

Justice Delayed: New Jersey’s Battle with Environmental Justice and a Call for the Feds to Follow Suit

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I. INTRODUCTION	480
II. BACKGROUND AND LEGISLATIVE HISTORY	483
A. New Jersey’s History of Environmental Discrimination	484
1. Post-Civil War Era.....	484
2. 19th Century Industrial Development	485
3. Discriminatory Housing and Land Use Policy	486
4. Sites of Early Industry Largely Coincide with Overburdened Communities Due to Discriminatory Housing Practices.....	488
B. Legislative History	490
C. How the Law Works.....	491
D. Requirements for Permit Applications	492
E. What Other States are Doing and How it Falls Short.....	494
III.SUPPORT FOR FEDERAL ENVIRONMENTAL JUSTICE LEGISLATION	495
A. Source of Congressional Authority for a Federal Environmental Justice Law	496
B. Nondelegation Under Gundy	498
C. Response to Criticisms of the New Jersey Law	500
1. “Too Much of the State is Overburdened”	500
2. To the Extent That the Law Merely Calls for Additional Hearings and Procedures, How Certain are we That it Will Make a Meaningful Dent in the Number of Permits that are Ultimately Denied?	501
3. Environmental Stressors Currently in Place.....	502
IV. CONCLUSION	502

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I. INTRODUCTION

For far too long, New Jersey's underserved communities have borne the brunt of decades of environmental racism that have sequestered low-income and minority communities in areas of high pollution in close proximity to noxious properties.¹ Each year, the American Lung Association releases its annual "State of the Air" report; each year, New Jersey's air quality ranks among the worst in the nation.² Six counties in the state scored an "F" grade for ozone pollution in 2022, including Camden, Mercer, Hudson, Bergen, and Morris, all of which have high minority populations.³ Due to years of redlining, restrictive covenants, and other governmental controls on housing, a disproportionate amount of polluting facilities are located in low-income and minority communities, drastically negatively impacting public health.⁴ Respiratory illnesses such as asthma, COPD, and lung cancer are prevalent in counties with poor air quality.⁵ Ozone and particulate pollution in the air are harmful to even healthy people, and

¹ See generally N.J. Exec. Order No. 89 (Oct. 29, 2019), <https://nj.gov/infobank/eo/056murphy/pdf/EO-89.pdf>; N.J. STAT. ANN. § 13:1D-157 (LexisNexis 2022).

² Michael Sol Warren, *New Jerseyans Still Breathe Some of the Worst Air in the U.S.*, NJ ADVANCE MEDIA FOR NJ.COM (Apr. 21, 2020, 12:28 PM), <https://www.nj.com/news/2020/04/new-jerseyans-still-breathe-some-of-the-worst-air-in-the-us.html>.

³ The *State of the Air* report breaks down data on overall air quality by state and county. In New Jersey, Bergen, Camden, Hudson, Mercer, Middlesex, and Ocean counties all received "F" scores for the frequency of "High Ozone Days." These grades are calculated using a weighted average of the data collected by ozone monitors in the respective county. The study also collects data on the demographics of each county. For the purposes of this Comment, the race demographics are most important. The study shows that Bergen county has a population of 930,394 and 425,060 people of color (45.68%); Camden county has a population of 506,809 and 227,527 people of color (44.89%); Hudson county has a population of 671,666 and 477,308 people of color (71.06%); Mercer county has a population of 367,239 and 193,641 people of color (52.73%); Middlesex county has a population of 822,736 and 487,102 people of color (59.21%); Ocean county has a population of 614,237 and 98,065 people of color (15.97%). Further, some counties do not monitor the quality of their air and therefore do not participate in the study. These counties include Union and Summerset which both have high populations of people of color. See AM. LUNG ASS'N, *STATE OF THE AIR* (2022).

⁴ N.J. Dep't of Env't Prot., *Environmental Justice Mapping, Assessment and Protection Tool*, <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6> (last visited Feb. 4, 2024); see generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 44 (2017).

⁵ AM. LUNG ASS'N, *supra* note 3 (The average minority population of the six counties that scored an "F" for air quality is 47.72% and the percentage of the population with either asthma, COPD, or lung cancer is 12.38%).

2024]

KIZIMA

481

those with asthma and other lung conditions are particularly at risk.⁶ Since 9 percent of adults and 8.7 percent of children in the state are asthmatic, air quality should take priority as a matter of public health, especially where the negative externalities of the state's polluting properties have turned deadly.⁷

Between 2010 and 2017, eight children in Newark schools died of asthma-related deaths.⁸ The prevalence of asthma in Newark is three times the national average, and the condition hospitalized children at thirty times the national rate in the area.⁹ For years, students and parents have fought the operation of a garbage incinerator in the Ironbound section of Newark, yearning for cleaner air from "[t]he waste-to-energy plant [that] emits lead, dioxin, and other pollutants" into the atmosphere.¹⁰ Nevertheless, the facility continues to run today, serving twenty-two municipalities in Essex County and others in the surrounding area with what Covanta describes as a commitment to safe operation and minimizing environmental impacts.¹¹

Recognizing that New Jerseyans breathe some of the worst air in the country, Governor Murphy signed the New Jersey Environmental

⁶ Warren, *supra* note 2.

⁷ New Jersey State Health Assessment Data, *Complete Health Indicator Report of Asthma Hospitalizations and Emergency Department Visits*, NJSHAD, https://www.doh.state.nj.us/doh-shad/indicator/complete_profile/NJEPHTAsthmaHosp.html#:~:text=In%20New%20Jersey%2C%20over%20600%2C000,estimated%20to%20have%20asthma%20currently.

⁸ Devna Bose, *'It's Killing Children And No One Is Talking About It': Asthma Is Taking A Steep Toll On Newark's Students And Their Schools*, CHALKBEAT NEWARK (Dec. 17, 2019, 2:02 PM), <https://newark.chalkbeat.org/2019/12/17/21055583/it-s-killing-children-and-no-one-is-talking-about-it-asthma-is-taking-a-steep-toll-on-newark-s-stude> (discussing community respiratory issues stemming from poor air quality in Newark, and explaining that Newark is an overburdened community under the statute with multiple polluting facilities).

⁹ *Id.*

¹⁰ Karen Yi, *'Our Air is Not Good Enough.' Kids Fight Plant Burning 2.8K Tons of Trash Every Day*, NJ ADVANCE MEDIA FOR NJ.COM (Dec. 9, 2018, 11:08 AM), <https://www.nj.com/news/erry-2018/12/9799c118c54580/our-air-is-not-good-enough-kid.html>.

¹¹ COVANTA, <https://www.covanta.com/where-we-are/our-facilities/essex> (last visited Jan. 21, 2024). Covanta is a multinational waste management services company that operates seven waste management facilities in New Jersey including two in Paterson, one in Camden, and, as mentioned above, one in Newark. As discussed later in this Comment, all of these stated facilities are located in what the New Jersey Environmental Justice Law considers an overburdened area.

Justice Law on September 18, 2020.¹² This first-in-the-nation legislation requires special consideration for permits to construct “facilities” or nuisance properties if their proposed location falls within an “overburdened community.”¹³ According to the statute, a facility constitutes any property that is a major source of air pollution, water pollution, and other uses of property commonly understood to be harmful to the surrounding communities.¹⁴ An “overburdened community” is identified by examining the most recent United States Census and discerning census block groups in which “(1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency.”¹⁵

This legislation aims to help ease the negative health impacts that New Jersey’s most vulnerable have endured for years.¹⁶ But this new legislation is ruffling feathers in the boardrooms that operate some of the state’s most prosperous industries.¹⁷ Additionally, some feel this solution is too little too late, as generations of individuals will continue to live with the negative health implications of environmental racism.¹⁸ Conversely, advocates of the law champion it as a groundbreaking accomplishment for environmental justice in a state where the lines

¹² Warren, *supra* note 2; GOVERNOR MURPHY SIGNS HISTORIC ENVIRONMENTAL JUSTICE LEGISLATION, <https://www.nj.gov/governor/news/news/562020/20200918a.shtml#> (last visited Feb. 15, 2024).

¹³ N.J. STAT. ANN. § 13:1D-157 (LexisNexis 2022); GOVERNOR MURPHY SIGNS HISTORIC ENVIRONMENTAL JUSTICE LEGISLATION, <https://www.nj.gov/governor/news/news/562020/20200918a.shtml#> (last visited Feb. 15, 2024).

¹⁴ N.J. STAT. ANN. § 13:1D-158 (LexisNexis 2022) (“‘Major source’ means a major source of air pollution as defined by the federal ‘Clean Air Act,’ 42 U.S.C. § 7401 et seq., or in rules and regulations adopted by the department pursuant to the ‘Air Pollution Control Act,’ . . .”).

¹⁵ *Id.*

¹⁶ See Michael Sol Warren, *Murphy Backs Plan to Protect N.J. Low-Income Communities from More Pollution*, NJ ADVANCE MEDIA FOR NJ.COM (June 19, 2020, 4:40 PM), <https://www.nj.com/politics/2020/06/murphy-backs-plan-to-protect-nj-low-income-communities-from-more-pollution.html> (“For years, proud residents of countless cities have been afterthoughts to development that did not enrich them and in fact hurt them.”).

¹⁷ See Zach Bright, *New Jersey Debates ‘Overburdened’ in Environmental Justice Rule*, BLOOMBERG LAW (Aug. 10, 2022, 5:30 AM), <https://news.bloomberglaw.com/environment-and-energy/new-jersey-debates-overburdened-in-environmental-justice-rule>.

¹⁸ See Bose, *supra* note 8 (discussing community respiratory issues stemming from poor air quality in Newark). Newark is an overburdened community under the statute with multiple polluting facilities.

between the haves and have-nots are rather stark and apparent.¹⁹ While other states like California and Oregon have recently taken steps to confront environmental racism, no state has gone as far as New Jersey has in this area, at least on paper.²⁰ While other states require reports conducted before the construction of a facility to include an environmental justice component, the New Jersey Environmental Justice Law involves the denial of a permit should such a report find that the facility could disproportionately impact an overburdened community.²¹ Regardless of the law's novelty, its message and intent are clear: no longer will the most vulnerable bear the brunt of the state's pollution.²²

Part II of this Comment will set forth a brief history of environmental injustice in New Jersey and its impacts on citizens. Examining the history of industrialization in the state, discriminatory housing practices that clustered minority communities in undesirable areas, and the legislative history of environmental justice in New Jersey illustrate the need for environmental justice reform. Part III will discuss how this law will help move and prevent future polluting properties from being constructed in these areas, and it will call for similar legislation on the federal level. Since it is clear that environmental justice is a pressing issue for states all around the country, federal intervention is required to ensure that all communities, coast to coast, can fully realize their American dream without the increased burden of pollutants. Finally, Part IV will conclude by reaffirming the importance of environmental justice legislation in promoting a more inclusive and fair society in New Jersey and around the country.

II. BACKGROUND AND LEGISLATIVE HISTORY

This part will discuss the history of environmental discrimination in New Jersey by examining historical records of industrialization in the state and how discriminatory housing policies at the state and federal level clustered minority communities in what are today's overburdened

¹⁹ See generally *New Jersey Passes an Environmental Justice Law with Teeth*, ENV'T SCI. ASSOCS. (Oct. 14, 2020), <https://esassoc.com/news-and-ideas/2020/10/new-jersey-passes-an-environmental-justice-law-with-teeth/>; see also Kayla Greenawalt, *Come Hell or High Water: Protecting New Jersey's "Overburdened" Coastal Communities Through Environmental Justice*, 74 RUTGERS U. L. REV. 843, 853 (2022).

²⁰ See *id.*

²¹ Greenawalt, *supra* note 19, at 859; N.J. STAT. ANN. § 13:1D-160(a)(3) (LexisNexis 2022).

²² Warren, *Murphy Backs Plan to Protect N.J. Low-Income Communities from More Pollution*, *supra* note 16.

areas. Additionally, this section will discuss the overwhelming abundance of current polluting facilities in these areas. This discussion will demonstrate that pollution in overburdened communities is not a matter of coincidence. The historical analysis highlights the necessity and importance of environmental justice legislation as a matter of corrective justice to right the wrongs of past discrimination against minority communities. Finally, the section closes with a discussion of the legislative history of the New Jersey Environmental Justice Law and an overview of how the law will improve the lives of New Jersey's minority communities.

A. *New Jersey's History of Environmental Discrimination*

1. Post-Civil War Era

Not unlike the nation as a whole, New Jersey has a long and troubled history of discrimination against minority groups.²³ Between 1865 and 1870, the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, often called the Reconstruction Amendments, were ratified.²⁴ New Jersey, however, struggled to vote in favor of ratification, showing continued deference and support to the institution of slavery and denying African Americans legal protection from slavery and the right to vote.²⁵ In 1865, New Jersey refused to ratify the Thirteenth Amendment.²⁶ On January 23, 1866, Governor Ward signed a state Constitutional Amendment, finally ending slavery in the state, making it the last to do so.²⁷ Additionally, New Jersey, following the ratification of the Fifteenth Amendment, "was one of the first northern

²³ See generally Noelle Lorraine Williams, *New Jersey, The Last Northern State to End Slavery*, N.J. HIST. COMM'N, <https://nj.gov/state/historical/his-2021-juneteenth.shtml> (last visited Feb. 4, 2024).

²⁴ *The Reconstruction Amendments: Thirteenth Amendment, 1865, Fourteenth Amendment, 1868, Fifteenth Amendment, 1870*, BILL OF RTS INST., <https://billofrightsinstitute.org/activities/the-reconstruction-amendments-thirteenth-amendment-1865-fourteenth-amendment-1868-and-fifteenth-amendment-1870> (last visited Feb. 4, 2024).

²⁵ JAYNE JOHNSON ET AL., N.J. INST. FOR SOC. JUST., ERASING NEW JERSEY'S RED LINES, REDUCING THE RACIAL WEALTH GAP THROUGH HOMEOWNERSHIP AND INVESTMENT IN COMMUNITIES OF COLOR (2020); SCOTT NOVAKOWSKI, N.J. INST. FOR SOC. JUST., WE ARE 1844 NO MORE: LET US VOTE; GILES R. WRIGHT, *AFRO-AMERICANS IN NEW JERSEY: A SHORT HISTORY* 29 (1989) (In 1866, a Republican governor and legislature ratified the Fourteenth Amendment, but that ratification was later rescinded in 1868 after the Republicans lost control. In 1870, the Legislature outright rejected the Fifteenth Amendment).

²⁶ Williams, *supra* note 23.

²⁷ Williams, *supra* note 23.

2024]

KIZIMA

485

states to restrict the vote to white men” in yet another effort to disenfranchise minority groups.²⁸

2. 19th Century Industrial Development

New Jersey once hosted robust pockets of industry in Paterson, New Brunswick, Trenton, and Camden that today coincide with clustered neighborhoods of overburdened communities.²⁹ Following the War of 1812, Paterson hosted a growing number of businesses producing goods such as heavy machinery, textiles, and other metal products.³⁰ South of Paterson, New Brunswick, was the home of manufacturing plants producing rubber and wallpaper.³¹ Around the same time, Paterson saw growth in the industry, “Trenton’s economy was strengthened by the completion of the Delaware and Raritan Canal conveying coal and iron ore . . . [which] facilitated its emergence as a nationally prominent center for iron refining and metalworking.”³² Industry was also thriving in Camden due to its location between the Delaware and Cooper Rivers and the city’s proximity to Philadelphia.³³

As Camden’s population grew, so did the glassmaking and ironworking industries in the 1800s.³⁴ This population growth prompted the construction of blocks of rowhouses to house the factory workers.³⁵ Because of this increase in population, streets became the sites for waste disposal, prompting the construction of waste disposal sites in heavily populated areas.³⁶ During this time, the African American population of New Jersey increased by 46.6 percent from 1890 to 1900.³⁷

²⁸ Johnson, *supra* note 25; Novakowski, *supra* note 25.

²⁹ See generally N.J. Dep’t of Env’t Prot., *Environmental Justice Mapping, Assessment and Protection Tool*, EJMAP, <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6> (last visited Feb. 4, 2024).

³⁰ *19th Century Industrial Development*, N.J. ALMANAC, <https://www.newjerseyalmanac.com/19th-century-industrial-development.html> (last visited Feb. 4, 2024).

³¹ *Id.*

³² *Id.*

³³ See generally *Industrialization*, <https://www.ci.camden.nj.us/wp-content/uploads/2020/07/Industrialization.pdf> (last visited Feb. 4, 2024).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Environment—Waste Disposal History*, N.J. ALMANAC, <https://www.newjerseyalmanac.com/environment—waste-disposal-history.html> (last visited Feb. 4, 2024).

³⁷ U.S. CENSUS BUREAU, *TWELFTH CENSUS OF THE UNITED STATES, TAKEN IN THE YEAR 1900* cxii (1901).

3. Discriminatory Housing and Land Use Policy

As commerce thrived and minority populations moved into the state, discriminatory housing practices ensured that minority communities stayed clustered in working-class neighborhoods around industrial properties.³⁸ Then, with homeowners reeling from The Great Depression, the Roosevelt administration created the Home Owners' Loan Corporation, also known as the HOLC.³⁹ This organization purchased interest-only mortgages ripe for default and issued new amortized mortgages over longer timeframes at favorable interest rates to save the working and middle class.⁴⁰ Local real estate agents, bound by their code of ethics to uphold segregation, conducted neighborhood assessments on behalf of the HOLC to determine the default risk of individuals in certain areas.⁴¹ Based on these findings, the HOLC determined whether or not to finance homes in the region.⁴² In addition, these agents created maps outlining areas safe for the HOLC to service by outlining safe neighborhoods in green and risky neighborhoods in red.⁴³

Regardless of the neighborhood's demographic makeup, the agents outlined any area containing African American homes in red.⁴⁴ These distinctions between racial communities led to minimal, if any, lending opportunities in black neighborhoods and decreased property values.⁴⁵ Lacking the resources to relocate and watching lending opportunities and federal assistance flee to white neighborhoods, those living within the red lines witnessed the gradual demise of their community's living quality.⁴⁶ Further, the Federal Housing Authority used the redline maps to ensure federal mortgage insurance programs were unavailable to disadvantaged communities within the red lines.⁴⁷ A service called

³⁸ See generally ROTHSTEIN, *supra* note 4, at 44.

³⁹ ROTHSTEIN, *supra* note 4, at 63.

⁴⁰ ROTHSTEIN, *supra* note 4, at 63–64.

⁴¹ ROTHSTEIN, *supra* note 4, at 63–64.

⁴² ROTHSTEIN, *supra* note 4, at 64.

⁴³ ROTHSTEIN, *supra* note 4, at 64.

⁴⁴ ROTHSTEIN, *supra* note 4, at 64.

⁴⁵ Johnson, *supra* note 25; Sarah Mikhitarian, *Home Values Remain Low in Vast Majority of Formerly Redlined Neighborhoods*, ZILLOW (Apr. 25, 2018), https://www.zillow.com/research/home-values-redlined-areas-19674/?mod=article_inline.

⁴⁶ Johnson, *supra* note 25; Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/>.

⁴⁷ Johnson, *supra* note 25; ROTHSTEIN, *supra* note 4, at 63–64.

2024]

KIZIMA

487

“Mapping Inequality” uploaded the original HOLA maps to an interactive website that shows large portions of Newark, Camden, and Trenton within the infamous red lines.⁴⁸

Additionally, racially restrictive covenants severely limited the neighborhoods where those living within the redlines could move.⁴⁹ A racially restrictive covenant is an element of the deed instrument that prevents a property owner from selling or transferring property ownership to a member of a particular race.⁵⁰ For example, a 1925 covenant from a deed for a northern New Jersey property read, “[t]here shall not be erected or maintained without the written consent of the party . . . any structure other than a dwelling for people of the Caucasian Race.”⁵¹ This practice continued long after the Supreme Court held in *Buchanan v. Warley* in 1917 that racially exclusionary zoning by municipalities was unconstitutional because the decision did not pertain to private agreements between individuals, like deeds.⁵² It was not until the Supreme Court’s 1948 *Shelley v. Kraemer* decision, which held judicial enforcement of private restrictive covenants unconstitutional, that enforcement of these agreements ended.⁵³

Thus, years of economic discrimination from banks and the inability to move to areas restricted to those of the Caucasian Race entrenched minority communities inside the redlines.⁵⁴ As a result, many of these neighborhoods now fall under the statutory definition of an overburdened community.⁵⁵ The New Jersey Environmental Justice Law aims to address the damage caused by these government-endorsed practices as a measure of corrective justice for those profoundly wronged communities.⁵⁶

⁴⁸ Colleen O’Dea, *As Redlining Persists, Camden Area Among Hot Spots in U.S. for Mortgage Denials*, NJ SPOTLIGHT (Feb. 16, 2018), <https://www.njspotlight.com/2018/02/18-02-16-as-redlining-persists-camden-area-among-hot-spots-in-us-for-mortgage-denials/>; MAPPING INEQUALITY, REDLINING IN NEW DEAL AMERICA, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58> (last visited Feb. 2, 2024).

⁴⁹ See ROTHSTEIN, *supra* note 4, at 77–78.

⁵⁰ Lauren A. Schaffer, *A Statutory Analysis On Racially Restrictive Covenants*, 53 U. TOL. L. REV. 351, 353 (2021).

⁵¹ ROTHSTEIN, *supra* note 4, at 78.

⁵² Johnson, *supra* note 25; *Buchanan v. Warley*, 245 U.S. 60, 81–82 (1917).

⁵³ Johnson, *supra* note 25; see also *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

⁵⁴ See generally Johnson, *supra* note 25.

⁵⁵ See generally ENVIRONMENTAL JUSTICE LAW, RULES AND POLICY, <https://dep.nj.gov/wp-content/uploads/ej/docs/ej-law.pdf> (last visited Feb. 4, 2024).

⁵⁶ See generally Warren, *supra* note 16.

4. Sites of Early Industry Largely Coincide with
Overburdened Communities Due to Discriminatory
Housing Practices

According to research compiled by the New Jersey Department of Environmental Protection, approximately three hundred and thirty-eight municipalities in the state contain overburdened communities per the statute.⁵⁷ This characterization means that 4,976,161 individuals of the state's 9,288,994 total population are affected by this legislation.⁵⁸ The data discussed below confirms the story of how the more significant environmental burden placed on minority communities in the state results from government-endorsed discriminatory housing practices in the state.⁵⁹

Trenton and surrounding municipalities in Mercer County, New Jersey, are considered overburdened, with 52.5 percent of the population categorized as low income, a 77.9 percent minority population, and 9.9 percent of households with limited English proficiency.⁶⁰ These communities host five major sources of air pollution, three solid waste recycling facilities that receive greater than one hundred tons of waste per day, eight scrap metal facilities, and two transfer stations.⁶¹ Neighboring Princeton, while still containing pockets of overburdened communities, hosts only a 5.3 percent low-income population and 1.9 percent of the population having limited English proficiency.⁶² Unsurprisingly, Princeton is the home of only two

⁵⁷ ENVIRONMENTAL JUSTICE LAW, RULES AND POLICY, <https://dep.nj.gov/ej/communities/> (last visited Feb. 2, 2024).

⁵⁸ *Id.*; *Population - Overview*, N.J. ALMANAC, <https://www.newjerseyalmanac.com/population.html> (last visited Jan. 21, 2024) (The population data used by the New Jersey Almanac is sourced from the United States Census Bureau's 2020 census).

⁵⁹ *See generally* ENVIRONMENTAL JUSTICE, <https://dep.nj.gov/ej/> (last visited Feb. 18, 2024).

⁶⁰ N.J. Dep't of Env't Prot., *Environmental Justice Mapping, Assessment and Protection Tool*, EJMAP, <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6> (last visited Feb. 2, 2024); ENVIRONMENTAL JUSTICE LAW, RULES AND POLICY, <https://www.nj.gov/dep/ej/policy.html> (last visited Feb. 2, 2024) (Low income households are those "at or below twice the poverty threshold as determined by the United States Census Bureau" and limited English proficiency is defined as a household "without an adult that speaks English 'very well' according to the United States Census Bureau.").

⁶¹ N.J. Dep't of Env't Prot., *Environmental Justice Mapping, Assessment and Protection Tool*, EJMAP, <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6> (last visited Feb. 2, 2024).

⁶² *Id.*

2024]

KIZIMA

489

major sources of air pollution and zero other types of facilities that developers saddled Trenton's citizens with.⁶³

The eastern part of Essex County, which encompasses Newark, the Oranges, Irvington, and parts of Bellville, are almost all considered overburdened communities.⁶⁴ For example, Newark alone hosts twenty-six scrap metal facilities, fourteen major sources of air pollution, five transfer stations, a resource recovery facility or incinerator, a sewage treatment plant, and a solid waste facility receiving greater than one hundred tons of waste per day.⁶⁵ The resource recovery facility, in particular, is located in a neighborhood where 61.2 percent of the population is categorized as low-income.⁶⁶ On the other hand, neighboring Maplewood, New Jersey, does not contain a single overburdened community and likewise does not host a single facility considered problematic under the statute.⁶⁷

Paterson is in a similar situation to Newark. The entire population of Paterson is considered overburdened under the framework of the statute.⁶⁸ As is customary, the citizens of Paterson are subject to the negative repercussions of hosting a remarkable number of polluting facilities.⁶⁹ These include twelve scrap metal facilities, three major sources of air pollution, four transfer stations/material recovery facilities, and one solid waste recycling facility receiving more than one hundred tons of waste daily.⁷⁰ Meanwhile, neighboring Wayne, New Jersey, absent any overburdened communities except two low-income areas that border Paterson, hosts one auto parts store considered a scrap facility.⁷¹ This distribution trend of statutorily problematic facilities and their location in or near overburdened communities continues throughout the state in areas such as Vineland, Bayonne,

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ N.J. Dep't of Env't Prot., *Environmental Justice Mapping, Assessment and Protection Tool*, EJMAP, <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6> (last visited Sept. 22, 2022).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ N.J. Dep't of Env't Prot., *Environmental Justice Mapping, Assessment and Protection Tool*, EJMAP, <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6> (last visited Feb. 2, 2024).

Passaic, and most of Hudson County.⁷² It is hard to ignore the real-life implications of the political power dynamics that have allowed these polluting facilities to exist almost exclusively in communities of vulnerable populations and its effects on these areas. Thankfully, the legislature has decided to intervene.

B. Legislative History

Advancement of the civil rights movement—and research showing polluting facilities were more likely built in low-income neighborhoods and communities of color—allowed the environmental justice movement to gain traction in the 1980s.⁷³ In 1994, feeling the pressure of the growing pro-environment trend, President Bill Clinton addressed environmental injustices by directing federal agencies to address “disproportionately high and adverse human health or environmental effects of programs, policies, and activities on low-income and minority populations.”⁷⁴ This sentiment caused the U.S. Congress to amend the National Environmental Policy Act in 1997 to require agencies to incorporate an analysis of a project’s impacts on the community into the permitting process.⁷⁵

Every year since 2008, New Jersey lawmakers have introduced an environmental justice bill at the state level that has routinely succumbed to industry pushback.⁷⁶ Cory Booker, the former mayor of Newark and Senator for New Jersey, introduced environmental justice legislation at the federal level in 2017.⁷⁷ This bill, called the Environmental Justice Act, sought to codify Clinton’s 1994 executive order and allow environmental regulators to deny permits for projects based on the project’s cumulative impacts on the community.⁷⁸ Unfortunately, this bill never made it past the introduction phase.⁷⁹ This stall, coupled with the rollback of regulations by the Trump

⁷² *Id.*

⁷³ Samantha Maldonado, *How a Long-Stalled ‘Holy Grail’ Environmental Justice Bill found its Moment in New Jersey*, POLITICO, <https://www.politico.com/states/new-jersey/story/2020/08/27/new-jersey-legislature-sends-groundbreaking-environmental-justice-bill-to-governors-desk-1313030> (last visited Feb. 2, 2024).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Maldonado, *supra* note 73.

2024]

KIZIMA

491

Administration, leaves a legislative gap at the federal level concerning environmental justice that warrants attention.⁸⁰

In 2019, Governor Murphy signed Executive Order No.89.⁸¹ This order called for, among other things, a climate resilience strategy recognizing that “minority and low-income communities are disproportionately affected by climate change, including by the health effects of higher temperatures and increased air pollution” making good on promises to promote equality and combat pollution.⁸² During the 2020 to 2021 session of the New Jersey State Legislature, six state senators introduced bill S232.⁸³ After moving through the state legislative process, Governor Murphy signed S232 into law on September 18, 2020.⁸⁴

C. *How the Law Works*

This section will analyze the law and its components to show that denying permits in overburdened areas will incentivize the construction of such facilities in other parts of the state. Further, the law will slowly lead to the phasing out of currently operating facilities as these facilities’ major source permits expire.⁸⁵ As mentioned above, the act pertains to the construction, expansion, or renewal of a major source permit for both proposed facilities and currently operating facilities located in whole or in part in an overburdened community.⁸⁶ A more comprehensive list of the facilities to which the statute pertains includes any:

- (1) Major source of air pollution; (2) resource recovery facility or incinerator; (3) sludge processing facility, combustor, or incinerator; (4) sewage treatment plant with a capacity of more than 50 million gallons per day; (5) transfer station or other solid waste facility, or recycling facility intending to receive at least 100 tons of recyclable material per day; (6)

⁸⁰ Maldonado, *supra* note 73.

⁸¹ N.J. Exec. Order No. 89 (Oct. 29, 2019), <https://nj.gov/infobank/eo/056murphy/pdf/EO-89.pdf>.

⁸² Greenawalt, *supra* note 21; N.J. Exec. Order No. 89 (Oct. 29, 2019), <https://nj.gov/infobank/eo/056murphy/pdf/EO-89.pdf>.

⁸³ S. S232, 219th Leg., 2020 Sess. (N.J. 2020).

⁸⁴ S. S232, 219th Leg., 2020 Sess. (N.J. 2020).

⁸⁵ See generally EPA, *Who Has to Obtain a Title V Permit?*, <https://www.epa.gov/title-v-operating-permits/who-has-obtain-title-v-permit> (last visited Feb. 7, 2023) (“A major source has actual or potential emissions at or above the major source threshold for any ‘air pollutant.’ The major source threshold for any air pollutant is 100 tons/ year . . .”).

⁸⁶ N.J. Stat. § 13:1D-160(a) (LexisNexis 2022).

scrap metal facility; (7) landfill, including, but not limited to, a landfill that accepts ash, construction or demolition debris, or solid waste; or (8) medical waste incinerator . . .⁸⁷

The overburdened nature of a community is determined by examining the most recent United States Census and identifying census block groups in which “(1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency.”⁸⁸ The 2020 census guidelines considered one-, two-, three- and four-person household poverty lines to be \$12,760, \$17,240, \$21,720, and \$26,200, respectively, for the forty-eight contiguous states and the District of Columbia.⁸⁹ Therefore, since this statute defines “low-income” as households who earn less than or equal to “twice the poverty threshold as determined by the United States Census Bureau,” the statute considers one-, two-, three- and four-person household poverty lines to be \$29,160, \$39,440, \$49,720, \$60,000, respectively.⁹⁰ Additionally, the department must maintain a list of overburdened communities in the state, update that information at least once every two years, and notify municipalities of their status.⁹¹

D. Requirements for Permit Applications

The statute defines permits subject to the law as “any individual permit, registration, or license issued by the department to a facility establishing the regulatory and management requirements for a

⁸⁷ N.J. STAT. ANN. § 13:1D-158 (LexisNexis 2022) (“‘Major source’ means a major source of air pollution as defined by the federal ‘Clean Air Act,’ 42 U.S.C. § 7401 et seq., or in rules and regulations adopted by the department pursuant to the ‘Air Pollution Control Act,’ . . .”).

⁸⁸ § 13:1D-158 (LexisNexis 2022) (Low-income households are those “at or below twice the poverty threshold as determined by the United States Census Bureau” and limited English proficiency is defined as a household “without an adult that speaks English ‘very well’ according to the United States Census Bureau.”); see N.J. Dep’t of Env’t Prot., *Environmental Justice Mapping, Assessment and Protection Tool*, EJMAP, <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6> (last visited Feb. 4, 2024).

⁸⁹ *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, U.S. DEP’T OF HEALTH AND HUM. SERV., <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2020-poverty-guidelines> (last visited Feb. 4, 2024).

⁹⁰ FEDERAL POVERTY LEVEL, <https://www.healthcare.gov/glossary/federal-poverty-level-fpl/> (last visited Feb. 18, 2024).

⁹¹ N.J. STAT. ANN. § 13:1D-159 (LexisNexis 2022).

regulated activity” under certain state laws.⁹² Permits do not include “any authorization or approval necessary to perform a remediation . . . or any authorization or approval required for a minor modification of a facility’s major source permit for activities or improvements that do not increase emissions.”⁹³ In order for a permit to be considered for a proposed facility “located, or proposed to be located, in whole or in part, in an overburdened community,” the applicant must complete several requirements.⁹⁴

First, the applicant must prepare an environmental justice impact statement.⁹⁵ This statement intends to identify potential public health and environmental implications that the facility poses to the area.⁹⁶ Additionally, this statement should include ways to avoid these negative impacts on the community.⁹⁷ The proposed developer must deliver the statement to the proposed hosting municipality at least sixty days before the required public hearing.⁹⁸

Arguably, the most important part of the statute is the requirement to hold a public hearing.⁹⁹ The law requires that the permit applicant publish notice of the hearing in at least two newspapers circulating in the area, including at least one non-English newspaper, to bridge the language barrier in households with limited English proficiency.¹⁰⁰ The proposed developer is then required to submit the notice to the municipality, which, in turn, will publish the notice on its website and in other materials circulated around the community.¹⁰¹ At the hearing, the statute requires the permit applicant to accept oral and written comments from any interested party, transcribe the hearing, and submit the transcription and written arguments to the Department of

⁹² N.J. STAT. ANN. § 13:1D-158 (LexisNexis 2022). The state laws in question are The Solid Waste Management Act, C.13:1E-1; section 17 of C.13:1E-26; the Comprehensive Regulated Medical Waste Management Act, C.13:1E-48.1 et al.; The New Jersey Statewide Mandatory Source Separation and Recycling act, C.13:1E-99.11; the Pesticide Control Act of 1970, C.13:1F-1; The Wetlands Protection Act of 1970, C.13:9A-1 et seq.; the Highlands Water Protection and Planning Act, C.13:20-1; The Coastal Area Facility Review Act, C.13:19-1 et seq.; the Air Pollution Control Act of 1954, C.26:2C-1 et seq.; the Water Supply Management Act, C.58:1A-1 et al.; the Water Pollution Control Act, C.58:10A-1 et seq.; or the Flood Hazard Area Control Act, C.58:16A-50 et seq.

⁹³ N.J. STAT. ANN. § 13:1D-158 (LexisNexis 2022).

⁹⁴ N.J. STAT. ANN. § 13:1D-160(a) (LexisNexis 2022).

⁹⁵ § 13:1D-160(a)(1) (LexisNexis 2022).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ § 13:1D-160(a)(2) (LexisNexis 2022).

⁹⁹ § 13:1D-160(a)(3) (LexisNexis 2022).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Environmental Protection.¹⁰² The department takes these statements and evaluates the permit to determine if approval is in the best interests of the overburdened community.¹⁰³ The New Jersey Department of Environmental Protection is instructed to deny the permit for a new or existing facility if, after a forty-five-day period, the department, in considering all relevant information required by the statute, determines that the new facility would subject the overburdened community to higher adverse cumulative environmental or public health stressors than those borne by others.¹⁰⁴

E. What Other States are Doing and How it Falls Short

Examplifying other states' attempts at mitigating environmental injustices illustrates the need for federal action on the matter. A few other states, including California and Virginia, have sought to amend their land use laws to incorporate environmental justice goals.¹⁰⁵ Still, none go nearly as far as the New Jersey Law concerning mandatory denial.¹⁰⁶ Regardless, the fact that other states recognize the disparate impacts of environmental injustice shows that corrective measures are needed around the country.

The California land use law promotes the inclusion of environmental injustice considerations in a county or municipality's general plan.¹⁰⁷ A general plan guides a town or county's local development and investment.¹⁰⁸ Unfortunately, this law falls short because California relied on the assumption that towns and counties would amend their general plans to comply with the law in a way that is advantageous to disadvantaged communities without implementing an enforcement mechanism.¹⁰⁹ Instead of operating as a hard and fast rule like the New Jersey Statute, the California bill acts more as a guideline for towns as they look to future plans concerning zoning, the regulation of open space, and the location of certain buildings, with no mention of

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ § 13:1D-160(b) (LexisNexis 2022); § 13:1D-160(c)–(d) (LexisNexis 2022); § 13:1D-161 (LexisNexis 2022).

¹⁰⁵ Greenawalt, *supra* note 21, at 854.

¹⁰⁶ Greenawalt, *supra* note 19, at 855; *see also* H.B. 2488, 81st Legis. Assemb., Reg. Sess. (Or. 2021); VA. CODE ANN. §§ 2.2-2699.8–12 (West 2020).

¹⁰⁷ Greenawalt, *supra* note 21, at 855; CAL. GOV'T CODE § 65302(a), (h)(1) (West 2022).

¹⁰⁸ Greenawalt, *supra* note 21, at 855.

¹⁰⁹ Greenawalt, *supra* note 21, at 855; *see* Emily C. Dooley, *Environmental Justice Becomes Part of California City Planning*, BLOOMBERG L. (Aug. 27, 2020, 6:00 AM), <https://news.bloomberglaw.com/environment-and-energy/environmental-justice-becomes-part-of-california-city-planning>.

2024]

KIZIMA

495

permitting restrictions.¹¹⁰ Nonetheless, local governments will now identify, as part of their master plan, ways plan, ways to promote civil engagement, reduce health risks, and prioritize improvements that address the needs of disadvantaged communities within their borders.¹¹¹ While this measure is a step in the right direction, it remains to be seen how much of the state will voluntarily participate.¹¹²

The Virginia General Assembly has passed legislation regarding climate change and environmental justice issues in the last couple of years.¹¹³ Part of these efforts was to expand the mission of the Virginia Department of Environmental Quality's mission to include "further[ing] environmental justice and enhance[ing] public participation in the regulatory and permitting process."¹¹⁴ Further, the Virginia Counsel on Environmental Justice, an advisory board comprised of individuals from public health organizations, civil rights groups, and Native American tribes, was added to the state's executive branch to provide policy recommendations on protecting vulnerable communities from the disproportionate effects of pollution.¹¹⁵ Unfortunately, the work this council does is purely advisory.¹¹⁶ The statute utilizes language such as "integrating environmental justice considerations" and "recommending statutory . . . consideration[s]" which show the law's limited ability to bring about change.¹¹⁷

III. SUPPORT FOR FEDERAL ENVIRONMENTAL JUSTICE LEGISLATION

Civil rights have been and continue to be a prominent issue in the United States, and while states likely have a better hold on how to regulate land use, civil rights legislation has been primarily left to the federal government.¹¹⁸ The federal government has been able to bring about sweeping change with civil rights legislation, such as the Civil

¹¹⁰ CAL. GOV'T CODE § 65302(a) (West 2022).

¹¹¹ Emily C. Dooley, *Environmental Justice Becomes Part of California City Planning*, BLOOMBERG L. (Aug. 27, 2020, 6:00 AM), <https://news.bloomberglaw.com/environment-and-energy/environmental-justice-becomes-part-of-california-city-planning>.

¹¹² See generally Greenawalt, *supra* note 19, at 855–56.

¹¹³ Tyler Demetriou, *Reinvigorating the Virginia Constitution's Environmental Provision*, 40 VA. ENVTL. L.J. 66, 86 (2022).

¹¹⁴ Demetriou, *supra* note 113, at 87; VA. CODE ANN. § 10.1-1183 (LexisNexis 2022).

¹¹⁵ VA. CODE ANN. § 2.2-2699.9 (LexisNexis 2022).

¹¹⁶ VA. CODE ANN. § 2.2-2699.12 (LexisNexis 2022).

¹¹⁷ VA. CODE ANN. § 2.2-2699.12(1)(a),(f) (LexisNexis 2022).

¹¹⁸ U.S. DEP'T OF HEALTH & HUM. SERV., WHAT ARE CIVIL RIGHTS, <https://www.hhs.gov/civil-rights/for-individuals/faqs/what-are-civil-rights/101> ("Civil rights are personal rights guaranteed and protected by the U.S. Constitution and federal laws enacted by Congress . . .").

Rights Act of 1964 and the Americans with Disabilities Act of 1990. The area of environmental justice presents a unique opportunity for the federal government to once again pioneer in the space and ensure everyone in the country is treated equally by the law and has equal access to clean living environments.

In his dissenting opinion in *New State Ice v. Liebmann*,¹¹⁹ Justice Brandeis famously stated that “it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹²⁰ Environmental justice represents one such area where Justice Brandeis’s insights can be fruitfully put to work. More specifically, a federal environmental justice law with an enforcement capacity akin to New Jersey’s legislation would perfectly embody this idea.

A. *Source of Congressional Authority for a Federal Environmental Justice Law*

The Constitution grants Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”¹²¹ Also known as the Commerce Clause, Congress uses this power to provide a justification for exercising legislative control over the economic activities of states and their citizens.¹²² Although the Court has narrowed the reach of the Commerce Clause in several of its more recent cases, a federal environmental justice law would likely still fall comfortably within its scope.

Consider first the Court’s recent suggestion that the Commerce Clause authorizes Congress to regulate only “activities” as opposed to “inactivity.”¹²³ Since the permitting process in this law is a concerted effort to engage in the industry by regulating commercial facilities, it is rather apparent that there is an activity in question.¹²⁴ Unlike an individual coming under regulation for NOT participating in an activity as described in *NFIB*,¹²⁵ an active market participant, such as a company

¹¹⁹ 285 U.S. 262 (1932) (Brandeis, J., dissenting).

¹²⁰ *Id.* at 311.

¹²¹ U.S. CONST. art. I, § 8, cl. 3.

¹²² Commerce Clause, *Legal Information Institute*, CORNELL UNIV. (last visited Feb. 4, 2024), https://www.law.cornell.edu/wex/commerce_clause.

¹²³ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012).

¹²⁴ *See* N.J. STAT. ANN. § 13:1D-158 (LexisNexis 2022).

¹²⁵ *Sebelius*, 567 U.S. at 557 (holding that the failure of an American citizen to purchase health insurance under the Affordable Care Act is not an economic activity and is rather inactivity that is outside the purview of the commerce clause).

2024]

KIZIMA

497

seeking to construct a facility, could be subject to regulation for that activity under the Commerce Clause.¹²⁶

As a category of “activities,” the class of conduct regulated by the law bears other key features that render it regulable under the Commerce Clause. Specifically, the Supreme Court stated in *United States v. Lopez*¹²⁷ that there are three categories of laws that the federal government can enact under the commerce clause:¹²⁸ (1) laws regulating the channels of interstate commerce, (2) laws regulating the instrumentalities of interstate commerce, or (3) laws regulating *economic* activities that, when viewed in the aggregate, have a substantial effect on interstate commerce when viewed in aggregate.¹²⁹ This law most cleanly fits within the third category as an economic activity that substantially affects interstate commerce. Most environmental legislation relies on Article I, Section 8 commerce power as its source of authority to regulate against pollution and protect endangered species.¹³⁰ Environmental legislation makes commerce possible entirely by attaching itself to economic means to ensure clean air and water and prevent catastrophic climate change that would halt the commercial economy.¹³¹ Similar reasoning could be used to relate environmental justice legislation to commerce. The aggregation principle set out in *Wickard v. Fillburn*¹³² and *Gonzales v. Raich*¹³³ legitimizes regulatory schemes that impact environmental stressors that, when viewed in the aggregate, substantially impact interstate commerce.¹³⁴ Based on the above reasoning, the Supreme Court has refused to strike down any federal environmental legislation as outside the scope of the commerce power, even though the Court chose to interpret some environmental legislation narrowly in reference to

¹²⁶ *Id.*

¹²⁷ 514 U.S. 549 (1995).

¹²⁸ *Id.* at 558.

¹²⁹ *Id.*

¹³⁰ Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, THE ATLANTIC (last visited Jan. 16, 2024), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/>.

¹³¹ David M. Metres, *The National Impact Test: Applying Principled Commerce Clause Analysis to Federal Environmental Legislation*, 61 HASTINGS L.J. 1035, 1037 (2010).

¹³² 317 U.S. 111, 128–29 (1942).

¹³³ 545 U.S. 1, 22 (2005).

¹³⁴ Metres, *supra* note 131, at 1038 (citing Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 435–440 (2007)).

commerce clause concerns.¹³⁵ The Court would, therefore, likely uphold a federal environmental justice law under the Commerce Clause because it is shown that environmental health stressors substantially affect interstate commerce.¹³⁶

Most of the well-known environmental laws are federal statutes that apply to everyone.¹³⁷ For example, the National Environmental Policy Act of 1969 paved the way for future environmental legislation by codifying a national concern for the quality of the environment and promoting environmental awareness.¹³⁸ Following this step forward in environmental legislation came the Endangered Species Act of 1973,¹³⁹ The Federal Water Pollution Control Act,¹⁴⁰ The Clean Air Act,¹⁴¹ The Safe Drinking Water Act,¹⁴² and The Comprehensive Environmental Response, Compensation, and Liability Act of 1980.¹⁴³ These statutes, enacted at the federal level, are still operative today, boding well for continued legislation in the area, despite growing polarization on environmental issues.¹⁴⁴

B. *Nondelegation Under Gundy*

The recent changes in delegation jurisprudence in the *Gundy* decision could change the administrative landscape.¹⁴⁵ The *Gundy* case involved a constitutional challenge to the Sex Offender Registration and

¹³⁵ Metres, *supra* note 131, at 1038 (citing Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 912 (2008)); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (holding that the Clean Water Act does not extend to intrastate waters and declining to answer whether congress has the authority under the commerce power to extend the Clean Water Act to intrastate waters).

¹³⁶ See Metres, *supra* note 131, at 1038.

¹³⁷ See Lydia B. Hoover, *The Commerce Clause, Federalism and Environmentalism: at Odds After Olin?*, 21 WM. & MARY ENVTL. L. POL'Y REV. 735, 750 (1997).

¹³⁸ *Id.*; 42 U.S.C. §§ 4321–4370d (1994).

¹³⁹ 16 U.S.C. §§ 1531–1544 (protecting fish, wildlife, and plants that are either threatened or endangered and promotes plans for their recovery).

¹⁴⁰ 33 U.S.C. §§ 1251–1387 (intending to maintain the integrity of the country's water).

¹⁴¹ 42 U.S.C. §§ 7401–7671q (intending to protect the nation's air by preventing air pollution).

¹⁴² 42 U.S.C. §§ 300f–300j–26 (providing the population with safe drinking water through public systems).

¹⁴³ 42 U.S.C. §§ 9601–9675 (providing for remedial action for hazardous waste sites and superfund provisions).

¹⁴⁴ See Jamie Fuller, *Environmental Policy is Partisan. It Wasn't Always.*, WASH. POST (June 2, 2014, 6:30 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/02/support-for-the-clean-air-act-has-changed-a-lot-since-1970/>.

¹⁴⁵ See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

Notification Act (“SORNA”) regarding whether Congress could delegate its legislative power to another branch of government to apply the act to offenders convicted prior to its enactment.¹⁴⁶ Presumably, this law would be implemented and enforced by the United States Environmental Protection Agency. Therefore, we must assess the possibility of issues with the law arising out of Congress’s delegation of legislative power to agencies. Absent in the Federal and all state constitutions is a provision expressly forbidding the delegation of legislative power.¹⁴⁷ “[T]he delegation doctrine in the federal government arises from Article I of the Constitution, the doctrine of separation of powers, and the doctrine of checks and balances.”¹⁴⁸ Jurisprudence in this area requires that Congress lay out an “Intelligible Principle” or a legal framework to restrict an administrative agency’s authority.¹⁴⁹ This is a rather broad standard, as the Court has not struck down legislation under this principle since 1935.¹⁵⁰

This agency delegation jurisprudence could all change following the *Gundy* decision. The *Gundy* case concerned the delegation of power to the attorney general to run sex offender registration.¹⁵¹ Only eight justices sat on the Court at the time, as Congress had not yet voted to confirm Justice Kavanaugh.¹⁵² Thus, Justice Kagan authored the opinion for a four-justice plurality, holding that the intelligible principle standard was complied with in this case.¹⁵³ The late Justice Ginsburg joined in Kagan’s opinion.¹⁵⁴ Justice Gorsuch, along with Justice Roberts and Justice Thomas, dissented, stating that the Court needs to review its approach to nondelegation and that this case is a good vehicle to do so.¹⁵⁵ Justice Alito concurred with Kagan but indicated that he, too,

¹⁴⁶ *Id.*

¹⁴⁷ Gary J. Greco, *Survey: Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 569 (1994).

¹⁴⁸ *Id.*

¹⁴⁹ Cong. Rsch. Serv., *Origin of the Intelligible Principle Standard*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S1-3-3/ALDE_00001317/ (last visited Jan. 17, 2024); see, e.g., *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

¹⁵⁰ Cong. Rsch. Serv., *Origin of the Intelligible Principle Standard*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S1-3-3/ALDE_00001317/ (last visited Jan. 17, 2024).

¹⁵¹ *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019).

¹⁵² Amy Howe, *Decade in Review: Justice Kavanaugh’s Confirmation Hearing*, SCOTUSBLOG (Dec. 31, 2019, 9:00 AM), <https://www.scotusblog.com/2019/12/decade-in-review-justice-brett-kavanaughs-confirmation-hearing/>.

¹⁵³ *Gundy v. United States*, Oyez, <https://www.oyez.org/cases/2018/17-6086> (last visited Jan. 17, 2024).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

wanted to revisit the Court's approach to nondelegation.¹⁵⁶ Now that Justice Amy Barrett has replaced the late Justice Ginsburg, Justice Alito and the dissenters' desire to review nondelegation seems more likely.¹⁵⁷ Thus, an environmental justice law at the federal level, presumably granting broad legislative power to the EPA, might run into some delegation problems that Congress may deal with by minimizing the degree of discretion afforded the EPA should the Court decide to overhaul agency delegation in a future case.

As a solution, the federal legislation must erect sufficient statutory boundaries to constrain the delegation of power to the subject agency. The federal law must be specific enough to fully outline the agency's power to implement the law while not frustrating the purpose of the legislation, even under a narrower interpretation of the delegation doctrine possibly forthcoming.

C. Response to Criticisms of the New Jersey Law

Since its federal counterpart will likely face some of the same criticisms, addressing concerns surrounding the New Jersey law is important.

1. "Too Much of the State is Overburdened"

Most industry pushback comes from those who feel the requirements for what is considered an overburdened community are too broad.¹⁵⁸ According to "Sean Moriarty, the DEP's deputy commissioner for legal and regulatory affairs, . . . about 3,440 Census block groups representing 4.6 million people, roughly 51 percent of the state's population, live in areas that are overburdened."¹⁵⁹ During five public hearings in July, industry leaders pushed for a "compelling public interest" consideration that would take into account the economic gain and job opportunities a facility could provide.¹⁶⁰ This idea, however, was met with stark opposition during the public commenting period.¹⁶¹ Even though large portions of the state's population are overburdened under the statute, reducing the health stressors caused by polluting

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Bright, *supra* note 17.

¹⁵⁹ Frank Kummer, *Proposed N.J. Rule Says Half of Neighborhoods are Overburdened*, THE PHILA. INQUIRER (June 6, 2022), <https://www.governing.com/community/proposed-n-j-rule-says-half-of-neighborhoods-are-overburdened>.

¹⁶⁰ Bright, *supra* note 17.

¹⁶¹ See Bright, *supra* note 17.

2024]

KIZIMA

501

facilities in these communities is the entire intent of the law.¹⁶² Moreover, although 51 percent of the population is considered overburdened,¹⁶³ those populations are densely consolidated in highly populated areas around New York City and Philadelphia.¹⁶⁴ This uneven distribution of people means that large parts of the state, which are less densely populated, are open for business for these industries.¹⁶⁵ Placing these facilities in less populated areas could allow for a less dense consolidation of pollutants near large groups of people.

2. To the Extent That the Law Merely Calls for Additional Hearings and Procedures, How Certain are we That it Will Make a Meaningful Dent in the Number of Permits that are Ultimately Denied?

What gives this legislation “teeth” is that the act allows for denying a permit should the department deem that adding the facility to the community would subject the overburdened community to heightened public health stressors than other communities.¹⁶⁶ While the public outreach portion of the law is intended to promote informed communities and bridge language barriers, the actual muscle lies in the findings of the applicant’s environmental impact study and the department’s ability to deny the permit based on the report’s findings.¹⁶⁷ Greater public knowledge of the proposed actions could increase public pressure on the politicians in the area to fight the proposed facility on behalf of their constituents. This, in turn, will incentivize developers to offer projects outside of overburdened communities due to the permitting complications. While this may not increase outright permit denials, it still furthers the law’s goal of limiting the constriction of polluting facilities in overburdened communities.

Regardless of the aforementioned complexities, this law perpetuates the bigger-picture environmental goal of limiting pollution altogether through innovation. Studies have shown that the typically referenced trade-off of increased environmental regulation leading to increased costs for companies and environmental protection as an

¹⁶² Kummer, *supra* note 159.

¹⁶³ Kummer, *supra* note 159.

¹⁶⁴ N.J. Dep’t of Env’t Prot., *Environmental Justice Mapping, Assessment and Protection Tool*, EJMAP, <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6> (last visited Jan. 17, 2024).

¹⁶⁵ *Id.*

¹⁶⁶ *New Jersey Passes an Environmental Justice Law with Teeth*, *supra* note 20.

¹⁶⁷ § 13:1D-160(c) (LexisNexis 2022).

inhibitor of innovation is no longer the case.¹⁶⁸ Instead, properly designed environmental regulations can promote more productive uses of resources, thus enhancing a company's competitive advantage and driving innovation in the environmental space, leading to less waste and pollution.¹⁶⁹ Therefore, if a developer can propose a cleaner facility to be built in an overburdened community, the law is still promoting the outcomes for which it was intended.

3. Environmental Stressors Currently in Place

One major criticism of the law is that it does nothing to improve the current environmental stressors in these communities. The statute provides that in cases of facility expansion, the statute is not to be construed as limiting applicants' rights to continue operating the facility throughout the permitting process so long as doing so complies with currently established law.¹⁷⁰ But, since the law also applies to expanding current facilities, any current polluter, presumably located in an overburdened community, will have to comply with the standards of the act.¹⁷¹ Thus, while not directly relocating an existing facility, the law will not only force developers to look elsewhere but also require that current facilities clean up their actions should they require extensive repair or expansion.¹⁷²

IV. CONCLUSION

New Jersey's most vulnerable have scored a massive victory in improving the health of their communities through the New Jersey Environmental Justice Law that aims to redirect the development of pollution-producing properties away from their communities.¹⁷³ Based on the overwhelming evidence implicating government action in ensuring minority communities reside in substandard living conditions, it is time for the government to take responsibility for its past actions. Additionally, the public health data tells a harrowing story of illness, grief, and sadness that accompanies poor air quality. Powerful change is the only remedy.

¹⁶⁸ Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, HARV. BUS. REV. (1995), <https://hbr.org/1995/09/green-and-competitive-ending-the-stalemate>.

¹⁶⁹ *Id.*

¹⁷⁰ § 13:1D-160(f) (LexisNexis 2022).

¹⁷¹ § 13:1D-160(f) (LexisNexis 2022).

¹⁷² § 13:1D-160(f) (LexisNexis 2022).

¹⁷³ N.J. STAT. ANN. § 13:1D-157 (LexisNexis 2022).

2024]

KIZIMA

503

The possibility of a federal analog of the New Jersey Environmental Justice Law looks bright. The law, as drafted, passes muster under the Commerce Clause jurisprudence promulgated by the Supreme Court.¹⁷⁴ New Jersey's tale of environmental discrimination is not unique. Therefore, a federal environmental justice law only makes sense to further domestic tranquility and provide for the general welfare that the preamble to the Constitution outlines.¹⁷⁵

¹⁷⁴ Commerce Clause, *Legal Information Institute*, CORNELL UNIVER. (last visited Jan. 17, 2024), https://www.law.cornell.edu/wex/commerce_clause.

¹⁷⁵ U.S. CONST. pmbl.