second, the agency may develop further alternatives previously considered in only a limited manner.⁸⁵ Third, the agency may supplement or modify the analysis itself.⁸⁶ Fourth, the agency may make factual corrections to the EIS.⁸⁷ Finally, the agency may decline to a comment, explaining only why such comment does “not warrant further agency response.”⁸⁸

The formal requirements for the structure of the EIS and the agency’s solicitation of and response to comments are all intended to provide careful consideration at the federal level of the effects of proposed projects. Courts have attempted to give the NEPA requirements some teeth by interpreting them to require that agencies give a “hard look” to proposals with environmental effects.⁸⁹ Although “hard look” is an ambiguous standard, it requires, at the very least, “good faith” from the agency in responding to comments and considering all alternatives.⁹⁰ An agency may be required to hold

Dynamics?, 103 YALE L.J. 1383 (1994) (criticizing economic analysis and suggesting that non-quantifiable factors should play a role in the analysis of alternative sites); see also Mohai and Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992).

80. See 40 C.F.R. § 1502.23.

81. See *id.* § 1502.19.

82. See *id.* § 1503.1.

83. See *id.* § 1503.4.

84. See *id.*

85. See *id.*

86. See *id.*

87. See *id.*

88. *Id.*

89. See, e.g., *Louisiana v. Lee*, 635 F. Supp. 1107, 1116 (E.D. La. 1986); *Fritiofson v. Alexander*, 772 F.2d 1225, 1248 (5th Cir. 1985); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 993-95 (5th Cir. Unit A July 1981).

90. See *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803, 806-08 (11th Cir. 1988); *Vieux Carre Property Owners, Residents & Assocs. v. Pierce*, 719 F.2d 1272, 1282 (5th Cir. Unit A July 1983).

a public hearing after completion of the EIS and notification of interest parties.⁹¹

The statutes require a public hearing after public notification if there is “substantial environmental controversy,” “substantial interest in holding the hearing,” or a request for a hearing by another agency with jurisdiction.⁹² The regulations do not define “substantial environmental controversy” or “substantial interest,” and the courts defer to an agency’s decision as to a public hearing unless the determination can be shown to have been made in the absence of good faith or to be unreasonable,⁹³ even though the agency at the center of the controversy determines whether or not to hold the hearing.⁹⁴ Moreover, courts will not reverse agencies’ EIS-based decisions unless the EIS is proven to be somehow technically inadequate.

While the public participation mechanism may not work as well as possible, another method of controlling agency action may exist. Under Section 309 of the Clean Air Act,⁹⁵ the Administrator of the Environmental Protection Agency must comment in writing on the environmental impacts of all major federal projects.⁹⁶ If the Administrator determines that the project is “unsatisfactory from the standpoint of public health or welfare or environmental quality,” then the Administrator may refer the matter to the President’s Council on Environmental Quality (the Council).⁹⁷ As the Council considers the record brought before it by the Administrator and the agency, “[i]nterested persons (including the applicant) may deliver their views in writing to the Council.”⁹⁸ On the basis of such a record, the Council may recommend negotiations or further public hearings and/or discussions, or may refer the matter to the President.⁹⁹ However, the volume of material that the Administrator must review is astounding and provides some insight into how careful a review such projects receive from the Administrator.¹⁰⁰ It is doubtful that the EPA often objects to an EIS which they review.

91. See 40 C.F.R. § 1506.6.

92. *Id.*

93. See *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-66 (5th Cir. 1973).

94. See 40 C.F.R. § 1506.6.

95. 42 U.S.C. § 7609 (1997).

96. See 40 C.F.R. § 1504.1.

97. *Id.* § 1504.1(b).

98. *Id.* § 1504.3(e).

99. See *id.* § 1504.3(f).

100. See *id.*

Judicial review provides another avenue for review of agency actions, but it too fails to add much muscle to the NEPA requirements. A court reviewing an agency's findings and recommendation as to a proposed project will conduct the review under the strictures of the Administrative Procedure Act (APA).¹⁰¹ Section 706 of the APA requires that an agency follow procedures outlined by the organic statute and the APA, comply with those procedures in good faith, and not act in an arbitrary or capricious manner.¹⁰² Unless the organic statute imposes more stringent requirements, judicial review of agency actions under the APA is ultimately deferential, relying on the agency's special expertise and the consistency of its determinations.¹⁰³ Therefore, while a community might seek judicial review of an agency FONSI or determination under an EIS that a project should go forward, the community faces a substantial likelihood, absent clear proof of prejudice or arbitrary decision making, of judicial deference to the agency determination. As *Sabine River Authority v. U.S. Department of the Interior* explains: "NEPA does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences."¹⁰⁴ Although NEPA sets up myriad requirements and lofty goals, in practice it also permits federal agencies to overcome opposition to specific projects by adhering to the procedural niceties without actually addressing the concerns of opponents to the projects. At each step in the process of review and public participation, all authority to decide whether to pursue a certain line of investigation remains in the hands of the agency.¹⁰⁵ The agency determines whether a project is a "major Federal action[]" significantly affecting the quality of the human environment,"¹⁰⁶ or qualifies as a categorical

101. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521 (1997).

102. *See id.* § 706.

103. David Schoenbrod argues that such deferential review and broad delegation of power are improper because agencies have power without corresponding public accountability. DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION*, 8-10, 183-84 (1993). Similarly, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene)*, 448 U.S. 607, 672-75 (1980) (Rehnquist, J., concurring), Justice Rehnquist criticizes the broad delegation of power to agencies based on these policies. He argues that Congress improperly delegates to avoid responsibility for its actions and that agencies are without the power to act on such a broad scale. *See id.* (Rehnquist, J., concurring).

104. 951 F.2d 669, 676 (5th Cir. 1992).

105. *See* 40 C.F.R. §§ 1503.1-1503.4 (1997).

106. 42 U.S.C. § 4332(C) (1997).

exclusion.¹⁰⁷ The agency chooses how to respond to the comments of other agencies, applicants, and interested parties.¹⁰⁸ Should the agency meet the formal requirements of writing its findings, inviting comments, and/or stating reasons, whether real or illusory, for a particular choice, the agency's actions are largely free of critical review.

For a community such as Ledbetter Heights, the practical effect of opposing development by attempting to force adherence to the NEPA requirements may be only to achieve the appearance of adherence. The deference given agency determinations by the courts suggests that money spent in litigation is likely to achieve at most a delay, and the result may not be worth exhaustion of the clients' funds. Attempting to go beyond the agency in a process such as review by the Administrator is also of doubtful effectiveness. An Administrator who must comment on all environmental impacts of all major federal projects must, of necessity, rely upon the information his or her office receives from the lead agency on the project. If the lead agency has prepared an EIS biased towards completion of a project in a certain manner, such fact will be almost impossible for a community organization to prove in the absence of, essentially, a costly alternate EIS. Thus, NEPA provides opponents of development a flawed tool, one that cannot reach many areas of the decision making process with its critique. The very procedural requirements through which activists seek to ensure consideration and analysis of environmental and human impacts of projects allow agencies to escape community criticism by an adherence to the letter instead of the spirit of the statute.

B. Transportation and Highways: DOT and ISTEA

Some commentators have asserted that the Department of Transportation (DOT) Act section 4(f)¹⁰⁹ has more muscle than NEPA in the enforcement of environmental standards.¹¹⁰ Section 4(f) of the DOT Act forbids the Federal Highway Administration to approve a use of park land or historic sites unless the agency determines that there is "no feasible and prudent alternative,"¹¹¹ and requires DOT to make an evaluation, which may later be reviewed for legal

107. See 40 C.F.R. § 1501.4(a).

108. See *id.* § 1503.4.

109. 49 U.S.C. § 303 (1997).

110. See Barbara Miller, *Department of Transportation's Section 4(f): Paving the Way Towards Preservation*, 36 AM. U. L. REV. 633, 635-36 (1987).

111. 49 U.S.C. § 303(b).

sufficiency.¹¹² The evaluation under section 4(f) is intertwined with other statutory requirements. If impact assessments are required by other statutes, then the regulations allow preparation of only one assessment of the project with the coordination of all involved agencies. Thus, a DOT section 4(f) analysis will often be part of a NEPA EIS.¹¹³

Section 4(f) states that it is DOT policy to protect national, state, and local parks, refuges, and recreation areas, or historic sites of national, state, or local significance.¹¹⁴ To trigger section 4(f) protection, a site must be determined to have significance by the “Federal, State, or local officials having jurisdiction over the park, area, refuge, or site.”¹¹⁵ Although courts have read section 4(f)’s application to park land or significant sites broadly,¹¹⁶ the regulations specifically state that “[c]onsideration under section 4(f) is not required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire site is not significant.”¹¹⁷ The regulations do not define the term “not significant” and the Secretary of the Department of Transportation may not overturn the determination of the official within whose jurisdiction the site lies.¹¹⁸ Nonetheless, unless federal, state, or local officials determine that the site is not significant, significance is presumed by the regulations.¹¹⁹

Once the agency, state, or local officials determine that a site is significant and therefore within the ambit of the statute, a section 4(f) review must be performed for any “transportation program or project . . . requiring the use” of the site.¹²⁰ Such use may be direct or indirect, and may even be a constructive use such as noise, pollution, or aesthetic interference.¹²¹ Courts have considered this “use”

112. See 23 C.F.R. § 771.135(b) (1998).

113. See *id.* § 771.105. “It is the policy of the Administration that: (a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation.” *Id.*

114. See 49 U.S.C. § 303; 23 C.F.R. § 771.135.

115. 49 U.S.C. § 303(c).

116. See *Miller*, *supra* note 110, at 637; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411-14 (1971).

117. 23 C.F.R. § 771.135(c).

118. See *Lathan v. Volpe*, 350 F. Supp. 262, 268 (W.D. Wash. 1972), *aff’d in part, vacated in part on other grounds, sub nom. Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974) (obliging the Secretary to accede to the determination of local official as to the local significance of publicly owned land).

119. See 23 C.F.R. § 771.135(c).

120. 49 U.S.C. § 303(c).

121. See *Miller*, *supra* note 110, at 646.

threshold to be fundamentally the same as NEPA's "significantly affecting the quality of the human environment" standard.¹²²

While the standard for triggering the DOT section 4(f) review is substantially similar to that for a NEPA EIS, the DOT section 4(f) procedure is somewhat more stringent in its requirements. The NEPA process is intended only to require consideration of relevant environmental, developmental, and social factors.¹²³ The DOT process, on the other hand, is intended to protect parks and historic sites *if at all possible*.¹²⁴ While the burden of proof to show a "use" under the DOT statute is on the plaintiff,¹²⁵ once a use has been shown, the statute forbids further action on the project until the agency can show that there is "no feasible and prudent alternative."¹²⁶

Unfortunately, in court, a showing of "no feasible and prudent alternative" has not turned out to be a difficult burden for the agency to meet. Factors that might indicate a lack of feasibility include prohibitive cost, asserted features of the community, or inconvenient geographical features.¹²⁷ Alternatives need not present unique or insurmountable problems to be considered either not feasible or imprudent.¹²⁸ While courts state that alternatives will only be discarded if they present "truly unusual" problems,¹²⁹ courts have also considered lack of a "sensible" alternative sufficient to allow a proposed project to use a historic or park site.¹³⁰ In one case, "sound engineering" difficulties were sufficient to render all alternatives unfeasible and to allow construction of a highway through park land.¹³¹ In fact, courts have required only that agency decision makers consider the alternatives and reject them as not feasible on their merits.¹³² Once an agency has considered alternatives, then, as with NEPA, the courts will not overturn the agency's findings "unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in

122. See, e.g., *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 441 (5th Cir. 1985).

123. See 40 C.F.R. § 1500.2 (1997).

124. See 23 C.F.R. § 771.135(a)(1).

125. See *I-CARE*, 770 F.2d at 441.

126. 49 U.S.C. § 303(b) (1997).

127. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411-13 (1971); see also *Louisiana Env'tl. Soc'y, Inc. v. Coleman*, 524 F.2d 930, 933 (5th Cir. 1975).

128. See *Overton Park*, 401 U.S. at 411.

129. See *id.* at 413.

130. See *Hickory Neighborhood Defense League v. Skinner*, 731 F. Supp. 207, 213 (W.D.N.C. 1990), *aff'd*, 910 F.2d 159 (4th Cir. 1990).

131. See *Committee to Preserve Boomer Lake Park v. Department of Transp.*, 4 F.3d 1543, 1549-50 (10th Cir. 1993).

132. See, e.g., *id.* at 1550.

accordance with law.”¹³³ As an additional burden, the regulations require that “evaluations of alternatives to avoid the use of section 4(f) land and of possible measures to minimize harm to such lands shall be developed by the applicant [usually the state,] in cooperation with the Administration.”¹³⁴ An applicant, having already chosen the alternative it prefers, has little incentive to assist in the preparation of an alternative EIS, and a poor community which opposes a project will lack funds to assist in the preparation of an alternate EIS. Thus, as a practical matter, the development of alternatives to a proposed plan is a costly and time-consuming business, if possible at all.

If an agency finds that no feasible alternative to a proposed project exists, a community still has two protective mechanisms under DOT section 4(f). First, the agency is required to minimize harm to the site through “all possible planning,”¹³⁵ thus creating an affirmative duty to mitigate the effects of the proposed project. Second, activists may seek judicial review of a DOT finding that a project is not a use or that there are no feasible alternatives available.¹³⁶ However, such a review would be conducted under the arbitrary and capricious standard, again affording the agency much leeway and correspondingly limiting the protections afforded the community.¹³⁷

DOT section 4(f) provides only marginal protection for opponents of the I-49 inner-city segment in the Ledbetter Heights community. Unless federal, state, or local officials find otherwise, the regulations presume that the site is significant.¹³⁸ However, the considerable benefits that the local officials, specifically the Chamber of Commerce, hope will accrue to Shreveport from the I-49 inner-city segment certainly would be an incentive to find that the site of the proposed highway, primarily occupied by public housing, has no local significance. As noted above, such a finding would not be questioned.¹³⁹ Moreover, the proposed highway does not cross park lands or even the historic district. Thus, even assuming the site were to be found significant, the community would still have to establish that the effects of increased traffic, noise, and automobile pollution would constitute a “use” of the adjacent historical district. Were the

133. *Sierra Club v. Pena*, 915 F. Supp. 1381, 1395 (N.D. Ohio 1996) (quotations omitted).

134. 23 C.F.R. § 771.135(i) (1998).

135. *Id.* § 771.135(a)(1)(ii).

136. *See* 5 U.S.C. § 706 (1997).

137. *See* *Committee to Preserve Boomer Lake Park v. Department of Transp.* 4 F.3d 1543, 1550 (10th Cir. 1993) (utilizing a “clear error” standard); *National Parks and Conservation Ass’n v. FAA*, 998 F.2d 1523, 1532 (10th Cir. 1993) (utilizing an “arbitrary and capricious” standard).

138. *See* 23 C.F.R. 771.135(c).

139. *See* SCHOENBROD, *supra* note 103, at 8-10, 183-84.

community able to establish that the highway would constitute a “use” of the historic district, the burden would then shift to the proponents of the highway segment to show that no feasible or prudent alternative existed. Unfortunately, as noted above, the burden would not be a difficult one to fulfill, as courts have been permissive in their definitions of what is not feasible or prudent, and the Corridor Study of the inner-city segment of I-49 already suggests that construction of the inner-city segment may provide greater travel efficiency and operational safety benefits than other options.¹⁴⁰

The Intermodal Surface Transportation Act (ISTEA) and its reauthorization, the Transportation Equity Act for the Twenty-First Century (TEA-21), provide funding to the states for highway construction, facility, and rehabilitation projects.¹⁴¹ They also place some requirements on the states receiving such funding.¹⁴² Before approving such projects, the Secretary of Transportation must “make written findings that [environmental and social] factors were considered and that parties in interest were given an adequate opportunity to present their views.”¹⁴³ States submit plans for such projects to the Secretary and must certify that, for any federal-aid highway project going through a city, such as the I-49 project, “it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.”¹⁴⁴ Compliance with the environmental impact assessment requirements of ISTEA/TEA-21 are set forth, as for section 4(f), in 23 C.F.R. 771.101 through 771.137.¹⁴⁵ ISTEA/TEA-21, because it requires basically the same procedures as DOT section 4(f), may be similarly limited. However, unlike DOT section 4(f), ISTEA’s application is not limited to park lands and sites of local or federal significance. But, as with many of the federal statutes, ISTEA/TEA-21 coverage is limited to those projects receiving federal funds.¹⁴⁶ Shreveport has sought and needs such

140. See DEMOPULOS & FERGUSON, *supra* note 17.

141. 49 U.S.C. § 5301-5338 (1997).

142. See *id.* § 5307.

143. *Sierra Club v. Pena*, 915 F. Supp. 1381, 1391 (N.D. Ohio 1996), *citing* *Town of Seacaucus v. United States Dept. of Transp.*, 889 F. Supp. 779, 788 (D.N.J. 1995).

144. 23 U.S.C. § 128(a) (1997).

145. 23 C.F.R. 771.101-771.137 (1998).

146. See 49 U.S.C. § 5307; 23 C.F.R. 771.109.

federal funds to carry out its plans for an inner-city segment of I-49.¹⁴⁷ Under ISTEA/TEA-21, the project would be subject to the same procedural strictures as under DOT section 4(f), but again, the community would face the gamble of spending its resources to potentially achieve only a temporary delay.

C. *National Historic Preservation Act*

The National Historic Preservation Act (NHPA)¹⁴⁸ provides safeguards similar to those of NEPA, but imposes even more formality in the consideration process. The focus of NHPA is on the historically, rather than the environmentally or culturally, significant. NHPA provides for a review and evaluation of the impacts of federal projects on historic sites.¹⁴⁹ Like NEPA, NHPA's protections are primarily procedural.¹⁵⁰ The purpose of NHPA project review, known as the section 106 process,¹⁵¹ is to "accommodate historic preservation concerns with the needs of federal undertakings."¹⁵² A section 106 evaluation is triggered by commencement of a federal undertaking. An undertaking is defined as "any project, activity, or program that can result in changes in the character or use of historic properties."¹⁵³ The evaluation begins with a determination of the area of potential effects.¹⁵⁴ This area will include all properties and buildings surrounding the site of the proposed project on which the proposed project may have an effect.¹⁵⁵ The official for the federal agency in charge of the project then determines if there are any historic properties that may be affected by the proposed project, and collects information for their addition to the National Register of Historic Places, if the properties are not already included.¹⁵⁶ As noted before, numerous homes in the Ledbetter Heights neighborhood are included on the National Register.¹⁵⁷

Once an area of potential effects has been determined, the agency and State Historic Preservation Officer (SHPO) assess the

147. See John McKinney, *La. Delegation Unites on Plan for Highway*, SHREVEPORT ADVOCATE, Feb. 27, 1997, at 1A, 6A.

148. 16 U.S.C. §§ 470-470x-6 (1997).

149. See *id.* § 470(b).

150. See *id.* § 470(b)(7).

151. See 36 C.F.R. § 800.1(a) (1997).

152. *Id.* § 800.2(b).

153. *Id.* § 800.2(o).

154. See *id.* § 800.4(a).

155. See *id.* § 800.3(c).

156. See *id.* § 800.4(b).

157. See Brock, *Historic and Moral Reasons*, *supra* note 24.

proposed project to determine if it poses the possibility of an “effect” or an “adverse effect.”¹⁵⁸ The regulations explain that “[a]n undertaking has an effect on a historic property when the undertaking may alter characteristics of the property.”¹⁵⁹ The factors relevant to considering what may alter the nature of the property include changes in location, setting, or use.¹⁶⁰ A finding of adverse effect requires a higher showing than a finding of an effect, and has correspondingly stricter procedural requirements. The finding of an adverse effect, however, is required for a project to remain within the ambit of NHPA evaluation.¹⁶¹ A finding of no adverse effect, similar to a “no effect” finding which would end the NEPA or DOT section 4(f) process, typically ends the section 106 process for all practical purposes.¹⁶² Officially, the SHPO and the agency simply submit their finding to the Advisory Council on Historic Preservation and the process is completed.¹⁶³ Were a community able to obtain a finding of a potential or definite “adverse effect,” however, the project would remain within the section 106 process.¹⁶⁴ However, the Statute designates as adverse only those effects that “diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.”¹⁶⁵ The elements of such an adverse effect include physical damage to existing parts of the property, changes that permanently affect or eliminate the property’s eligibility for the National Register, changes to the environment of the site (audio, visual, or atmospheric), or neglect allowing deterioration.¹⁶⁶ While the regulations suggest that audio pollution of a site may be sufficient to obtain an adverse impact finding, courts have repeatedly turned a deaf ear to claims of increased noise and pollution in already urban environments.¹⁶⁷

The Ledbetter Heights community faces the strong possibility that a SHPO or agency would find no adverse effects on the

158. See 36 C.F.R. § 800.5.

159. *Id.* § 800.9.

160. *See id.*

161. *See id.*

162. *See id.* § 800.5(b).

163. *See id.* § 800.5(d). The Advisory Council on Historic Preservation may consist of only one employee authorized to carry out the responsibilities of the Council for the purposes of the Act. *See id.*

164. *See id.* § 800.5(e).

165. *Id.* § 800.9(b).

166. *See id.*

167. *See* Arkansas Community Org. for Reform Now v. Coleman, 531 F.2d 864, 866 (8th Cir. 1976) (per curiam); Arkansas Community Org. for Reform Now v. Brinegar, 398 F. Supp. 685, 693 (8th Cir. 1975).

community because the proposed site of the I-49 extension skirts the northern edge of the historic districts and because the neighborhoods are already within the general metropolitan area of Shreveport. The community would need to show that the increased traffic, air, and noise pollution from an interstate highway would somehow negatively alter the character of the historic district. Such a showing of potential future effects of a currently nonexistent highway requires sophisticated studies which are probably unavailable to a community such as Ledbetter Heights. Thus, the neighborhood most affected by the construction of the highway has the least ability to defend itself against the consequences of the construction. Moreover, the community already sits between two highways and is near the center of Shreveport, even if the presence of trees and small hills gives the community more of a suburban than metropolitan feel, further decreasing the likelihood of a finding of adverse conditions.

A finding of an adverse effect on a historical district must be made by the federal agency official, who may be unfamiliar with the community, and the SHPO, who may be politically motivated to ignore, or simply unmotivated to carefully research, the effects. The Shreveport city officials have signaled their unconditional support for the inner-city segment of I-49. Obtaining a neutral review of the dangers to the historical neighborhood within Ledbetter Heights may prove a difficult and costly task, beyond the means, both in terms of effort and finances, of the citizens of Ledbetter Heights.

Should the agency official or SHPO find, however, that a project is likely to have an adverse effect on a historical property, consultations would take place to possibly modify the project.¹⁶⁸ The two may agree to ask the Advisory Council or other interested parties to join such negotiations. The public may also be invited to express its views in a notice and comment procedure.¹⁶⁹ The SHPO and agency official may then agree on “how the effects will be taken into account” and may issue a Memorandum of Agreement on the matter.¹⁷⁰ Such a memorandum will be submitted to the Council for acceptance or proposed changes.¹⁷¹ If the SHPO and the agency reach no agreement, the matter is referred to the Council for comment.¹⁷² The agency, however, is not required to abide by the wishes of either

168. See 36 C.F.R. § 800.6.

169. Such a notice and comment process would probably be conducted according to the requirements of the APA, 5 U.S.C. § 553 (1997).

170. 36 C.F.R. § 800.6.

171. See *id.*

172. See *id.*

the Council or the SHPO. It may proceed with the project, amended or not, whether the SHPO and/or the Council objects, even if adverse effects on the historical site have been found.¹⁷³

As with the NEPA process and the DOT section 4(f) requirements, a community adversely affected by the determinations of the agency may seek judicial review.¹⁷⁴ Again, the standard of judicial review under the Administrative Procedure Act will be deferential to the agency determinations,¹⁷⁵ and, therefore, seeking judicial review may be an expensive and poorly weighted gamble, even if the Ledbetter Heights citizens were able to finance the studies necessary to assess the potential impacts from the construction of the new segment of the highway. Also, as with the other procedural requirement statutes (NEPA and DOT), NHPA challenges often serve only to delay planned projects. All of the statutes discussed above focus on procedural faults. For Ledbetter Heights and similarly situated communities, other statutes may allow more substantive challenges to projects like the siting of the proposed inner-city segment of I-49.

V. CIVIL RIGHTS AND THE HOME

The several federal statutes directly addressing civil rights may allow a substantive challenge to development in communities like Ledbetter Heights. Sections 1982, 1983, and 2000d of Title 42 of the United States Code¹⁷⁶ may apply to a claim of discriminatory siting of a highway, and all have been used with some frequency to arrest or change siting plans. Unfortunately, while the language of the statutes is strong, recent judicial interpretations have limited their reach, thereby decreasing their power for many communities. Title VIII, the Fair Housing Act,¹⁷⁷ may provide a remedy for those judicially-created weaknesses in the Civil Rights statutes. An examination of these statutes and the case law accompanying them will not only illuminate the ways in which the courts have limited their reach, but will also suggest the routes by which an environmentally contextualized Fair Housing Act challenge could expand judicial protection for neighborhoods such as Ledbetter Heights.

173. *See id.*; 5 U.S.C. § 706.

174. *See* 5 U.S.C. § 706.

175. *See id.*

176. 42 U.S.C. §§ 1982, 1983, 2000(d) (1997).

177. *Id.* §§ 3601-3619 (1997).

A. *Sections 1982 and 1983*

Sections 1982 and 1983 of the Civil Rights Act were originally enacted just after the Civil War. They were intended to ensure that all United States citizens would receive equal treatment under the law in their property transactions and in their relationship with the state.¹⁷⁸ Each section appears regularly in litigation surrounding urban development and the provision of municipal services.¹⁷⁹ Urban development and municipal services litigation are closely related. Urban development issues tend to arise out of what a developer or municipality wants to do in a neighborhood, while municipal services cases tend to focus on what local authorities will not do for a neighborhood.¹⁸⁰ In fact, a municipal services suit might prove a useful way for a community like Ledbetter Heights to draw attention to its disadvantaged treatment in the municipality before a siting decision follows on the heels of such treatment. However, sections 1982 and 1983 are structured somewhat differently, and require a different showing to establish a cause of action.

Section 1982, while guaranteeing property rights of all United States citizens, protects a limited scope of rights. Section 1982 states that: "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."¹⁸¹ In *City of Memphis v. Greene*, the Court announced that section 1982 should be interpreted "to protect not merely the enforceability of property interests acquired by black citizens but also their right to acquire and use property on an equal basis with white citizens."¹⁸² In that case, the Court found that a street closure by a municipality was within the ambit of section 1982.¹⁸³ However, other cases have limited section 1982 protection to property amenities linked to property transactions. In *Sullivan v. Little Hunting Park, Inc.*, a white homeowner leased a house and assigned shares of membership, subject to board approval, in a community recreation

178. *See id.* §§ 1982, 1983.

179. *See, e.g.*, *City of Memphis v. Greene*, 451 U.S. 100 (1981); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978); *Laramore v. Illinois Sporting Facilities Auth.*, 722 F. Supp. 443 (N.D. Ill. 1989).

180. *See sources cited supra* note 179.

181. 42 U.S.C. § 1982.

182. 451 U.S. 100, 120 (1981).

183. *See id.* at 123.

park to an African American.¹⁸⁴ The board of directors of the nonprofit corporation formed to manage the community park refused to approve the transfer of membership shares and, upon the objection of the homeowner, expelled the homeowner from the corporation.¹⁸⁵ The Supreme Court held that the corporation's refusal to approve the transfer of membership shares violated the civil rights of the African American lessee.¹⁸⁶ The Court based its finding of a violation of section 1982 on the link between the access to the community playground and the lease.¹⁸⁷ The Court found that the membership shares were a condition of the lease and that the refusal to approve the shares interfered with the right to lease.¹⁸⁸

Tillman v. Wheaton-Haven Recreation Ass'n similarly found a violation of section 1982 by a community recreation association that discouraged black applicants from membership and prevented black guests of association members from visiting the community's pool.¹⁸⁹ The recreation center, composed principally of a pool, operated under a set of bylaws that favored membership applications by residents of a community within a certain distance of the recreation center.¹⁹⁰ However, when an African American moved into the neighborhood and sought information about membership, he was discouraged from applying and was not given a membership application.¹⁹¹ Further, when white members of the association brought an African American guest to the pool, the board of directors of the association rapidly changed the bylaws of the association at a special meeting so as to prospectively disallow any further guests who were not family members of current association members.¹⁹² Because the recreation association had no African American members, this move had the practical and (as admitted by the board) intended effect of disallowing African American guests.¹⁹³ In this case, as in *Sullivan*, the Court found the right to the amenity to be "property-linked."¹⁹⁴ Comparing *Tillman* to *Sullivan*, the Court held that the preference for membership

184. 396 U.S. 229, 234-35 (1969).

185. *See id.*

186. *See id.* at 240-41.

187. *See id.* at 237.

188. *See id.*

189. 410 U.S. 431, 439-40 (1973).

190. *See id.* at 432-34.

191. *See id.* at 434.

192. *See id.*

193. *See id.* at 432-35.

194. *See id.* at 435; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236-37 (1969).

was linked to property rights and, therefore, was encompassed within section 1982.¹⁹⁵

Other cases suggest that urban planning not specifically and physically affecting the land of a party to the claim may be beyond the reach of section 1982. For example, in *Terry Properties, Inc. v. Standard Oil Co.*, the Eleventh Circuit rejected section 1982 claims by a community that objected to the siting of a carpet-backing manufacturing plant behind their neighborhood and the rerouting of a public road to a location outside the community.¹⁹⁶ The case involved a Byzantine chain of events, all of which culminated in the siting of the industrial facility behind a minority neighborhood and the abandonment, by the city, of a road passing through the community.¹⁹⁷ The court found, based on a jury finding in a state court of zero damages, that the siting and the road rerouting did not implicate any property interests that section 1982 had been intended to remedy.¹⁹⁸ Nonetheless, because the jury finding played a central role in the court's analysis, the case's conclusion should perhaps be limited to its particular and peculiar facts.¹⁹⁹

Cases such as *Tillman and Sullivan* raise serious questions as to whether section 1982 can be used in a situation involving racially discriminatory urban planning. Although commentators have been optimistic about the availability of section 1982 for urban development actions, they typically cite only *Houston v. City of Cocoa*²⁰⁰ as supporting such a broad reach.²⁰¹ However, *Houston v. City of Cocoa* is a small hook on which to hang such a large claim. In *Houston v. City of Cocoa*, residents of a low-income minority community sought to halt urban renewal plans on the grounds that (1) the plans would destroy the community and (2) the plans were part of historical pattern of discrimination and destructive zoning

195. See *Tillman*, 410 U.S. at 435.

196. 799 F.2d 1523, 1536 (11th Cir. 1984).

197. See *id.* at 1525-33.

198. See *id.* at 1536.

199. See *id.*

200. No. 89-82-CIV-ORL-19 (M.D. Fla. Oct. 26, 1990).

201. See JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT, AND REVITALIZATION, § 6.01 at 547 n.69 (2d ed., Shepard's/McGraw-Hill, Inc. 1995); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 796-97 (1993). Also, in *City of Memphis v. Greene*, the Court ultimately rejected the section 1982 claims of the plaintiffs, finding that, although urban planning decisions are within the ambit of section 1982, the local government in that case had offered sufficient and sufficiently reasonable explanations for its decision to close a street between a black community and a white community. See Kelly Michele Colquette & Elizabeth A. Henry Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153, 198 (1991).

practices.²⁰² In an unpublished decision, the district court denied the defendant city's motion to dismiss, but the case ultimately settled.²⁰³ As the court made no ruling on the specifics of the claim, the case provides only shaky support for optimistic statements about section 1982's availability in actions in response to damaging siting or planning decisions.²⁰⁴

Even if a section 1982 cause of action is available to fight discriminatory siting or planning decisions, its usefulness may be limited by the evidentiary showing required to prove racial discrimination. In racial discrimination cases, courts have created three main tests to establish discrimination. First, in *Washington v. Davis*, a case asserting discrimination in employment tests given to job applicants, the Supreme Court required a showing that the law or policy at issue was directed toward a racial group.²⁰⁵ Characterized as an intent requirement, the Davis test is more properly understood as focusing on whether a law or policy was an action directed towards a minority group.²⁰⁶ *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²⁰⁷ clarified the application of *Davis* in the context of municipal land use. In *Arlington Heights*, the Court recognized that official statements of discriminatory intent were unlikely, and suggested that circumstantial evidence might be used to prove discriminatory intent.²⁰⁸ It suggested that courts conduct a "sensitive inquiry" into evidence such as historical background of the decision, procedural abnormalities, legislative or administrative history, and impact.²⁰⁹ A second test for discrimination, announced in *Griggs v. Duke Power Co.* and applied in employment discrimination cases, requires only evidence of disparate impact.²¹⁰ According to *Griggs*, once a policy or law is shown to have impacted a racial minority differently than other racial groups, the defendant must show that the policy was either a business or governmental necessity.²¹¹

202. See Dubin, *supra* note 201, at 771.

203. See Order Denying Motion to Dismiss, *Houston v. City of Cocoa*, 2 Fair Housing-Fair Lending (P-H) ¶15,625 at 16,208-09 (M.D. Fla. Oct. 26, 1990).

204. *Houston v. City of Cocoa*, No. 89-82-CIV-ORL-19 (M.D. Fla. Oct. 26, 1990).

205. 426 U.S. 229, 239 (1976).

206. See KUSHNER, *supra* note 201, § 3.01, at 131.

207. 429 U.S. 252 (1977).

208. See *id.* at 264-66.

209. See *id.* at 264-68.

210. 401 U.S. 424, 430-32 (1971).

211. See *id.* at 431-32. Although *Griggs* was later overruled *sub silentio* as to its Title VII holdings, it is used here only to delineate the test which it established. The implied overruling of *Griggs* is recognized in *United States v. North Carolina*, 914 F. Supp. 1257, 1265 (E.D.N.C. 1996).

Finally, in a case involving an unsuccessful job applicant, *McDonnell Douglas Corp. v. Green* established the disparate treatment test.²¹² Under this test, the plaintiff must show that a minority group member, who was qualified for a job, applied and was rejected, and that the employer then continued to seek applicants or hired a white person.²¹³

Courts have split on which test is the appropriate one to prove a violation of section 1982.²¹⁴ The leading case on section 1982's validity in the housing sales context, *Jones v. Alfred H. Mayer Co.*, failed to directly address the question of proof.²¹⁵ In *General Building Contractors Ass'n v. Pennsylvania*, the Court addressed the question of the showing required pursuant to section 1981, the "twin provision of § 1982."²¹⁶ Justice Rehnquist, writing for the Court, focused on the wording of the prohibition in *Mayer* against "all racially motivated deprivations of the rights enumerated."²¹⁷ The Court determined that, under section 1981, a showing of discriminatory intent was required.²¹⁸ Most courts have applied either *General Building Contractors Ass'n's* intent requirement or the *McDonnell Douglas* disparate treatment showing to section 1982 cases, although some have applied the disparate impact test.²¹⁹ In the Fifth Circuit, *Vaughner v. Pulito* required a showing of intent.²²⁰

Because of the difficulty of determining which racial discrimination test a court will utilize and because of the evidentiary difficulty of meeting either the intent or the disparate treatment requirements, section 1982 presents a high evidentiary barrier for plaintiffs seeking to prevent discriminatory city planning. Unfortunately, this same difficulty arises pursuant to section 1983.

Section 1983, like section 1982, attempts to redress the effects of racial discrimination. Section 1983 provides a cause of action to any person whose statutory or constitutional rights are violated by state authorities. The statute states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

212. 411 U.S. 792 (1973).

213. *See id.* at 802.

214. *See* KUSHNER, *supra* note 201, § 6.04, at 555.

215. 392 U.S. 409 (1968).

216. 458 U.S. 375, 387 (1982); *see also* KUSHNER, *supra* note 201, § 3.07, at 154.

217. *See General Bldg. Contractors*, 458 U.S. at 387-88; KUSHNER, *supra* note 201, § 3.07, at 154, *citing* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968).

218. *See* KUSHNER, *supra* note 201, § 3.07, at 154.

219. *See id.* at 155.

220. 804 F.2d 873, 877 (5th Cir. 1986).

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.²²¹

As one court explained, section 1983 is a "vehicle to redress violations of constitutional rights, in this case a violation of the Fourteenth Amendment."²²² It is important to note that, while section 1983 provides a mechanism for enforcing the Fourteenth Amendment, the rights sought to be vindicated under section 1983 must be "characterized as protected by a constitutional provision."²²³

When used in conjunction with the Fourteenth Amendment to seek vindication for violations of equal protection, a section 1983 claimant must usually provide evidence of an intent to discriminate, as required under *Washington v. Davis* in the context of employment discrimination.²²⁴ *Laramore v. Illinois Sports Facilities Authority* suggests as much.²²⁵ In that case, the district court denied a motion to dismiss on the grounds that the plaintiffs had made sufficient allegations, on the face of the pleadings, that the siting of a new baseball stadium was racially discriminatory in violation of the equal protection clause and that the discrimination was intentional.²²⁶ The court treated the section 1983 claim as requiring the same showing of intent required under the Fourteenth Amendment.²²⁷ As with section 1982, intent proves a slippery evidentiary foothold for opponents of siting decisions. The *Laramore* court found the allegations sufficient to survive summary judgment, but noted that the plaintiffs might have difficulty proving the discrimination alleged at a later stage in the proceedings.²²⁸ Similarly, the Ledbetter Heights community has little access to the channels of power and few financial means by which to open the doors to high-level deliberation, and likely will find little evidence upon which to build a discrimination case. Thus, section

221. 42 U.S.C. § 1983 (1997).

222. *Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1377 (M.D. Fla. 1978).

223. KUSHNER, *supra* note 201, § 1.07, at 26-27.

224. *See* 426 U.S. 229, 239 (1976).

225. 722 F. Supp. 443, 448-49 (N.D. Ill. 1989).

226. *See id.* at 445-51.

227. *See id.* at 449-50.

228. *See id.* at 450-53.

1982 and 1983 claims, whatever their substantive benefit in terms of halting local projects damaging to minority neighborhoods, present evidentiary problems difficult for the average litigant to overcome.

B. Section 2000d

Originating almost one hundred years after sections 1982 and 1983, Title VI of the Civil Rights Act of 1964²²⁹ also seeks to ensure substantive civil rights. Like sections 1982 and 1983, however, Title VI contains evidentiary barriers that may limit its usefulness for minority communities combating undesirable land uses. The statute states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²³⁰ The goal of Title VI “is to eliminate racial discrimination from the social fabric of the nation,”²³¹ by “halt[ing] federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution.”²³² *Young v. Pierce* makes clear that the statute should be read expansively:

The view that Title VI is designed merely to eliminate financial participation by the federal government in racial discrimination presents an unduly narrow portrait of the Civil Rights Act of 1964. The scope of that Act and the Congressional debates which generated it stand as ample testimony to the breadth of congressional intent behind the Act. . . . Ultimately, the purpose of Title VI is to codify, and provide further protection for, the plain “law of the land”: that all persons living within the United States have a right to be treated equally with all others without regard to race, color, or national origin.²³³

Nonetheless, the focus of Title VI is federal funding. The wording of the statute creates three specific limitations as to what law suits may be brought under Title VI: (1) the opposed project must be funded with federal money, directly or perhaps indirectly; (2) the defendant must specifically be the party receiving the federal funding; and (3) the party opposing the project must be the intended beneficiary.

229. 42 U.S.C. § 2000d (1997).

230. *Id.*

231. *Young v. Pierce*, 544 F. Supp. 1010, 1016 (E.D. Tex. 1982).

232. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978); *see also Laramore*, 722 F. Supp. at 451.

233. 544 F. Supp. at 1016.

First, under Title VI, the plaintiff must prove that the project is funded with federal funds. In *Laramore v. Illinois Sports Facilities Authority*, the court questioned whether a proposed baseball stadium was receiving federal funding when plaintiffs alleged funding only in the forms of: (1) a federal tax exemption for bonds sold to finance the stadium, and (2) salary funding by a federal block grant for city employees who might have worked on the project.²³⁴ The case suggests that funding may not be so removed and indirect as to require courts to include virtually every municipal project vaguely connected to federal money. However, the I-49 project will be extensively, if not principally, funded by federal money.²³⁵ Consequently, the first element of a Title VI claim could be met by I-49 opponents with little difficulty.

The party against whom a section 2000d suit is brought also must be the actual recipient of the federal funds. In *Hodges by Hodges v. Public Building Commission*, a group of minority students and applicants to a vocational high school filed suit against the Public Building Commission of Chicago claiming that a planned project violated Title VI.²³⁶ The court held that the students had failed to show that the Commission had a contractual relationship with the board of education that allowed the commission which received federal funds to control the board of education's funds.²³⁷ Without such control over the federal funds, the Commission was not the proper party to be sued under section 2000d.²³⁸ Such a requirement would not prevent suit by a community group but it does suggest that the group should choose its opponent carefully. For example, while the Shreveport Chamber of Commerce has been a vocal proponent of the I-49 inner-city segment, it would most likely be an inappropriate defendant, as federal highway funds would probably go directly to the state highway department, which, therefore, would be perhaps a more appropriate defendant.

The most important, and most often litigated,²³⁹ requirement of Title VI is that the plaintiff be the "intended beneficiary" of, applicant

234. See *Laramore*, 722 F. Supp. at 451-52.

235. See Shreveport Chamber of Commerce, *supra* note 41; *Hearings*, *supra* note 18 (testimony of Ms. Acree).

236. 864 F. Supp. 1493, 1497-99 (N.D. Ill. 1994).

237. See *id.* at 1506-07.

238. See *id.*

239. See, e.g., *Drayden v. Needville Indep. Sch. Dist.*, 642 F.2d 129, 132-33 (5th Cir. 1981); *Simpson v. Reynold Metals Co.*, 629 F.2d 1226, 1235 (7th Cir. 1980); *Miller v. Phelan*, 845 F. Supp. 1201, 1207 (N.D. Ill. 1993); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 775 (N.D. Ill. 1993); *Vucicevic v. MacNeal Mem'l Hosp.*, 572 F. Supp. 1424, 1431 (N.D. Ill.

for, or participant in, the federally funded program.²⁴⁰ As a simple example, some federal courts have denied standing to employees of hospitals which received federal funding through Medicare/Medicaid, because the intended beneficiaries of the programs are the patients of the hospitals and not the hospital.²⁴¹ In the field of urban development, determining the intended beneficiary of a federally funded program may prove a difficult exercise. However, for minority communities, such indeterminacy, along with *Young v. Pierce's* directive to read the statute broadly, may prove a boon by allowing them to argue, in good faith, that they fit within the reach of federal programs. In *Neighborhood Action Coalition v. City of Canton, Ohio* a neighborhood association argued that its Title VI civil rights had been violated by the police department's failure to respond to calls from that neighborhood because of the racial makeup of the community.²⁴² The plaintiffs argued that the city received funding from the Department of Housing and Urban Development and from United States Department of Treasury Block Grants, and that the city refused to invest these funds in its neighborhoods, or to provide police protection financed generally by such funds to its community.²⁴³ The Sixth Circuit Court of Appeals reversed a lower court's dismissal of the Title VI claim, finding that the plaintiffs had standing, and were among the intended beneficiaries of said federal funding.²⁴⁴

A minority community opposing a highway project, however, faces the difficult task of establishing that it is the intended beneficiary of federal funds. Nonetheless, the language of the proponents of the I-49 segment between I-20 and I-220 gives some support to the idea that all residents of Northwest Louisiana, including the residents of Ledbetter Heights, are the intended beneficiaries of the highway project. In her testimony before the Subcommittee on Surface Transportation of the United States House of Representatives,

1983); *Griggs v. Lexington Police Dept.*, 672 F. Supp. 36, 39 (D. Mass. 1987), 867 F.2d 605 (1st Cir. 1988); *Flora v. Moore*, 461 F. Supp. 1104 (D.C. Miss. 1978), *aff'd*, 631 F.2d 730 (5th Cir. 1980); *Gilliam v. City of Omaha*, 388 F. Supp. 842 (D. Neb.), *aff'd*, 524 F.2d 1013 (8th Cir. 1975); *Scelsa v. City Univ. of New York*, 806 F. Supp. 1126, 1139 (S.D.N.Y. 1992); *Mosley v. Clarksville Mem'l Hosp.*, 574 F. Supp. 224, 236 (D.C. Tenn. 1983) (superseded by statute, recognized in 929 F. Supp. 1088 (M.D. Ind. 1996)).

240. See *Simpson v. Reynold Metals Co.*, 629 F.2d 1226, 1234-35 (7th Cir. 1980).

241. See, e.g., *Vucicevic*, 572 F. Supp. at 1429 (finding physicians and staff not protected by Title VI as they are not its intended beneficiaries). *But see* *United States v. Harris Methodist*, 970 F.2d 94, 97 (5th Cir. 1992) (finding physicians and staff of hospital protected as being within class of intended beneficiaries of federal funds).

242. 882 F.2d 1012, 1013-14 (6th Cir. 1989).

243. See *id.* at 1014.

244. See *id.* at 1017.

on March 13, 1997, Arlena Acree, Chairperson of the Shreveport City Chamber of Commerce, stated:

There has been some local opposition to this segment in the past, although we now have increasing support from the businesses in the proposed study area with a desire to *rehabilitate this area* of our community. . . . We believe that the study will lead to a recommendation that this 3.5 mile segment be completed and that *it will have an overwhelmingly positive impact on the economy of the entire Northwest Louisiana region . . .*²⁴⁵

Ms. Acree's comments suggest that the proposed construction will rehabilitate the community and benefit the entire city's economy. The Ledbetter Heights community could potentially argue that, as alleged beneficiaries of the construction, they fall within the ambit of intended beneficiaries of any federal funds for the highway construction.

Title VI also requires that all federal agencies disbursing federal aid promulgate regulations to implement the objectives of Title VI.²⁴⁶ In fact, the current presidential administration has issued "an executive order requiring all agencies to establish a mechanism to monitor and ensure compliance with Title VI whenever its programs have environmental consequences."²⁴⁷ The Department of Transportation has done so. Section 200.5(d) of Title 23 of the Code of Federal Regulations defines compliance in terms of Title VI. Compliance occurs when "[the] recipient [of federal highway funds] has effectively implemented all of the Title VI requirements or can demonstrate that every good faith effort toward achieving this end has been made."²⁴⁸ Section 200.7 further states that "it is the policy of the [Federal Highway Administration] to ensure compliance with Title VI of the Civil Rights Act of 1964."²⁴⁹ Section 200.9 sets up procedures for monitoring Title VI compliance and requires the states to participate in numerous ways, including requiring that states set up a Title VI unit.²⁵⁰

The Title VI litigant may pursue a claim administratively or in court, and need not exhaust all administrative remedies before filing suit.²⁵¹ Thus, unlike the procedural statutes discussed above, Title VI

245. *Hearings, supra* note 18, at 1632 (testimony of Ms. Acree) (emphasis added).

246. See Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act of 1964*, 25 ENVTL. L. 285, 312 (1995).

247. *Id.* at 314 (citing Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994)).

248. 23 C.F.R. § 200.5(d) (1998).

249. *Id.* § 200.7.

250. See *id.* § 200.9.

251. See Fisher, *supra* note 246, at 313 (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 593-95 (1983)).

allows a community challenging development to assess the likelihood of success and the resources necessary to proceed in administrative channels or court, and to choose one or the other based on strategy. While the administrative route may be less expensive for clients, it also fails to garner the sort of publicity that a trial might engender. Further, if the agency is unsympathetic, the administrative route might squander a client's limited reserves, both financially and in spirit, long before a successful resolution or compromise can be reached. Moreover, "as the Supreme Court noted when granting an implied right of action under Title VI, a complainant has no formal means of participation in the administrative process" under Title VI.²⁵²

Judicial action, however, poses its own set of obstacles. In *Guardians Ass'n v. Civil Service Commission*, the Supreme Court seemed to adopt a disparate impact test for Title VI actions for injunctive relief.²⁵³ For compensatory damages, however, the Court ruled that the *Davis* intent test would still apply.²⁵⁴ The practical effect, according to *Alexander v. Choate*, is that, where the regulations implementing Title VI prohibit disparate impact, a plaintiff may show the disparate impact solely in a suit to enforce the regulations.²⁵⁵ On the other hand, where the plaintiff's suit is based on Title VI, the plaintiff must show intent.²⁵⁶ The legislative history of Title VI seems to support the proposition that a disparate impact test was anticipated, rather than an intent test. President Kennedy, in support of the bill, stated, "simple justice requires that public funds, to which taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."²⁵⁷ However, in *Laramore v. Illinois Sports Facilities Authority*, the court implied an intent test, as it did for the section 1983 claim.²⁵⁸ Further, in *Tinsley v. Kemp*, the court interpreted *Guardians* to call for *Davis*'s intent test in Title VI cases, whether for injunctive or compensatory relief.²⁵⁹ The judicial uncertainty as to the standard a plaintiff faces in court leaves a claimant under Title VI, like a claimant under section 1982 or 1983, in the uncomfortable position of not being certain of the kind of a showing he is required to make as he goes into the

252. *Id.* at 316 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 706 n.41 (1979)).

253. 463 U.S. 582, 598 (1983).

254. *See Guardians*, 463 U.S. at 595-96.

255. 469 U.S. 287, 293-94 (1985); *see also* Fisher, *supra* note 246, at 319-21.

256. *See Alexander*, 469 U.S. at 293-94; *see also* Fisher, *supra* note 246, at 319-21.

257. KUSHNER, *supra* note 201, § 3.07, at 157 n.89 (citing 109 CONG. REC. 11,161 (1963) (statement of Pres. Kennedy)).

258. 722 F. Supp. 443, 451 (N.D. Ill. 1989).

259. 750 F. Supp. 1001, 1011 (W.D. Mo. 1990).

courtroom. Such uncertainty encourages the litigant to look further afield for a more certain or promising cause of action.

VI. OPTIMISM AND REALISM

In light of the difficulties inherent in the procedural and civil rights statutes, commentators have focused recently on the possibilities of Title VIII, the Fair Housing Act of 1968 (FHA).²⁶⁰ The commentary has been generally optimistic. Ralph Santiago Abascal included Title VIII among the “statutory civil rights claims most likely to achieve victory.”²⁶¹ Professor John O. Calmore has argued that the Fair Housing Act has “tremendous untapped potential.”²⁶²

In analyzing Title VIII claims, the commentators have focused on the lack of an intent requirement to prove violations of the Fair Housing Act.²⁶³ Similarly, they have relied on the broad interpretation of the Act suggested by some courts and on a selective reading of the legislative history. However, despite the commentator’s optimism, a Title VIII claim for discriminatory siting of a highway should be carefully constructed, with a recognition of the circumstances in which the legislature and the courts have allowed a broad reading of the FHA and where they have drawn limits. A successful FHA claim should bring together environmental and civil rights arguments, rooted in a careful reading of both the language and the legislative history of the FHA.

The theoretical Fair Housing Act claim has attained its academic luster primarily because it seems not to require a showing of intent on the part of the defendant. The Supreme Court appears to have given its implicit blessing to a discriminatory effects standard in affirming *Huntington Branch NAACP v. Town of Huntington*.²⁶⁴ The Court specifically stated: “Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima

260. 42 U.S.C. §§ 3601-19 (1997). See, e.g., Dubin, *supra* note 201, at 782-91; Ralph Santiago Abascal, *Tools for Combating Environmental Injustice in the ‘Hood’: Title VIII of the Civil Rights Act of 1968*, 29 CLEARINGHOUSE REV. 345, 345-359 (1995); Alice L. Brown and Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act)*, 14 VA. ENVTL. L.J. 741, 741-756 (1995); Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 477-486 (1996); KUSHNER, *supra* note 201, § 1.05, at 12-22.

261. Abascal, *supra* note 260, at 345.

262. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1514 (1993).

263. See, e.g., KUSHNER, *supra* note 201, § 3.07, at 153-59.

264. 488 U.S. 15 (1990) (per curiam), *aff’g* 844 F.2d 926 (2d Cir. 1988).

facie case was inadequate.”²⁶⁵ Further, most circuit courts have adopted a disparate impact test, rather than the *Davis* intent test.²⁶⁶ Ralph Santiago Abascal explains:

The Second, Third, Fifth, and Eighth Circuits provide that, upon a showing by plaintiffs of discriminatory effect, the burden formally shifts to defendants to offer a justification for their action. The Fourth and Seventh Circuits use a four-part test, stated as follows:

- (1) How strong is plaintiff’s showing of discriminatory effect?
- (2) Is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*?
- (3) What is defendant’s interest in taking the action complained of?
- (4) Does plaintiff seek to compel defendant affirmatively to provide housing for member of minority groups or merely to restrain defendant from interfering with individual property owners who wish to provide such housing[?]

A plaintiff need not offer evidence of all four factors.²⁶⁷

The concurrence of the circuits on the matter of the evidentiary showing required under a Title VIII claim makes such a claim more attractive to civil rights litigants who often have little money to risk on claims based on statutes with unclear evidentiary requirements.

Despite the appeal of the fact that plaintiffs do not need to show intent and the enthusiasm of the commentators, the Fair Housing Act is not a panacea for minority communities opposing undesirable land uses. An examination of the Act itself, the regulations attempting to clarify it, the case law attempting to explain it, and the legislative history preceding it indicates the ambiguity of the scope of the Act. Section 3601 declares that it is the policy of the FHA “to provide, within constitutional limitations, for fair housing throughout the United States.”²⁶⁸ Section 3604 forms the heart of the Act, and the critical section for claimants opposing projects in their neighborhoods. That section lists the prohibited practices under the Act.²⁶⁹ Most importantly for purposes of claiming discriminatory siting, section 3604 makes it unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”²⁷⁰ The words of the statute, and the regulations

265. *Id.* at 18.

266. *See* Dubin, *supra* note 201, at 784-85; Abascal, *supra* note 260, at 353.

267. Abascal, *supra* note 260, at 355 (citations omitted).

268. 42 U.S.C. § 3601 (1997).

269. *See id.* § 3604.

270. *Id.* § 3604(b).

seeking to clarify them, suggest that Title VIII, while ultimately a promising tool for neighborhoods opposing siting decisions, is not the easy solution envisioned by the academic commentators.²⁷¹ One question regarding an FHA claim is whether or not the “facilities” and “services” which must be provided on an equal basis are those affecting dwellings in general or only sales and rentals of dwellings; another question is whether or not siting decisions are included in the provision of facilities and services.

Commentators have argued that the courts, the regulations, and the legislative history of the Fair Housing Act clearly require a broad construction of section 3604.²⁷² Commentators cite *Trafficante v. Metropolitan Life Insurance Co.*²⁷³ which urged a “generous construction” of Title VIII, and *City of Edmonds v. Oxford House*,²⁷⁴ which reaffirmed a broad reading of the Act in the context of discrimination on the basis of handicap. Commentators point out that the Department of Housing and Urban Development (HUD) regulations at least specify that section 3604(b) applies to certain activities beyond selling and renting.²⁷⁵ Finally, commentators note Senator Mondale’s language introducing the Act, which states that the Act’s purpose is to bring about “truly integrated and balanced living patterns.”²⁷⁶ Against this backdrop, these authors argue that the courts will clearly apply the Act broadly to encompass actions only generally connected to housing.

However, the backdrop is not quite as sympathetic as the commentators have painted it. Litigants should be aware of the other side of the story, the side which courts, particularly conservative courts, will certainly consider. Certain judicial decisions do not support interpretations of the Act which would allow application to siting. *Southend Neighborhood Improvement Ass’n v. County of St. Clair* specifically noted that section 3604(b) applies only to “services generally provided by governmental units such as police and fire

271. See Adams, *supra* note 260, at 480 (indicating that Fair Housing Act cases are “few in number”).

272. See Dubin, *supra* note 201, at 783; Abascal, *supra* note 260, at 349.

273. 409 U.S. 205, 209-10 (1972). In addition to *Trafficante*, see *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 93 (1978) and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) for the proposition that Title VIII should be broadly construed.

274. 115 S. Ct. 1776, 1780 (1995).

275. See 24 C.F.R. § 100.65(b)(1995); Brown and Lyskowski, *supra* note 260, at 750 (noting the application of section 804(b) by the regulations to maintenance and repairs); Dubin, *supra* note 201, at 784 (noting the application of the section to the disparate provision of municipal services); Abascal, *supra* note 260, at 358 (noting the application of the statute to general services provided by municipalities such as police and fire protection).

276. 114 CONG. REC. 2276, 3422 (Feb. 6, 1968) (statement of Sen. Mondale).

protection or garbage collection.”²⁷⁷ The court envisioned the Act as encompassing only those services provided to dwellings, whether owned or rented, and not to unwanted actions affecting dwellings, even if such actions occurred in such traditional governmental service areas as streets.²⁷⁸ Based on its assessment of the scope of the Act, the court declined to extend Fair Housing Act coverage to require the city to repair or demolish over five thousand buildings in a predominantly minority community, despite the negative impacts of the buildings on the property values and general quality of living in the community.²⁷⁹ *Laramore v. Illinois Sports Facility Authority* more clearly required that the services at issue be amongst those generally provided to be covered by the Fair Housing Act.²⁸⁰ The court stated explicitly: “Even under a broad reading, however, ‘services or facilities’ refers to ‘services generally provided by governmental units such as police and fire protection or garbage collection.’ Section 3604(b) cannot be extended to a decision such as the selection of a stadium site.”²⁸¹ Again, the court considered the scope of the FHA to be limited to services provided to dwellings, not activities which might otherwise harm neighborhoods.²⁸² *Campbell v. City of Berwyn* went so far as to find that discriminatory termination of police protection does not affect Title VIII rights as it does not affect the right to move.²⁸³

A brief reading of the FHA’s legislative history also suggests that it may not have been intended as a preventative remedy to discriminatory siting. The debates surrounding the passage of the Fair Housing Act stretched from February 6 until March 11, 1968, when the Act was abruptly passed in the wake of Martin Luther King’s assassination.²⁸⁴ Throughout the debates, discussion focused on mobility and choice in housing transactions.²⁸⁵ According to Senator Brooke, the purpose of the Act was to “make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America. It will make possible renewed hope for ghetto residents who have begun to believe that escape from their

277. 743 F.2d 1207, 1210 (7th Cir. 1984).

278. *See id.* at 1209.

279. *See id.* at 1207-10.

280. 722 F. Supp. 443, 452 (N.D. Ill. 1989).

281. *Id.* at 452 (quoting Southend Neighborhood Improvement Ass’n v. County of St. Clair, 743 F.2d 1207, 1216 (7th Cir. 1984)).

282. *See id.*

283. 815 F. Supp. 1138, 1143 (N.D. Ill. 1993).

284. *See* Dubin, *supra* note 201, at 783; Abascal, *supra* note 260, at 348-49.

285. *See* Dubin, *supra* note 201, at 783.

demeaning circumstance is impossible.”²⁸⁶ While introducing the Act, Senator Mondale noted that industry was moving to the suburbs and racial discrimination in housing was not allowing African Americans to follow the jobs.²⁸⁷ A week later, Senator Proxmire stated that the “obvious solution” to such a problem was to “move the people to the jobs.”²⁸⁸ Senator Proxmire specifically rejected a plan for infusing minority, low-income neighborhoods with redevelopment funds:

A[nother] policy [beyond doing nothing and the policy of dispersion of the Fair Housing Act] has already been called a Marshall plan for the ghettos. There is no doubt that if we are willing to pour \$30 billion or more a year into the ghettos, they can be made a tolerable place in which to live. But unlike the Marshall plan aid to Western Europe, such massive expenditures in the ghettos are likely to be continuing subsidies rather than one time investments. With more and more industry moving to the suburbs, massive investment in the ghetto is likely to be a failure in the long run. It is simply out of tune with economic reality.²⁸⁹

Senator Proxmire’s statement indicates the general tenor of the legislative discussions surrounding the Fair Housing Act and suggests that Congress intended the FHA to be a mechanism for mobility, not equalization.

The HUD regulations also present an unclear picture of the scope of section 3604(b). Section 100.65(a) prohibits the imposition of “different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.”²⁹⁰ The next section of the same regulation gives examples of forbidden actions under the FHA, including: “[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin;”²⁹¹ and “[l]imiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant or a person associated with him or her.”²⁹² One interpretation of the regulations indicates that section 100.65(b) is not a separate grant of rights, but rather an enumeration of some of the rights encompassed by section 100.65(a). Section 100.65(b)(1) specifically applies to discriminatory provisions in documents for the

286. 114 CONG. REC. 2279 (Feb. 6, 1968) (statement of Sen. Brooke).

287. See 114 CONG. REC. 2276 (Feb. 6, 1968) (statement of Sen. Mondale).

288. 114 CONG. REC. 2985 (Feb. 14, 1968) (statement of Sen. Proxmire).

289. *Id.*

290. 24 C.F.R. § 100.65(a) (1997).

291. *Id.* § 100.65(b)(2).

292. *Id.* § 100.65(b)(4).

sale or rental of dwellings. Section 100.65(b)(4) seems to be simply transferring the holding of *Tillman v. Wheaton-Haven Recreation Ass'n*²⁹³ into Fair Housing Act cases from section 1982 claims. As explained above, *Tillman* involved a recreation center that refused to give an African-American the same membership preferences as were given to other homeowners in the neighborhood.²⁹⁴ The court stated:

When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U.S.C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident.²⁹⁵

The regulations forbid “[l]imiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant or a person associated with him or her.”²⁹⁶ The words of section 100.65 track the language of *Tillman* to the extent that the regulation contains a provision for persons associated with the property owners. If the regulation is a codification of *Tillman*, then the regulation requires only that privileges accorded those who buy or lease property be accorded without regard to race or certain other characteristics.

It is not advisable to cite blithely and selectively from the case law, the regulations, and the legislative history in support of a convenient interpretation of the Fair Housing Act, because all three provide examples both in favor of and against the broad reading of the FHA. Accordingly, a court may adopt either position and find sufficient support. Instead, a good faith argument, drawing on civil rights and environmental awareness, should be made; an argument calling for the judicial inclusion of such issues as highway siting within the scope of the Fair Housing Act. Such an argument would rest on several grounds. First, the problems of housing in the inner-city have not been and cannot be resolved by a narrow interpretation of the reach of the Fair Housing Act. Discriminatory problems of housing exceed the boundaries of “sale and rental” and provision of municipal services, as has been recognized by numerous courts. Second, the original Act itself suggested that future changes might be necessary. Third, courts and the legislature increasingly recognize that civil rights and environmental rights, in both urban and rural

293. 410 U.S. 431 (1973).

294. *See id.* at 439-40.

295. *Id.* at 437.

296. 24 C.F.R. § 100.65(b)(4).

contexts, are inseparable. Fourth, if the two are inseparable then a housing law that attempts to address racial discrimination should and must address that discrimination within the environmental context.

The problems of the inner-city discussed by the legislature in 1968 while considering the FHA, remain and are becoming more intractable, and the traditional solutions seem increasingly incapable of resolving them. Michelle Adams has noted that allowing inner-city residents to move away from problems such as inadequate housing or schooling (mobility relief) is an insufficient remedy for the ills, essentially environmental in nature, of the inner city.²⁹⁷ The problems of segregation within the inner city are intertwined with other social problems, including the environmental problems of the physical neighborhoods themselves. Charles Haar stated that, “concentrated poverty in the inner city creates social pathologies different in magnitude and in kind from those associated with individual low incomes, and the problems of crime, increased dropout rates for high school students, drug addiction, and other asocial behavioral patterns in the inner cities are self-perpetuating.”²⁹⁸ While certain comments in the legislative history of the FHA suggest that legislators were concerned primarily with mobility relief, other comments indicate that the FHA’s creators were not unaware that the contours of the Act might need to shift to adapt to changing social needs.

Senator Brooke realized that what was necessary was:

A total strategy for desegregation. The segregation problem is too complex to be solved without a total approach which recognized all the manifold forces which brought it to its present magnitude and threaten to enlarge it further. This approach must take maximum strategic advantage of all available resources and knowledge. It must be *adaptable . . . and flexible enough to permit changes* as ‘feedback’ from early applications dictates. But it must be directed always to a clear and unwavering set of goals.²⁹⁹

Clearly, Senator Brooke saw the Fair Housing Act as something that would mature as the social context changed. Courts should adopt a similar view. Senator Mondale clarified that, “[o]utlawing discrimination in the sale or rental of housing will not free those

297. See Adams, *supra* note 260, at 447-64.

298. CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 7 (1996). Although these sentences precede yet another call for greater mobility out of the inner cities, Professor Haar later notes that the Mount Laurel decisions (a series of decisions focused on exclusionary zoning by suburban communities) could be considered “a forerunner of the environmental justice movement” with their “fairness-inspired requirement for land-use policies.” *Id.* at 196.

299. 114 CONG. REC. 2991 (Feb. 14, 1968) (statement of Sen. Brooke) (emphasis added).

trapped in ghetto squalor, but it is an absolutely essential first step.”³⁰⁰ Senator Mondale, like Senator Brooke, saw the Act as only a starting point.

That first step, the Fair Housing Act itself, should now be followed with second and third steps in the form of a broad judicial interpretation of the language of the Act that reflects the increased understanding of environmental and civil rights as interconnected. The statutes and regulations do not hinder such an interpretation, providing only vague limits on the scope of the FHA. The legislative history shows that, while the primary focus of the FHA was mobility, certain legislators, such as Senator Brooke and Senator Mondale, foresaw an expanded role for the FHA in the future. The courts, while uncertain, have not yet shut the door on such an expanded interpretation of the scope of and role for the FHA in the struggle for civil rights for all communities. Within the past twenty years, environmental and civil rights commentators have begun recording the civil rights component of environmental decisions. As early as 1973, Yale Rabin noted the racially discriminatory environmental impacts of highway siting decisions.³⁰¹ Peter L. Reich and Jon C. Dubin analyzed the siting of and fighting against environmentally disfavored activities in communities of color.³⁰² As environmental activists have become aware of the often racially discriminatory siting decisions for environmentally undesirable land uses, they have also become increasingly aware that the problems of the inner-city are both environmental and civil rights issues. Traditional environmental groups such as the Earth Justice Legal Defense Fund have increasingly begun to work with minority communities facing environmental threats in urban contexts.³⁰³

Academics and activists have become aware that racial and environmental concerns are necessarily intertwined. The courts should acknowledge this connection and should address it. Environmental decisions with racially disparate impacts on the quality of housing should be addressed by the courts, through the Fair

300. 114 CONG. REC. 2274 (Feb. 6, 1968) (statement of Sen. Mondale).

301. See Yale Rabin, *Highways as a Barrier to Equal Access*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (1973).

302. See Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271 (1992); Dubin, *supra* note 201; see also Symposium, *Urban Environmental Justice*, 21 FORDHAM URB. L.J. 425 (1994).

303. The Earth Justice Legal Defense Fund (EJLDF), formerly the Sierra Club Legal Defense Fund, in New Orleans, Louisiana has a Community Liaison who oversees relations with community, environmental, and civil rights groups. The New Orleans branch of EJLDF has been involved in such traditionally civil rights activities as voter registration.

Housing Act, as the kind of extension and maturity Senator Brooke and Senator Mondale envisioned as necessary in 1968. In the current social and legal setting, it is unthinkable to simply “move the people;” instead, it is necessary to interpret the laws broadly enough to carry out their purposes.³⁰⁴

VII. CONCLUSION

The I-49 inner city extension in Shreveport, Louisiana may provide a testing ground for an argument for a broad interpretation of the reach of the Fair Housing Act. The planned highway's path goes directly through a public housing project including a popular gym and a child care center. The residents of both the housing project and the neighborhood through which the extension is to run are predominantly poor and minority citizens. The party most interested in the construction of the inner-city segment of I-49, the Shreveport Chamber of Commerce, is predominantly, if not completely, white. However, it is worth noting that the project is supported by a group of African-American businessmen. The question of racial animus may be difficult to prove when the project has the blessings of at least a portion of the minority community. Notwithstanding the support of certain business leaders, the necessity of the project is questionable in the face of its cost, both financially and in the displacement of the individuals currently living in the neighborhood and the housing project. Moreover, the I-49 inner-city extension project has crawled along for years, hindered by community opposition, but has never halted completely. While procedural statutes provide tools with which to slow the progress of any project, they also seem unable to ultimately resolve the matter. Other substantive statutory claims are fraught with uncertainty, particularly to the extent that they require a showing of discriminatory animus. The evidence available at this point indicates that the Ledbetter Heights community could not meet the stringent intent requirements for cases filed pursuant to sections 1982 and 1983. The community can show, however, a racially disparate impact from the planned project. Were the I-49 inner-city segment approved, the public housing project would be removed, displacing every occupant of every rental unit in the project. Moreover, the proposed construction would bisect the community, separating neighbors and discouraging, if not terminating, community unity. Furthermore, the highway would run alongside a historic community, bringing increased noise and air pollution.

304. See 114 CONG. REC. 2985 (Feb. 14, 1968).

A Title VIII claim, recognizing the equivocal nature of the legislative history and court decisions, but alerting a court to the increasing awareness of the conjunction of environmental and civil rights, particularly as expressed by the presidential directives on environmental justice, may serve a community, such as Ledbetter Heights, well in its opposition to highway siting decisions. The environmental and civil rights movements are growing increasingly intertwined. The courts are also beginning to recognize that development projects must be understood and judged with an eye to their impact, both environmentally and racially. Careful adherence to the requirements of procedural statutes, such as NHPA and NEPA, as well as conscientious enforcement of substantive statutes, such as sections 1982, 1983, and Title VI, provide methods by which courts may introduce social and environmental responsibility into development and planning. More importantly, however, a renewed understanding of the FHA, firmly grounded in the current social and environmental context, allows a broad interpretation of the statute and should enable communities like Ledbetter Heights to question and oppose, and reverse if necessary, discriminatory siting decisions.

APPENDIX. MAP OF THE PROPOSED PROJECT