The Bureau of Environmental Justice and Change From the Top

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Introduction

On February 22, 2018, California Attorney General Xavier Becerra announced the establishment of a Bureau of Environmental Justice (Bureau) within the Environment Section of the California Department of Justice.[1] The Bureau's stated mission is to protect "people and communities that endure a disproportionate share of environmental pollution and public health hazards," which are often referred to as environmental justice communities.[2] The Bureau will work to ensure compliance with the California Environmental

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1. Press Release, Cal. Attorney Gen. Xavier Becerra, Attorney General Becerra Establishes Bureau of Environmental Justice (Feb. 22, 2018), https://oag.ca.gov/news/press-releases/attorney-general-becerra-establishes-bureau-environmental-justice [https://perma.cc/M53Q-67P6].

2. *Id.*; *Attorney General: Environmental Justice Fund: Hearing on AB 2636 Before the Assembly Committee on Judiciary*, 2018 Leg., 1 (Ca. 2018).

Quality Act (CEQA), remediate contaminated drinking water, address issues of environmental lead exposure, introduce enforcement actions to penalize illegal air and water polluters, and challenge actions taken by the federal government that worsen public health and environmental quality.[3] California Assemblymember Eduardo Garcia introduced a concurrent bill, AB 2636, to "provide additional support for [Attorney General] investigations and litigation intended to protect communities that endure a disproportionate share of environmental pollution."[4]

Previous failures by the federal and state governments to allocate environmental enforcement resources to minority communities may indeed be a leading cause for the inequity in environmental quality between minority and nonminority neighborhoods.[5] Without question, it is an important and laudable step to dedicate state resources to rectifying the disproportionate impacts of pollution and improving environmental quality in disadvantaged communities. In his comments at the announcement of the creation of the Bureau, Assemblymember Garcia aptly stated as such: "[j]ustice should not be reserved for the communities who can afford to investigate and litigate parties that break the law."[6] However, prominent environmental justice lawyer and commentator Luke Cole has criticized both litigation and top-down approaches as being ineffective and perhaps counterproductive as remedies to the problem of environmental justice. Cole argues that environmental justice is ultimately a problem of political and economic inequities exacerbated by a lack of participation in environmental decisionmaking by affected communities.[7] This presents a clear paradox: while the environmental justice enforcement that the California Attorney General's office is poised to provide is likely needed,

3. *Id.*

4. *Id.*; A.B. 2636, 2017–2018 Assemb., Reg. Sess. (Cal. 2018). Assemblymember Garcia's bill would establish a state Environmental Justice Fund, filled with the proceeds of state settlements, that would fund Environmental Justice Bureau investigations and litigation. *Id.*

5. Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 817 (1993). Professor Lazarus suggests that "inequities in the distribution of enforcement resources" might lead to "less generous cleanup remedies, lower fines, slower cleanups, or more frequent violations of pollution control laws, in areas where minorities reside in greater percentages than nonminorities" (citations omitted). *Id.* at 818–19.

6. Becerra, *supra* note 1.

7. Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 Fordham Urb. L.J. 523, 524 (1994) ("Bringing a lawsuit may ensure loss of the struggle at hand, or cause significant disempowerment of the client community.") [hereinafter *Environmental Justice Litigation*]; *see also* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 Ecology L.Q. 619, 648–49 (1992) [hereinafter *Empowerment as the Key to Environmental Protection*] ("Using a legal strategy, rather than a political one, would likely fail these communities: a legal victory does not change the political and economic power relations in the community that led to the environmental threat in the first place.").

top-down and litigation-focused approaches might disempower those communities, ultimately working against the goal of further self-determination in community environmental decisionmaking. In Part I, this paper will explore the genuine benefits an environmental justice-focused bureau of the Attorney General's office could provide, as well as its serious shortcomings.

If, as commentators such as Cole argue, litigation and top-down approaches are ineffective or counterproductive to addressing the root causes of environmental injustice, what options remain for policymakers who genuinely want to address the problem of environmental justice? Recent examples of major environmental injustices, such as the Flint Water Crisis, might signal the gravity of environmental justice issues to policymakers and encourage them to harness their moral obligation to prevent environmental injustice before it happens. To such policymakers, the costs of waiting for environmental justice communities to organize themselves to address the problems that affect them are morally, and perhaps politically, too high. Part II will address whether, in light of these costs, any other top-down public alternatives to the attorney general model of increasing environmental quality in environmental justice communities might more effectively address the root causes of environmental injustice.

Finally, Part III will address whether environmental justice, as a policy concern that is symptomatic of a democracy deficit, is unique in its tension with top-down and litigation-focused approaches as compared to other policy concerns. Environmental justice is similar to other policy concerns in that its regulatory response requires a delicate balance of technocracy and democratic accountability, as well as a leveling of the playing field upon which parties vie for influence. On the other hand, environmental justice differs from other policy concerns where the interested parties each have natural sources of leverage over one another, such as workers' rights.

I. What Are the Strengths and Limitations of a State Government-Run Environmental Justice Enforcement and Litigation Office in Achieving the Goals of Environmental Justice?

If the state wants to alleviate the harms caused by environmental injustices in poor and minority communities, and if environmental injustices are caused or exacerbated by ineffectual enforcement, it makes sense to put more resources into environmental enforcement. Indeed, as Professor Richard Lazarus argues, "inequities in the distribution of enforcement resources" might lead to "less generous cleanup remedies, lower fines, slower cleanups, and more frequent violations of pollution control laws in areas where minorities reside in greater percentages than nonminorities."[8] If so, why not make

8. Lazarus, *supra* note 5, at 818–19.

affirmative efforts to reduce the inequity in the distribution of enforcement resources? A hypothetical Bureau could force cleanups, put bad actors on notice, and disincentivize indiscriminate dumping of pollutants. On the other hand, improving enforcement efforts would likely only play a limited role in stopping bad permits from being issued in the first place. Further, it would play no role in helping communities organize themselves to prevent environmental injustices from occurring in the future, and might even play a negative role in instances where emitters are technically in compliance with permits but continue to harm environmental justice communities regardless. In short, a state-government-run, litigation-focused Bureau of Environmental Justice can effectively provide sorely needed relief for some symptoms of environmental injustice, but cannot effectively address its causes.

There is no silver bullet for environmental justice issues, and, to be fair, state officials never publicly claimed that creating the Bureau was an attempt to solve all of California's environmental justice issues in one fell swoop. If preventing environmental injustices is a serious governmental concern, however, it is still important to recognize the limitations and strengths of a Bureau of Environmental Justice so that policymakers can craft complementary or alternative solutions in the future.

A. *Strengths of the Bureau of Environmental Justice*

In many instances, the Bureau should be able to alleviate the most visible effects of environmental injustices. When successful, the Bureau could mandate environmental cleanups, enjoin continued pollution, and perhaps even create abatement funds that are channeled back into communities suffering from pollution. Effective enforcement also signals to polluters that the state government is taking environmental justice seriously, and creates incentives for better self-monitoring of potential harm-causing activity.

As an elected official, the California Attorney General wields a popular mandate.[9] Arguments put forward by the Attorney General carry forceful weight in California courts, and through those arguments the Attorney General can play a role in expanding California law at the margins. Actions taken by the previous Attorney General, now-U.S. Senator Kamala Harris, show how Attorney General Becerra and the Bureau can wield such persuasive authority in the environmental justice context.[10] During Senator Harris's time as California

9. However, it should be noted that Attorney General Becerra was not elected. Rather, Becerra was appointed by Governor Jerry Brown on December 1, 2016 when then-Attorney General Kamala Harris was elected to the U.S. Senate. Sarah D. Wire & John Myers, *Gov. Brown Taps California's Rep. Xavier Becerra to be State's First Latino Attorney General*, L.A. Times (Dec. 1, 2016, 8:33 AM), https://www.latimes.com/politics/la-pol-ca-xavier-becerra-attorney-general-20161201-story.html [https://perma.cc/33GE-27QD].

10. While serving as San Francisco District Attorney, Senator Harris also established an environmental justice unit within the Office of the District Attorney. Jason B. Johnson, *SAN FRANCISCO / D.A. Creates Environmental Unit / 3-Staff Team Takes on Crime Mostly Affecting the Poor*, SFGATE (June 1, 2005, 4:00 AM), https://www.sfgate.com/crime/article/

Attorney General, her office "[promoted] interpretations of CEQA"—the California Environmental Quality Act, California's cousin to the federal National Environmental Policy Act (NEPA)—"that would require environmental justice impacts to be more explicitly addressed, despite many years of courts limiting the analysis of economic and social impacts under CEQA."[11] This "aggressive" and "unprecedented" interpretation "requires [CEQA] environmental review documents to analyze environmental justice-related impacts."[12] Attorney General Harris's arguments expanded CEQA's explicit requirement to consider a project's "social" impacts into an implicit requirement to consider its environmental justice impacts.[13] This was manifested in the Attorney General pushing San Diego County to consider, for example, whether a San Diego County Regional Transportation Plan unjustly favored freeway expansion over mass transit expansion to the detriment of air quality for local residents.[14] In another instance, the Attorney General pushed Riverside County to incorporate environmental justice impacts in its CEQA environmental review process.[15] Specifically, Riverside County was told that a project's addition of 1,500 diesel truck trips per day would exacerbate disproportionate impacts on the surrounding Hispanic and low-income residential community "who already suffer[ed] from substantial exposure to toxic air contaminants."[16]

It is not hard to imagine this iteration of the Bureau taking a similar position on incorporating environmental justice impacts into the CEQA environmental review process. Further, it may also advance interpretations of other California law that require the consideration of environmental justice impacts at important steps of land use decisionmaking. The Attorney General also often issues Attorney General Opinions, which are sometimes cited as

SAN-FRANCISCO-D-A-creates-environmental-unit-2666667.php.

11. Peter Hsiao et al., *Environmental Justice as Environmental Impact: The Intersection of Environmental Justice, Climate Change, and the California Environmental Quality Act*, *in* 48 Bloomberg BNA World Climate Change Rep. 1, 2 (2012).

12. *Id.*

13. Alan Ramo, *Environmental Justice as an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives*, 19 Hastings W.-N.W. J. Envtl. L. & Pol'y 41, 63–64 (2013) (*citing* Cal. Pub. Res. Code. § 21081 (Deering 2012)).

14. Ramo, *supra* note 13, at 74 (*citing* People of the State of California's Pet. For Writ of Mandate in Intervention, Cleveland Nat'l Forest Found. & Ctr. for Biological Diversity v. San Diego Ass'n of Gov'ts, et al., No. 37-2011-00101593-CU-TT-CTL (Cal. Super. Ct. Jan. 20, 2012), https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/San_Diego_Petition.pdf [https://perma.cc/D8ZJ-HJ6J]).

15. Ramo, *supra* note 13, at 72 (*citing* People's Compl. In Intervention and Pet. For Writ of Mandate at 4, ¶ 12, Ctr. for Community Action and Environmental Justice v. Cty. of Riverside et al., No. RIC 1112063 (Cal. Super. Ct. Sept. 6, 2011), http://ag.ca.gov/cms_attachments/press/pdfs/n256_mira_loma_proposed_complaint_in_intervention.pdf [https://perma.cc/HUG2-EC4Q]).

16. *Id.*

persuasive authority in California judicial opinions.[17] Creating Attorney General Opinions that have positive environmental justice implications would be a different means to achieve the same goal of additional incorporation of environmental justice review in California law. Using the authority of the Attorney General in these ways would be an unqualified positive for those who are concerned with environmental justice. Furthermore, once such arguments are advanced by the Attorney General and accepted by California courts, other non-governmental plaintiffs may be able to advance them in instances where the Attorney General is institutionally constrained from doing so, such as when a state agency issues a permit in question and the Attorney General's role is to defend it.

B. *Limitations of the Bureau of Environmental Justice*

However, the Bureau will also suffer from serious shortcomings. First, the Bureau will have only a limited role in stopping bad permits from being issued in the first place. While advancing arguments that expand the environmental justice requirements of CEQA might make land use decisions more equitable, ultimate decisionmaking authority still rests with the administrative agencies that issue land use permits. Despite the Bureau's best efforts in modifying the CEQA process that agencies must follow to incorporate environmental justice considerations, final permitting decisions might still conflict with environmental justice values or the wishes of environmental justice community members.

Second, once a permit is issued, the Bureau will have very limited capacity to challenge it on procedural or substantive grounds. The California Department of Justice is often tasked with defending the permitting decisions of California agencies; one could hardly imagine the Bureau litigating against a permit that another Deputy Attorney General has an obligation to defend. This institutional limitation narrows the post-permitting role of the Bureau to entering enforcement actions against those who do not comply with the terms of their permits. Meanwhile, community members and local nongovernmental organizations are left with the task of litigating against permits that never should have been issued in the first place, including instances where a polluter is technically in compliance but harm to the community still occurs. In those suits, community members and nongovernmental organizations will often argue against their sometimes-ally, the Office of the Attorney General. When the Office of the Attorney General argues in support of continuing

17. *See* CAL. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, *Legal Opinions of the Attorney General—Opinion Unit*, https://oag.ca.gov/opinions [https://perma.cc/YS2Q-LK95] ("As chief law officer of the state, the California Attorney General provides legal opinions upon request to designated state and local public officials and government agencies on issues arising in the course of their duties. The formal legal opinions of the Attorney General have been accorded 'great respect' and 'great weight' by the courts.").

environmental harm, and litigates against its community partners, it plays a negative role in the resolution of environmental justice issues.

Further, the ability of the Bureau to be effective in entering enforcement actions depends on adequate monitoring and the commencement of enforcement actions before the harms become too great to bear. Hopefully, the Environmental Justice Fund created by Assemblymember Garcia's bill will provide enough resources for the Bureau to adequately monitor compliance with existing permits. These funds could also be beneficial if used by the Bureau to coordinate with client agencies charged with performing the monitoring to ensure the Department of Justice commences timely enforcement actions in environmental justice communities. This is a tall order, however, and will require prolonged and consistent interest in environmental justice issues from state officials outside the Office of the Attorney General.

Finally, and perhaps most importantly, a state government-run environmental justice enforcement and litigation office cannot engender the public participation necessary to address the root causes of environmental injustices. As currently proposed, the Bureau will play no role in helping communities organize themselves to prevent environmental injustices from occurring in the first place. When the Bureau takes control of enforcement actions without engaging the community first, it risks disempowering the communities it is charged with protecting.

The difficulties of effective environmental justice litigation by community outsiders are not limited to State-imposed actions—nonprofit and public interest organizations face many of these same challenges when choosing strategies to alleviate the symptoms and causes of environmental injustices. Litigation is often identified as a fickle tool in environmental justice literature because it fails to redress the systemic conditions that caused the problem.[18] Without "chang[ing] the political and economic power relations in the community that led to the environmental threat in the first place,"[19] the threat is free to recur, and litigation on its own can do very little to change underlying political and economic power structures. Instead, litigation needs to be partnered with strategies to build community political capital and engage public interest in environmental justice issues.[20]

Cole's proposition that "bringing a lawsuit may ensure loss of the struggle at hand, or cause significant disempowerment of the client community" might apply doubly when the Attorney General brings suit in the name of the People of California, without an identified client community and lacking significant

18. *Environmental Justice Litigation*, *supra* note 7, at 524.

19. *Id.* at 649.

20. Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 Va. Envtl. L.J. 687, 709 (1995) [hereinafter *Three Models of Environmental Advocacy*].

public engagement.[21] Cole explains the shortcomings of environmental justice litigation that does not engage the community:

> Communities are typically chosen for noxious land uses because they are politically and economically powerless. Thus, the noxious land use is merely a symptom of the larger problem of powerlessness. If an attorney steps in without involving the community and defeats the noxious land use through inspired legal argument, only the symptom is removed. By teaching communities that they have no role in solving the problems which affect them, [this model of environmental justice litigation] *reinforces* powerlessness and is thus antithetical to environmental justice.[22]

Thus, a paradox is presented: the enforcement work done by the Bureau is without doubt necessary in the absence of empowered communities, but doing the enforcement work without engaging the community risks disempowering communities further. For policymakers with a genuine interest in alleviating the causes and symptoms of environmental justice, this is an untenable compromise—so what more can be done?

II. Are There Top-Down Alternatives to the Environmental Justice Attorney General Model That Might Generate More Public Participation?

Given the recent backdrop of major environmental justice crises, such as the Flint Water Crisis, some state policymakers will rightfully feel a moral and political obligation to act on environmental justice issues.[23] What approaches should such policymakers take, when increased enforcement might be ineffective at addressing the root political and economic causes of environmental justice issues, but the health, environmental, and political costs of waiting for communities to organize themselves are too high? For one, these state policymakers might take the Community Action Agency model first adopted in the social justice and antipoverty movements of the 1960s and adapt it to address environmental justice issues and build community resilience against environmental injustices.[24] They might also create a general Office of Environmental Justice, perhaps housed in the California Environmental Protection Agency,

21. *Environmental Justice Litigation*, *supra* note 7, at 524.

22. *Three Models of Environmental Advocacy*, *supra* note 20, at 705.

23. For instance, in the wake of the Flint Water Crisis, Governor Rick Snyder commissioned a study charged with "develop[ing] and provid[ing] recommendations to the Governor that improve environmental justice awareness and engagement in state and local agencies." Mich. Envtl. Just. Work Grp., Environmental Justice Work Group Report: Michigan as a Global Leader in Environmental Justice (2018), https://www.michigan.gov/documents/snyder/Environmental_Justice_Work_Group_Report_616102_7.pdf [https://perma.cc/M9N2-C24R]. The study proposed a number of public and private partnerships and procedural changes designed to prevent future environmental justice crises in Michigan, and to make Michigan "a national and global leader in environmental justice." *Id.*

24. Howard Nemon, *Community Action: Lessons from Forty Years of Federal Funding, Anti-Poverty Strategies and Participation of the Poor*, 11 J. Poverty 1 (2007).

much like the Office of Environmental Justice formed under former President Obama's Environmental Protection Agency (EPA), and task them with addressing a wide range of environmental justice issues across the state.[25] Finally, they might create "Offices of Goodness" within each state agency whose actions intersect with environmental justice issues, in order to create strong, internal voices advocating for environmental justice in land-use decisionmaking.[26]

A. *Community Action Agency Model*

Community Action Agencies were created by the federal Economic Opportunity Act of 1964 to engage poor communities in the project of lifting themselves out of poverty.[27] The belief guiding the adoption of the Community Action Agency model was that antipoverty campaigns would be most successful when low-income people participated in, and had discretion over, their implementation.[28] Thus, "[p]articipation was viewed as a way to empower the poor and thereby effectuate institutional change in the communities."[29] These agencies ultimately failed to achieve their lofty goal of eliminating poverty in the United States.[30] However, they were successful in providing community members with discretionary funding to address some of the root causes of poverty and unemployment for community members.[31] They also created a formalized yet homegrown platform through which community members communicated with industry and government about the causes of poverty.[32]

One could imagine an approach similar to the Community Action Agency model being applied to issues related to environmental justice. States could appropriate funds to create Environmental Justice Action Agencies, through which local community members would be trained in ways to attack the problem of environmental justice and given the funds to do so. Such tools might include: activism training to help communities organize and signal their opposition when locally undesired land use proposals are pending before agencies; training in tracking and monitoring adherence to permits granted by land use agencies so that enforcement actions can be quickly brought; and training in the use of citizen suit provisions under major state and federal environmental statutes, such as NEPA, CEQA, the Clean Water Act, and the Clean Air Act. Ultimately, because the Environmental Justice Action Agencies would be led

25. Brady Dennis, *EPA Environmental Justice Leader Resigns, Amid White House Plans to Dismantle Program*, Wash. Post (Mar. 9, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/09/epas-environmental-justice-leader-steps-down-amid-white-house-plans-to-dismantle-program [https://perma.cc/XD8P-5BUJ].

26. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 Cardozo L. Rev. 53 (2014).

27. Nemon, *supra* note 24, at 4.

28. *Id.* at 14.

29. *Id.*

30. *Id.* at 5.

31. *Id.*

32. *Id.*

by community members, the exact tools with which the Agencies would train their members would be determined *by local Agency leaders and community members*; as a result, each Environmental Justice Action Agency might implement any, all, or none of the above training structures.

A basic function of Environmental Justice Action Agencies might be to train local community members in activism and organizing around environmental justice issues. Such training could range from general event organizing and picketing of polluters to participating in public hearings. Such organizing and activism efforts might also include training community members to write comment letters to administrative agencies making land use decisions in ways that "get heard;" an empirical study by now-California Supreme Court Justice Cuéllar suggests that administrative agencies are more likely to integrate responses to the concerns of comments that display some degree of sophistication.[33] Activism and organizing training would be an important step toward raising the visibility of environmental justice issues within environmental justice communities and building community empowerment through teaching methods of participation in the administrative process.[34]

Environmental Justice Action Agencies might also train community members to monitor emissions from polluters in order to track when they become noncompliant with their permits. Ease of detecting noncompliance—and the corresponding ease of monitoring training—ranges from simple, as in the context of National Pollutant Discharge Elimination System permits under the Clean Water Act, with one pollutant-effluent limitation and one clear source of effluent,[35] to very difficult, as in the context of the Clean Air Act, under which determining the source of a pollutant and determining if a source is noncompliant with a permit can be an expensive and scientific endeavor.[36] Despite the range of difficulties in tracking noncompliance for each given statute, the project of training community members to participate in the compliance process would empower environmental justice communities by giving those members the tools and confidence to confront polluters themselves. It would also provide additional sources of noncompliance notice for agency officials tasked with entering enforcement actions.

Citizen suit provisions were added to the major federal environmental statutes in part as a means for private citizens to shore up problems of

33. *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 Admin. L. Rev. 411, 474–86 (2005).

34. *See* R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning From the Civil Rights Movement*, 48 Am. U. L. Rev. 229 (1998) (arguing that strategies to build community empowerment are the most effective way to achieve environmental justice).

35. Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 Ecology L.Q. 1, 47 (1995).

36. *Id.* at 56.

underenforcement.[37] However, research suggests that they are underutilized by poor and minority communities.[38] Citizen suits—if they are not adequately representative of the community, and brought by a private party with uniquely private interests—may present many of the same problems as the Environmental Justice Attorney General model because the actions don't truly empower the community or serve their interests. If initiated under the auspices of the Environmental Justice Action Agency and out of a community consensus to address some pressing environmental justice concern, however, citizen suits could have public empowerment advantages that are lacking under the Environmental Justice Attorney General model. Training Environmental Justice Action Agencies to initiate citizen suits under the major state and federal environmental statutes could be an important and effective means to build civic participation and community resiliency against environmental injustices.

However, the Community Action Agency model is not without its potential pitfalls. Within four years of the creation of the Community Action Agency model, Congress and President Lyndon B. Johnson, who created the original iteration of the Community Action Agencies, passed an amendment that shifted the Agencies' board structure from being entirely composed of low-income community members to being composed of "one-third elected public officials, at least one-third low-income residents, and the remainder nonprofit and for-profit representatives."[39] This change came about after some mayors criticized the program for "'fostering class struggle,' since the agencies allowed poor people to use federal funds to openly defy the local political structure."[40] The change in board structure tethered some of the institutional energies wielded by low-income community members and transformed the agencies into more conservative institutions. One can imagine similar changes being made to an Environmental Justice Action Agency that flies too close to the sun by challenging existing municipal and state power structures.

Another problem with Community Action Agencies is that they might struggle to retain local expertise and local community members over time. Many of the first employees of the Community Action Agencies were women who lived and worked in low income communities and had previous experience (albeit unpaid) as community workers and advocates.[41] Their preexisting community experiences and perspectives were valuable for the work and helped inform their implementation of community projects in ways that often

37. *Id.* at 40–41.

38. *Id.* at 5.

39. Nemon, *supra* note 24, at 15–16.

40. Mary-Ellen Boyle, *Poverty, Partnerships, and Privilege: Elite Institutions and Community Empowerment*, 4 City & Community 233, 236 (2005).

41. Nancy A. Naples, *Contradictions in the Gender Subtext of the War on Poverty: The Community Work and Resistance of Women from Low Income Communities*, 38 Soc. Problems 316 (1991).

differed from those of professionals and bureaucrats.[42] In an effort to temper some of the projects implemented by these workers, however, some agency administrators "implemented personnel policies that sanctioned workers who participated in political activities."[43] These policies created an inherent tension for nominally apolitical state workers with histories as political community activists and confused their roles within the agencies.[44] Furthermore, many of these workers who had been providing community services long before the creation of the Agencies eventually found themselves passed up for promotions because they lacked professional credentials.[45] Hypothetical Environmental Justice Action Agencies would do well to make efforts to retain local community expertise, allow that expertise to flourish within the structure of the agency, and value that expertise on at least equal footing with professional credentials.

Despite these limitations, development of Environmental Justice Action Agencies based on the 1960s Community Action Agency model could lead to increased community resilience and engagement through training in activism and organizing, monitoring adherence to granted permits, and increasing the use of citizen suit provisions. Such features would likely go further in building the kind of community empowerment capable of addressing the root causes of environmental injustices than pure top-down litigation and enforcement strategies.

B. *General Environmental Justice Office*

State policymakers with a genuine interest in alleviating the causes and symptoms of environmental injustices might also create a general Office of Environmental Justice, like the Office of Environmental Justice housed in former President Obama's Environmental Protection Agency, and task that Office with addressing a wide range of environmental justice issues across the state.[46] Such an Office could work as a clearinghouse for environmental justice issues, coordinate environmental justice efforts across agencies, and interface with municipalities to help ensure a healthy environment for all.

A more powerful version of a state Office of Environmental Justice might also resemble the federal Office of Information and Regulatory Affairs (OIRA) when that Office is acting at its best. Just as OIRA oversees rulemaking procedures in myriad agencies, coordinates interagency dialogue regarding rules whose subjects touch multiple agencies, and assesses proposed rules using some form of cost-benefit analysis,[47] a powerful version of the Office of

42. *Id.* at 323.
43. *Id.* at 326.
44. *Id.*
45. *Id.* at 324.
46. Dennis, *supra* note 25.
47. Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1858–59 (2013).

Environmental Justice might oversee rulemaking procedures for rules with environmental justice dimensions, coordinate interagency dialogue regarding those rules, and assess the rules using some intensive form of cost-benefit analysis that heavily weighs environmental justice factors.

Especially in a time where federal action on environmental justice issues is unlikely and preexisting federal efforts in the area are likely to be dismantled and defunded, state governments could be leading and essential voices in moving the needle on environmental justice.[48] Interested state governments might have these clearinghouse agencies adopt environmental justice policies proposed by the Obama EPA that are unlikely to continue under President Trump, such as the EJ 2020 Action Agenda, to the extent that doing so is constitutionally permissible.[49] These general environmental justice offices would have the dynamism and flexibility to adopt plans that empower environmental justice communities in their quest to address concerns facing their communities and act as powerful internal advocates for environmental justice.

C. *"Offices of Goodness"*

Finally, state policymakers with a genuine interest in alleviating the symptoms and causes of environmental injustices might create "Offices of Goodness" within each state agency whose actions intersect with environmental justice issues and create strong, internal voices advocating for environmental justice in land-use decisionmaking. Professor Margo Schlanger, drawing from her time as U.S. Department of Homeland Security Officer for Civil Rights and Civil Liberties, offers the term "Office of Goodness" as a shorthand for advisory bureaus created within larger agencies that are charged with advocating for values important to the agency's core mission but undervalued by the institutional culture of the agency.[50] In Professor Schlanger's experience, the Department of Homeland Security Office for Civil Rights and Civil Liberties was charged with overseeing Department of Homeland Security compliance with civil rights and civil liberties requirements mandated by the Constitution,

48. *See* Phil McKenna, *Chief Environmental Justice Official at EPA Resigns, With Plea to Pruitt to Protect Vulnerable Communities*, Inside Climate News (Mar. 9, 2017), https://insideclimatenews.org/news/09032017/epa-environmental-justice-mustafa-ali-flint-water-crisis-dakota-access-pipeline-trump-scott-pruitt [https://perma.cc/SAU5-3ZBD] (referencing EPA Administrator Pruitt's intent to dismantle the EPA Office of Environmental Justice and reduce its funding by 75 percent); *see also* Charlie Savage, *E.P.A. Threatens to Stop Funding Justice Dept. Environmental Work*, N.Y. Times (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/us/politics/scott-pruitt-epa-justice-department-funding.html [https://perma.cc/B63AN33Q] (referencing EPA Administrator Pruitt's intent to withdraw reimbursements paid to the Department of Justice for Superfund litigation).

49. U.S. Envtl. Prot. Agency, *EJ Action Agenda 2020: The U.S. EPA's Environmental Justice Strategic Plan for 2016–2020*, https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf [https://perma.cc/64XX-XRL4]; *see also* Dennis, *supra* note 25 ("There have been few indications that the [Trump] administration intends to follow through on [the EJ 2020 Action Agenda]").

50. Schlanger, *supra* note 26, at 60–62.

statutes, and regulations.[51] In the environmental justice context, an Office of Goodness might be an internal bureau within, for example, the California Division of Oil, Gas, and Geothermal Resources. Such an Office could serve to educate permitting officials on environmental justice generally, illustrate the environmental justice impacts of proposed projects to permitting officials, and to be an internal advocate for community environmental justice leaders, ensuring that their voices are heard and valued by the relevant authorities during notice-and-comment periods. Such Offices could become valuable allies for community environmental justice leaders and develop trust between state agencies and the community.

Each state agency whose decisions may intersect with environmental justice issues will not necessarily require the creation of an Office of Goodness. It might even be more administratively difficult to create numerous environmental justice offices within separate agencies instead of creating a single, more powerful general environmental justice agency. Furthermore, the values espoused by an Office of Goodness might constrain "or even conflict with [an] agency's *raison d'etre*" to the point that external reinforcement of the Office is necessary to prevent its dissipation into the general culture of the agency.[52] Regardless, Offices of Goodness could be effective tools in advancing environmental justice values from the top down, especially if policymakers intend to continue supporting these offices with political capital after their creation. While Offices of Goodness might not directly empower environmental justice communities, they could ensure that environmental justice advocates always have a seat at the table and that their voices are heard in the administrative process.

III. Lessons Learned From Contrasting Environmental Justice With Other Policy Concerns

Finally, how does environmental justice compare to other policy areas that regulators seek to regulate or ameliorate? Contextualizing the differences and similarities between environmental justice and other policy concerns may provide interested policymakers a framework for understanding appropriate regulatory responses to environmental injustice. Environmental justice is similar to other policy areas in that response to it through regulation requires a delicate balance of technocracy and democratic accountability, as well as a leveling of the playing field upon which parties vie for influence. However, environmental justice differs from areas of law such as workers' rights, wherein each party in the equation has a natural source of leverage over the other's actions. Instead, environmental justice is more similar to civil rights in that the movement must create leverage through the development of creative solutions.

51. *Id.* at 62.
52. *Id.* at 103.

Contrary to common stereotypes, the administrative state is neither entirely technocratic nor entirely captured by special interests. Often, technocracy is positioned as the desirable alternative to the revolving door between the regulatory state and outside industrial or activist interests. In truth, neither extreme is desirable, and a functioning administrative state should incorporate facets of both stereotypes, using the expertise of technocrats when necessary and heeding political pressures when appropriate.[53]

This tension between technocracy and democracy is heightened in the environmental justice context. Cost-benefit analyses might show that a poor or minority neighborhood is the optimal site for a new industrial facility, or that the absolute impacts of such a project will be lesser in an area where there are already a number of similar industrial facilities. Deciding to expand a highway that leads through environmental justice communities because it enhances prosperity for the region as a whole by increasing shipping loads and creating warehouse jobs might make sense from the top down perspective. However, such projects could elevate preexisting pollution hot spots surrounding the highway to untenable levels, thus unequally distributing the burdens associated with the project. Pure technocracy fails in the environmental justice context because remedying the causes of environmental injustice requires engagement with the kinds of communities whose voices are traditionally ignored by elite technocrats.[54]

This is not to say that an approach to environmental justice regulation that values democracy above all will necessarily result in fewer locally undesired land uses. If the Bureau only engaged cleanup or enforcement efforts when prompted by outside interests, it is possible that environmental justice community concerns would still go unrepresented. Such communities don't necessarily have the required access to the relevant levers of authority or the political ability and will to organize and petition enforcement authorities. Without coupling a purely democratic approach with affirmative efforts to build community resilience through activism training or education on citizen

53. *See* K. Sabeel Rahman, Note, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 HARV. J. ON LEGIS. 555, 557–58 (2011) (arguing that models of technocracy and models of democracy should both be incorporated in regulatory efforts, and critiquing models of regulation that tilt too far toward pure technocracy on bases that they inadequately generate democratic engagement in what is an essentially political process).

54. There is a noteworthy tangible quality to failures of democracy in the environmental justice context. In Rahman's *Envisioning the Regulatory State*, the author explores the consequences of failures of democracy in the financial regulation context. In such a context, failures of democracy can lead to economic inequality and affect individuals' balance sheets. In contrast, when democracy fails and decisions are made through purely technocratic means in the environmental justice context, locally undesired land uses appear as physical manifestations of such failures. These emitting failures of democracy worsen the health of individuals in the nearby community and exist as living monuments to the inadequacies of the state. *See id.*

suit provisions, as discussed above, only the status quo will be upheld, and more locally undesired land uses will be created.[55] Absent such concurrent changes, one can imagine a netherworld of "purely democratic" approaches to environmental justice regulation, in which enforcement agencies are nominally open to petition by all, but in practice only those with access and influence have the capability to induce an enforcement action. In such a scheme, the pattern and practice seen in the recent episode of conservative commentator Hugh Hewitt privately petitioning former EPA Administrator Pruitt to prioritize a Superfund cleanup in his home district might become the rule, instead of the exception.[56]

However, environmental justice differs in a major way from other policy areas, particularly workers' rights. Environmental justice communities have less leverage over the parties they oppose than striking workers. Through strikes and other collective action, workers can withhold their labor as a means of creating leverage for higher wages or additional benefits. Environmental justice community members can demonstrate in collective actions, but they lack the corresponding leverage. Threatening to leave the neighborhood or refusing to pay property taxes or rents would be counterproductive or threaten the protestors' material security past a tolerable threshold. Perhaps it is in part for this reason (aside from the obvious racial and economic parallels) that comparisons are often drawn between environmental justice and the Civil Rights movement of the 1960s.[57] Then, as now, the Civil Rights movement lacked natural sources of leverage over the government or private industry, and it either had to develop creative mechanisms for leverage, such as boycotts and sit-ins, or loudly and publicly lobby for support to ameliorate the set of laws and social structures that imposed their oppression. The similar lack of leverage held by environmental justice advocates in their struggle should further establish the need to give communities the tools to fight environmental justice battles on their own, through training in activism efforts, citizen suit provisions, and compliance monitoring.

Conclusion

The creation of the Bureau of Environmental Justice by California Attorney General Xavier Becerra raises important questions about the efficacy of

55. *See* Kate Andrias, Response, *Confronting Power in Public Law*, 130 Harv. L. Rev. Forum 1 (2016) (similarly arguing that at least as much attention must be paid to power distributions and power inequities between social groups as is paid to power distributions between branches of government when making reforms that attempt to create a more just society).

56. *See* Emily Holden & Anthony Adragna, *Pruitt Fast-tracked California Cleanup After Hugh Hewitt Brokered Meeting*, Politico (May 7, 2018, 10:12 PM), https://www.politico.com/story/2018/05/07/pruitt-california-cleanup-hewitt-meeting-521215 [https://perma.cc.9BAM-NH7E].

57. *See* Ramo, *supra* note 13, at 41–42; *see also* Roberts, *supra* note 34.

litigation strategies for environmental justice, especially when imposed by the government. Without question, dedicating state resources to rectifying the disproportionate impacts of pollution and improving environmental quality in disadvantaged communities is an important and laudable step, and there are actions the Bureau can take to materially improve lives. On the other hand, litigation and top-down approaches may ultimately be ineffective or counterproductive remedies to environmental injustice, which ultimately is a problem of political and economic inequities exacerbated by a lack of participation in environmental decisionmaking by affected communities. As long as policymakers have a genuine interest in implementing government programs to address the causes and symptoms of environmental justice, however, they might also look to the Community Action Agency model, the general Office of Environmental Justice model, and the "Office of Goodness" model as means to increase and ensure public participation in land use decisionmaking. Such policymakers might also seek to contextualize environmental justice with other policy areas in an effort to understand what strategies are most effective for addressing the issue. Regulatory reforms addressing environmental justice should independently seek to increase public participation while also seeking to create institutions that balance the need for expertise with a capacity for public engagement.