

ENVIRONMENTAL BENEFITS AND THE NOTION OF POSITIVE ENVIRONMENTAL JUSTICE

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Environmental justice scholars have noted that, in the United States, there is less empirical work documenting disparities in environmental *benefits* than there is empirical study documenting the inequitable distribution and cumulative impact of multiple environmental *burdens*.¹ The fact that much less has been done with respect to environmental benefits is, perhaps, unsurprising. The distribution of parks, green space provision, and walkable sidewalks, along with access to coastal and water resources, to cite just four examples, are generally conceived of more as “land use” than “environmental” matters. In the United States, land use is sacrosanct—it is the traditional province of local and state government.² Pollution control laws, by contrast, are understood

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¹ See generally CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 328 (2002) (describing Scorecard, a website that compiles and publishes data on every U.S. county and allows users to “calculate, within a given county or state, what the distribution of [four particular environmental] hazards is across race, income, or other demographic or socioeconomic characteristics.”).

² For this reason, presumably, Rechtschaffen urges greater environmental justice action in the United States at these levels of government. See *id.* at 327–28 (discussing the comparative success of California’s Proposition 65 over the U.S. Toxics Release Inventory Program in reducing toxic air emissions, and also referencing Scorecard’s ability to link users to state regulators and local environmental organizations). Of the above examples, coastal and water resources are the items most likely to be subject to federal regulation, creating a

to be more “environmental” than “land use” questions in the United States, at least since the 1970s.³ Thus, U.S. environmental law and regulatory norms emanate in the first instance from the federal government, even where their implementation and enforcement occurs at the state or, less often, at the local level.⁴ The fact that most empirical work in the environmental justice area

complicated maze of cross-government regulation. See Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–66 (2006) (creating the National Coastal Zone Management Program as well as the National Estuarine Research Reserve system, under which both federal and state law impact the use and preservation of resources); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1387 (2006) (authorizing the U.S. Environmental Protection Agency to implement and enforce measures aimed at restoring and preserving water resources, which include mandatory state water quality standards as well as funding for state and federal programs); Robin Kundis Craig, *Regulation of U.S. Marine Resources: An Overview of the Current Complexity*, 19 NAT. RESOURCES & ENV'T 3 (2004) (discussing the large number of federal departments and agencies involved in living coastal and marine resource management, as opposed to the regulatory split between federal and state agencies in managing nonliving marine resources); Roderick E. Walston, *California Water Law: Historical Origins to the Present*, 29 WHITTIER L. REV. 765 (2008) (providing an overview of the “amalgam of state and federal laws that establish both local and national goals in the field of water regulation” in California). On the sometimes crippling consequences of the insistence that “land use” remain a local concern, see, for example, Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 254 (2002), which notes that sprawl results, in part, from conflicting self-interested actions by multiple localities in the same region. See also Katharine J. Jackson, *The Need for Regional Management of Growth: Boulder, Colorado, as a Case Study*, 37 URB. LAW. 299 (2005) (discussing the negative effects and costs associated with urban sprawl that result from local land use control).

³ That decade saw the passage of what remain the core federal laws regulating pollution. See generally Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–66 (2006); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1387 (2006); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–70 (2006); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–92 (2006); Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–75 (2006); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 88–99 (6th ed. 2009) (providing a chronology of federal environmental regulation and noting the decade of the 1970s has been called the “environmental decade” because it marked the beginning of most major federal environmental regulation).

⁴ This sharing of responsibility for lawmaking and implementation is famously known as “cooperative federalism” and is typical of the environmental law field. See, e.g., Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179 (2005) (explaining the concept of cooperative federalism as well as providing a “taxonomy of cooperative federalism, as actually practiced in the United States”). See generally RECHTSCHAFFEN & GAUNA, *supra* note 1, at 328 (discussing environmental data available at the community level, as well as the perceived need for community activism targeted towards both the EPA and state regulators).

documents environmental burdens rather than benefits is therefore, to some degree at least, a reflection of the structure of U.S. environmental and land use law. Early environmental justice cases used, unsuccessfully, theories such as Equal Protection challenges under the U.S. Constitution⁵ and, later still, theories such as disparate impact,⁶ in both cases borrowing from federal civil rights law.⁷ Thus, one can observe a “federalization” of much of the environmental justice discourse that, in the U.S. context at

⁵ The cases include *Rozar v. Mullis*, 85 F.3d 556, 558 (11th Cir. 1996) (affirming summary judgment in favor of the defendants, where a neighborhood association alleged “racial discrimination in the siting and permitting of [a] solid waste landfill”); *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, No. Civ.A. 01-702(FLW), 2006 WL 1097498 (D.N.J. Mar. 31, 2006) (granting summary judgment in favor of the defendant, the New Jersey Department of Environmental Protection, against a claim that it granted permits to operate a granulated blast furnace slag grinding facility in violation of Section 601 of Title VI of the Civil Rights Act of 1964); *Cox v. City of Dallas*, No. Civ.A. 3:98-CV-1763BH, 2004 WL 2108253 (N.D. Tex. Sept. 22, 2004), *aff’d*, 430 F.3d 734 (5th Cir. 2005) (finding in favor of the City where plaintiff failed to prove by a preponderance of the evidence that the City failed to stop illegal dumping in violation of the Equal Protection clause); *Boyd v. Browner*, 897 F. Supp. 590 (D.D.C. 1995), *aff’d*, 107 F.3d 922 (D.C. Cir. 1996) (affirming summary judgment in favor of the government, where plaintiffs claimed that the reappraisal of property to account for contamination during EPA condemnation proceedings was performed in a racially discriminatory manner); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff’d without opinion*, 977 F.2d 573 (4th Cir. 1992) (finding in favor of the defendants in a claim that intentional racial discrimination led to a landfill’s placement in a predominantly black neighborhood, where evidence presented shows that the site was chosen based on its central, yet remote, location); *E. Bibb Twiggs v. Macon Planning & Zoning Comm’n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d* 896 F.2d 1264 (11th Cir. 1990) (holding that evidence was insufficient to establish that permitting a landfill in a predominantly black neighborhood was motivated by race discrimination, where the only other landfill was located in a primarily white neighborhood); *Bean v. Sw. Waste Mgmt.*, 482 F. Supp. 673 (S.D. Tex. 1979) (denying plaintiffs’ motion for a preliminary injunction on the grounds that plaintiffs failed to establish a substantial likelihood that they would prevail in their claim: that the decision to grant a waste facility permit was motivated by racial discrimination), *aff’d without opinion*, 782 F.2d 1038 (5th Cir. 1986). *But see* *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at *2 (N.D. Tex. Feb. 14, 2002) (denying the City’s motion for summary judgment against plaintiffs’ claims that the City intentionally discriminated against them based on their race “in providing municipal services related to flood protection, zoning, protection from industrial nuisances, landfill practices, [and] streets and drainage . . .”).

⁶ See THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 34-37 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) (describing disparate impact litigation under the Environmental Protection Agency’s Title VI regulations).

⁷ See sources cited *supra* notes 5 and 6.

least, resulted in a lack of attention to the “local” land use issues.⁸ Of course, land use questions have implications well beyond the locale where they are made, just as pollution travels beyond state and local borders.⁹

At the analytical, if not the empirical level, this Article ultimately seeks to demonstrate that this distinction is a false and damaging one. In the process, the Article also undertakes to explore a framework for thinking about environmental benefit provisions as part of a comprehensive environmental justice strategy. That is, the argument below proceeds on the assumption that in addition to empirical work, it is essential to define the normative advantages of what this Article will call a notion of “positive environmental justice”—that is, of a right to environmental goods that can be understood to be at least as important as the right to be protected *from* environmental harms, which has been the central focus of most U.S. environmental justice activity for the last quarter century.¹⁰

Following this introductory section, the Article is divided into three parts. The first portion of Part 1 will chart the relatively thin case made in the U.S. literature for what this Article labels “positive environmental justice.” The second section in Part 1 then looks outside the United States and analyzes an important and relatively recent decision of the Colombian Constitutional Court. The Colombian decision, which affirmed the constitutional and other international and domestic law rights of native and Afro-Colombian peoples in that country to make decisions regarding the use and exploitation of the nation’s abundant forests,¹¹ provides a nuanced and extensive defense of what I characterize as positive

⁸ See RECHTSCHAFFEN & GAUNA, *supra* note 1, at 327–28 (discussing efforts to handle environmental problems on both the state and local level, such as California’s Proposition 65 and the Scorecard system developed by the environmental group, Environmental Defense).

⁹ The loss of green space to suburban sprawl is an excellent example of this fact. See generally KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) (detailing how the growth of American suburbs has influenced economic, social, and technological development).

¹⁰ See THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 6, at xxxiii (explaining environmental justice as “the idea that minority and low-income individuals, communities, and populations should not be disproportionately exposed to environmental hazards . . .”).

¹¹ Corte Constitucional [C.C.] [Constitutional Court], Enero 23, 2008 [Jan. 23, 2008], Sentencia C-030/08 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2008/C-030-08.htm> [Hereinafter Sentencia C-030/08].

environmental justice.¹² As such, it provides a compelling model for those interested in heeding the call to expand environmental benefits.¹³ Part 2 will then identify and critically evaluate normative advantages that can be derived from a capacious notion of environmental justice that seeks to secure benefits as well as burdens. Part 3 will conclude, finally, with reflections on the consequences of doing so. Specifically, Part 3 will argue that by moving towards this more capacious notion of environmental justice, it also will be possible to begin to erode the artificial distinction between “environmental” and “land use” decisions that so effectively impede needed changes in land use, environmental law, and regulation structures and institutions in the United States.¹⁴

1. POSITIVE ENVIRONMENTAL JUSTICE

1.1. U.S. Environmental Justice and Environmental Benefits

Over a decade ago, one scholar predicted that “[t]he next frontier for both the [environmental justice] movement and the focus of environmental justice scholarship . . . is land use planning . . .”¹⁵ That prediction, however, has not come to pass, despite the fact that for nearly forty years, U.S. jurisprudence has affirmed the right of all communities to equal municipal service provision, a category that surely includes parks and green space.¹⁶ As early as the 1930s, the prominent landscape architect Frederick Olmstead, Jr. set forth an ambitious park plan for the East Bay of the San Francisco metropolitan region, one that stressed equal space access and provision.¹⁷ Nonetheless, one would be hard pressed to argue

¹² See *id.* (finding that the consultation of indigenous peoples is necessary for any law affecting their territory because of its close ties to their communities and the need to respect indigenous populations).

¹³ See RECHTSTAFFEN & GAUNA, *supra* note 1, at 328–29 (arguing for more focus on correcting imbalances in environmental benefits, not just burdens).

¹⁴ See *id.* at 327–28 (discussing information sources focused solely on negative environmental impacts).

¹⁵ Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 8 (1998).

¹⁶ See *Hawkins v. Town of Shaw, Miss.*, 461 F.2d 1171, 1175 (1972) (“[W]e recognize the right of every citizen regardless of race to equal municipal services.”); see also *Evans v. Newton*, 382 U.S. 296, 301–02 (1965) (“The service rendered by [parks] is municipal in nature [A park] is more like a fire department or police department that traditionally serves the community.”).

¹⁷ Paul Stanton Kibel, *The People Down the Hill: Parks Equity in San Francisco’s East Bay*, 1 GOLDEN GATE U. ENVTL. L.J. 331, 354 (2007) (noting that with

that this vision has taken hold as an organizing principle at the national level; the provision of green space varies widely by region.¹⁸

To be sure, at the state and local level, there are some notable exceptions, particularly in California. In the political sphere, for example, during his successful 2006 campaign, Los Angeles Mayor Antonio Villaraigosa announced his "Building Parks for Everyone" plan, in which he announced his view that Los Angeles "needs many more large and small parks. Ideally [Los Angeles] should have small parks and open space areas no more than a mile walk away for anyone in the city."¹⁹ Efforts in the Los Angeles area to transform neglected or blighted areas into parks have occurred at the local community activist and regulatory levels as well.²⁰ Other jurisdictions have detailed land use planning tools that focus on widespread provision of green space. For example, in 2005, Georgia passed the Georgia Land Conservation Act that established a statewide conservation program designed to preserve the state's land resources by emphasizing partnerships between all levels of government and the private sector.²¹ The Land Conservation Act did not, however, emphasize social equity in the allocation of conservation land.²²

widespread ownership of cars it became "possible for a large portion of the population to spend many leisure hours in the country . . .").

¹⁸ See, e.g., TRUST FOR PUB. LAND, TOTAL PARKLAND AS PERCENT OF CITY LAND AREA (2008) (comparing park acres as a percent of land area for several U.S. cities throughout the country).

¹⁹ Kibel, *supra* note 17, at 339.

²⁰ See Heather Barnett, *The Chinatown Cornfields: Including Environmental Benefits in Environmental Justice Struggles*, 8 CRITICAL PLAN. 50, 51 (2001) (recounting development efforts and demands for environmental justice in Los Angeles' Chinatown); Robert García & Aubrey White, *Warren County's Legacy for Healthy Parks, Schools And Communities: From the Cornfield to El Congreso and Beyond*, 1 GOLDEN GATE U. ENVTL. L.J. 127, 127 (2007) (tracing the development of environmental justice movements and provisions for green space following the Chinatown Cornfield efforts); Robert García et al., *Healthy Children, Healthy Communities: Schools, Parks, Recreation, and Sustainable Regional Planning*, 31 FORDHAM URB. L.J. 1267, 1267 (2004) (linking lack of adequate open space in urban areas to rising childhood obesity rates); Paul Stanton Kibel, *Los Angeles' Cornfield: An Old Blueprint for New Greenspace*, 23 STAN. ENVTL. L.J. 275, 277 (2004) (detailing how the vacant "Cornfield" of Los Angeles will be made into a public park).

²¹ See Press Release, State of Georgia Office of the Governor, Landmark Georgia Land Conservation Act Becomes Law (Apr. 14, 2005), available at http://www.georgia.gov/00/press/detail/0,2668,78006749_79688147_93023024,0.html (describing \$100 million loan fund with state, federal and private funds).

²² See GA. CODE ANN. § 12-6A-1 (2010) (making no mention of the allocation of conservation land).

The academic literature on equitable provision of green space and “positive” environmental benefits is not much more extensive than the literature already cited above.²³ Of the few useful studies that exist, most come from practitioners and activists rather than scholars.²⁴ Government-sponsored studies are equally few and far between. The U.S. Environmental Protection Agency contracted the National Academy of Public Administration to prepare a report in July 2003 that examined the land use-environmental justice nexus.²⁵ In sum, while sometimes useful, these scattered studies, commentaries, and analyses do not amount to a focused and coherent defense of what this Article labels the “positive concept of environmental justice.”²⁶ For this reason, Decision C-080 of the Colombian Constitutional Court, which struck down the then-extant forestry law, merits special attention.

1.2. *The Colombian Forestry Law Case*

Of Colombia’s legal industries, forestry ranks among the most important.²⁷ Logically enough, in light of the industry’s

²³ See, e.g., Peter Harnik & Jeff Simms, *Parks: How Far Is Too Far*, PLANNING, Dec. 2004, at 8–9 (discussing the importance of proximity for park access and the lack of major U.S. cities that take it into account); Deborah Keeth, Book Note, *Wilderness as a Matter of Environmental Justice*, 31 ECOLOGY L.Q. 209, 209 (2004) (reviewing JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS (Kathryn M. Mutz et al., eds., 2002)); Patricia Salkin, *Intersection Between Environmental Justice and Land Use Planning*, 56 PLAN. & ENVTL. L., 5–7 (2006) (surveying land use tools that can be put to the service of environmental and land use justice).

²⁴ See García et al., *supra* note 20, at 1267 (linking lack of adequate open space in urban areas to rising childhood obesity rates); Kibel, *supra* note 17, at 335 (inquiring whether the differential access to East Bay Parks might be due to environmental racism); BAY AREA OPEN SPACE COUNCIL, PARKS PEOPLE AND CHANGE: ETHNIC DIVERSITY AND ITS SIGNIFICANCE FOR PARKS, RECREATION AND OPEN SPACE CONSERVATION IN THE SAN FRANCISCO BAY AREA 43 (2004) (reporting observations collected from various public agencies and land conservation organizations); CHONA SISTER ET AL., ACCESS TO PARKS AND PARK FACILITIES IN THE GREEN VISIONS PLAN REGION 3 (2008), available at http://www.greenvisionsplan.net/html/documents/17_access_parks_and_park_facilities_in_the_green_visions_plan_region_081508.pdf (detailing “access to and equity in the distribution of park and open space resources” in parts of southern California).

²⁵ See generally NAT’L ACAD. OF PUB. ADMIN., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING (2003), available at <http://www.epa.gov/compliance/ej/resources/reports/annual-project-reports/napa-land-use-zoning-63003.pdf>.

²⁶ See Keeth, *supra* note 23, at 214–17 (detailing how environmental justice is integral to effective administration of public policies and programs).

²⁷ The CIA World Factbook reports that agricultural occupations account for 18% of the labor force and, of agricultural products, forestry products are the 11th

importance and value to the nation, in 2006 the country enacted a general forestry law: “[t]he present law intends to establish the National Forest Plan To this end, the law establishes the necessary organization by the State to regulate activities related to natural forests and forest plantations.”²⁸ These include not only “the conservation and sustainable management of [the country’s] natural forests and forest plantations in soils dedicated to forest use,”²⁹ but also the following provision, one that appears on its face to commit the country to what can only be understood as a broad-based commitment to environmental justice regarding forest use:

[A]ll public institutions of the country that participate in development of the forest sector, the norms, strategies and national policies of the said Plan, with the aim to guarantee the organic character [literally, the “organicity”] and coherence required as an essential condition to provide for sustainable investment and growth in the forest sector, including that by economic agents and forestry actors in general, [by means of] a clear, universal and legally secure framework. Said provision operates without prejudice to the autonomy and powers accorded by law to the environmental and territorial authorities, as well as indigenous and Afro-Colombian communities.”³⁰

most important. U.S. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* (2011), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> (follow “Economy: Columbia”).

²⁸ Ley 1021 de 2006, abril 24, 2006 *Diario Oficial* [D.O.] 46.249, art. 1 (Colom.), available at http://www.secretariassenado.gov.co/senado/basedoc/ley/2006/ley_1021_2006.html (“La presente ley tiene por objeto establecer el Régimen Forestal Nacional A tal efecto, la ley establece la organización administrativa necesaria del Estado y regula las actividades relacionadas con los bosques naturales y las plantaciones forestales.”).

²⁹ *Id.* art. 2, § 1 (“[L]a conservación y el manejo sostenible de sus bosques naturales y el establecimiento de plantaciones forestales en suelos con vocación forestal . . .”).

³⁰ *Id.* art. 2, § 2.

[T]odas las instituciones públicas del país que participen en el desarrollo del sector forestal, a las normas, estrategias y políticas nacionales de dicho Régimen, en la perspectiva de garantizar la organicidad y la coherencia requeridas como condición esencial para propiciar la inversión sostenida y creciente en el sector forestal, brindando a los agentes económicos y actores forestales en general, un marco claro y universal de seguridad jurídica. Dicha cláusula opera sin perjuicio de las autonomías y potestades acordadas por la ley a las autoridades

Moreover, the Forestry Law created the National Forest Council, which included not only representatives of government, industry, and universities, but also representatives of indigenous groups and Afro-Colombian communities.³¹ However, these steps were not enough to rescue the Forestry Law from a successful constitutional claim challenging its failure to substantively serve the interests of Colombian racial and ethnic minority groups.³²

1.2.1. *The Legal Challenge*

In August of 2006, the Public Interest Law Group at the University of the Andes in Bogotá (“G-DIP”)³³ formed an alliance with an inter-American environmental group to challenge the General Forestry Law as unconstitutional.³⁴ In the first semester of 2007, G-DIP filed a complaint in Colombia’s Constitutional Court³⁵ challenging the constitutionality of the Forestry Law.³⁶ For those

ambientales y territoriales, así como a las comunidades indígenas y afrocolombianas.

Id.

³¹ *Id.* tit. I, ch. 1, art. 7 (listing in detail the diverse membership of the National Forest Council broken down by representation, which notably includes members of indigenous groups as part of the body).

³² See Sentencia C-030/08, *supra* note 11 (declaring the Forestry Law to be unconstitutional based on the legislature’s failure to consult indigenous communities and people of African descent during the process of drafting and enacting the law).

³³ “G-DIP” is a Spanish acronym for “Grupo de Derecho de Interés Público.” See *Grupo de Derecho de Interés Público*, <http://gdip.uniandes.edu.co/> (last visited Mar. 3, 2011) (emphasizing the groups goals to connect the university with society, increase focus on legal education in Colombia, and solve structural problems of society using the law, particularly those problems affecting vulnerable communities).

³⁴ The group was the Asociación Interamericana para la Defensa del Ambiente. See *G-DIP – Lineas de Trabajo*, <http://gdip.uniandes.edu.co/interno.php?Id=6&Menu=10&lang=es> (last visited Mar. 3, 2011) (detailing how the partnership attacked the General Forestry Law on the grounds that it did not promote sustainable development and was enacted without the consultation of indigenous peoples).

³⁵ See generally Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 IND. J. GLOBAL LEGAL STUD. 173, 186–89 (2009) (discussing the formation and functionality of the Colombian Constitutional Court and concluding that its method of judicial appointment, jurisdiction over matters involving the violation of ordinary citizens’ fundamental rights, and practical perspective on how those rights should be understood have helped it develop into a “powerful guardian of constitutional rights”).

³⁶ Demanda de inconstitucionalidad contra la Ley 1021 de 2006 o Ley General Forestal [hereinafter Complaint], available at <http://gdip.uniandes.edu.co/leyforestal.html>. Although four lawyers associated with G-DIP were the

interested in environmental protection and sustainable environmental management practices, as well as for those committed to the goals of the environmental justice movement, the complaint (and the decision to which it led) is a document of special interest because of its conceptual breadth.³⁷ That is, perhaps reflecting the complaint's genesis in a clinic devoted to constitutional matters, it does not make its case in mere reliance upon environmental statutes and regulations. On the contrary, the complaint looks to a broad range of Colombian legal rights—some with origin in Colombian ratification of international agreements³⁸—based on equality principles.

The central claim of the complaint rests upon the premise that the forestry law failed “for not having realized a prior consult [a form of public hearing] with either indigenous communities or Afro-descendent communities during the process of drafting the legislative initiative that led to the passage of Law 1021 of 2006.”³⁹ The specific procedural error alleged by the complaint was a failure to recognize Colombian international treaty obligations, specifically International Labour Organization (“ILO”) Convention

principal plaintiffs, they were supported in their action by other organizations like the Friends of the Earth Colombia and Asociación Centro Nacional Salud, Ambiente y Trabajo (CENSAT Agua Viva). See, e.g., FRIENDS OF THE EARTH INT'L, SUMMARY ANNUAL REPORT 2008 (2009), available at <http://www.foei.org/en/resources/publications/annual-report/2008/what-we-achieved-in-2008/member-groups> (follow “Latin America and the Caribbean” hyperlink; then follow “Colombia: Court Overturns Controversial Forestry Law” hyperlink) (describing Friends of the Earth Colombia's and CENSAT Agua Viva's opposition to the General Forestry Law and the Colombian Constitutional Court's subsequent finding that the law was unconstitutional). Some of the points advanced here with respect to the complaint and subsequent decision were first explored in Colin Crawford, *Derechos culturales y justicia ambiental: lecciones del modelo colombiano*, in JUSTICIA COLECTIVA, MEDIO AMBIENTE Y DEMOCRACIA PARTICIPATIVA 27, 42–61 (Daniel Bonilla Maldonado, ed., 2010) [Hereinafter JUSTICIA COLECTIVA].

³⁷ See generally Complaint, *supra* note 36 (raising arguments based in international treaty obligations, constitutional protection of pluralism, constitutional minority rights protections, in addition to the Forestry Law's own provisions).

³⁸ *Id.* at 21–27 (discussing the constitutional provisions violated by the Forestry Law and focusing especially on Article 6 of the ILO Convention 169 which requires legislatures to consult with indigenous peoples when formulating laws which will affect them—this provision has been incorporated into Colombia's constitution).

³⁹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 100, available at <http://pdba.georgetown.edu/Constitutions/Colombia/col91.html>.

169 on the rights of indigenous and tribal peoples.⁴⁰ ILO Convention 169 creates the duty to “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”⁴¹ This step is extraordinary compared to U.S. practice; to put it mildly, reliance upon treaty obligations as a means to secure domestic rights is a controversial practice in the United States,⁴² to say nothing of the use of foreign law, which continues to prove deeply contentious.⁴³ But in Colombia, according to the complaint, a violation of ILO Convention 169 was tantamount to a constitutional violation since the treaty duty was part of the “constitutional bloc,”⁴⁴ including ILO Convention 169 duties to observe this and other treaty commitments, like rights of self-determination (Article 9) and, more generally, human rights obligations (Article 93).⁴⁵ However, by itself, this argument might

⁴⁰ Int’l Labour Org., Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 28 I.L.M. (1989), available at <http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm> (framing the international standards for recognizing the rights of Indigenous and Tribal people).

⁴¹ *Id.* art. 6(1)(a).

⁴² See, e.g., Brief for Respondents, *Hamdan v. Rumsfeld*, 548 U.S. 331 (2006) (No. 05-184), 2006 WL 460875, at *30 (“The long-established presumption is that treaties and other international agreements do not create judicially enforceable rights.”); Brief for the United States as Amicus Curiae Supporting Respondents at 11, *Sanchez-Llamas v. Oregon*, 548 U.S. 557 (2006) (Nos. 05-51 and 04-10566), 2006 WL 271823, at *11 [hereinafter Gov’t Sanchez-Llamas Brief] (arguing that international agreements are generally presumed not to confer judicially enforceable individual rights); David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT’L L. 20 (2007) (noting that in both the *Sanchez-Llamas* and *Hamdan* cases, the U.S. Supreme Court avoided a direct answer to this issue, and providing a preliminary framework for thinking about introducing a doctrinal innovation that would address the enforcement of rights created by treaty).

⁴³ Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES MAG., Sept. 28, 2008, at 50–57, 66, 70 (discussing the ongoing debate within the Supreme Court as to how international law should interact with the U.S. system, and pointing out the impact Supreme Court decisions have on the country’s international policies).

⁴⁴ See, e.g., Complaint, *supra* note 36, at 36 (stating that under Colombian law, Article 6 of ILO Convention 169 expanded the rights granted in Article 330 of the Colombian Constitution, making violation of the treaty provisions a violation of constitutional law).

⁴⁵ See CONSTITUCIÓN POLÍTICA DE COLOMBIA [CONSTITUTION], arts. 9, 93, available at <http://pdba.georgetown.edu/Constitutions/Colombia/col91.html> (recognizing the right to self determination as one of the three tenets of state foreign relations, and stating that constitutional rights are construed according to

not have held. The protections offered by Articles 9 and 93 are only general.⁴⁶ The “human rights” to which Article 93 refers, for example, are not specified.⁴⁷ Moreover, the two articles do not relate to either the particular context of the Colombian forestry law or to the interests of traditional communities, whether indigenous or Afro-Colombian.⁴⁸ The complaint’s next argument cleverly links the treaty commitments to existing Colombian minority rights, specifically to more detailed rights articulated in the Constitution itself.

The constitutional rights to which the complaint referred were of two types. The first type protects rights enjoyed by all members of Colombian society. Articles 1, 2, and 3 articulate the aspirational character of the Colombian democracy and in particular provide that it is to be both pluralistic and participatory.⁴⁹ The second type, by contrast, provides specific protection of minority rights. Article 7 refers to a particular feature of Colombian pluralism, namely a commitment to “ethnic and cultural pluralism.”⁵⁰ Article 13 commits to protect groups that suffer from discrimination or have otherwise been marginalized in Colombian society,⁵¹ while Article 330 entitles indigenous people to the right to self-determination in the exploitation of natural resources within their lands.⁵²

A less thoughtful argument might have only focused on Article 330 as a means to invalidate the Colombian forestry law. Article 330 is the most concrete of all the cited provisions, and, at least on its face, would appear to demand the forestry law’s reformulation to the extent that it implicated the use of forests within indigenous lands. But the complaint cleverly juxtaposed its claims, suggesting that the goal of a pluralistic society that respects minority rights

human rights treaties to which Colombia is a party); *see also* Complaint, *supra* note 36, at 28 (stating that Convention 169 was Colombian law regardless of whether there were statutory provisions implementing it).

⁴⁶ *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA, *supra* note 45, art. 93 (referring generally to “treaties and conventions ratified by the Congress”).

⁴⁷ *See id.* art. 93 (referring generally to “the human rights treaties ratified by Columbia”).

⁴⁸ *Id.*

⁴⁹ *See id.* arts. 1–3 (setting forth constitutional principles of territorial sovereignty within the state, democracy, equal protection of law, and personal liberty).

⁵⁰ *Id.* art. 7.

⁵¹ *Id.* art. 13.

⁵² *See id.* art. 330 (outlining the administrative functions and principles of government to be used by political councils governing indigenous territories).

should be measured not only by internal legal obligations to equal protection but also by international ones.⁵³

These equal protection commitments are then paired with specific minority entitlements, namely the self-determination of resource use by indigenous people.⁵⁴ Thus, the complaint implicitly made the case—by virtue of its juxtaposition and accumulation of constitutional protections—that the Colombian Constitution centrally and fundamentally commits the nation to minority protection, not just in isolated articles but also throughout its text. Moreover, the complaint urged the Court to apply the widest possible definition of environmental justice, meaning one that allows for special minority protections while also protecting the environmental rights of all citizens.⁵⁵ All Colombians need be considered, the complaint suggested, when national natural resources were at stake: “[t]he Court should recognize as beneficiaries of the prior hearing not only those in indigenous lands but also Afro-descendants. In equal manner, the object of the duty was expanded, such that it is not limited . . . but also to extend to all of those susceptible to being directly affected [by the decisions].”⁵⁶

1.2.2. *The Constitutional Court Decision*

Article 79 of the Colombian Constitution of 1991 guarantees that “all people have the right to a healthy environment. The law will guarantee the participation of communities in decisions that

⁵³ See Complaint, *supra* note 36, at 32 (noting that national and international measures are relevant in examining the obligations that the state has to indigenous people).

⁵⁴ See *id.* at 22–23 (summarizing the relevant provisions of the constitution that point to the right of indigenous people to determine how resources within their territories are used).

⁵⁵ See *id.* at 29 (urging the constitutional court to make it mandatory for indigenous people to be involved in the allocation of their natural resources and to do so according to the customs of each ethnic group).

⁵⁶ JUSTICIA COLECTIVA, *supra* note 36, at 221.

Se reconocieron como beneficiarios del derecho a la consulta previa [de medidas legislativas] no sólo a los territorios indígenas sino también a los afrodescendientes. En igual sentido, el objeto de la obligación de realizar consulta fue ampliado, toda vez que ya no se limita a las decisiones sobre explotación de recursos naturales, sino que se extiende a todas aquellas susceptibles de afectarlos directamente.

Id. This quotation comes from the part of the decision in which the Court reiterated the parties’ arguments in the civil law fashion.

may affect them.”⁵⁷ Yet interestingly, the Constitutional Court did not rely upon Article 79 for its decision that the national forestry law could not stand. Instead, the Court’s opinion endorses environmental justice principles while not basing the claim upon a legal right or obligation specifically identified in an environmental or natural resource law or regulation.⁵⁸ That is, it can be said to endorse a view of positive environmental justice, one that argues for equality in access to and control over a clean environment as among those things that constitute a just society.

In the press release announcing the decision, the Court declared that in its decision “the Court reiterates the line of jurisprudence traced in material that recognizes ethnic and cultural diversity as a constitutional principle and foundation of Colombian nationality.”⁵⁹ As the Court’s decision further clarified, this reasoning is constitutionally required under constitutional Articles 1, 2, 3, 7, 9, 13, 93 and 330.⁶⁰ As the press release and the decision itself went on to explain, this conclusion was compelled because Colombia must be understood “as a democratic, participatory and pluralistic State.”⁶¹

Given the context, this must be judged as an environmental justice victory of the highest order, linking, as it does, equality principles and environmental management decisions. In fact, Colombia’s population is, in absolute numbers, not especially diverse. Although census and other survey classifications of race and ethnicity are problematic because they typically rely upon self-

⁵⁷ See CONSTITUCIÓN POLÍTICA DE COLOMBIA, *supra* note 45, art. 79 (providing that the law guarantees the participation of the communities “[t]odas las personas tienen derecho a gozar de un ambiente sano. La ley garantizará la participación de la comunidad en las decisiones que puedan afectarlo.”).

⁵⁸ See generally Sentencia C-030/08, *supra* note 11 (discussing the procedural defects and omissions in the court’s opinion that affect the materiality of the legal right of indigenous communities to consultation in the formation of forestry law).

⁵⁹ See Press Release, Republica de Colombia Corte Constitucional, Comunicado de Prensa No. 1 de 23 de enero de 2008 (Jan. 23, 2008), available at <http://gdip.uniandes.edu.co/leyforestal.html> (last visited Mar. 3, 2011) (highlighting the court’s acknowledgement that the constitution requires that special consideration be given to ethnic and cultural diversity in jurisprudence—“La Corte reiteró la línea jurisprudencial trazada en materia de reconocimiento de la diversidad étnica y cultural como principio constitucional y fundamento de la nacionalidad colombiana.”).

⁶⁰ See Sentencia C-030/08, *supra* note 11 (premising the court’s line of reasoning on the text of the constitution).

⁶¹ See Press Release, *supra* note 59 (explaining that there is a constitutional duty imposed on the judiciary by article 1 that compels the result); See, e.g., JUSTICIA COLECTIVA, *supra* note 36, at 276-77.

reporting and so responses often reflect cultural and social stereotypes, it is at least true to say that, comparatively speaking, the ethnic and racial populations constitute a relatively small percentage of the Colombian population. Indigenous people constitute but 1.75% of the national population, while the Afro-Colombian population represents approximately 12% of the population.⁶² By contrast, elsewhere in the continent the indigenous population is much more significant: 55% in Bolivia,⁶³ 25% in Ecuador,⁶⁴ and 45% in Peru.⁶⁵ Brazil, like Colombia a country with extensive forests traditionally the home of indigenous people and also a country whose history was marked by the African slave trade, has an official Afro-Brazilian population of 44.7%.⁶⁶ The United States, like Brazil a nation of near-continental dimensions once dominated by indigenous people, and also a country shaped by the African slave trade, reports official statistics comparable to Colombia's composition. The United States has an official indigenous population of but 1.15%; African-Americans constitute 12.85% of the official national total.⁶⁷ Nevertheless, the Columbian Court accepted the claim advanced in G-DIP's complaint that the actual population percentage had disproportionate influence over management of the resource.⁶⁸ The Court recognized that the lands of indigenous peoples and Afro-descendants constituted fully 32.2% of the national territory overall—not an inconsequential fraction.⁶⁹ Moreover, in defined

⁶² DANIEL BONILLA MALDONADO, *LA CONSTITUCIÓN MULTICULTURAL* 26 (2006).

⁶³ See U.S. Cent. Intelligence Agency, *Field Listing—Ethnic Groups*, 2008 WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2075.html> (reporting that of the indigenous population in Bolivia, 30% are Quechua, 25% are Aymara, and another 25% are classified as mestizo, meaning of mixed white and Amerindian ancestry).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, 2000 BRAZIL CENSUS available at http://www.ibge.gov.br/home/estatistica/populacao/censo2000/populacao/cor_raca_Censo2000.pdf (providing population statistics from the 2000 census).

⁶⁷ See U.S. Cent. Intelligence Agency, *supra* note 63 (providing the actual count of ethnic populations in the United States from 2000-2007); U.S. CENSUS BUREAU, *POPULATION PROFILE OF THE UNITED STATES: RACE AND HISPANIC ORIGIN IN 2005* (2005) (detailing the Hispanic component of the United States' ethnic population).

⁶⁸ See *Sentencia C-030/08*, *supra* note 11, ¶ 5.1 (detailing the court's reasoning and analysis on the right of participation of indigenous communities).

⁶⁹ *Id.*; *cf.* Complaint, *supra* note 36, at 30. (quantifying the fraction of land inhabited by Afro-descendants).

regions of Colombia, the percentage was much higher, further strengthening the case.⁷⁰

In other words, the Constitutional Court's decision represents a commitment to a diverse and pluralistic society where one might have thought that, by the absolute numbers, it least mattered. Thus, the decision affirms a principle defending the rights of a minority group, no matter how small, as a reflection of a nation's deepest values. It further articulates a commitment to diversity because of the importance of preserving the traditions, practices, and cultures that help define a nation. In this, too, the decision ought to be read as an important articulation of environmental justice principles, since affirmation of the principle of respect for minority rights is framed in terms of a question of access to natural resources with implications for environmental management and protection.

In fact, the Court endorsed the arguments of the G-DIP and affiliated plaintiffs in nearly every respect. It thus held that the forestry law "should have been submitted to a consult process with indigenous and tribal communities prior to its passage."⁷¹ Moreover, as the Court clarified, "to establish in what sense the

⁷⁰ See Sentencia C-030/08, *supra* note 11, ¶ 5.1 (detailing the fractions of national territory controlled by ethnic populations).

Por un lado, el carácter general e integral de la ley hace que resulte imposible excluir de su ámbito de aplicación a las comunidades indígenas y tribales, a las cuales, según documentos oficiales, se las ha hecho entrega formal de un total de 36,336.807 hectáreas de tierras, lo que representa el 32.2% del área total nacional, si se tiene en cuenta, además, que, de acuerdo con el informe de ponencia para segundo de debate del Proyecto de Ley Forestal en la plenaria del Senado de la República, [d]el área cubierta en bosque natural; en el Pacífico y la Amazonia, cerca del 41.6% pertenece a comunidades indígenas y afrocolombianas. De hecho el 72% de los territorios de los resguardos indígenas, es decir 22.5 millones de hectáreas, coinciden con áreas boscosas; por su parte, del 69.4% de las tierras adjudicadas a comunidades afrocolombianas, cerca de 2.6 millones de hectáreas cubren áreas boscosas. Estas comunidades dependen casi en su totalidad de los recursos que le proveen los bisques.

Id. (footnote omitted).

⁷¹ *Id.*, pt. VI, ¶ 5.1.

Tal como se ha señalado, en este caso el problema de constitucionalidad que le ha sido planteado a la Corte conduce a establecer, en primer lugar, si la Ley 1021 de 2006, o Ley General Forestal, debía haber sido sometida a un proceso de consulta con las comunidades indígenas y tribales previamente a su expedición.

Id.

forestry law contained an obligation to consult, it is necessary to attend to the controversy that occurred from the moment that the initiative was presented to Congress," because those changes implicated the very tribal and indigenous interests affected by the proposal.⁷² This is further striking in that the Court thus makes clear that a prior consult in environmental decisions (or, for that matter, other administrative decisions where a consult is required) is not a *pro forma* activity to be conducted at the end of a matter, but one based upon a robust notion of inclusion, in which stakeholder participation is valued because it is understood that involvement from the beginning of a process is different than a formal nod to airing of complaints and concerns once a project is nearly ready for signature. Furthermore, the Court endorsed the suggestion that the consult was compelled, at least in part, by the obligations of ILO Convention 169.⁷³

The complaint advanced the notion, accepted by the Court, that the appropriate process for the prior consult would be distinctive in three crucial respects. First, it would be understood as both necessary and obligatory at the *legislative* level.⁷⁴ That is, a prior consult is required for any legislation affecting ethnic and minority communities. Decision C-030 confirms this requirement for a legislative consult is terribly important. It reflects the Court's understanding that a pluralistic democracy requires public participation at the earliest possible stage, rather than, for example, immediately prior to the issuance of a regulatory norm by an executive branch agency, as is typically the case, for example, in the United States.⁷⁵

⁷² *Id.* In full, the explanation reads:

[P]ara establecer si en relación con la ley forestal existía un deber de consulta, es preciso atender a la controversia que se suscitó desde el momento mismo en el que se presentó la iniciativa a la consideración del Congreso, porque muchas de las modificaciones que se le introdujeron a lo largo del debate serían indicativo de que los temas sobre los que versaba el proyecto comprometían aspectos que afectaban directamente a las entidades tribales que son titulares del derecho de consulta.

Id.

⁷³ *Id.* ("El debate sobre tales materias se adelantó, sin embargo, sin que se hubiesen cumplido los presupuestos para la consulta a los pueblos indígenas y tribales en los términos del Convenio 169 de la OIT.").

⁷⁴ See Complaint, *supra* note 36, at 36-40 (asserting that the legislature should be required to consult with affected groups during the entire process of drafting relevant bills).

⁷⁵ THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 6, at 187-90.

Second, and equally radical in potential scope, the complaint urged the Court to acknowledge that this consult would be required not just for direct effects on indigenous and Afro-Colombian communities.⁷⁶ On the contrary, it would, the petitioners argued, apply to *any* exploitation of national forests.⁷⁷

Third, the Court helped articulate a notion of positive environmental justice when it supported the early, broad, and deep inclusion of affected communities because of the environmental imperative, noting that Colombian forests contained nearly 10% of global biodiversity.⁷⁸

2. THE NORMATIVE CASE FOR A BROAD, PLURALISTIC VISION OF POSITIVE ENVIRONMENTAL JUSTICE

It merits asking, then, what makes Decision C-080 of the Colombian Constitutional Court useful beyond the confines of its particular case. What makes the case special for one wishing to make the normative case for positive environmental justice? First, the fact that the decision locates the basis for its argument in the national constitution, a foundational document, is a fact that cannot be undervalued. As the frustrated story of U.S. attempts to secure environmental justice claims in terms of the Equal Protection Clause demonstrate,⁷⁹ this is not necessarily an easy matter. That is, despite the common criticism of post-colonial constitutions as “overflowing with promise”—and promises that cannot be kept⁸⁰—Decision C-080 affirms the value of giving the

⁷⁶ See Complaint, *supra* note 36, at 30–33 (arguing that the close ties between the identities of indigenous groups and their territories requires their consultation in all matters affecting the territory, even if the effects are indirect ones).

⁷⁷ See Sentencia C-030/08, *supra* note 11, pt. III.

[S]e reconocieron como beneficiarios del derecho a la consulta previa [de medidas legislativas] no solo a los territorios indígenas sino también a los afrodescendientes. En igual sentido, el objeto de la obligación de realizar consulta fue ampliado, toda vez que ya no se limita a las decisiones sobre explotación de recursos naturales, sino que se extiende a todas aquellas susceptibles de afectarlos directamente.

Id.

⁷⁸ *Id.* pt. VI, ¶ 5.1 (discussing the biodiversity found in the region); see also Complaint, *supra* note 36, at 30 (outlining the composition of the Colombian forests). In fact, more recent U.N. estimates put the figure at 14%.

⁷⁹ See *supra* note 5 (providing cases in which environmental justice claims were brought unsuccessfully under the Equal Protection Clause).

⁸⁰ See DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA* (2000) (reporting mixed conclusions on the successful implementation of the Bolivian and Colombian constitutions). Van

environment constitutional protection that can be reinforced with subsequent articulation by other governmental branches.

Second, Decision C-080 can be considered a triumph of legal pluralism in light of the manner in which it celebrates Colombia as a diverse state. For example, at the beginning of the opinion, the Court demonstrated its sympathy for arguments framed by some of the petitioners and their supporters in the case.⁸¹ The Court thus stated its understanding that the forestry law, because of its non-inclusive drafting, resulted in the following situation: “the regulation of native forests . . . with a criterion that gave primacy to extraction over ecology, affect[ing] in a clear and direct way the said [indigenous and Afro-descendent] communities.”⁸² This situation, as the previous section makes clear, was unacceptable. What is key here is the recognition that traditional communities

Cott notes numerous paradoxes, for example, while “constitution-makers [in both countries] believed that their constitutional reforms would legitimate democratic institutions and that this would lead to increased voter registration and reduced abstention. . . . In Colombia, voter abstention actually increased after 1991[,]” as it did in Bolivia. At the same time, “in both countries the indigenous population increased its levels of registration and voting.” *Id.* at 224. Van Cott further reports complaints from some elders of indigenous groups in Colombia that “new political openings have resulted in conflict between older [political] authorities and younger political officeholders, resulting in community fragmentation and a decline in the value of traditional authority.” *Id.* at 240. Van Cott also notes that “[o]bservers point out a basic contradiction between the emphasis of the 1991 Constitution on improving the quality of democracy and the neoliberal economic reform that accompanied the charter’s implementation The extreme inequality in the distribution of resources impedes the disempowered majority from exercising their new rights to participation.” *Id.* at 248; *see also*, Laurie Goering, *Venezuela’s Draft Constitution is Overflowing With Promise*, CHI. TRIB., Nov. 14, 1999, at 6 (discussing the lengthy Venezuelan constitution and presenting some of its major criticisms); Monte Reel, *South America’s Constitutional Battles: As Three Leaders Attempt to Reshape Power, One Question is Central: Who Would Benefit?*, WASH. POST, Jan. 18, 2008, at A12 (considering efforts to rewrite the constitutions of Bolivia, Ecuador, and Venezuela to reflect “21st-century socialism” and the resulting political backlash).

⁸¹ *See* Sentencia C-030/08, *supra* note 11, pt. VI, ¶ 2 (acknowledging the support groups that contributed to the claim that the issuance of law 1021 of 2006 omitted the constitutional requirement of consultation with indigenous and Afro-descendant communities).

⁸² *See id.*

[C]onsulta que era imperativa a la luz de nuestro ordenamiento constitucional, debido a que la ley general forestal, particularmente en cuanto regula los bosques nativos, y lo hace, además, con un criterio en el que prima lo extractivo sobre lo ecológico afecta de manera clara y directa a dichas comunidades.

Id.

have knowledge over an activity (here, forest management) that is rooted in a different set of values than those that predominate in the extractive capitalist model.

Third, one cannot underestimate the value of linking national law to a powerful, detailed international instrument that is widely admired like ILO Convention 169.⁸³ Further on in the opinion, the Court thus clearly makes reference to the utility of arguments based upon ILO Convention 169, which demonstrate, the Court observes:

a new understanding of the situation of indigenous and tribal peoples in all regions of the world, such that it was necessary to eliminate the tendency favoring assimilation to which they had been led, and instead, in its place, to establish a principle that would conform to the structures and forms of life of indigenous and tribal peoples as permanent and durable, and [that] the international community would have interest in the intrinsic value of these communities to be saved.⁸⁴

⁸³ See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 48–49 (2d. ed. 2004) (recognizing that Convention No. 169 can be viewed as both “a manifestation of the movement toward responsiveness to indigenous peoples’ demands through international law and . . . the tension inherent in that movement” but concluding that the convention was ultimately successful “in affirming the value of indigenous communities and cultures . . .”). See generally Russel Lawrence Barsh, *An Advocate’s Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209 (1990) (discussing the rights advanced by Convention No. 169 and urging advocates for indigenous rights to broadly interpret and promote the convention’s provisions); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677 (1990) (considering the advances made by Convention No. 169 in recognizing the existence and rights of indigenous peoples and encouraging ratification). See also Jeremy Valeriotte, *Chile’s Supreme Court Upholds Indigenous Water Use Rights*, SANTIAGO TIMES, Nov. 30, 2009 (describing a similar first application of the ILO Convention 169 by the Chilean Supreme Court to protect tribal water rights in a conflict between Aymara tribes and a company seeking to bottle and sell a freshwater source the tribe historically relied upon).

⁸⁴ Sentencia C-030/08, *supra* note 11.

[E]l Convenio 169 de la OIT fue adoptado con base en una nueva aproximación a la situación de los pueblos indígenas y tribales en todas las regiones del mundo, conforme a la cual era preciso eliminar la orientación hacia la asimilación que se había venido manejando, para, en su lugar, asentar el principio conforme al cual las estructuras y formas de vida de los pueblos indígenas y tribales son permanentes y perdurables, y la comunidad internacional tiene interés en que el valor intrínseco de sus culturas sea salvaguardado.

Id. pt. VI, ¶ 4.2.

Importantly, moreover, for the Court, this is not merely a matter of compliance with international obligations. It thus demonstrates its sympathy for the view that it is the obligation of the State not only to secure the standard range of political and civil rights characteristic of modern democracies, but also “freely to articulate, with State support, for the promotion of their associational interests that have as their object the formation of democratic mechanisms of representation in different types of participation”⁸⁵ Once again, what is striking from an environmental justice perspective is the linkage—or perhaps, better said, the juxtaposition—of three separate but related concerns: democratic participation, cultural inclusion, and different methods of responding to and interacting with the physical environment.

Fourth, Decision C-080 stands as an early, broad, and deep endorsement of public participation for access to positive environmental benefits poised to further the aims of environmental protection and community resource access, particularly for indigenous and Afro-descendent minority communities. With respect specifically to “the measures that may be susceptible directly to affect indigenous and tribal peoples,” the Court affirmed that it “has said that this is a direct consequence of the right of native communities to decide the priorities in their process of development and cultural preservation” such that the public consult is a legal means for the “defense of identity and cultural integrity and its status as a participatory mechanism.”⁸⁶ One could hardly wish for a clearer endorsement of a functional role for a

⁸⁵ *Id.* ¶ 4.2.1 (“[D]e articularse libremente, con el apoyo del Estado, para la promoción de sus intereses, en asociaciones que tengan por objeto constituir mecanismos democráticos de representación en las diferentes instancias de participación, concertación, control y vigilancia de la gestión pública que se establezcan.”).

⁸⁶ *Id.* ¶ 4.2.2.

En relación con el deber de consulta de las medidas que sean susceptibles de afectar directamente a los pueblos indígenas y tribales, la Corte ha dicho que el mismo es consecuencia directa del derecho que les asiste a las comunidades nativas de decidir las prioridades en su proceso de desarrollo y preservación de la cultura y que, cuando procede ese deber de consulta, surge para las comunidades un derecho fundamental susceptible de protección por la vía de la acción de tutela, en razón a la importancia política del mismo, a su significación para la defensa de la identidad e integridad cultural y a su condición de mecanismo de participación.

Id. (footnotes omitted).

broad, pluralistic view of political participation in a multicultural democracy.

In contrast, consider the form of public participation included in the forestry law struck down by the Court's decision, C-080. By international standards, the Colombian forestry law's participation provisions were up-to-date. The law began with a commitment to economically productive and sustainable forest management.⁸⁷ Furthermore, the law went on to commit the nation to the protection and development of rural communities⁸⁸ and to the study and sharing of traditional knowledge as "fundamental elements in the sustainable management of natural forests and the development of tree plantations."⁸⁹ Moreover, the law provided the following assurance: "[t]he State guarantees the right of indigenous and Afro-Colombian communities to make decisions freely, within the framework of the Constitution and the law, with respect to forestry activities of a sustainable character that they wish to apply in their territories."⁹⁰ The law also created a National Forestry Council comprised of state and private actors with forestry interests, as well as two representatives from each of the indigenous and Afro-Colombian populations, in addition to a number of other seats for representatives of the non-profit environmental and sustainable development activist communities.⁹¹ Additionally, Article 19, in conformity with other laws protecting minority rights, contained a specific requirement for a prior consult, of at least 12 months in advance, with Afro-Colombian and indigenous communities with respect to the "enjoyment, management, and use" of the forests.⁹²

⁸⁷ See Ley 1021 de 2006, abril 24, 2006 Diario Oficial [D.O.] 45.249, art. 2(1), (Colom.) (promising to prioritize the sustainable management of Colombia's forests while maintaining that any actions taken will be in line with international law).

⁸⁸ See *id.* art. 2(6) (detailing how the sustainable management plans will include a focus on maintaining and improving the living conditions for rural communities).

⁸⁹ *Id.* art. 2(7) ("[E]lementos fundamentales para el manejo sostenible de los bosques naturales y el desarrollo de plantaciones forestales.").

⁹⁰ *Id.* art. 2(10) ("El Estado garantiza el derecho de las comunidades indígenas y afrocolombianas a la libre toma de decisiones, dentro del marco de la Constitución y la ley, respecto de las actividades forestales de carácter sostenible que desearan emprender en sus territorios . . .").

⁹¹ *Id.* art. 7.

⁹² *Id.* art. 19 (reiterating the focus on the protection of indigenous and rural communities in regards to the use or management of forests in their territories).

If the goal of public hearings is to involve possibly affected populations, the prior Colombian law was arguably much stronger than many U.S. and European examples. In the U.S. context, there exists an over-reliance on “technical and scientific tools and norms” that fail to “recognize the complex social, political and ethical concerns embedded in many environmental and natural resource issues.”⁹³ This can result from adherence to a “tightly structured and open public process” that nonetheless, “[i]n practice . . . is frequently manipulated into announce-and-defend decision-making, in which meaningful outside input [from the potentially most-affected communities] is effectively stillborn.”⁹⁴ In the European context, a possible preference in public participation for larger and well-financed environmental interest groups to the exclusion of smaller, community-based interest groups likely leads, it has been observed, to the “dangers of capture and exclusion.”⁹⁵

Thus, the Colombian Constitutional Court’s rejection of the law’s relatively far-sighted public participation requirements is striking. Perhaps even more significantly, the complaint demonstrated that neither the executive nor the legislative branches of government had observed even the most minimal public consultation before promulgating the forestry law, a serious error because the law affected indigenous and minority communities directly.⁹⁶ Paradoxically, the elitist promulgation of the law, which ignored its basic requirements, resulted in a decision that puts in place an even more robust prior consult procedure that can be used to ensure an even more powerful voice for indigenous and ethnic minority Colombians.

Fifth, Decision C-080’s significance extends to its consistent intertwining of social, environmental, and natural resource

⁹³ Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 139, 141–42 (Kathryn M. Mutz et al. eds., 2002).

⁹⁴ *Id.* at 143.

⁹⁵ JANE HOLDER & MARIA LEE, ENVIRONMENTAL PROTECTION, LAW AND POLICY: TEXT AND MATERIALS 129 (2d ed. 2007).

⁹⁶ *See* Complaint, *supra* note 36.

Se solicita a la honorable Corte Constitucional que se declare la inexecutable de la totalidad de la Ley 1021 de 2006, por no haberse realizado consulta previa a las comunidades indígenas ni a los pueblos afrodescendientes durante el proceso de construcción de la iniciativa legislativa que condujo a la expedición de la Ley 1021 de 2006.

Id. § 1.2.

concerns. For the Colombian Constitutional Court, minority interests are more than central to the protection of national resource interests; they are indivisible from them.⁹⁷ The Court thus explained: “[t]he content of the general forestry law demonstrates an undeniable national interest, whose provisions affect, in a broad way, all Colombians, and in a specific way, a group of diverse sectors, who have a closer relation to forests and with forestry activities or are dependent on them.”⁹⁸ Therefore, the law fails not just because it directly and negatively affected the autonomy of indigenous and Afro-Colombian communities, but also because its application “could have repercussions over the forms of life in and over the close relationships that are maintained in the forest.”⁹⁹ Unlike the majority of U.S. environmental cases, which proceed from a premise in the negative of unequal environmental burdens, Decision C-030 advances a positive, inclusive vision of the *benefits* of applying environmental justice principles. For the Colombian Constitutional Court in Decision C-080, protecting minority rights acts to defend the rights of all.

Sixth, Decision C-030 provides a normative road map for the benefits of advance and inclusive environmental planning. It recognizes that short-term economic interests need to yield to long-term environmental consequences. For example, Decision C-030 suggests that a reformulated prior consult process would result in decisions that reduce rates of forest extraction today and promote other long-term goals that matter both for economic and environmental sustainability (including water resource protection and land stabilization to prevent erosion).¹⁰⁰ In addition, the Decision understands biodiversity protection as bearing upon the continued healthy development of human societies as well as being a value in its own right.¹⁰¹ As the Court acknowledged, this is not a trivial matter in the Colombian case since the nation contains an

⁹⁷ See Sentencia C-030/08, *supra* note 11, ¶ 5.3(a) (emphasizing that while the Forestry Act is important to all Colombians, it is of particular importance to industries and groups of people with close ties to the forest).

⁹⁸ *Id.*

⁹⁹ *Id.* ¶ 5.3(d).

¹⁰⁰ See Rômulo S.R. Sampaio, *Seeing the Forest for the Treaties: The Evolving Debates on Forest and Forestry Activities Under the Clean Development Mechanism Ten Years After the Kyoto Protocol*, 31 *FORDHAM INT'L L.J.* 634, 675 (2008) (emphasizing the possibility of negative long-term consequences such as increased erosion and problems with water supply).

¹⁰¹ See Sentencia C-030/08, *supra* note 11, art. 4, ¶¶ 3, 8, 13 (focusing on involving indigenous peoples in decisions that affect them).

estimated 14% of the world's biodiversity, the world's second highest number of species per land unit, and three times the number of avian species as in all of North America.¹⁰² Importantly, the Court acknowledged that forest protection plays a role in response to climate change, because forests are "carbon sinks."¹⁰³

Seventh, Decision C-080 implicitly makes the case that environmental, land use, and development policies need to be linked. A failure to include affected communities in exploitation of the forests where they have flourished will have consequences including, most likely, immigration to larger urban centers for work. Only by stemming urban migration can Colombia and other Latin American countries begin to reduce poverty and urban violence in cities ill-equipped to handle, and unable to productively employ, all of the new arrivals.¹⁰⁴

3. REFLECTIONS ON SECURING LAND USE AND ENVIRONMENTAL JUSTICE

As noted at the outset of this essay, environmental justice claims most typically focus on preventing harm to communities in the United States.¹⁰⁵ Decision C-080 charts a different path, providing a more ample conception of environmental justice that understands individuals and communities as existing on land and within the environment with a central role to play in their protection. In this way, Decision C-080 adopts the dominant U.S. view and demonstrates the extreme artificiality of the conception of environmental matters as federal, and land use questions as local.

¹⁰² *Country Profiles Page—Colombia*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/countries/?country=co> (last visited Mar. 3, 2010) (summarizing the components of biodiversity in Columbia's ecological system).

¹⁰³ Sampaio, *supra* note 100, at 638 (detailing how forests can store large amounts of carbon, but become problematic when disturbed because this leads to forests releasing the carbon instead of retaining it). See generally U.N. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SPECIAL REPORT: LAND USE, LAND USE CHANGE, AND FORESTRY SUMMARY FOR POLICYMAKERS (2000), available at <http://www.ipcc.ch/pdf/special-reports/spm/srl-en.pdf> (discussing the carbon cycle and how different forestry and land use practices affect standing carbon stocks and greenhouse emissions).

¹⁰⁴ Hernán Darío Correa, *Ordenamiento Territorial, participación social y manejo de áreas protegidas en medio de la crisis humanitaria y el conflicto armado en Colombia*, in REGIÓN, CIUDAD Y ÁREAS PROTEGIDAS: MANEJO AMBIENTAL PARTICIPATIVO 51, 61-64 (Felipe Cárdenas Támara et al. eds., 2005).

¹⁰⁵ See RECHSTAFFEN & GAUNA, *supra* note 1, at 329 (describing a program that provides data on every county in the United States and highlighting environmental justice implications).

In contrast to the view dominant in the United States, the Colombian Constitutional Court's Decision C-080 provides a bio-centric vision of environmental protection that understands human actors as one part of a more complex and dynamic system. Assuring justice in access to environmental benefits—what has been called here “positive” environmental justice—is thus a mechanism that does not merely defend individual or group rights for their own sake but also helps ensure the long-term sustainability and survivability of all people and all things. Decision C-080 does so with its repeated and emphatic linking of social and environmental concerns. This is quite unlike, for example, the refusal to recognize the way human beings interact with and affect the environment in a noted decision like the 2006 *Rapanos* case. In that case, writing for the plurality, Justice Scalia advanced a view of the hydrological cycle's functioning that no scientist would likely support.¹⁰⁶ By contrast, the Decision C-080's nuanced and layered attention to human-environmental reactions and the consequences of thoughtless environmental and land use management is encouraging not only for its defense of minority community rights but also because, as has been suggested above, the Decision understands that minority rights deserve protection because in so doing one defends larger goals of social and environmental stability.

¹⁰⁶ See *Rapanos v. United States*, 547 U.S. 715, 732–34 (2006) (tying the Clean Water Act's grant of jurisdiction to a dictionary definition of streams, rivers, oceans, and lakes, despite scientific evidence of the extensive interconnection over land and underground among water bodies).