If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and Their Role in Environmental Inequity

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IF YOUR GRANDFATHER COULD POLLUTE, SO CAN YOU: ENVIRONMENTAL “GRANDFATHER CLAUSES” AND THEIR ROLE IN ENVIRONMENTAL INEQUITY

Heidi Gorovitz Robertson*

I. INTRODUCTION: ENVIRONMENTAL GRANDFATHER CLAUSES AND ENVIRONMENTAL INEQUITY

When this country was struggling over voting rights, it adopted what are now called “grandfather clauses” to exclude certain groups from the democratic process.¹ Although various types of laws excluded people from voting,² a man could vote if his grandfather had been allowed to vote.³ Almost by definition, this excluded all black Americans, slave or free.

¹ The New Shorter Oxford English Dictionary defines “grandfather clause” as “a legislative clause exempting certain pre-existing classes of people or things from the requirements of a regulation.” 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1130 (3d ed. 1993). Between 1890 and 1910, 12 states enacted laws that, although they did not mention race, were used to prevent non-whites from voting. “[G]randfather clause[s]’ stipulated that no lineal descendent of any person qualified to vote on January 1, 1866, should be denied the right to vote.” Karen McGill Arrington, The Struggle to Gain the Right to Vote, in VOTING RIGHTS IN AMERICA: CONTINUING THE QUEST FOR FULL PARTICIPATION 30 (Karen McGill Arrington & William L. Taylor eds., 1992) [hereinafter VOTING RIGHTS]; see also LANI GUINIER, THE TYRANNY OF THE MAJORITY 8 (1994).

² Some of these laws required that a prospective voter pass a literacy test which excluded many non-whites from the voting process. VOTING RIGHTS, supra note 1, at 30. Even illiterate prospective voters, however, could vote if they qualified under a grandfather clause. Id. Other examples of exclusionary laws are those that imposed poll taxes as a prerequisite to voting rights. Id.

³ Clearly, “grandfather clauses” also discriminated against women, who could not vote consistently in this country until ratification of the Nineteenth Amendment to the United States Constitution. Although Congress passed the Nineteenth Amendment on
free, and anyone whose grandfather had not lived in this country. Just as grandfather clauses were discriminatory as applied to the voting laws in the nineteenth century, modern grandfather clause-like provisions have a similarly discriminatory impact in environmental laws today. Applied to modern environmental laws, a grandfather clause, in essence, says, "if your grandfather could pollute, so can you."

Grandfather clauses are common in the laws of this country. "In congressional jargon, a grandfather clause lets somebody who's already doing something keep doing it after Congress decrees it shouldn't be done anymore." As such, when a tough new law is proposed, affected industry lobbyists fight, often successfully, to exempt the existing industry from the new, presumably more stringent requirements. This is true, for

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June 4, 1919, the states did not fully ratify it until August 26, 1920. Voting Rights, supra note 1, at 32.

4. Id. at 30. "Grandfather clauses" exempted from rigid economic and literacy requirements those persons eligible to vote on January 1, 1866 and their descendants. This effectively barred all black Americans from the polls. The term is now applied more generally, to any kind of legal exemption based on prior status. Concise Columbia Encyclopedia 352 (3d ed. 1994); see also Frances Fox Piven & Richard A. Cloward, Why Americans Don't Vote 6 (1988) (recognizing the disenfranchisement of blacks and the poor at the beginning of the twentieth century).

5. With respect to voting rights, the Supreme Court ruled "grandfather clauses" unconstitutional in 1915. Guinn v. United States, 238 U.S. 347 (1915). In Guinn, the Supreme Court invalidated, under the 15th Amendment, an Oklahoma statute that imposed a literacy requirement on voters but contained a "grandfather clause" applicable to individuals and their lineal descendants entitled to vote on (or prior to) January 1, 1866. Id. at 362-68.

The judiciary has been called the most receptive branch of the U.S. government with respect to fostering the Civil War amendments. Charles V. Hamilton, The Civil War Amendments: The Second Constitution and the Evolving Political Struggle, in Voting Rights, supra note 1, at 79, 83. One major manifestation of this role is its overturning of the "grandfather clause" provisions that disenfranchised Americans who should have benefitted from the substantive rights the Civil War amendments provided. Id.

6. It actually might be more accurate, in the modern environmental example, to say "if you are a grandfather, you can pollute," because the environmental clauses apply to old, existing facilities, not to lineal descendants or any other "human" characteristic.

example, in banking, taxation, food and drug law, interior design, Medicaid, Congress' self-regulation, and baseball, as well as in environmental law. Grandfather clauses are even used in high-level international negotiations.

8. One "grandfather clause" under Virginia banking law allows a few Virginia banks to operate insurance divisions if they were doing so by the early 1970s. The law, however, barred other Virginia banks not involved in the insurance business at that time from selling insurance. See First Virginia Bank Acquires Fairfax Insurance Agency, WASH. POST, Aug. 12, 1991, at Wash. Bus. 7.

9. See, e.g., Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986). The Tax Reform Act of 1986 provides two methods for reporting a lump-sum distribution. Persons meeting an age requirement may choose the better of the two forms. Persons allowed to make this choice, by virtue of a "grandfather clause" are those who were 50 years old on January 1, 1986, or at least 59 1/2 in 1987. Id. § 1122(h)(3)(C)(i), 100 Stat. at 2471. The choice for how to report a lump sum distribution "appl[ies] to any lump sum distribution ... received by an individual who has attained age 50 before Jan. 1, 1986." Id.; see also E.M. Abramson, IRS Again Postpones Mandatory IRA Withdrawal Requirement, WASH. POST, Jan. 26, 1987, at Wash..Bus. 53 (discussed in a financial question and answer column).

10. The Food and Drug Administration, until recently, could not regulate silicone breast implant devices because they were introduced in 1962, and thus protected from FDA regulation under a "grandfather clause." Malcolm Gladwell, FDA Set To Begin Hearings On Silicone Breast Implants, WASH. POST, Feb. 17, 1992, at A1, A6. This clause allowed companies to continue to sell existing devices. Id. at A6. Despite the grandfather clause, the FDA could ask for product safety data whenever it desired, and in the case of silicone breast implants, the FDA did not ask for this information until 1990. Id.; see 58 Fed. Reg. 3436 (1993).


14. Even the Major League Players Association has tried to make use of "grandfather clauses" to protect the incomes of its players. The league owners, after seeking to institute a salary cap, proposed to phase in a salary cap in a way that "grandfathers" players currently in Major League Baseball. Richard Justice, Baseball Closer To A Strike, WASH. POST, June 9, 1994, at D1, D7.

15. While negotiating an arms reduction treaty with Mikhail Gorbachev in 1990, then Secretary of State James Baker turned to Mr. Gorbachev and said: "'You got a deal and we close ALCMs, provided Tacit Rainbow is grandfathered.' " Lewis H. Diuguid, Declaring War On Plain English, WASH. POST, Sept. 2, 1990, at B2. Mr. Baker was seeking to exempt "Tacit Rainbow", a now-defunct Pentagon weapons program, from the agreement. Id.
In the environmental arena, these laws make it much easier for companies or municipalities to expand older, existing facilities than to create new ones.\textsuperscript{16} They also make it significantly more difficult for opponents to shut down an existing facility than to block the siting or construction of a new one.\textsuperscript{17} But most troubling for the environmental justice movement, which in part seeks to distribute environmental risk more equitably, grandfather clauses make it difficult to reduce the risk presented by polluting facilities currently located in low-income minority communities.\textsuperscript{18}

By “environmental grandfather clause”, this Article refers to all environmental law provisions or principles that create virtual “safe havens” for existing polluting facilities by exempting them from the stringent environmental standards applicable to new facilities. Although usually not explicitly called grandfather clauses,\textsuperscript{19} some provisions in the environmental laws work like the voting rights grandfather clauses in the late nineteenth century, protecting something because it existed at an earlier date. Because some polluting facilities were already constructed or operational at the time of enactment of certain environmental provisions, grandfather clauses exempt them from the requirements of the enactment.

Environmental grandfather clauses make it easier, and legal, for existing facilities to pollute at higher, more dangerous levels than newer


\textsuperscript{17} Id.

\textsuperscript{18} Robert D. Bullard, \textit{The Threat of Environmental Racism}, NAT. RESOURCES \& ENVR’T, Winter 1993, at 23. This Article assumes that the environmental justice movement’s goal in attempting to distribute environmental risk more equitably is not merely to move polluters to other neighborhoods, but also to reduce overall environmental risk, and in doing so, to make the level of risk to which low-income communities are exposed more similar to that to which non-minority communities are exposed. \textit{Id.} This Article will not attempt to address all of the potential solutions to the problem of grandfather clauses. Administrative solutions may be a topic for a later Article, but are beyond the scope of this one.

\textsuperscript{19} Environmental grandfather clauses are not referred to as such within the environmental statutes and are rarely referred to as such elsewhere. \textit{But see, e.g.}, Idaho Dept. of Health and Welfare v. United States Dept. of Energy, 959 F.2d 149, 150, 152 (9th Cir. 1992); Vineland Chem. Co., Inc. v. Environmental Protection Agency, 810 F.2d 402, 404 (3d Cir. 1987); Environmental Protection Agency v. Environmental Waste Control, Inc., 710 F. Supp. 1172, 1182 (N.D. Ind. 1989); General Motors Corp. v. Dept. of Natural Resources, 472 N.W.2d 49, 51 (Mich. Ct. App. 1991); Fletcher Gravel Co., Inc. v. Jorling, 583 N.Y.S.2d 329, 331 (N.Y. App. Div. 1992), in which courts refer to various provisions within environmental laws as “grandfather clauses” or to facilities benefiting from these provisions as “grandfathered facilities.”
facilities. Older facilities may also continue to operate in their existing locations, even where current siting regulations would not allow them to locate there if they were new. In fact, "EPA found that about seventy percent of all land-based [hazardous waste] treatment, storage, and disposal facilities would fail the EPA's current siting criteria for protecting groundwater." By allowing older facilities to operate under less stringent environmental regulation, environmental grandfather clauses substantially hamper communities located near existing facilities in their attempts to improve environmental quality in their neighborhoods.

Sociologists, lawyers, scientists, and the general public have begun to notice that hazardous waste generating facilities, hazardous waste landfills, hazardous waste incinerators and many other major sources of pollution and environmental risk are located disproportionately in low-income communities. Studies have also shown that of the low-income neighborhoods chosen as sites for polluting facilities, low-income neighborhoods of Hispanics and African-Americans are chosen most frequently.

21. Id. at 1099. For example, Radiac Research Corp., a commercial hazardous and low-level radioactive waste facility, has been located at the same site for many years. The area is now a largely residential area in Brooklyn, New York. But, because the facility has been located and operating there for so long, it is allowed to remain there and to continue to operate. See id.; see also infra notes 111-22 and accompanying text (giving examples of grandfathered sites).
22. Gerrard, supra note 16, at 1099 (internal citations omitted).
24. This point is somewhat controversial and has been debated in several fora. See, e.g., U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 1, 3 (1983) [hereinafter GAO REPORT] (stating that of the four offsite hazardous waste landfills in the Southeast, African-Americans make up the majority in three of the communities); COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES xiii (1987) [hereinafter UCC REPORT] (recognizing that race is a significant factor in the location of hazardous waste facilities); Robert D. Bullard, Solid Waste Sites and the Black Houston Community, 53 SOC. INQUIRY 273 (1983) [hereinafter Solid Waste Sites]; Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality (1990); see also Vicki Been, What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses, 78 CORNELL L. REV. 1001, 1009-10 (1993).

Robert Bullard's original study, in 1978, was the first extensive research connecting environmental hazard to race. Bullard studied Houston's state permitted landfills and found that five of the six facilities were located in African-American neighborhoods. Solid Waste Sites, supra, at 281-82. The GAO Report found that three of the four major hazardous waste landfills in the South were located in predominantly African-American communities, well below the poverty line. GAO REPORT, supra, at 1. The study that resulted in the UCC Report was a nationwide study of the distribution of hazardous waste sites to deter-
Moreover, studies have also confirmed that a substantial disparity exists between the federal government's diligence in environmental enforcement and cleanup in minority communities\textsuperscript{25} as compared to its efforts in non-minority communities.\textsuperscript{26} Specifically, government officials impose.

mine whether the pattern unearthed in the GAO Report was true nationwide. UCC Report, supra, at xii. The UCC Report found that race is the single best predictor of where commercial hazardous waste facilities will be located, and asserts that it is virtually impossible that this occurs by chance. Id. at xiii; see also Mohai & Bryant, supra note 23, at 927. The Mohai and Bryant study showed that, in the Detroit area, members of racial minority groups are four times more likely to live in close proximity to a commercial hazardous waste facility than are caucasian people. Id. Like the UCC Report, Mohai and Bryant tested for predictors of powerlessness, such as race, low-income and housing cost, and found that race best predicted proximity to an environmental hazard. Id. at 923-25.

Vicki Been has argued that these studies did not provide an accurate picture of where hazardous waste facilities are actually sited or how their sites were chosen. Vicki Been, Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?, 103 Yale L. J. 1383, 1384 n.2 (1994) [hereinafter Disproportionate Siting]. She writes that the previous studies and literature addressing this problem are simplistic because they assume that a siting pattern is disproportionate whenever the percentage of people of color in a host community is higher than the percentage of people of color in the nation's population or in the population of non-host communities. Id. She argues that the Bullard study, and others, do not show "that the host communities were disproportionately minority or poor at the time the [waste] sites were selected." Id. at 1384.

The major studies concluding that siting decisions were at worst discriminatory, but at least racially disproportionate are bolstered by a number of local studies reaching the same conclusions. See id. at 1393 n.40 (citing numerous local studies reaching similar conclusions).

Two recently released studies challenge previous claims of race-based industry siting decisions. One study concluded that commercial hazardous waste treatment facilities are more likely to be sited in working-class white neighborhoods than in minority communities. Douglas L. Anderton et al., Environmental Equity: The Demographics of Dumping, in Demography, May, 1994, at 229. The second study claims that research does not support claims of discriminatory industrial siting policies. Christopher Boerner & Thomas Lambert, Environmental Justice? 4-6 (Center for the Study of American Business, Policy Study No. 121, 1994).

25. By "minority" community, this Article refers to communities of racial minority groups, specifically, those in which Hispanics and/or African Americans are the predominant racial group. See Clean Sites, Inc. Hazardous Waste Sites and the Rural Poor: A Preliminary Assessment vi (1990) [hereinafter "Clean Sites"]; UCC Report, supra note 24, at xiv; see also Patricia J. Williams, Alchemical Notes: Reconstructing Ideals From Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 404 n.4 (1987) (discussing problems with the term 'minority' as used to refer to African-American, Hispanic and other groups of people of color).

26. Marianne Lavelle & Marcia Coyle, Unequal Protection: The Racial Divide in Environmental Law, Nat'l L.J., Sept. 21, 1992, at S2; see also Clean Sites, supra note 25, at 50-51 (concluding that hazardous waste sites in rural counties were more likely to be cleaned up than those in other counties, but failing to address the racial variable in the analysis); Lazarus, supra note 23, at 818-19; Rae Zimmerman, Social Equity and Environmental Risk, 13 Risk Analysis 649, 649, 664 (1993) (finding that with respect to inactive hazardous waste disposal sites on the NPL, communities with relatively higher percentages of
higher penalties on violators of environmental regulations when the viola-
tions occur in non-minority communities than when similar violations
occur in minority neighborhoods.27

The fact that low-income minority communities host a disproportionate
number of polluting facilities suggests that these communities also bear a
disproportionate burden of the environmental risk that accompanies
those facilities.28 Environmental justice29 advocates have attempted to
remedy this apparent disparate distribution of environmental risk, pri-
marily by bringing lawsuits to block the construction of new polluting
facilities in low-income, minority communities.30 Groups have brought

racial minority populations have fewer clean up plans than other communities with NPL
sites); but see John A. Hird, Environmental Policy and Equity: The Case of Superfund, 12 J.
POL'Y ANALYSIS & MGMT 323, 337 (1993) (finding no relationship between the speed with
which sites are cleaned up and the host county's socioeconomic or racial characteristics);
Georgia: State Report Looks at Waste Site Fines, Finds No Discrimination in Minority Ar-
eas, 24 ENV'T REP. (BNA) No. 6, at 284 (June 11, 1993).

27. Lavelle & Coyle, supra note 26, at S2. This point is critical to the problem of
inequitable distribution of environmental risk. Although this Article focuses on the role of
the legislative tool of grandfather clauses, equity in enforcement could substantially reduce
the current inequities in environmental risk.

28. Marianne Lavelle, An Industrial Legacy, Nat'l L.J., Sept. 21, 1992, at S3 (discuss-
ing the health effects of pollution of an African-American community on Chicago's South
Side). Studies have shown that the effects of any disproportionate exposure to environ-
mental risk suffered by minority communities would be exacerbated by the substandard
health care, poor eating habits, hazardous occupations, and high consumption of cigarettes,
alcohol and illegal drugs found in those communities. ENVIRONMENTAL PROTECTION
AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 11 (1992);
Regina Austin & Michael Schill, Black, Brown, Poor & Poisoned: Minority Grassroots En-

29. This Article uses the term "environmental justice" to refer to the movement that
seeks to remedy the disproportionate burden of environmental risk and harm currently
and historically borne by low-income minority communities. The terms "environmental
equity" and "environmental racism" are often used to refer to the same movement and will
be used interchangeably throughout this Article. The author finds the term "environmen-
tal equity" the least inflammatory and therefore perhaps the most useful of the terms, but
recognizes the validity and importance of the others in appropriate circumstances. See
Karl Grossman, From Toxic Racism to Environmental Justice, E: THE ENVTL. MAG., May-
June 1992, at 31; see also, Richard Lazarus, The Meaning and Promotion of Environmental
Justice, 5 MD. J. CONTEMP. LEGAL ISSUES 1 (1994) (defining the origins and objectives of
'environmental justice'); Michel Gelobter, The Meaning of Urban Environmental Justice,
21 FORDHAM URB. L.J. 841, 844 (1994) (distinguishing between "environmental racism"
and "environmental justice").

30. Been, supra note 24, at 1005 n.13 (citing Community Alliance for the Env't v.
Dinkins, No. 400080/93 (N.Y. Sup. Ct., New York County, filed Feb. 25, 1993) (alleging
violation of environmental and zoning laws in an incinerator siting decision)). Environ-
mental justice advocates have also lobbied Congress and other legislative bodies seeking
the enactment of laws regulating distribution of environmental risk. Id. at 1005. For ex-
ample, environmental justice advocates in New York City were instrumental in pushing the
legislature to pass the "fair share" law, which requires that each of the City's five boroughs
bear its fair share of the City's undesirable sitings. Id. Other states are considering similar
such suits using civil rights, equal protection, and environmental law approaches. To date, however, the civil rights and equal protection attempts have been largely unsuccessful. Only the environmental law-based approaches have succeeded in delaying, and occasionally preventing, the construction of new polluting facilities.

Consequently, many environmental justice lawsuits attempt to use environmental laws to block the construction of new polluting facilities which, because they are new, would be subject to the most stringent environmental standards to date. At the same time, many polluting facilities already located in low-income minority communities have been there for legislation. See id. (citing examples of contemplated state legislation requiring guidelines in siting decisions).


32. El Pueblo Para el Aire y Agua Limpio v. County of Kings, 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Cal. Super. Ct. Sacramento County, Dec. 30, 1991). In this case, involving an allegation that the decision to cite an incinerator in a predominantly Hispanic neighborhood violated the California Environmental Quality Act and other laws, the court held that an environmental impact report and other environmental review documents for a proposed hazardous waste incinerator should have been translated into Spanish, the primary language of the surrounding community. Id. at 20,357-58; Been, supra note 24, at 1005 n.13.

33. See Gerrard, supra note 16, at 1129. These attempts have failed, in part, because plaintiffs could not prove a discriminatory intent or purpose, which is required to maintain a successful civil rights or equal protection challenge. Id.; see Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (noting that “[r]espondents simply failed to carry their burden of proving that discriminatory purpose was not a motivating factor”).

decades,\textsuperscript{35} and because of environmental grandfather clauses, are entitled to remain there, often subject to less stringent environmental standards.

This Article argues that lawsuits to block the siting or construction of new facilities, even when successful, are of limited utility, partly because communities plan very few new polluting facilities. Serious pollution and environmental harm already exist in the neighborhoods at issue, and litigation to stop new polluting facilities does not improve the existing environments. This Article suggests that environmental justice advocates employ an alternative approach to achieving environmental equity. Specifically, they should attempt to minimize or eliminate the benefits and protections that environmental grandfather clauses confer on older polluting facilities. This approach, if successful, would not only promote more equitable regulation of polluting facilities, but could also improve the quality of the environment in low-income minority communities.

Because it is a goal of the environmental justice movement to improve the quality of the environment in low-income, minority communities,\textsuperscript{36} environmental justice advocates should address the older grandfathered facilities that currently cause the most environmental damage to their neighborhoods. Environmental justice advocates should work to reduce or eliminate the benefits and protections environmental grandfather clauses confer on older polluting facilities. If successful, this would subject older facilities to more stringent standards, and perhaps decrease or stop the further accumulation of pollution from those facilities. In addition, it would create a more balanced and equitable regulatory scenario for all communities and industries.

Although this Article is premised on the argument that environmental grandfather clauses have had a disproportionate and adverse impact on low-income minority communities, the inequities caused by environmental grandfather clauses would exist regardless of race. Environmental grandfather clauses create inequitable regulation of similar facilities based solely on the age of the facility. This inherent inequity in the regulation of polluting facilities due to environmental grandfather clauses, would exist regardless of the racial or demographic makeup of surrounding communities. So, even if race were not an issue, one should still ques-

\textsuperscript{35} In 1992, one environmental policy analyst surmised that “[i]t is probably possible to count on one hand the number of new facilities successfully sited in the United States over the past 10 years.” \textit{1 Kent E. Portney, Controversial Issues in Environmental Policy} 153 (1992). In fact, only one of the 21 currently operating commercial hazardous waste landfills is located on a site selected since RCRA was enacted in 1976. Gerrard, \textit{supra} note 16, at 1098-99.

tion the use of grandfather clauses to give preference or protection to older facilities.

This Article examines the language and operation of specific provisions that amount to grandfather clauses in the Resource Conservation and Recovery Act (RCRA), the Clean Air Act, land use and zoning law, and certain state provisions. It will illustrate how each of these systems of environmental regulation allows older polluting facilities to remain in operation, subject to less stringent regulation than is applicable to new facilities, thereby inflicting greater amounts of pollution on the neighborhoods in which they are located. This Article will discuss the reasons lawmakers use grandfather clauses both in general and in


39. This Article will address one example of grandfathering under New York’s Environmental Conservation Law. See infra notes 111-22 and accompanying text (discussing BDT). Many other state provisions, not addressed in this Article also contain environmental grandfather clauses. See, e.g., New York’s State Environmental Quality Review Act (SEQRA), which exempts from compliance any action undertaken or approved prior to the statute’s effective date, N.Y. ENVTL CONSERV. LAW § 8-011.5(a) (McKinney 1984), and Maine’s Hazardous Waste Sewage and Solid Waste Management Act, Me. Rev. Stat. Ann. tit. 38, § 1308 (West 1989), which allows facilities in existence on October 3, 1973 to continue to operate without complying with the statute’s provisions regarding location, establishment and construction of solid waste disposal facilities. This law does not, however, exempt such facilities from complying with regulations regarding alteration or operation. Dept. of Env’t Protection v. Emerson, 563 A.2d 762, 768-69 (Maine 1989); see also Fla. ADMIN. CODE ANN. r. 62-701.330(1) (1990) (Florida’s landfill requirements); N.Y. COMP. CODES R. & REGS. tit. 6, § 201.6(r), (y) (1966) (New York state’s air pollution regulations).

40. While other federal laws also include provisions that function as environmental grandfather clauses, this Article does not attempt to address each one. Instead, this Article attempts only to illustrate the operation and effects of such clauses by discussing three representative examples. Other examples include: The Clean Air Act’s solid waste combustion rule, 42 U.S.C. § 7429(b); the Clean Water Act’s rules for publicly-owned treatment works, 33 U.S.C. § 1311(b)(1)(B) (1988); the National Environmental Policy Act’s environmental impact statement requirements, 42 U.S.C. §§ 4321-4370(a); restrictions on trade in endangered species, 16 U.S.C. § 1539(b)(1) (1988); the designation of areas suitable for mining under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1272(a)(6) (1988); the EPA’s regulations on municipal solid waste landfills, 40 C.F.R. § 258.16(a) (1994); the Clean Water Act provisions which provide authorization for the Army Corps of Engineers’ policy of grandfathering prior wetlands determinations, 33 U.S.C. § 404; 5 U.S.C. § 702; and the regulations set forth under the Hazardous Materials Transportation Act, 49 C.F.R. § 173.23 (1994). A comprehensive review of these provisions is beyond the scope of this Article.

41. The EPA has determined that older municipal solid waste facilities pose the greatest health and environmental threat as compared to similar new facilities. Solid Waste Disposal Facility Criteria, 53 Fed. Reg. 33,314, 33,319 (1988). Note that in addition to causing harm where they are located, many facilities emitting water or air pollutants also cause environmental damage in downstream or downwind localities. Id. at 33,314.
environmental laws. It will discuss the role of fairness in arguments for the creation of grandfather clauses, and in arguments for reducing or eliminating the benefits and protections they confer on older sources of pollution. Finally, it will propose some suggestions for eliminating grandfather clauses, or reducing or amortizing grandfathered benefits. This Article will demonstrate that eliminating or reducing grandfathered protectionism can lead to the cleaning up or shutting down of polluting facilities, and potential environmental improvement for communities.

II. THREE EXAMPLES OF ENVIRONMENTAL GRANDFATHER CLAUSES


RCRA, the major federal law governing the generation, treatment, storage, transportation and disposal of hazardous waste, was intended to be a “cradle to grave” regulatory system to track hazardous waste from creation to disposal.\(^{42}\) However, RCRA includes two significantly different regulatory systems within its regulation of hazardous waste treatment, storage, or disposal facilities (TSDFs). Congress did not require certain existing TSDFs to meet the tougher new siting and technology standards it created.\(^{43}\) Instead, Congress created a separate system within RCRA, known as "interim status", through which older facilities were allowed to operate without complying with the tough standards and operating permit requirements applicable to similar new facilities.\(^{44}\) Referring to the marked disparity in regulatory stringency, one commentator has called

\[^{42}\] For a comprehensive, practical look at RCRA regulatory requirements, see Sue M. Briggum et al., Hazardous Waste Regulation Handbook: A Practical Guide to RCRA and Superfund (1985) (providing, in outline form, a straightforward, practical look at RCRA requirements).


\[^{44}\] Id.; see General Motors Corp. v. Dept. of Natural Resources, 472 N.W.2d 49, 50-51 (Mich. Ct. App. 1991) (per curiam) (stating that “[i]nterim status is merely a statutorily conferred grandfather provision which allows a facility to continue operations until a permit is issued”).

Municipal solid waste facilities are regulated under RCRA, Subtitle D, and hazardous waste TSDF facilities are regulated under RCRA Subtitle C. There are some significant distinctions between the regulatory processes applicable to these two different types of facilities, indicating that although both are eligible for interim status, the applicable rules are different. Under RCRA, older facilities regulated by Subtitle C, the hazardous waste facilities, are more stringently controlled than those subject to Subtitle D, the municipal solid waste facilities. See Kristen Engel, Environmental Standards as Regulatory Common Law: Toward Consistency in Solid Waste Regulation, 21 N.M. L. REV. 13, 23 (1990).
this distinction in RCRA "the old and soft regime as distinguished from the new and the hard."\(^{45}\)

In RCRA, Congress required EPA to promulgate regulations requiring new and existing hazardous waste TSDFs to obtain a RCRA operating permit.\(^{46}\) However, the law also allows a hazardous waste facility, which otherwise would be subject to the RCRA permit requirement, to operate as if it has a permit if the facility existed on November 19, 1980, or was in existence on the effective date of the statutory or regulatory changes rendering the facility subject to RCRA permit requirements.\(^ {47}\) The facility is allowed to operate as if it has a RCRA permit "until such time as final administrative disposition of [its] application is made."\(^ {48}\) In other words, a qualifying permitless facility is allowed to operate under interim status until EPA makes a final decision on its pending RCRA permit application.\(^ {49}\) Interim status is supposed to be a "temporary condition intended by Congress to enable existing facilities to continue while their permanent permit application is pending. It is a stage prior to the issuance or denial of a permit."\(^ {50}\)

More specifically, existing TSDFs which file a short, initial (Part A) application and meet certain minimal requirements are granted "interim

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47. RCRA § 3005(e)(1), 42 U.S.C. § 6925(e)(1) (1982 & Supp. II 1984). This is a classic example of an environmental "grandfather clause":

(e) Interim status—(1) Any person who—(A) owns or operates a facility required to have a permit under this section which facility—(i) was in existence on November 19, 1980, or (ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section, (B) has complied with the requirements of [Subsection 3010(a)], and (C) has made an application for a permit under this section shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. This paragraph shall not apply to any facility which as been previously denied a permit under this section or if authority to operate the facility under this section has been previously terminated.

Id.

48. Id.
50. Id. at 136 (citing Hempstead County & Nevada County Project v. Environmental Protection Agency, 700 F.2d 459, 461-62 (8th Cir. 1983) (holding that interim status is not something "issued" by the Administrator, but rather a "statutorily conferred grandfathering provision which allows a facility to continue until a permit is issued"); see Vineland Chemical Co. v. Environmental Protection Agency, 810 F.2d 402, 404 (3d Cir. 1987).
status," allowing them to continue to operate at lower environmental standards than new TSDFs.51 To continue operating under interim status for longer than twelve months, existing TSDFs also must file a longer, more comprehensive (Part B) application, asking EPA to make a final determination on its permit application.52 But for the interim status provisions, most of these existing facilities would be operating in clear violation of the new, more stringent, requirements for the siting and operation of hazardous waste facilities. This is because lower standards apply to TSDFs with interim status than to those operating under regular RCRA permits.53

One fundamental problem with this system is that the applicant facility may continue to operate under the less stringent interim status standards until EPA either issues or denies the applicant's request for a final permit.54 This has caused a de facto lowering of standards, because "most facilities are currently operating under interim status."55 Because most facilities are operating under interim status, and low-income, minority communities host a greater proportion of hazardous or solid waste landfills, these communities are located near many facilities operating under a less-stringent system of regulation than is applicable to newer facilities.56

This section sets forth and explains the interim status and RCRA-permit regulations applicable to hazardous waste incinerators to demonstrate how RCRA's interim status provisions amount to an environmental grandfather clause. It will then discuss the reasons Congress may have created the interim status system. Finally, it will use the example of a hazardous waste facility in New York state to show that environmental grandfather clauses exist in hazardous waste law at both the state and federal level.

51. RCRA § 3005(e), 42 U.S.C. § 6925(e).
52. RCRA § 3005(e), 42 U.S.C. § 6925(e)(2).
56. Id. at 551 (expressing that one way to reduce or eliminate the inequities in the regulation of polluting facilities created by the interim status provisions is to push the EPA to act on permit applications). Although this would certainly eliminate the negative impact of RCRA's grandfather clause, it does not address the more basic problem of grandfathering in the environmental laws. See id.
I. Interim Status Standards v. Final RCRA Permit Standards: The Example of Hazardous Waste Incinerators

As an example of the two-tiered system of environmental control within RCRA, this section examines the interim status regulations for hazardous waste incinerators, and compares them to the final RCRA permitting standards for the same type of facility. Facilities not qualifying for interim status must obtain a permit to operate under RCRA and comply with the operating requirements applicable to RCRA-permitted facilities. To qualify for interim status, a hazardous waste incinerator must qualify as an "existing hazardous waste management facility." It must also make a required notification to EPA regarding its treatment, storage, or disposal of hazardous waste and file an initial (Part A) application for a RCRA operating permit. While operating under interim status, a hazardous waste facility may not treat, store, or dispose of any hazardous waste not listed in its initial application, employ processes other than those specified, or exceed the design capacity specified in its application. It may, however, submit a revised application to change the scope of its permit to include these actions if necessary.

a. RCRA Permitted Hazardous Waste Incinerators

Owners of hazardous waste facilities that do not qualify for interim status and are not otherwise exempt from the RCRA operating permit requirements must perform extensive waste analyses on their facili-
ties.\textsuperscript{67} They must test the output of their facilities by performing periodic trial burns according to a detailed plan to verify that the waste going into the incinerator "waste feed" is within the physical and chemical composition parameters specified in the facility's permit.\textsuperscript{68} In addition, prior to obtaining their operating permits, these facilities had to have done an extensive waste analysis to qualify for the permit.\textsuperscript{69} To qualify for a hazardous waste incinerator permit, owners of hazardous waste incinerators must also satisfy the EPA that their facilities are capable of complying with specific performance standards and operating conditions set forth in the regulations.\textsuperscript{70}

To assist EPA in determining what standards should apply to a particular facility, owners of hazardous waste incinerators must submit suggested permit conditions.\textsuperscript{71} They must also prepare and propose a trial burn plan including: an analysis of each waste or mixture of wastes to be burned,\textsuperscript{72} a detailed engineering description of the incinerator,\textsuperscript{73} a de-

\begin{itemize}
\item \textsuperscript{67} 40 C.F.R. § 264.341 (1995).
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id. (stating that Part B permit holders must have produced an analysis of the waste feed sufficient to provide all information required by 40 C.F.R. §§ 270.62(b) or 270.19); 40 C.F.R. § 270.62 (1995) (setting forth extensive conditions applicable to permits for hazardous waste incinerators).
\item \textsuperscript{70} 40 C.F.R. § 270.62(a)(2), (b) (1995). The applicable performance standards and operating conditions are at 40 C.F.R. §§ 264.343, 264.345 (1995).
\item \textsuperscript{71} 40 C.F.R. § 270.62(a)(1) (1995) (stating that minimum suggested permit conditions must include suggested restrictions on waste constituents, waste feed rate and operating parameters).
\item \textsuperscript{72} 40 C.F.R. § 270.62(b)(i) (1995). This analysis must include the "[h]eat value of the waste in the form and composition in which it will be burned," the "[v]iscosity . . . or description of the physical form of the waste . . . [a]n identification of any hazardous organic constituents present in the waste," and "[a]n approximate quantification of the hazardous constituents identified in the waste." Id.
\item \textsuperscript{73} 40 C.F.R. § 270.62(b)(2)(ii) (1995). The detailed engineering description must include:
\begin{itemize}
\item (A) Manufacturer's name and model number of the incinerator (if available).
\item (B) Type of incinerator.
\item (C) Linear dimensions of the incinerator unit, including the cross sectional area of the combustion chamber.
\item (D) Description of the auxiliary fuel system type/feed.
\item (E) Capacity of the prime mover.
\item (F) Description of the automatic waste cut off system(s).
\item (G) Stack gas monitoring and pollution control equipment.
\item (H) Nozzle and burner design.
\item (I) Construction materials.
\item (J) Location and description of temperature, pressure, and flow indicating and control devices.
\end{itemize}
\end{itemize}

\textsuperscript{Id.}
scription of the procedures the plant will use to sample and monitor its waste,\textsuperscript{74} a test schedule for each waste for which the trial burn is planned,\textsuperscript{75} a test protocol,\textsuperscript{76} a description of, and proposed operating conditions for emission control equipment which will be used to control the plant's output,\textsuperscript{77} "[p]rocedures for rapidly stopping waste feed, shutting down the incinerator, and controlling emissions in the event of a malfunction,"\textsuperscript{78} and other information necessary to determine whether the trial burn plan is satisfactory.\textsuperscript{79} Based on the information EPA receives from the waste analysis data, EPA will create trial Principle Organic Hazardous Constituents (POHCs).

POHCs are those ingredients in the trial burn for which the plant must calculate destruction and removal efficiencies—basically, a determination of how well the incinerator is actually breaking down the waste.\textsuperscript{80} The facility's operating permit specifies the principal POHCs,\textsuperscript{81} and the plant must treat them in accordance with performance standards applicable to regular RCRA-permitted hazardous waste incinerators (those not operating under interim status).\textsuperscript{82} In addition, throughout the normal operation of the incinerator, owners must continue testing the waste to verify that it is within the physical and chemical composition limits specified in the facility's permit.\textsuperscript{83}

A RCRA-permitted incinerator must meet the operating requirements set forth in its operating permit.\textsuperscript{84} During start-up and shut-down of the facility, operators may not feed hazardous waste into the incinerator un-

\begin{itemize}
\item \textsuperscript{74} 40 C.F.R. § 270.62(b)(2)(iii) (1995).
\item \textsuperscript{75} 40 C.F.R. § 270.62(b)(2)(iv) (1995) (including the date(s), duration, and quantity of waste to be burned).
\item \textsuperscript{76} 40 C.F.R. § 270.62(b)(2)(v) (1995) (stating that the test protocol must include "the ranges of temperature, waste feed rate, combustion gas velocity, use of auxiliary fuel, and any other relevant parameter that will be varied to affect the destruction and removal efficiency of the incinerator").
\item \textsuperscript{77} 40 C.F.R. § 270.62(b)(2)(vi) (1995).
\item \textsuperscript{78} 40 C.F.R. § 270.62(b)(2)(vii) (1995).
\item \textsuperscript{79} 40 C.F.R. § 270.62(b)(2)(viii) (1995).
\item \textsuperscript{80} 40 C.F.R. § 270.62(b)(4) (1995).
\item \textsuperscript{81} 40 C.F.R. § 264.342(b)(1) (1995).
\item \textsuperscript{82} 40 C.F.R. § 264.243(a) (1995). The performance standards applicable to hazardous waste incinerators are complicated, and in most cases require that the incinerator "achieve a destruction and removal efficiency (DRE) of 99.99% for each [POHC] designated . . . in its permit for each waste feed." 40 C.F.R. § 264.343(a)(1) (1995).
\item \textsuperscript{83} 40 C.F.R. § 264.341(b) (1995).
\item \textsuperscript{84} 40 C.F.R. § 264.345(a), (b) (1995) (stating that operating requirements are determined on a "case-by-case basis" based on the results of trial burns and other data). "Each set of operating requirements will specify the composition of the waste feed (including the physical or chemical properties composition of the waste feed)." \textit{Id}. Permits will also include operating conditions that include operating limits on "[c]arbon monoxide (co) level in the stack exhaust; [w]aste feed rate; [c]ombustion temperature; [a]n appropriate indica-
Environmental “Grandfather Clauses”

less it is functioning within its operating conditions. Facilities must control the fugitive emissions—those emissions from the incinerator that escape uncontrolled into the environment, and operate with a functional system to cut-off the feeding of waste to the incinerator automatically when operating conditions deviate from prescribed limits. “An incinerator must cease operation when changes in waste feed, incinerator design or operating conditions exceed” or otherwise violate permitted conditions or limits.

RCRA permitted incinerators are also subject to some additional inspection and reporting requirements. For example, owners must subject incinerators and associated equipment “to thorough visual inspection, at least daily, for leaks, spills, fugitive emissions, and signs of tampering.” Also, “[t]he emergency waste feed cutoff system and associated alarms must be tested at least weekly to verify operability,” and all of this monitoring and inspection data must be recorded with the records placed in the incinerator’s operating log.

b. Interim Status Hazardous Waste Incinerators

Like similar facilities functioning under RCRA operating permits, hazardous waste incinerators operating under interim status must also perform certain waste analysis functions. They must perform the general waste analysis applicable to all interim status facilities. This analysis includes obtaining a chemical and physical evaluation of a representative sample of the wastes which, at a minimum, must contain all the information of combustion gas velocity; allowable variations in incinerator system design or operating procedures.”

86. 40 C.F.R. § 264.345(d) (1995) (stating that facilities must control fugitive emissions from the combustion zone by maintaining a totally sealed combustion zone, keeping the combustion zone pressure lower than atmospheric pressure, or by providing equivalent control).
89. 40 C.F.R. § 264.347(a) (1995). Owners must monitor, at a minimum, combustion temperature, waste feed rate, and the indicator of combustion gas velocity as specified in the permit. Id. Owners must monitor “CO on a continuous basis at a point in the incinerator downstream of the combustion zone and prior to the release into the atmosphere.” Id. Owners must, upon the request of EPA, conduct sampling and analysis of the waste and exhaust emissions to verify compliance with performance standards. Id.
tion needed to treat, store, or dispose of the waste. The owner must repeat this analysis, as necessary, to keep it current. Owners must inspect and, if necessary, analyze hazardous waste received at the incinerator to determine whether it matches the manifest with which it arrived. The owner must also follow a written waste analysis plan, which describes the procedures for carrying out the analysis.

In addition to meeting these general requirements for waste analysis, owners of interim status incinerators must analyze any waste which has not previously been burned in a particular incinerator to establish normal operating conditions (also called "steady state" conditions) and to determine the type of pollutants which might be emitted upon burning of this new waste. This requirement is significantly less stringent than those required of comparable facilities operating under regular RCRA operating permits.

The general operating requirements applicable to interim status incinerators are also less stringent, and less complicated than those applicable to RCRA permitted incinerators. In short, during start-up or shut-down, the owner "must not feed hazardous waste unless the incinerator is at steady state (normal) conditions of operation."

Finally, the monitoring and inspection requirements of interim status incinerators are less stringent than those required of permitted facilities. Every fifteen minutes, owners of interim status incinerators must monitor and inspect those portions of the incinerator which relate to combustion and emission control. Similar inspections must occur daily for the

96. 40 C.F.R. § 265.13(a)(3) (1995) (stating that, at a minimum, the owner must repeat the analysis whenever he or she is notified, or has reason to believe, that the process or operation generating the waste has changed, and when the results of an inspection show that the waste received at the facility does not match that described on the manifest).
98. 40 C.F.R. § 265.13(b) (1995) (stating that this plan must specify the parameters for which each waste will be analyzed "and the rationale for the selection of these parameters," the test methods which will be used to test the waste, "the sampling method which will be used to obtain a representative sample of the waste," and "the frequency with which the initial analysis of the waste will be reviewed or repeated"). There are additional requirements for off-site facilities and surface impoundments. 40 C.F.R. § 265.13(b)(5),(7) (1995).
99. 40 C.F.R. § 265.341 (1995). Steady state (normal) operating conditions include waste and auxiliary fuel feed and air flow. Id. At minimum, this analysis must determine the heating value of the waste, the halogen and sulfur content in the waste and concentrations of lead and mercury. Id.
100. 40 C.F.R. § 265.345 (1995) (noting that steady state includes steady state operating temperature and air flow).
101. 40 C.F.R. § 265.347(a) (1995). Owners must make appropriate correction to maintain steady state combustion. Id. Instruments which relate to combustion and emissions,
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complete incinerator and associated equipment,\textsuperscript{102} as well as for leaks, spills, and fugitive emissions. Emergency shutdown controls and system alarms must also be inspected daily to assure proper operation.\textsuperscript{103}

Fundamentally, interim status standards are weaker and more accommodating than the standards applicable to RCRA-permitted facilities with housekeeping requirements but no performance standards, softer technologies, more excuses, and reduced monitoring and inspection obligations.\textsuperscript{104} As described above, a hazardous waste incinerator in continuous operation since before RCRA was enacted could qualify for interim status. RCRA subjects that older facility to the less stringent interim status performance and operating standards, rather than to the more stringent standards required of newer RCRA-permitted incinerators.\textsuperscript{105}

2. \textit{RCRA Permits and Interim Status - The Why and Wherefore}

Congress may have created this two-tiered regulatory system because it feared that most of the existing facilities would have been forced to shut down if required to meet tougher new standards too quickly, thereby creating a capacity shortage for generated hazardous waste.\textsuperscript{106} Congress may have been concerned with issues of fairness as it created new regulations applicable to solid and hazardous waste facilities. Finally, the interim status provisions may have been Congress' practical response to an admitted administrative incapacity to carry out the permitting task.\textsuperscript{107}

Even when EPA began to implement RCRA, the agency was unacceptably slow to issue regulations. Under a court order, EPA eventually issued regulations governing the granting of permits to hazardous waste facilities. Thereafter, EPA was slow to issue permits under the new rules. By 1985, only five landfills and seventeen incinerators had received RCRA permits.\textsuperscript{108} This left the remaining facilities to operate under interim status. Some say that interim status took on a "life of its own" as it and which therefore are subject to this inspection would normally include those measuring waste feed, auxiliary fuel feed, air flow, incinerator temperature, scrubber flow, scrubber pH, etc. \textit{Id.}

\textsuperscript{102} 40 C.F.R. § 265.347(b) (1995) (stating that associated equipment includes pumps, valves, conveyors, pipes, etc.).

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{RODGERS}, supra note 45, § 7.14, at 142.


\textsuperscript{106} Gerrard, \textit{supra} note 16, at 1100.

\textsuperscript{107} \textit{RODGERS}, \textit{supra} note 45, § 7.14, at 136, 136 n.3 (noting that enforcement of the general prohibition of Section 3005 would have been "completely disrupting" to "ongoing operations").

\textsuperscript{108} \textit{PORTNEY}, \textit{supra} note 35, at 145.
became reality for approximately 8000 facilities. Referring to the regulatory exemptions provided by interim status, critics contended that “the hole [was] bigger than the doughnut.”

3. **BDT, Inc.: A Brief Case Study of An Environmental Grandfather Clause**

The above analysis demonstrates how RCRA’s interim status provisions operate as an environmental grandfather clause, allowing older hazardous waste facilities to operate under less stringent regulation than is applicable to newer facilities. Similar circumstances exist in hazardous waste law at the state level. This section presents a practical example of an environmental grandfather clause in New York hazardous waste law.

In the town of Clarence, located in western New York, an environmental grandfather clause has allowed a hazardous waste facility to remain exempt from state siting certification rules because it predated current law. Although hazardous waste treatment, disposal or storage facilities ordinarily fall under the regulatory control of the New York State Siting Board (Board), the BDT Inc. facility was established in 1980, two

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110. Rodgers, supra note 45, § 7.14, at 136-37 (quoting Richard C. Fortuna, Preventing Hazardous Waste Management Liability: The Lessons of Recent Legislation 25 Hous. L. Rev. 877, 878 (1988)); see also David Schnapf, State and Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act, 12 Envtl. L. 679, 729 (1982) (noting that the concept of interim status of unlimited duration is unique among the major federal environmental permitting programs). Most environmental permit programs prohibit facilities from operating or engaging in certain activities until a facility has obtained the required permit. Id. Under RCRA, however, a facility may operate under “interim status” until it has obtained a permit. Id. Although the availability of “interim status” makes the RCRA program appear less stringent than other regulatory programs, it may not actually be less stringent in its application. Id. In other environmental permitting programs, EPA rarely seeks to stop an existing facility from operating without a permit if the facility has applied for one. Id. The requirement that unpermitted facilities cease operations takes those facilities out of the regulatory system while RCRA’s interim status scheme keeps facilities within the agency’s regulatory control. Id.
111. New York’s Environmental Conservation Law requires the commissioner of the Department of Environmental Conservation to publish criteria for the siting of certain industrial hazardous waste facilities. N.Y. EnvTL. Conserv. Law § 27-1103.1 (McKinney 1984 & Supp. 1995). After the publication of those criteria, new facilities could not commence construction or operation without a certificate of environmental safety and public necessity from the facility siting board. § 27-1105.1. The siting certification requirement applies to new facilities, but, except for a 1987 amendment which expanded the law to include expansions of existing commercial landfills, not to existing facilities. See infra notes 207-20 and accompanying text (discussing CECOS v. Jorling, 895 F.2d 66 (2d Cir. 1990)).
113. BDT, Inc., which stands for “battery disposal technology” is a subsidiary of Wilson Greathbatch Ltd., a locally owned manufacturer of medical and commercial batteries.
years before the Board was established.\textsuperscript{114} Because BDT was in operation before the Board was established, it was not subject to Board review.\textsuperscript{115}

BDT and Clarence currently disagree about BDT's right to transfer its stock to Laidlaw Environmental Services,\textsuperscript{116} one of the largest hazardous waste companies in North America.\textsuperscript{117} BDT also seeks state approval to transfer its operating permits to Laidlaw.\textsuperscript{118} In an attempt to stop the relevant transfers, the town proposed a local ordinance which attempts to give the town a voice in future expansions at the Clarence BDT facility.\textsuperscript{119} The proposed law would authorize the town to regulate expansions of existing industrial hazardous waste treatment, storage and disposal facilities.\textsuperscript{120} Opponents of the proposed law argue that the state maintains preemptive authority over such facilities.\textsuperscript{121} Supporters argue that it would give the town co-extensive permitting authority and some control over the growth of polluting industry in its community, and possibly primary permitting authority under the State Environmental Quality Review Act (SEQRA).\textsuperscript{122} They argue that the town's authority should not be preempted by the state because the state siting law retains authority only over facilities subject to that law, and not to predating facilities, like BDT. Because the BDT facility was never subject to state siting certification review, the state should not have preemptive authority over the permitting of its expansions.

The BDT case is a clear example of a facility benefitting by virtue of an environmental grandfather clause. If the BDT facility had been subject to the state hazardous waste siting board review, the Board could have

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\item Id.; Dick Dawson, \textit{BDT Drops Lawsuit as Clarence Cooperates, Company Eager to Explain its Objections to Proposed Town Ordinance}, \textit{Buff. News}, Mar. 11, 1994; see also Town of North Hempstead v. New York State Dept. of Envtl. Conservation, 445 N.Y.S.2d 877 (1981) (finding the statutory requirement that the siting board must issue a certificate of environmental safety and public interest before any person may operate a new industrial waste facility applicable only to new constructions or new operations, not to continuing operations).
\item Dawson, \textit{Waste Treatment Firm}, supra note 113.
\item Dawson, \textit{BDT Drops Lawsuit}, supra note 115.
\item Telephone Interview with R. Nils Olsen, Professor of Law, SUNY Buffalo School of Law.
\item Id.; \textit{Clarence Will Turn Over Records}, supra note 119.
\end{itemize}
regulated the facility's expansion rights and would have undertaken environmental review at appropriate stages of the process. The town's response to the BDT situation exemplifies a community coming to terms with the impact of an environmental grandfather clause, and attempting to find a way to circumvent the protection it provides for an older polluting facility.

B. Grandfather Clauses in The Clean Air Act

Like RCRA, the Clean Air Act includes grandfather clauses that allow older, existing facilities to operate according to less stringent regulations than their new facility counterparts. In doing so, the Clean Air Act makes a clear, formal distinction between "old" and "new" sources of air pollution risk by creating an entirely separate set of stringent performance standards for "new sources" of air pollutants. Although all sources of air pollution are subject to ambient air quality regulation through source-specific emission limitations, new sources face more stringent pollution control technologies and permitting requirements than are required for existing facilities.

Like the two-tiered regulatory system in RCRA, the similar system in the Clean Air Act allows older polluting facilities to pollute in greater amounts than would be permitted for similar new facilities. Because of this disparity in regulatory standards, working in conjunction with the established disparity in the siting of polluting facilities, low-income, minority communities suffer a disproportionately high burden of air pollution risk. This section will discuss some of the provisions within the Clean Air Act that function as grandfather clauses. It will show how

124. Id. at 1041.
126. Id.
128. This Article does not attempt to address every regulatory framework within the Clean Air Act that acts as an environmental "grandfather clause."
they operate to create a two-tiered regulatory system, similar to that discussed with respect to RCRA, that puts low-income, minority communities at a regulatory and risk-bearing disadvantage.

1. New Source Performance Standards

Clean Air Act section 111 required the EPA Administrator to identify categories of new and modified sources that contribute significantly to air pollution which endangers public health or welfare. Most major industrial processes have been so identified, and many are located in low-income minority communities. However, older facilities within the same groups of industrial processes do not fall within the regulatory scope of section 111.

EPA must set emission standards that reflect the "degree of emission limitation achievable" through the technology that the agency determines has been "adequately demonstrated" to be the best, taking into consideration "non-air quality health and environmental impacts and energy requirements." These standards apply only to new or modified sources identified as significant contributors to air pollution which endangers public health and welfare. The standards, called New Source Performance Standards (NSPS), may be promulgated as design, equipment, work practice, or operational standards where numerical emission limitations are not feasible. Each NSPS includes the types of facilities to which the standard applies. Once determined, the NSPS is the minimum level of control that EPA or the state can require of a new or modified source through a related program, the new source pre-construction permitting program.

Originally, new source performance standards specified how many pounds of a specific pollutant a plant could emit per unit of plant input or output. Under this system each pollutant source determined what combination of technological measures and fuel changes to use to achieve the standard. But under the Clean Air Act Amendments of 1977, Congress directed EPA to approach NSPS differently. EPA now sets a percentage of emission reduction based on source emissions without air

131. Id.
133. Id.
134. States often implement this system through EPA-approved implementation plans under the Clean Air Act. See, e.g., Idaho Dept. of Health and Welfare v. United States Dept. of Energy, 939 F.2d 149, 150 (9th Cir. 1992) (discussing Idaho's right to require permits at "grandfathered sites if there is additional construction or a modification").
pollution control technology. This is a significantly more effective approach to controlling emissions, yet it does not apply to existing sources.

2. New Source Review

Major new sources of air pollution, and in most cases, major modifications of existing sources (which, in many circumstances, are treated like new major sources), are also subject to preconstruction review and permitting under the Clean Air Act. The types of requirements applicable depend on whether the new major source, or major modification to an existing major source, is located in an area which meets the National Ambient Air Quality Standards (NAAQS). Areas in which the NAAQS for a particular pollutant are met are called attainment areas. Areas in which the NAAQS are not met are called nonattainment areas. These sources, when in an attainment area, are subject to the Prevention of Significant Deterioration (PSD) program, while sources in nonattainment areas are subject to the nonattainment program.

a. The Prevention of Significant Deterioration Program

In attainment areas, the Clean Air Act requires that new major sources, and major modifications to existing major sources, obtain a Pre-
vention of Significant Deterioration (PSD) permit. To receive a PSD permit, the owner or operator of a proposed new source must show that the source will comply with ambient air quality levels designed to prevent deterioration of air quality, called the “PSD increments.” The owner must also show that the proposed source will employ “best available control technology” (BACT) for each pollutant regulated under the Clean Air Act that it will emit in “significant” amounts. In addition, the PSD permit applicant must show that the proposed source will not adversely affect other air quality-related values, such as visibility.

b. The Nonattainment Program

In nonattainment areas, the Clean Air Act requires that new major stationary sources, or major modifications to existing major sources, receive a nonattainment permit before beginning construction. In nonattainment areas, existing (and therefore older) sources must employ “reasonably available control technology,” the least stringent standard required under the Clean Air Act.

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145. 40 C.F.R. § 52.21(b)(23) (1994) (providing “significant” levels for various pollutants).
149. Id.
150. In other situations the Clean Air Act requires, for example, “best available control technology,” or “maximum achievable control technology,” both of which are more stringent standards than the “reasonably available control technology” (RACT) applicable to existing stationary sources. See PORTNEY, supra note 35, at 85. In mandatory RACT, Congress sought to establish the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.
New major stationary sources located in a nonattainment area, however, must obtain permits for construction and operation. These permits must contain standards more stringent than those required for the older, existing sources located in the same nonattainment area, and are subject to a much higher pollution control standard. To qualify for a nonattainment permit, the new source must comply with the lowest achievable emission rate (LAER). The LAER is based on the most stringent emission limitation contained in any state implementation plan (SIP), or achieved in practice by the same or a similar source category, whichever is more stringent. In addition, to help achieve ambient air quality standards, these facilities must also satisfy certain offset requirements. This means that proposed new or modified major sources must offset their potential to emit nonattainment pollutants by securing emission reductions from nearby facilities.

3. Modification and Reconstruction Rules

New source requirements apply not only to new sources of air pollutant emissions, but also to major modifications, or reconstructions of existing major sources.

a. Modification

Modification of an existing facility may trigger application of the PSD or nonattainment permit program requirements as well as the applicable

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151. A "new source" is "any stationary source the construction or modification of which commenced after the effective date of the applicable regulations." Clean Air Act § 111(a)(2), 42 U.S.C. § 7411(a)(2) (1988). "Modification" of a source is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted or results in the emissions of a pollutant not previously emitted." Id. § 7411(a)(4). A "stationary source" is "any building, structure, facility, or installation which emits or may emit any air pollutant..." Id. § 7411(a)(3) (1988 & Supp. V 1993).

152. The Clean Air Act requires that each state, in its implementation plan, require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area. Clean Air Act § 172(b)(5), 42 U.S.C. § 7502(b)(5).

153. Clean Air Act § 171, 42 U.S.C. § 7501. LAER is "the most stringent emission limitation... contained in the implementation plan of any state," unless the owner of the proposed source demonstrates that the standard is unachievable, or is "the most stringent emission limitation achieved in practice... whichever is more stringent." Id.


156. A "modification" of a major source is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." Id. §§ 7501(4), 7411(a)(4) (1988).
NSPS's. Under the modification rule, a facility will be subject to these other programs when there has been a physical or operational change at the source, and this change results in an increase in emissions of a regulated pollutant. In addition, the modification rule includes a list of specific activities which, when undertaken, do not amount to a modification even if there is a physical or operational change that results in an increase in emissions. Those activities include, for example, routine repair, replacement and maintenance.157

b. Reconstruction

The reconstruction rule was designed to extend the useful life of existing industrial facilities.158 The rule explains when a project to rebuild an existing facility is so extensive that it is effectively a plan to replace the facility “at the end of its useful life,” as opposed to being a modification of the facility. Basically, projects trigger the reconstruction rule when they involve expenditures equal to 50% or more of the capital costs to build a comparable new facility.159 The reconstruction rules only apply to the NSPS program, not to the PSD or nonattainment programs. However, when a facility triggers the reconstruction rule, it does not necessarily trigger application of an NSPS. Because an NSPS created for new facilities may not be achievable by reconstructed facilities, an NSPS does not apply to reconstructed facilities where it is shown to be technologically or economically unfeasible, or where the consideration of costs, remaining useful life, and potential emission reductions make it inappropriate for NSPS to apply.160 So, even here, reconstruction of older facilities to make them more similar to and competitive with new facilities may not subject them to the same regulatory standards.

4. Conclusion: Grandfather Clauses in the Clean Air Act

As shown above, the Clean Air Act, like RCRA, makes special provisions for new sources of pollution. In particular, the Act sets forth spe-

157. For a more comprehensive analysis of the modification rule and its application, see Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990). Before the WEPCo decision, the EPA made a series of decisions suggesting that virtually any activity designed to restore lost capacity (e.g., a repair of a breakdown), that did not constitute routine repair, replacement, or maintenance, would trigger NSPS's and must submit to preconstruction permit review. The court accepted EPA's position with respect to NSPS application, but rejected much of EPA's position regarding PSD permit program applicability. EPA promulgated a rule to address the WEPCo/modification rule problem in July 1992. See 57 Fed. Reg. 32314 (1992).
cific stringent provisions for facilities that qualify as major new sources of air pollution. Although older sources are regulated, the regulations are less stringent, as if Congress intended to focus its attention instead on large future sources and major modifications of existing sources. Although in the PSD program Congress professes to strive to prevent significant deterioration, this is not the same as environmental improvement. If Congress expended as much legislative energy on regulating older, existing sources, one might see pollution levels drop in areas infested with multiple existing polluting facilities.

C. Grandfather Clauses in Land Use and Zoning Law

Land use and zoning law serve as a third example of environmental law in which grandfather clauses promote the continued operation of older polluting facilities. This section will explain the general land use principles of "non-conforming use" and "natural expansion," and show that these doctrines, in part because of their entrenchment in our system of land use and zoning law, contribute to the continued operation, and even expansion, of existing polluting facilities.

1. "Prior Non-Conforming Uses"

A long-standing doctrine in land use and zoning law states that prior "non-conforming uses" may continue to operate in their current locations despite changes in the zoning laws that would make them unable to move into the area as a new facility. This means that if a polluting facility was located and operational in its current location before the zoning laws made that placement illegal, the facility is not required to leave the location. In short, a particular land use is "nonconforming when, although originally lawful, it no longer complies with [the community's] new or amended zoning legislation."

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161. Note that although zoning laws are sometimes used as environmental "grandfather clauses," some changes in zoning laws are used to get certain land uses, such as establishments of pornography, or other locally undesirable land uses (LULUs) out of an area. This point is beyond the scope of this Article and will not be addressed here.

162. See, e.g., Hempfield Township v. Hapchuk, 620 A.2d 668, 671-72 (Pa. Commw. Ct. 1993), appeal denied, 644 A.2d 165 (Pa. 1994), in which the owners of a 170 acre property, originally zoned agricultural, but for which the zoning was amended to make the property part agricultural and part residential, were permitted to continue spreading sewage sludge as an agricultural practice on the residential portion of the property because the amendment to the existing zoning ordinance did not mandate discontinuance of an existing non-conforming use. In Hapchuk, the court confirmed the long-standing rule that zoning ordinances apply prospectively only. Id. at 672.

For the environmental justice movement, this is of particular interest as it applies to hazardous waste facilities and other polluting facilities which have been held to have vested rights to continue their operations. For example, an older landfill in lawful operation will, in many states, be allowed to continue operating as a nonconforming use after the enactment of an ordinance which would prohibit a similar new landfill from opening on the same site. As such, land use law’s doctrine of ‘non-conforming use,’ although not statutory, functions as a grandfather clause.

2. The “Natural Expansion” Doctrine

The “natural expansion doctrine,” essentially an extension of the principle of nonconforming use, is applicable in some states. It requires municipalities to allow prior nonconforming uses to expand or make additions to their property to accommodate increased business, or natural expansion. In addition, an operator of a nonconforming use may in-
corporate modern technology into that use without running afoul of its status as a prior nonconforming use.\footnote{Lewis, supra note 165, at 267.} The expansion may only extend, however, over the portion of land used for the nonconforming purpose at the time the relevant ordinance was enacted.\footnote{Township of Chartiers v. William H. Martin, Inc., 542 A.2d 985, 989 (Pa. 1988). In one example, an expansion was 'natural' because it was clear that the portion of the lot on which the landowner sought to expand his garage had been "an integral part of the property used in the furtherance of the nonconforming purpose." In re Pierce, 119 A.2d 506, 510 (Pa. 1956). In the landfill context, however, the doctrine of natural expansion might only allow an owner of a landfill operating as a prior nonconforming use "to extend the scope of his nonconforming use over the portion of his lot devoted to his lawful business purpose at the time of the ordinance." Piecknick v. South Strabane Township Zoning Hearing Bd., 607 A.2d 829, 835 (Pa. Commw. Ct. 1992). Thus, if a landfill only occupied a portion of a larger piece of land, only that part of the land on which the landfill was operating could benefit from the doctrine of natural expansion. Land not used for the business purpose at the time of the zoning ordinance would not be subject to the doctrine. \textit{Id.} at 836.} The hypothetical landfill operating in nonconforming use, discussed above, may have the good fortune of increased business and a need to expand its operations. To do so, it would need to meet the applicable state law on expansion of non-conforming uses.

### III. Why Do We Grandfather?

Grandfather clauses have been tools for rearranging rights since their inception in the voting laws of the late nineteenth century. They allow legislators to adopt stringent legislation, yet delay its application, or apply it selectively, based on existing conditions. Grandfather clauses facilitate legislators' consideration of issues of fairness and issues of politics, protection of investment, and, in the case of environmental regulation, preservation of disposal or storage capacity for pollutants or hazardous wastes. Grandfather clauses enable legislators to create two-tiered systems of regulation and apply them according to the history of applicable rights, regulations, or regulated parties. Legislators can create stringent, immediately applicable legislation, exempt some from its applicability through the use of grandfather clauses, and in doing so, perhaps avoid adverse consequences at the polls. As such, legislators can meet the public's needs while avoiding some of its wrath.

Congress may have incorporated grandfather clauses into environmental laws to insulate existing facilities from the financial burden of immedi-
ate compliance with more stringent environmental standards.\footnote{168} For example, with respect to RCRA enactment, Congress feared that by requiring existing facilities to meet the new siting and technology standards, most would have to shut down, leaving too few facilities available for hazardous waste disposal.\footnote{169} The result of this fear is the two-tiered regulatory system that exists under RCRA.\footnote{170} This type of policy decision, on the part of both Congress and state legislatures, is common in environmental law.\footnote{171}

Congress may also have created regulation that includes grandfather clauses in keeping with a consistent statutory pattern. Historically, legislators have distinguished between "old" and "new", especially with regard to various sources of risk.\footnote{172} Similarly, grandfather clauses in


\footnote{169. See Gerrard, supra note 16, at 1100 (citing MARC K. LANDY ET. AL, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 109 (1990)). Also with respect to RCRA, Congress believed that the EPA could not issue permits to all hazardous waste applicants before RCRA became effective and therefore provided the interim status benefit to facilities in existence on November 19, 1980. See EPA v. Environmental Waste Control, Inc., 710 F. Supp. 1172, 1182 (N.D. Ind. 1989), aff'd, 917 F.2d 327 (7th Cir. 1990), cert. denied, 499 U.S. 975 (1991). With respect to the Clean Air Act, "Congress expressed concern that the costs of retrofitting existing sources [of air pollution] with state-of-the-art [pollution] control technologies could be prohibitively expensive," and concluded that "it would be more cost-effective to require high levels of technological performance at new sources" because of their flexibility in design and location. ENVIRONMENTAL LAW HANDBOOK 120, 127 (12th ed. 1993) (citing S. REP. NO. 91-1196, 91st Cong., 2d Sess. 15-16 (1970)).}

\footnote{170. See supra notes 42-56 and accompanying text.}

\footnote{171. Gerrard, supra note 16, at 1100 n.360.}

\footnote{172. See Huber, supra note 123, at 1025. Huber characterizes "old" risks as "the devils we know" and contrasts them with "new" risks, or "the ominous unknown." \textit{Id.} He argues that an "old risk-new risk double standard pervades regulatory statutes and decisions construing them," and analyzes the distinction between them on economic and political grounds. \textit{Id.} Huber also contends that by allowing "old" risks to operate at lower standards, we allow them to continue to operate longer and by stringently regulating "new" risks, inhibit their creation, which may be less dangerous than the known risk. \textit{Id.} at 1053. Huber notes that this double standard is especially evident in the areas of food and drug regulation, but also exists in environmental and occupational safety and health regulation. \textit{Id.} at 1025-26. In his analysis of "old" and "new" risks, Huber refers mostly to "old" risks as those to which society has already been widely exposed. \textit{Id.} at 1026. These are often associated with products already on the market, such as a food, drug or automobile technology. \textit{Id.} In contrast, "new" risks would be those with which society is not readily famil-
environmental laws allow old risks to persist, but enable new risks to be regulated in a more categorical and sweeping manner.\textsuperscript{173}

Finally, legislators may have created this system in keeping with general notions of fairness, to help investors protect investments in polluting facilities, or to enable themselves to enact stringent legislation while delaying potentially negative constituent or industry reaction. Some legislators have even used grandfather clauses as a form of revenge or protectionism.\textsuperscript{174} Regardless of the reasons for the emergence or existence of grandfather clauses, these provisions continue to create and fortify inequities in the treatment of polluting facilities. In addition, they foster disparate environmental circumstances among racial groups, just as they encouraged inequity in the voting rights laws of the nineteenth century.\textsuperscript{175}

Thus, there are numerous reasons grandfather clauses exist in law in general, and, in particular, in environmental law. But, as illustrated above, grandfather clauses have effectively created two-tiers of environmental regulation.\textsuperscript{176} This inequity in environmental regulation, according to the age of the facility, is symptomatic of the two-tiered environmental regulatory scheme. Yet, ironically, although many arguments support the creation and continued existence of grandfather clauses that create and maintain the resulting inequities, fairness is the strongest and most widely used among them.

Because fairness is the strongest and most prevalent argument supporting the use of grandfather clauses, this section addresses it and explains that it is an equally strong argument against the use of grandfather clauses in the environmental law context. Second, this section will consider the grandfather clause’s role in investment in polluting facilities.

\textsuperscript{173} He asserts that the public is less afraid of what they know, so those risks are less stringently regulated than those risks they do not know, which are therefore more stringently regulated. \textit{Id.}; cf. Peter Huber, \textit{Safety and the Second Best: The Hazards of Public Risk Management in the Courts}, 85 COLUM. L. REV. 277 (1985) (dealing with the related issue of the regulatory treatment of public risks as opposed to private risks).

\textsuperscript{174} Jerry Knight, \textit{A Night To Play 'Let's Make A Deal'}, WASH. POST, Nov. 28, 1991, at A1 (stating that Congress creates loopholes and introduces grandfather clauses to protect something from reform).

\textsuperscript{175} See discussion \textit{supra} notes 3-6 and accompanying text.

\textsuperscript{176} See \textit{supra} notes 42-57 and accompanying text.
Third, it will consider how grandfather clauses affect the preservation of
capacity to dispose of waste. Finally, this section will address some of the
politics of grandfathering and potentially perverse results created when
legislators place too much emphasis on one side of the fairness argument
by employing grandfather clauses in environmental legislation.

A. Fairness: On Both Sides of the Fence

Fairness, equity, and justice are often used to rationalize the distribution
of society's harms or benefits. The body of law regarding what is
fair, termed “equity,” has a rich and mythic history in this country. Equity, by definition, concerns inherent fairness to individuals, even in
the absence of a “fair,” clear-cut policy established by the representative
majority. As such, “equity” clearly should be a primary motivating
theory of a movement seeking to redistribute environmental risk and
harm to shift a disproportionate burden away from politically under-
represented groups. At the same time, equity is also a primary rationale
supporting the continued inclusion of grandfather clauses in modern leg-
islation. Equity also demands fairness in the form of relief to those
harmed by impending legislation or regulation, in the absence of grandfa-
ther clauses. At least one economist, however, argues that “[r]hetoric
about fairness tends (quite mistakenly) to 'grandfather in' special privi-
leges” in circumstances where the real inequity lies in the protectionism
that led to the grandfather clause.179

177. Michael Andrew O’Hara, The Utilization of Caveat Emptor in CERCLA Private
178. Id. at 158-59. To explain this principle of equity, O’Hara cites Edward Re ex-
panding on Zechariah Chafee, Jr.’s definition of “equity” as:
[A] way of looking at the administration of justice, the goal is to do justice in the
particular case. It implies a liberating influence which mitigates the rigidity of
formal rules. Its aim is to achieve an individualization of justice. In this sense,
equity is that part of our legal heritage that has given the law an ethical dimen-
sion. In extolling the virtues of candor and good faith, it reaffirms the moral
element of a just society.

Id. at 159.
Landsburg uses a town reassessment of his own property taxes to explain his position. Id. The reassessment led to an increase of 40% in Landsburg's property taxes, while his neigh-
bor's assessment did not change. Id. He argues that the unfairness lies, not in his in-
creased assessment as compared to his neighbors unchanged assessment, but in the fact
that his own taxes were probably actually disproportionately low for the past 15 years. Id.
According to Landsburg's neighbor, Landsburg should be making a large donation to the
town treasury, along with the increased assessment, to make-up for the past inequity. Id.
Landsburg applies the same principle to U.S. workers who complain about their loss of a
$16-an-hour job to a $3-an-hour Mexican worker. Id. Under his analysis, consumers have
been paying $16 for something they should have been able to get for $3—and the U.S.
worker ought, therefore, to have a portion of his assets confiscated to pay for the past
The principles of fairness, justice, and equity are important in this context because they have at least two potential positions in the analysis. First, these principles are important to the history of grandfather clauses. They help explain why some legislators created them originally, and perhaps more importantly, why legislators continue to use them. Second, although beyond the scope of this Article, the principles of fairness, justice and equity are important factors in determining how to redistribute inequitably distributed risk.\(^{180}\)

According to some contemporary philosophers, "justice" is "fairness" made up of two principles.\(^{181}\) The first is liberty.\(^{182}\) Without it, there can be no fairness and therefore no justice.\(^{183}\) The second principle is that social and economic inequalities must be arranged so that they are both to the greatest benefit of the least advantaged, and attached to offices and positions open to all under conditions of fair equality of opportunity.\(^{184}\) This concept of justice as fairness is an example of an appropriate platform from which environmental justice advocates might make their case, and again, an apparent rationale for the inclusion of modern grandfather clauses in environmental and other legislation.\(^{185}\)

inequity imposed on the U.S. consumer. \textit{Id.} Landsburg notes, however, that this rational, intellectual case against grandfathering cannot hope to overcome the political power of entrenched bureaucracies. \textit{Id.}

180. Some calls for environmental justice are, in effect, calls for "equality." Been, \textit{supra}, note 24, at 1006. Been argues that environmental justice advocates commonly choose "to advance general concepts of equality, rather than endanger their coalition by attempting to specify the precise content of "'justice,' 'equity' or 'fairness.'" \textit{Id.} Peter Westen has noted that "equality in the end is a rhetorical device that tends to persuade precisely by virtue of 'cloak[ing] strongly divergent ideas over which people do in fact disagree.'" \textit{Peter Westen, Speaking of Equality} 270-71 (1990) (quoting Charles Frankel, \textit{Equality of Opportunity}, 81 \textit{ETHICS} 192 (1971)).

181. For a more comprehensive look at various philosophical constructs of justice, see \textit{TOM CAMPBELL, JUSTICE} (1988). For purposes of this analysis, I have concentrated on "justice" as "fairness" because fairness is the principal and strongest argument that both proponents and opponents of grandfather clauses might use.


183. \textit{Id.} at 60-61.

184. \textit{Id.} at 60, 250. Rawls argues that of the two principles of justice as fairness, rational deliberators would give the first principle, that of liberty, absolute priority. It is these two principles, and the priority principle that make up Rawls' fundamental conception of justice. \textit{See id.}

185. Some will argue that Rawls' theory of justice does not apply in this context as it is intended to "address[ ] the design of fair institutional structures, not the fairness of individual distributional choices." Been, \textit{supra} note 24, at 1048. However, environmental justice advocates justifiably might argue that the siting and other decisions which lead to circumstances of environmental injustice, including the creation and maintenance of environmental grandfather clauses, are not individual distributional choices, but systemic, even institutionally entrenched systems of unfairness to which Rawls' theory of justice should apply.
To apply the justice as fairness principles to environmental grandfather clauses within the environmental justice movement, one must first address the question of liberty. Environmental grandfather clauses help establish and perpetuate environmental harm in low-income, minority communities. These communities often do not truly have liberty to make, or significantly influence, decisions regarding their environmental welfare. This is partly because they tend to be politically underrepresented, and partly because of the inherent racial discrimination that still exists and hampers the ability of residents of these communities to leave or change their circumstances.\footnote{See Austin & Schill, supra note 28, at 76-78 (explaining that African-Americans and Hispanics have greater difficulty leaving environmentally undesirable locations in part because of racially-based housing discrimination); see also Cole, supra note 34, at 628-29; James T. Hamilton, Politics and Social Cost: Estimating the Impact of Collective Action on Hazardous Waste Facilities, 24 RAND J. ECON. 101, 115-18 (1993).}

The second principle of justice as fairness requires analysis of the arrangement of social and economic inequalities. The arrangement of social and economic inequalities must provide the greatest benefit to the least advantaged. If one accepts the premise that low-income, minority communities are among the least advantaged in our society, and that they suffer a disproportionate burden of environmental harm, the use of environmental grandfather clauses certainly is not providing the greatest benefit to the least advantaged. In addition, these communities do not have the equality of opportunity required to fulfill the second principle of justice as fairness.\footnote{See Cole, supra note 34, at 628-29.}

For failing to meet these principles, one might argue that use of environmental grandfather clauses to the disproportionate disadvantage of low-income, minority communities is unfair and therefore unjust.

One could, however, apply the same analysis to the other side of the debate. Under the first principle of justice as fairness, owners of polluting facilities are not really at liberty to affect the rules by which they must operate their facilities. In other words, owners are at liberty to participate in the democratic process, but the creation of environmental regulations is removed sufficiently from the democratic process that owners may not be truly at liberty to affect the regulations that apply to them. Next, one applies the second principle, concerning the arrangement of social and economic inequalities. Again, the principle requires that those inequalities be arranged such that they are to the greatest benefit of the least advantaged. In terms of providing the greatest benefit to the least advantaged, one could argue that no party is less or more advantaged in terms of allocating the greatest good of environmental regulation. In ad-
dition, in terms of influence within the political process, large industry certainly is more influential than low-income minority community groups, while small business may be as disadvantaged in terms of political representation and influence as underrepresented communities. So, based on a cursory discussion of “justice as fairness” applied in an environmental equity scenario, fairness does apply to both sides of the grandfather clause debate.\textsuperscript{188}

In modern practical terms, grandfather clauses have, for example, allowed people to consume alcohol if they had reached the age of majority (for purposes of alcohol consumption) before the law was amended to raise the operative age.\textsuperscript{189} The rationale for this, sound or not, was that if a person was legally allowed to drink alcohol on one day because she had reached the age of majority, it seemed fair to allow her to continue to drink alcoholic beverages when the law changed.\textsuperscript{190} This demonstrates adherence to the “don’t change the rules in mid-game” theory of legislative fairness.\textsuperscript{191}

\textsuperscript{188} This analysis of fairness is intended merely to illustrate the point that the argument cuts both ways in any discussion of whether grandfather clauses should be used in environmental regulation. This Article does not attempt to chronicle or analyze all of the various theories of fairness or justice that might be applicable. Instead, it attempts to illustrate the role of fairness in the debate over the use of environmental grandfather clauses. For a comprehensive discussion of fairness applied in the environmental justice context, see Been, \textit{supra} note 24.

Vicki Been analyzes the meaning of fairness and then looks at the theoretical bases for fair siting proposals. \textit{Id.} at 1008. In doing so, she examines fairness in the pattern of distribution of locally undesirable land uses (LULUs), and considers compensation and other systems as possibilities for redistributing LULUs. \textit{Id.} She also looks at the various types of equality that may come to play in devising a system for redistributing LULUs: equality of treatment or equality of results. \textit{Id.} Been does not attempt to survey accounts of justice she considers “too indeterminant to guide fairness in siting, such as theories of highest total or average utility.” \textit{Id.} at 1027 n.133.

\textsuperscript{189} D‘Vera Cohn, \textit{George Mason U. Bans Sale of Alcohol at Outdoor Events}, \textit{WASH. POST}, Sept. 11, 1986, at C5.

\textsuperscript{190} Sandra Evans, \textit{D.C. Raises Drinking Age to 21}, \textit{WASH. POST}, Sept. 24, 1986, at A1. The District of Columbia City Council voted to approve a bill raising the drinking age to 21, provided that it grandfathered in persons already 18. \textit{Id.} D.C. Council Chairman David A. Clarke defended the grandfather clause as necessary to be fair to young persons who already have been able to drink in the city, asking “[h]ow can you tell somebody they can drink when they become 18, and then say at 19 they can’t?” \textit{Id.} at A19. The bill increased the drinking age to 21 as of September 30, 1986, but allowed persons who were 18 by that day to drink beer and wine. \textit{Id.} at A1.

\textsuperscript{191} Fairness has been cited as a reason for the institution of grandfather clauses in many circumstances. \textit{See, e.g., John Swades, Hillside Builders Get Exemptions, L.A. TIMES,} Aug. 3, 1990, at B3 (explaining that the L.A. City Planning Commission President Ted Stein voted for a grandfather clause in a new zoning ordinance “because he was concerned about the fairness of changing the rules of the game for developers who were already in the city planning approval process”).
This same principle of fairness also applies, for example, to an oil refinery built in accordance with the standards that applied when it was constructed. This refinery might well have operated in accordance with those standards for years, when the rules changed to increase the stringency of the operating requirements. Without a protective grandfather clause, the facility may have to shut down or incur great expense to reconstruct or modify in accordance with the new rules. With the protection of a grandfather clause, it remains in operation, continuing to pollute the surrounding community at lower standards of environmental regulation. While players on either side of this debate will disagree about whether this is a good or bad outcome, certainly both sides could use the fairness argument to support their position.

Hence, considerations of fairness weigh on both sides of the debate over the use of grandfather clauses in environmental laws. They support strong arguments against the use of environmental grandfather clauses, to create a more racially, economically and demographically equitable distribution of environmental risk. They also support the historical and continued creation and use of environmental grandfather clauses by legislators and regulators to protect the interests and investments of industry and their constituents.

B. The Impact of Grandfather Clauses on Investment

Failure of legislatures to enact grandfather clauses in the face of changing regulation may have various adverse effects on present and future investment. For example, failure to enact a protective grandfather clause while regulations become more stringent might cause recent investors in regulated industries to cry foul because their expectations have been compromised. Similarly, ungrandfathered regulation could discourage future investment in regulated industries by acting as a disincentive for potential future investors. These potential investors may see unpredictable changes in regulation as creating prohibitive expenses for which they are unable to prepare. ¹⁹²

Often owners or investors in a polluting facility have invested time, energy, and above all, money, in a facility which met all applicable environmental standards when it was built. Then the applicable laws change. To comply with the new laws, the facility would have to invest in and install pollution control technologies that may far exceed the standards for which the facility originally was built. These installations might be

extremely costly. They might even require significant modification of the
capability of the facility and the investment could be jeopardized. By
allowing existing facilities to work under less stringent environmental
standards, or in some cases under the environmental standards that applied
when the facilities were originally permitted, legislators are "fairly" or
"equitably" protecting major investments of their constituents under a
fairness rationale based on the expectation of those investors.\textsuperscript{193}

Likewise, if the regulatory rules of the game are subject to constant
change without protection from grandfather clauses, prospective inves-
tors reasonably could fear that a regulatory change could render a poten-
tially profitable investment less profitable or even unprofitable. Their
fear that a facility may face significant rebuilding or retrofitting to comply
with future rules unprotected by grandfathered status surely would dis-
courage investment.\textsuperscript{194} The legislative practice of grandfathering existing
facilities may not only protect current investment, but may also operate
as an incentive to future investment in regulated industries.

C. Grandfather Clauses and the Preservation of Capacity

In the environmental arena, the imposition of stringent standards on
polluting facilities could lead to the closure of some important facilities.
Some facility owners might decide that compliance with new regulation is
too onerous and instead opt for closure. For landfills, incinerators and
other waste disposal facilities where there may be an acute shortage, clo-
sure can create insurmountable problems for the communities served by
those facilities.\textsuperscript{195} Legislators might conclude that it is more responsible
to allow some existing facilities to operate under less stringent standards,
rather than lose the capacity they provide, especially given the increasing
difficulty in siting newer, cleaner replacement facilities.

\textsuperscript{193} A related issue of concern to legislators' constituents is the preservation of em-
ployment opportunities. Although most legislators are probably moved more by the con-
cerns of big investors, the employees of polluting facilities are also voters in their districts
and may want to keep polluting facilities open to preserve their jobs. Legislators' use of
grandfather clauses to keep these facilities operating longer, or under protected status, may
mask, for constituents, the fact that regulations are changing. Because a grandfather clause
can protect the facility, at least for a limited duration, constituents employed at the facility
may not become aware that the legislators changed the regulations applicable to the plant.

\textsuperscript{194} Kaplow, supra note 192, at 525-26.

\textsuperscript{195} Some commentators would argue that acute capacity shortages do not exist for
landfills, incinerators and other waste disposal facilities, except for certain special cases,
such as those designed for storing radioactive waste. See Gerrard, supra note 16, at 1104-
06 (contending that, from an economic standpoint, there is no severe shortage of hazard-
ous waste facilities).
D. Politics and Grandfathering

The political nature of representative democracy provides another potential answer to the question of why legislators use the grandfather clause mechanism, despite its potential for inequitable results. Because legislators represent not only resident constituents, but also special interest groups, some forms of regulation simply would not be politically palatable without protective grandfather clauses. The practice of grandfathering, in a sense, "buys off" those who might be most adversely affected by regulation. It places the cost of the compliance burden on future actors—those who may not be aware that they will be affected, and therefore cannot combat the regulatory enactment. Grandfathering allows legislators to deal with the costs of regulation and resistance to regulation by imposing the costs on future actors, and avoiding the resistance through the ignorance of those who will be affected.

The result is that legislators may be able to enact legislation which, without the inclusion of a protective grandfather clause, would be politically impossible. Legislators would be lobbied heavily by those subject to the legislation's stringent regulatory impact, to the extent that legislation leading to stringent regulation would not arise or become law. By using grandfather clauses as a political tool, legislators can create forward-thinking legislation that has its regulatory impact on future "generations" of polluters. The result is a positive future impact, but an abandonment of the current environment. Of course, the downside of this use of grandfather clauses lies in their negative attributes: inequitable protectionism and continued inequitable distribution of environmental risk.

E. Potentially Perverse Results of Grandfathering

In addition to their resultant unfairness and disproportionate impact, grandfather clauses confer a perverse advantage on older facilities. The combination of creating an exemption for older facilities by allowing them to remain subject to less stringent standards of environmental regulation, and creating costly regulatory requirements for newer facilities, gives a distinct advantage to older, dirtier facilities in their competition with newer cleaner counterparts.196 Thus, older facilities benefit at the expense of newer facilities, which create less pollution.

Also, in part because of the benefits they receive from grandfather clauses, older polluting facilities are likely to remain in use longer than they might have in the absence of increased regulation. In fact, it is often

196. Id. at 1098 (explaining that "[o]f the twenty-one commercial [hazardous waste] landfills operating today . . . only one is on a site selected since the enactment of RCRA in 1976").
easier for companies to continue operating existing facilities, and even to expand them, than it is to create new facilities subject to the more stringent regulations.\textsuperscript{197} This result may increase the total amount of pollution emitted (if we assume that newer facilities would be cleaner even without increased regulation) or at the very least, slow increases in productivity or other improvements that result from capital investment.

IV. **Some Solutions to the Problem of Environmental Grandfather Clauses**

Environmental justice literature, especially that which appears in the law reviews, has been criticized for its failure to provide feasible solutions to environmental inequity. However, the literature has offered numerous suggestions.\textsuperscript{198} While most agree that judicial remedies are inadequate, some suggest statutory approaches\textsuperscript{199} and an increasing number suggest a closer look at civil rights law.\textsuperscript{200} Unlike these approaches, this Article focuses on remedies specific to the problem of environmental grandfather clauses. If the unfairness created by these clauses can be reduced or eliminated, the resulting more equitable treatment of facilities of different ages should, at least in part, begin to reverse one of the causes of environmental inequity. In fact, the reduction or elimination of environmental grandfather clauses should reduce, not only racial and socio-economic inequity with respect to the regulation of polluting facilities, but also general inequity in the standards that apply to similar polluting facilities of different ages.

To that end, this section addresses the potential use of outright un-grandfathering of facilities that benefit from the protection of environmental grandfather clauses, creation of amortization provisions, and implementation of sunset provisions to create termination points for existing grandfathered benefits.\textsuperscript{201} In addition, this section will attempt to address some potential criticisms of these proposed remedies.

\textsuperscript{197} Id. at 1100.

\textsuperscript{198} See Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 537 (1992) (arguing that minorities may be economically less able to use the judiciary to remedy environmental inequity); Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121, 166 (1994) (noting that "[t]here is a consensus in the law review literature that judicial remedies are insufficient").


\textsuperscript{201} Each of these suggested remedies for the problem of environmental grandfather clauses involves a form of legal transition or transformation of the laws governing polluting
A. Outright Ungrandfathering-CECOS

In western New York, environmental justice advocates will find an example of a previously grandfathered facility which, upon becoming "ungrandfathered," became subject to and failed environmental standards required for it to remain in operation. What began as a solid waste disposal facility in the late nineteenth century had become, by 1976, one of two commercial hazardous waste facilities in New York.202 The facility, operated by CECOS International, Inc. (CECOS),203 handled, with one other commercial facility,204 eighty percent of the 280,000 tons of hazardous waste produced annually in New York state.205 To handle the large amount of hazardous waste it collected, CECOS sequentially operated five separate Secure Chemical Management Facilities (SCMF), or hazardous waste landfills, at the Niagara facility.206 As one SCMF was filled, CECOS would open and begin disposing waste into the next SCMF. By 1990, CECOS had filled all five existing SCMFs to capacity and they were no longer operational.

Anticipating the closure of its five SCMFs, CECOS began developing, in 1984, plans for a sixth landfill and filed an initial application for it in May 1985.207 In response to CECOS' application the Department of Environmental Conservation (DEC) requested additional information in a series of Notices of Incomplete Information.208 The information-gathering process continued for two years, after which DEC issued a draft permit for a sixth SCMF.209 A hearing on the permit began, but was postponed "pending the parties' submission of briefs on the issue of whether the siting law, as originally enacted, exempted CECOS from siting board review."210

facilities. This Article does not attempt to handle the various impacts of legal transitions. For a comprehensive discussion of legal transitions, see Kaplow, supra note 192.

204. Chemical Waste Management Inc. is a subsidiary of Waste Management Inc. MacClennan, supra note 203, at B10. In waste management, Browning-Ferris ranks second in size to Waste Management Inc., "which is about twice the size of BFI." Id. at B10.
205. CECOS Int'l, 895 F.2d at 68.
206. Id.
207. Id.
208. Id.
209. Id.
210. Id.
During the two-year information-gathering period, the New York legislature passed an amendment to the laws governing the siting of hazardous waste disposal facilities.\footnote{In 1987, the New York legislature amended the siting law to require siting board certification, not only for new hazardous waste facilities, but also for expansions of existing commercial landfills. Act of Aug. 3, 1987, ch. 618, sec. 8, § 27-1105, 1987 N.Y. Laws 1078, 1081 (McKinney) (codified at N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. 1987)). This amendment amounted to an "ungrandfathering" of existing commercial landfills, thus subjected them, upon expansion, to siting board certification review. See CECOS Int'l, 895 F.2d at 68 (stating that under new New York law, CECOS must obtain a siting certificate and is subject to the siting certification review process).} Prior to the amendment, CECOS argued that it fell within a grandfather clause exempting it from the requirement to obtain a Certificate of Environmental Safety and Public Necessity from the siting review board.\footnote{CECOS Int'l, 895 F.2d at 68. The question of whether CECOS actually fell within a grandfather clause was one that would have been addressed in briefs had the issue reached that stage of litigation. CECOS claimed that it was grandfathered; the opponents claimed that it was not. Regardless, the legislative amendment removed any ambiguity and left CECOS subject to siting certification review. See N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. Supp. 1987) (amending N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. 1982) (requiring that new landfill facilities, new land disposal facilities, and any expansion of a land disposal facility receive a certificate of safety from the siting board)).} The original law had included what amounted to a grandfather clause exempting from the certificate requirement hazardous waste landfill operators seeking to expand an existing facility.\footnote{See N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. 1982) (requiring a certificate for the construction of a new facility), amended by N.Y. ENVTL. CONSERV. LAW § 27-1105 (1) (Consol. Supp. 1987).} However, the new amendment eliminated commercial land disposal facilities like CECOS from the grandfather exemption, thereby requiring them to obtain a certificate.\footnote{N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. Supp. 1987).}

To reopen the administrative hearing on its application for a permit for its sixth landfill, CECOS renewed its application in November 1987 and, as required, "includ[ed] a request for a certificate from the siting board."\footnote{CECOS Int'l, Inc. v. Jorling, 895 F.2d 66, 69 (2d Cir. 1990).} Although the Administrative Law Judge recommended that the siting board and Commissioner grant CECOS a certificate and permit for its sixth landfill, those documents were never issued.\footnote{Id.} In March 1990, the siting board rejected the CECOS application for a site certification, foreclosing all possibility that CECOS could receive a permit to construct and operate the sixth landfill at its current location under the new law. Thus, the effective "ungrandfathering" of the CECOS facility with respect to the siting certification requirement, combined with certain characteristics of the site itself, essentially caused CECOS to discontinue its operation at its current location.

\begin{itemize}
\item \footnote{211. Id. In 1987, the New York legislature amended the siting law to require siting board certification, not only for new hazardous waste facilities, but also for expansions of existing commercial landfills. Act of Aug. 3, 1987, ch. 618, sec. 8, § 27-1105, 1987 N.Y. Laws 1078, 1081 (McKinney) (codified at N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. 1987)). This amendment amounted to an "ungrandfathering" of existing commercial landfills, thus subjected them, upon expansion, to siting board certification review. See CECOS Int'l, 895 F.2d at 68 (stating that under new New York law, CECOS must obtain a siting certificate and is subject to the siting certification review process).}
\item \footnote{212. CECOS Int'l, 895 F.2d at 68. The question of whether CECOS actually fell within a grandfather clause was one that would have been addressed in briefs had the issue reached that stage of litigation. CECOS claimed that it was grandfathered; the opponents claimed that it was not. Regardless, the legislative amendment removed any ambiguity and left CECOS subject to siting certification review. See N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. Supp. 1987) (amending N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. 1982) (requiring that new landfill facilities, new land disposal facilities, and any expansion of a land disposal facility receive a certificate of safety from the siting board)).}
\item \footnote{213. See N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. 1982) (requiring a certificate for the construction of a new facility), amended by N.Y. ENVTL. CONSERV. LAW § 27-1105 (1) (Consol. Supp. 1987).}
\item \footnote{214. N.Y. ENVTL. CONSERV. LAW § 27-1105 (Consol. Supp. 1987).}
\item \footnote{215. CECOS Int'l, Inc. v. Jorling, 895 F.2d 66, 69 (2d Cir. 1990).}
\item \footnote{216. Id.}
\end{itemize}
Further, the failure of CECOS' attempt to build the sixth landfill, a twenty-two million dollar, 1.2 million cubic yard toxic waste landfill, was a significant factor when Browning-Ferris, CECOS' parent company, decided to shut down its entire hazardous waste operations. Browning-Ferris announced, one month after the siting decision, that it would dismantle CECOS and leave the toxic waste management business entirely. Browning-Ferris now handles only non-hazardous waste and has moved into the recycling business. Therefore, one might conclude that the "ungrandfathering" of the CECOS facility caused Browning-Ferris to leave the hazardous waste management business entirely.

Although for many reasons a total shutdown of a business operation is not always an ideal result, the CECOS example shows that "ungrandfathering" is possible, and that it can change the way existing facilities approach environmental management. Ideally, the "ungrandfathering" of a facility would require that facility, within a reasonable time, to comply with the same stringent environmental standards applicable to newer facilities. This would raise the level of environmental regulation and improve environmental quality, especially in the low-income, minority communities currently hosting so many of the existing polluting facilities.

Nevertheless, some would argue that outright ungrandfathering is politically difficult to achieve because it is a legislative remedy in an arena where underrepresented groups have difficulty influencing the legislative process. This is true. But, while politically difficult, the CECOS example shows that it is not impossible. Any type of legislative change, especially that which is unattractive to influential lobbies, would require organization and a concerted effort on the part of change proponents.

B. Amortization, Sunset Provisions and Incremental Regulations

Many states have accepted, especially in the land use context, the theory that nonconforming uses can be eliminated from land use zones

217. MacClenan, supra note 203, at B10. Upon the shutdown of the CECOS landfill in Niagara Falls, N.Y., only one licensed hazardous waste landfill will remain in New York state. See Cecos Int'l, 895 F.2d at 68 (noting that the CECOS landfill is one of only two landfills in the state of New York).
219. Id.
220. Although CECOS illustrates that ungrandfathering is possible, it also illustrates that it can have important, though not wholly positive results. The ungrandfathering of the CECOS facility led to a reduction in capacity for hazardous waste disposal in New York state. So, while attempting to reduce inequities by eliminating grandfather clauses, change proponents must be mindful of the consequences and understand that they are making a choice. See supra note 200 and accompanying text (discussing Preservation of Capacity).
through an amortization period.\footnote{Fred P. Bosselman, The Impact of the Douglas Commission of Local Planning, in LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 433, 488 (1993); see Gosin, supra note 163, at 173-174; see also Ackerly Communications, Inc. v. City of Seattle, 602 P.2d 1177 (Wash. 1979), cert. denied, 449 U.S. 804 (1980). Here, the Washington Supreme Court considered the constitutional validity of a Seattle ordinance which provided a three-year amortization period (with the possibility of an extension of up to seven years) and required the removal of billboards located within a specified distance from designated sections of highway. \textit{id.} at 1180. The amortization period was to allow sign owners to recover their investment in the now-violative signs. \textit{id.} at 1181. The ordinance did not call for compensation for the sign owners and the court held it was not an unconstitutional taking of property without just compensation. \textit{id.} at 1184-85. See also John Donnelly & Sons v. Mallar, 453 F. Supp. 1272, 1276 (D. Me. 1978), rev'd \textit{sub nom.}, John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), aff'd, 453 U.S. 916 (1981). Here, the court considered a Maine statute, which included a six-year amortization provision, and required the removal of nonconforming billboards. The court failed to rule on the question of a constitutional taking. But see Pennsylvania Northwestern Distrib., Inc. v. Zoning Hearing Bd. of Moon Township, 584 A.2d 1372, 1376 (Pa. 1991) (holding that "amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution"). The Pennsylvania Supreme Court reached this conclusion, in part, because, "[i]f municipalities were free to amortize nonconforming uses out of existence, future economic development could be seriously compromised." \textit{id.} Further, the court held that amortization used in this way would amount to a taking without just compensation. \textit{id.}

\footnote{Gosin, supra note 163, at 175. The Clean Water Act also includes amortization provisions. The Clean Water Act provides that a more stringent standard of performance may not be imposed on an individual source for ten years after completion of construction or until the facility is fully depreciated or amortized, whichever is earlier. 33 U.S.C. § 1316(d) (1988). Some have inferred from Congress' special treatment of new sources in this context that it intended to afford protection to new sources without extending the same protection to existing sources or restricting the effectiveness of the § 1316(d) standards, even upon new sources. See American Frozen Food Inst. v. Train, 539 F.2d 107, 116 (D.C. Cir. 1976) (noting that the exceptions in the Federal Water Pollution Control Act function as amortization provisions, in that they diminish the economic disruption caused by the implementation of the Act); Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 822 F.2d 104, 115 (D.C. Cir. 1987) (stating that, under 33 U.S.C. § 1316(d), new sources have a ten-year amortization period to conform to more stringent standards); see also Town of Islip v. Zalak, 566 N.Y.S.2d 306, 313 (N.Y. App. Div. 1991) (holding that defendant's claim that local laws governing the operation of solid waste transfer stations were "invalid because they fail[ed] to provide for a reasonable amortization period [was] not ripe for judicial review").}
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regulation, so that the land use in a particular location eventually comes into compliance with the current zoning law.223

In addition to their use in the land use context, amortization provisions have appeared in other areas of law as well.224 They could certainly be used in areas of environmental law other than land use and zoning.225 In fact, in addition to their use in environmental legislation and regulation, amortization provisions have been used in environmental permitting. This means that a facility operating under a permit must meet increasingly stringent standards over a predetermined schedule.

In the legislative context, just as citizens have pushed to "un-grandfather" facilities, they could push legislators to create amortization provisions in existing statutes or regulations. Amortization periods, whether in legislation, regulation, or permits, would allow existing facilities to continue to operate under lower standards of environmental regulation for a limited regulated duration. Facilities would be required to comply, eventually, with the more stringent standards applicable to newer facilities. Investors should have time to recoup their investment, and use the amortization period to find ways to remain profitable under the new system of regulation.

Slightly different from, but related to amortization, would be a form of incremental regulation requiring facilities to meet more stringent standards over time. The only real difference between amortization and incremental regulation is that the express purpose of amortization is to allow for recoupment of investment. While amortization provisions may use incremental systems of regulation to allow recoupment of investment,

223. Gosin, supra note 163, at 164. Although many states have accepted the theory that an amortization period provides a solution to the "problem" of nonconforming uses, the Pennsylvania Supreme Court determined that amortization of nonconforming uses constituted a taking of property without just compensation, in violation of the Pennsylvania Constitution. Pennsylvania Northwestern Distrib., 584 A.2d at 1376.


225. See, e.g., Stepan Co. v. Pollution Control Bd., 550 N.E.2d 682, 683 (Ill. App. Ct. 1990) in which an Illinois appellate court interpreted an Illinois Administrative Code rule "providing that existing facilities with combustion devices to control process [volatile organic material] emissions do not have to meet the [new] 98% limit until the combustion device is replaced." This rule provides a stringent standard for the control of volatile organic materials, but does not make it immediately applicable to all facilities. Id. Significantly, however, it also does not provide a lifetime exemption for existing facilities. It provides a grandfather clause which allows existing facilities to continue to operate at lower control levels until the pollution control equipment at issue is in need of replacement, at which time the facility becomes responsible for meeting the new, more stringent control requirements. Id. This type of grandfather clause, which includes an identifiable end point for the exemption is the type of provision which, if universal, would help improve the environment in a way that is fair to existing facilities.
they may also simply set a future date for compliance, effectively creating a sunset provision and an end date for protected status.\footnote{For example, in the Oil Pollution Prevention, Response, Liability and Compensation Act of 1990, Congress required virtually all oil tankers operating in U.S. waters to be equipped with double hulls. The regulations implementing that requirement phases-in the double-hull requirement for existing tankers over a 20 year period, according to the age and size of the ship. 33 C.F.R. Part 167, App. G. The phase-in requirement began on January 1, 1995 for the oldest, largest ships, and is deferred for a period of time depending on size and age to as late as January 1, 2005. \textit{Id.}} In a pure incremental regulation scheme, regulations might require facilities to meet increasingly stringent regulation over a prescribed set of deadlines, ultimately resulting in full compliance with the standards applicable to new facilities.

Related to amortization provisions and incremental regulation are sunset provisions, which could provide another opportunity for legislators and regulators to amend the current rules in a way that positively deals with the problem of environmental grandfather clauses. Rather than creating friendly periods of incremental regulation, lawmakers could create sunset provisions for existing and future grandfather clauses. Sunset provisions would provide that older polluting facilities are subject to the older, less stringent standards until a predetermined future date. This method allows legislators and regulators to continue to use grandfather clauses in a positive way that is fair to investors, but provides an end date to the preferential treatment. In other words, sunset provisions allow legislators to reap the benefits provided by grandfather clauses while providing for a more equitable regulatory scheme over time. With the addition of sunset provisions, grandfather clauses provide only a temporally limited protection for regulated industry, thus minimizing the negative impact and inequity of eternal grandfathered protections.

\section*{C. A Word on Potential Criticism}

The solutions proposed in this Article may be subject to criticism on several counts. First, they are legislative solutions in an area where legislation, in the form of grandfather clauses, is the problem. If underrepresented groups were not strong enough to prevent the creation of environmental grandfather clauses in the first place, some will argue that they will not be able to win legislative solutions. Second, some may argue that the proposed solutions invite a takings challenge because they impose increased regulation that may, financially, force some facilities to close and thus depriving the owner of her property without just compen-
sation. Third, some may argue that better solutions exist through litigation or in the permitting process.

As illustrated by the CECOS example, outright ungrandfathering is possible. It may not be the easiest solution to implement, but it is achievable. Even underrepresented groups should be able to organize around the idea of eliminating a grandfathered benefit and succeed in changing the legislation that created the benefit.

Although they are legislative solutions, amortization provisions, incremental regulation and sunset provisions address one important potential criticism. Where some potential remedies to the problem of grandfathering invite a takings challenge, these solutions may help prevent one. These legislative remedies make a successful takings challenge less likely because they provide investors with substantial notice of impending changes in regulations, and allow investors ample time to recoup potential losses. Whether this would actually withstand a takings challenge would be a fact specific question. But, the nature of these remedies make them more likely to withstand such a challenge than an immediate increase in the stringency of environmental regulation.

Some will argue that better solutions exist through the administrative and permitting processes. These processes may indeed offer many acceptable solutions. Regardless, the legislative solutions offered in this Article provide workable, positive options for environmental justice advocates and others to consider in their attempts to remedy the inequities created by environmental grandfather clauses.

V. Conclusions: “Grandfather, That’s Not Fair”; And A New Focus for Environmental Justice Advocates

In some circumstances, the principles of fairness, equity and justice support the creation of grandfather clauses. They do not, however, dictate that their protections be eternal. To create a system in which the positive, equity-enhancing characteristics of environmental grandfather clauses exist, but are not masked by the inequity created when they are allowed to continue indefinitely, this Article made several suggestions for the reduction or elimination of grandfathered benefits over time. If implemented, these suggestions should help reduce inequity both generally in the regulation of polluting facilities and as applied to low-income, minority communities.

To begin reducing the inequities caused by environmental grandfather clauses, environmental justice advocates should heed the lessons that

227. U.S. CONST. amend. V.
CECOS teaches—that it is possible to "ungrandfather" a facility, and that upon "ungrandfathering," a facility may be shut down for its inability to meet the applicable environmental standards. Or ideally, the "ungrandfathered" facility would arrange to meet the more stringent standards applicable to its newer counterparts. Although it is clearly not simple to "ungrandfather" a facility, it is worthwhile to exert some effort and focus on a process that could help balance the regulation applied to similar facilities of various ages, and at the same time, improve the existing environment in low-income, minority communities.

If a facility cannot be outright "ungrandfathered," environmental justice advocates might push to create amortization provisions which would require facilities to comply, within a reasonable, legislatively determined time, with the stringent environmental standards applicable to new facilities, thereby allowing investors an opportunity to protect their investment. Congress and other legislative and administrative bodies could phase out the grandfather clauses that protect older facilities from tough regulatory requirements by using an incremental regulatory scheme under which existing facilities must meet incrementally more stringent standards over time. Legislators and rulemakers could create sunset provisions, under which a facility's grandfathered status would expire on a predetermined date. Upon expiration of the facility's grandfathered status, the facility would be required to comply with environmental regulation applicable to new facilities.

Amortization provisions, incremental regulation or sunset provisions would allow the use of protective grandfather clauses in a way that is fair to current and future investors, while not allowing protection and preferential treatment to continue indefinitely. As such, these provisions could work towards establishing equity, or at least reducing inequity, racial, demographic and general, created by environmental grandfather clauses. But, regardless of which approach they choose, environmental justice advocates should expand their focus.

The current, almost single-minded attention placed on blocking the construction or siting of new polluting facilities in low-income minority communities is of seriously limited utility. There are relatively few new facilities being built, and they are subject to the most stringent environmental regulation available. Because environmental justice advocates seek to improve the environmental quality in low-income minority communities, they should devote attention to the existing facilities currently located in and polluting the low-income minority communities they seek...

to serve. They should focus on the environmental grandfather clauses that allow those facilities to continue operating under less stringent environmental standards.

The suggested solutions and remedies in this Article, outright "ungrandfathering", amortization provisions, incremental regulation and sunset provisions would allow the principles of fairness, equity and justice to protect the interests of existing facility owners and investors while improving the environmental quality of the low-income communities that currently bear a disproportionate burden of environmental risk. Understanding that this disproportionate burden of environmental risk currently borne by low-income communities is due, at least in part, to the continued existence of environmental grandfather clauses, it would serve the environmental justice movement well to take a close look at environmental grandfather clauses and attempt to reduce or eliminate the benefits they confer on older polluting facilities.