6 Tul. Envtl. L.J. 317

Tulane Environmental Law Journal
Summer, 1993

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ENVIRONMENTAL RACISM: RECOGNITION, LITIGATION, AND ALLEVIATION

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*318 I. INTRODUCTION

Across the nation, communities are forced to deal daily with the problem of effective and efficient pollution control. The need to properly dispose of all types of waste is a national problem that everyone seemingly must confront equally. An assumption of equal confrontation, however, is not necessarily correct. It is becoming increasingly apparent that minority communities throughout the United States are faced with the increased likelihood that the solution to waste disposal will come to rest on their shoulders. [1] Minority communities are bearing a greater proportion of the effects of past and current industrial pollution, [2] as well as a larger number of decisions to site disposal facilities in their neighborhoods. For those communities experiencing endemic discriminatory environmental problems, [3] race continues to emerge ***320** as a common link. [4] Despite attempts to characterize this relationship as mere coincidence, vast statistical evidence continues to accumulate as an indication that more than happenstance is at play in this issue. For decades, sociologists, health care professionals, and environmentalists have realized and decried the disproportionate impact of environmental hazards [5] on minorities. [6] Both the government and the legal system, however, have been slow to recognize and respond to the severe problems facing these minority communities. Furthermore, the mainstream environmentalist groups have all but ignored, and in many ways have contributed to, the perpetuation of the disparate burden borne by racial minorities and the poor.

In recent years, studies conducted to chart the statistical occurrences of landfills, toxic waste sites, and other waste disposal systems within minority communities have begun to help bring the issue to the forefront. The growing awareness of the problem is ***321** helping to dispel the myth that all people in this country share equally the burden of waste disposal. [7] Moreover, academia, the government, and the judiciary are beginning to understand that this is a complex issue encompassing racial, [8] philosophical, [9] monetary, [10] and political [11] components. It is not a problem that is easily solved, but it is a concern that must be addressed. The United States must design a regulatory model for environmental justice soon to stop the trend of allowing people of color to bear the brunt of living with abandoned waste sites and of being industry's and the government's easiest target for current waste disposal.

***322** This Article attempts to shed light on the development of environmental racism and to suggest possible tactics for remedying and eventually eradicating discrimination from environmental policy in the United States. Part II of this Article defines the problem. Although easily described both in abstract and concrete terms, it is difficult to comprehend that the application of seemingly neutral environmental legislation could be discriminatory or racist. Part II also examines how the disparate impact of environmental burdens has developed, and explores the quickly accumulating statistical evidence of the problem. Part III analyzes the traditional law of discrimination and how the precedent in that area has worked to prevent the feasibility of fighting environmental racism with equal protection arguments. Part IV concludes that the failure of constitutional challenges means that communities around the nation facing the problem of environmental racism must take action on a different front. They must address the disproportional burdening of minorities through a multi-faceted strategy with political activism at its core. In developing such tactics, minority communities will be prepared to fight the impact environmental racism is having on minorities throughout the country.

II. DEFINING THE PROBLEM

A. What is Environmental Racism?

In introducing a special feature on environmental racism in the Colorado Law Review, Gerald Torres [12] wrote of the difficulty in the usage of the word racism. [13] According to Torres, it is important to avoid trivialization of the term. [14] Application of racism to every activity or outcome that appears to impact disproportionately on a particular group eventually will desensitize society to the concept. [15] Torres spoke of racism as

> ***323** [o]ne of those terms in contemporary political usage that is highly charged and which has an apparent meaning. The meaning of the term is clouded to the extent that it gets broadly applied to a variety of activities and outcomes. But racism has been and should be a term of special opprobrium. We risk having the term lose its condemnatory force by using it too often or inappropriately. By calling something racist when another term might suffice risks subjecting the word to a kind of verbal inflation. [16]

Although racism clearly deals with invidious discrimination toward a particular race, not every action "analyzable according to its racial distinctiveness may in fact be racist." [17] Racist acts may be committed by individuals or by institutions or organizations. [18] Some commentators have defined racism as consisting of acts done with or without intent, but generally carried out to "support or justify the superiority of one racial group over another." [19] Others similarly describe racism as "actions or practices carried out by dominant groups, or their representatives, which have a differential and negative impact on members of subordinate groups." [20] The overriding characteristic of racist acts is that they are performed to dominate or subordinate. [21]

Assuming environmental policy and legislation is fair on its face, the question arises of how racism was eventually a label ***324** applied to environmentalism. Torres explains the relationship between environmental policy and racism in terms of the policy's subordinating effect on racial groups. [22] The "predictable distributional impact" of the environmental action is such that it aids in the subordination and domination of a racial group. [23] Similarly, in construction of environmental laws, the government and the judiciary's insistence on pursuing the "color-blind" theory of legislation contributes further to the subjugation of certain races. [24] Adherence to such a theory precludes enforcement of laws and policies that are required to consider the impact the decisions will have on racial groups. Consequently, facially ***325** neutral laws become discriminatory when those applying them are

able to claim the excuse that any disparate impact was merely coincidence since the laws are enforced with no consideration of race. Environmental racism is adequately described, therefore, as the creation, construction, and enforcement of environmental laws that have a disproportionate and disparate impact upon a particular races, and that thereby further the subordination and domination of that group.

B. Growing Statistical Evidence

Having established a working definition of environmental racism, the next logical step is to consider whether such a problem truly exists. The steady accumulation of statistical evidence in this field of study [25] clearly militates in favor of finding a pattern of disparate impact of environmental burdens on racial minorities. Before specifically discussing the completed studies, it is important to understand how a valid model of discrimination is developed.

1. Effective Studies of Environmental Discrimination

Traditionally, discrimination is measured by controlling for certain demographic or social variables and attributing the remaining differences to discrimination. [26] Most researchers have attempted to prove environmental discrimination by measuring the geographical location of physical pollution, analyzing the characteristics of the communities where the pollution is located, and from that, drawing conclusions concerning environmental discrimination. [27] Environmental discrimination analysts suggest that studies are most effective, however, if they do not stop at that point. Because collecting data on the geographical location of pollution and the socio-economic characteristics of the surrounding communities considers the impact only as an absolute, such studies ***326** fall short. Analysis of environmental discrimination is most comprehensive if it considers both the absolute and the relative factors. [28] Relative analysis includes a study of the effects of time and regulation on the various control groups. [29]

In addition to physical measurements, some studies are conducted with economic factors as the basis for determining the existence of environmental discrimination. Those researchers using an economic analysis generally measure the costs and benefits of pollution distribution and regulation. [30] Because the economic-based studies often provide analysis of the data using different measurement techniques, the conclusions are sometimes widely varied. [31] Moreover, costs and benefits are a highly internalized factor and often will not be as reliable as physical measurements of environmental discrimination. [32]

***327** Effective environmental discrimination studies also must consider factors that may skew the statistics. These often are referred to as "confounders." Analyses of pollution's impact on various groups should be developed to encompass variables of location, duration, and magnitude. [33] Studies that fail to take such factors into consideration may be weakened as a result. Although the reports below have several of the problems discussed above, [34] the overall validity of the statistics is not greatly weakened. The studies' objects—to indicate the disparate impact of environmental decisions on minority communities—was achieved reliably if not perfectly.

2. The GAO Study

After fighting four years against the state's decision to dispose of poly-chlorinated biphenyl (PCB) contaminated soil in a landfill near Afton, North Carolina, residents of predominantly black Warren County turned to civil rights activist, Leon White. [35] Approaching the environmental issue as he would a civil rights violation, White organized non-violent protests to prevent the ***328** PCBs from entering Warren County. [36] White and the Warren County protesters were unsuccessful in stopping the landfill's construction, but their efforts did result in keeping out other hazardous wastes, providing an impetus for North Carolina's reevaluation of its siting policies, and, most importantly, placing national attention on the relationship between race and environmental hazards. [37]

Due to this national attention, the General Accounting Office (GAO) was prompted to conduct a study focusing on minority communities and their exposure to toxic waste. [38] In 1983 the GAO released its findings. The GAO studied four hazardous waste landfills located in EPA Region IV, and of those four landfills, three were located in predominantly poor and black communities. [39] Clearly a correlation between race and the location of landfill sites existed, but the limited scope of the study

was a flaw that undermined its usefulness.[40] The GAO study became most helpful as a catalyst for other investigations into disproportional environmental policies.[41]

***329 3. Toxic Wastes and Race in the United States**

When the United Church of Christ's Commission for Racial Justice became interested in the issue connection between environmental protection and race, the GAO study was the best, most complete research with which they had to work. The study, however, as indicated earlier, was not comprehensive enough to serve their purposes.[42] The Commission became committed to ***330** conducting a study thorough enough to prove the disparate impact of environmental hazards being borne by minority communities across the nation was more than mere coincidence.[43] To accomplish this goal, the Commission collected research and data to compile in its groundbreaking study, Toxic Wastes and Race in the United States.[44]

The study was divided into two components, the first analyzing commercial hazardous waste facilities and demographic patterns and the second analyzing uncontrolled toxic waste sites and demographic patterns.[45] The major conclusion the study ***331** drew was that "the racial composition of a community was found to be the single variable best able to explain the existence or non-existence of commercial hazardous waste facilities in a given community area."[46] Hispanic and African Americans tend to compose the majority of residents in communities hosting hazardous waste facilities.[47] Furthermore, the higher the percentage of minorities within a community, the greater the likelihood a higher number of facilities will be located in the community.[48] Hazardous waste disposal facilities are located in the communities of more than fifteen million African Americans and eight million Hispanic Americans.[49] In fact, that number only accounts for commercial sites.

The locations of abandoned toxic waste sites also disparately impact minorities.[50] Although these uncontrolled waste sites are prevalent in many American communities, such ***332** sites nevertheless more substantially affect minority communities.[51] Clearly, not only do minority communities continue to be chosen for controlled sites, but they have the added burden of dealing with illegal or abandoned sites as well.

These numbers are particularly startling if considered in light of the small percentage of African Americans that comprise our total population.[52] When viewing the cities that contain the greatest number of sites on the National Priorities List, the fact clearly emerged that wherever African Americans tend to congregate in larger percentages, higher numbers of facilities are located.[53] The study further indicated that "three of the five largest commercial hazardous waste landfills in the United States, accounting for 40 percent of the total commercial landfill capacity, are located in overwhelmingly African or Hispanic American communities."[54] The Commission's report indicates a definite ***333** pattern showing that environmental hazards weigh more heavily on an insular minority of the population.[55]

4. The Causes of Environmental Racism

The United Church of Christ's report concluded that race was the major variable in determining the location of hazardous wastes disposal facilities. The Commission acknowledged, however, that various factors related to race probably play an important role in location decisions.[56] Some of the factors include:

> 1) the availability of cheap land, often located in minority communities and neighborhoods; 2) the lack of local opposition to the facility, often resulting from minorities' lack of organization and political resources as well as their need for jobs; and 3) the lack of mobility of minorities resulting from poverty and housing discrimination that traps them in neighborhoods where hazardous waste facilities are located.[57]

Such factors combine with race to create a "racial bias" in the location of hazardous waste sites that Dr. Benjamin F. Chavis, Jr., ***334** termed "environmental racism."[58]

The most controversial factor contributing to the disparate impact is class. Debate continues over whether this is truly a race issue or whether the disparate impact stems from economics. It is hard to separate race from class in analyzing environmental racism, but it is not impossible. The majority of studies conducted have addressed the issue in some form, and have determined that although a community's poverty may correlate to its inability to prevent hazardous waste siting, the determining factor is generally race.

Paul Mohai and Bunyan Bryant explored this controversy by compiling and analyzing a list of studies in terms of inequity by income and by race. [59] Unlike income, [60] Mohai and Bryant found that, unlike income, inequitable distribution by race was present in all instances except one. [61] Researchers also discovered that in cases that weighed income and race factors and indicated which had more importance, the study showed that race weighed ***335** more heavily in six out of nine cases. [62] Furthermore, studies that have a national scope and consider both race and income have found race to be the more significant factor in determining the distribution of environmental hazards. [63]

A National Law Journal (the Journal or NLJ) report recently included an article in which race and income factors were weighed. [64] The Journal analyzed data concerning links between the racial and economic composition of the community and the stiffness of the penalty received. [65] The Journal's basic determination was that neglect of minority communities under environmental law occurs whether or not the communities are poor. Penalties against polluters in poor neighborhoods for all types of enforcement cases are fifty-four percent lower than in wealthy communities. [66] Income, however, is an unreliable predictor of the violator's treatment because the pattern varies with ***336** the type of law violated. [67] Minority status, on the other hand, consistently resulted in lower average fines than white communities under every type of environmental law. [68]

In its analysis of the Superfund cases, the Journal found the lapse of time before an abandoned hazardous waste site in a minority community is placed on the National Priorities List (the list or NPL) is twenty percent longer than for those sites located in white communities. [69] Once the sites are placed on the List, "in more than half of the 10 autonomous regions that administer EPA programs around the country, action on cleanup at Superfund sites begins from 12 percent to 42 percent later at minority sites ***337** than at white sites." [70] In addition, statistics indicated a difference in the chosen cleanup method for minority and white communities and high and low income communities. [71] Although Congress has declared treatment to be the preferred method of dealing with toxic waste sites, through administrative processes that consider relevant scientific and health factors, [72] containment, rather than remedial action was typically chosen more often in low income and minority communities than in high income and white communities. [73] The compiled statistics clearly seem to indicate that income does play a role in siting, penalty, and cleanup decisions, but race is the factor that most definitively controls. [74]

Arguably the penalty statistics are weakened slightly when viewed in relation to the process for determining fines. Fines may be assessed either through negotiation between the parties or through court decisions. Because the NLJ reached its conclusions ***338** through consideration of both, discriminatory intent in penalties may be questioned due to the government's lack of control over the judicial procedures. Given the method of computing the penalty statistics on an average percentile ranking rather than a normative curve, a problem may arise with large penalty awards. EPA argued that the validity of the NLJ's statistics were skewed by a $2.8 million penalty, the largest RCRA fine ever assessed and was levied against an environmental violator in a community composed of 99.4 percent white citizens. [75] Nevertheless, NLJ found the disparate treatment of penalties existed even if considering only negotiated settlements. [76] In those negotiated settlements, it is true that a variety of factors must be considered. [77] However, the strikingly disproportionate penalties cannot be explained easily as a result of those factors. As with many environmental battles, it is clear that industrial violators typically have stronger more readily financed "voices" in the negotiation process. Consequently, minority communities, lacking the resources to join the negotiations, generally are not heard.

III. LEGAL TREATMENT OF THE PROBLEM

A. Environmental Legislation for Hazardous Waste Siting

The main legislation governing disposal of hazardous waste is the Resource Conservation and Recovery Act (RCRA). [78] A principal purpose of RCRA is to ensure adequate disposal of ***339** hazardous waste. The act creates a "cradle to grave" tracking system for hazardous wastes with provisions addressing the "production, transport, treatment, and disposal of hazardous waste." [79] In addition, RCRA does not permit certain land formations to become sites for hazardous waste and prohibits land disposal of certain wastes. [80] RCRA also specifies minimum technological requirements for waste sites, but gives little guidance for siting other than this.

One cause of the disparate location of hazardous waste disposal sites is the lack of definitive statutory guidelines. Because RCRA leaves siting decisions to the states, the states themselves are responsible for translating and interpreting RCRA's requirements. [81] For federal approval, the states must combine RCRA's guidelines and the EPA's regulations into a workable program for waste disposal sites. As administrator of the nation's environmental policy and law, EPA may step in and use its retained enforcement powers. [82] The main responsibility of enforcement, however, lies with the state. [83] EPA requirements for siting programs include: 1) the state's technical analysis of proposed sites before selection; 2) full public participation in site selection; and 3) the state's protection of the selection process from blanket local vetoes. [84] The state must also develop programs to govern "permitting, compliance evaluation, enforcement, public participation, and sharing of information." [85] Furthermore, the overriding consideration in the development must ***340** be "human health or environmental protection." [86] From there, it is up to the state to devise and administer its program.

This is the point at which discrimination is introduced into the system. The state, in making its siting decisions must consider an array of concerns and interests. From the start of the process, states are faced with public opposition from communities less than eager to accept hazardous waste. Vocal and politically powerful white communities successfully transform, the "not-in-my-back-yard (NIMBY) [87] syndrome" into the "place-in-their-back-yard (PITBY) [88] syndrome" or, as some African American activists refer to the phenomenon, the "place-in-the-blacks'-back-yard (PIBBY) syndrome." [89] In selecting an approach to hazardous waste siting, states develop programs designed to "overcome" or "bypass" opposition and hostility. [90] Consequently, with avoidance of opposition as a main goal, the states have approached enforcement of their programs with an eye to the "path of least resistance." The result has been that industrialists and state ***341** political leaders turn to minority communities that may be quietly economically blackmailed, [91] "tricked," or merely out-maneuvered into accepting the waste.

When minority communities became aware that state programs were affecting them disproportionately some community groups initially responded with litigation. Because states are constitutionally bound under the Equal Protection Clause of the 14th Amendment to provide similar treatment under the law to similarly situated people, minority communities first approached the distributional inequity in waste disposal as an equal protection violation. The disparate impact seemed apparent, but for reasons set out below, their attempts to successfully claim a constitutional violation have failed thus far.

B. Application of Equal Protection Analysis to State Siting Decisions

Although some activists continue to view constitutional and civil rights arguments as the best means to achieve environmental justice, [92] most commentators question the effectiveness of such claims. [93] Indeed, the United States Supreme Court, in Washington v. Davis, [94] refused to find racial discrimination on the basis of disparate impact alone. The Court required both ***342** discriminatory intent and impact to find a constitutional violation. Thus far, the lower courts have followed the Supreme Court and have adhered to this standard despite the fact that the Washington Court intimated that in some cases the intent to discriminate might be inferred from the disparate impact alone. [95] Because the courts continue to refuse to find discriminatory intent in a pattern of disparate impact except in the most blatant cases, equal protection theories have proven fatal in environmental discrimination claims.

If the legislation is facially neutral and therefore not per se unconstitutional, communities must challenge the law on the basis that its true intent is to discriminate against a particular group. Although discriminatory intent may be proven by circumstantial evidence, litigants often find such proof problematic and constitutional challenges to environmental law decisions have proven no less difficult. [96] Many of the civil rights challenges against disparate impact of environmental laws have relied on Village of Arlington Heights v. Metropolitan Housing Development Corp. [97] There, the Supreme Court delineated the factors a litigant,

absent direct proof of racial animus, could use to prove the motive underlying the legislation. The following factors generally evidence racially discriminatory intent: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision, ***343** especially if it "reveals a series of official actions taken for invidious purposes;" (3) the sequence of events preceding the decision; (4) any departures, substantive or procedural, from the normal decision making process; and (5) the legislative or administrative history, specifically contemporary statements, minutes of meetings, or reports. [98]

Other evidentiary factors, including the state's ability to foresee adverse effects of its decision, may be considered in deciding whether a state action has discriminated invidiously. [99] In addition, pattern is an acceptable means by which intent can be proven. [100] Before the Court will find discriminatory motive from the pattern alone, however, the pattern must be so demonstrably "stark" as to lend itself to no other interpretation. [101] Consequently, the Court rarely relies on this "short-cut" to prove intent, and despite the continuing evolution of equal protection theory, [102] the plaintiff's burden of proof for such challenges remains almost insurmountable in the absence of direct proof. [103] Indeed, the Court's reluctance to use disparate ***344** impact as evidence of the requisite intent to discriminate means that, unless the state's actions are completely egregious, the plaintiff must prove specific racial animus to be successful. [104]

Several minority communities have attempted to use equal protection analysis to challenge the environmental actions affecting their communities. Each attempt, however, has failed to meet the intent to discriminate requirement.

1. Bean v. Southwestern Waste Management Corp.

Bean v. Southwestern Waste Management Corp. was one of the first cases to raise a civil rights challenge in an attempt to block the siting of a solid waste facility in a minority community. [105] When the Texas Department of Health (TDH) decided to allow the solid waste facility to be located and to operate near a predominantly black high school and neighborhood, the plaintiffs brought an action in federal court seeking an injunction. As the basis of their motion, the plaintiffs set forth a claim that the decision was racially motivated and was therefore a violation of section 1983. [106] As required under Washington v. Davis, the plaintiffs had the burden of proving intent to discriminate. To do so, they developed two arguments.

First, the plaintiffs argued that the TDH decision to locate the waste facility in their predominantly black community was part of a pattern of discrimination in placing such facilities. [107] Their second argument relied on TDH's history of discriminatory placement of solid waste sites and on irregularities in the application process in this particular instance. [108] Although the court questioned TDH's wisdom in placing the waste facility in ***345** such a location, the court did not find any purposeful racial discrimination, and therefore, found no section 1983 violation. [109]

The evidence the plaintiffs presented was not sufficiently striking to the Bean court and, as presented, may have actually favored the defendant's case. To support their first argument, the plaintiffs collected and submitted statistical data on TDH waste facility siting decisions. The data analyzed statistics indicating the percentage of minority populations in areas where TDH had approved sites. [110] These statistics indicated that of seventeen sites, 82.4% were located in area with minority populations of 50% or less. [111] Fifty-nine percent of sites were permitted to locate in census tracts with 25% minority populations or less. [112] Finally, TDH had approved only 2 sites in the target area where 70% of the population was minority. [113] Within that area, the two sites were located in different census tracts, one having less than 10% minorities and the one in question where the challenged site was to be located, having 60% minority residents. [114]

From this evidence, the court refused to find a pattern of discrimination. Because the statistics showed 50% of the solid waste sites were located in census tracts with less than 25% minority residents, the court held that the plaintiffs had not met their burden of proving that TDH had followed a pattern or practice of discrimination. [115] Consequently, the plaintiffs failed to establish the requisite element of discriminatory intent.

In attempting to prove their second argument, the plaintiffs once again relied on statistical evidence. The statistics were divided into three sets of data. The first demonstrated TDH's decisions to place 100% of Houston's Type I municipal landfills ***346** in

the targeted area. [116] The second set considered all types of solid waste sites in Houston and found the targeted area contained 15% of all solid waste sites. [117] Since the area contained only 6.9% of Houston's population, the plaintiffs argued that both sets of statistics, when viewed in relation to the minority population of the targeted area, proved a disparate impact that could only be explained by racial discrimination. [118]

To further support their argument, the plaintiffs presented a third set of data indicating that when location of waste sites was viewed citywide, the eastern side of the city hosted a greater number of sites than the western half. [119] The eastern half was predominantly minority, whereas the western half was predominantly white. According to the plaintiffs, such a disparity once again pointed to a pattern or practice of racially motivated siting decisions.

The court, however, disagreed. Despite what the court acknowledged as a surface correlation, the court rejected the actual validity of the statistics. [120] The Bean court did not use the Arlington Heights factors to make its determination. Instead, the court questioned the logic of TDH's decision to locate in that area, [121] but eventually concluded the evidence was inaccurate and lacking in probative value sufficient to support a finding of racial discrimination. The court found no section 1983 violation, and therefore, denied the injunction. [122]

Although the court refused to find racial animus or pattern and denied the injunction, the court did set forth particular issues to be addressed should the case ever make it to trial. The court stated that the following questions should be resolved: "Where ***347** .. are the solid waste sites located in each census tract? ... How large an area does a solid waste site affect? ... How are solid waste site locations selected? ... What factors entered into TDH's decision to grant the permit?" [123] According to the court, the answers to those questions would be determinative of the outcome at trial.

As the court pointed out, TDH's decision was an unfortunate one. Because siting decisions often affect the entire nature of a community, the factors the plaintiffs set forth should have been given more consideration. It is impossible to say, however, that the court improperly applied the law. Because the plaintiffs could demonstrate no direct proof of racial animus, precedent required that they produce statistics sufficiently "stark" from which the court could infer that any disparate impact shown was racially motivated. Such impact evidence was not available to the plaintiffs in Bean. The statistics, as broken down, showed that siting decisions were either more favorable to minority communities or could be explained through other non-racial factors. Race could not be determined to be any part of the purpose behind the siting decision. Consequently, the significance of the Bean decision lies solely in the fact that it heralded the beginning of legal action against the disproportionate impact that minorities bear in siting decisions. As the court rightly noted, however, while the Bean facts could not support an inference of racial animus alone, other facts could be dispositive.

2. East Bibb Twiggs Neighborhood Assn. v. Macon-Bibb County Planning & Zoning Commission

A later case involving a constitutional challenge to a siting decision was East Bibb Twiggs Neighborhood Assn. v. Macon-Bibb County Planning & Zoning Commission. [124] This case involved the claim that the Zoning Commission's decision to permit the siting of a landfill in a community where 60 percent of the census ***348** tract was black constituted discrimination if viewed in the context of the Commission's history of placing unwanted land uses in black neighborhoods. [125]

In rejecting this argument, the court placed great weight on the fact that the Commission had approved only one other landfill, and its location was in a predominantly white community. [126] The court failed to give credence to the plaintiffs' argument that both communities were census tracts located in a County Commission District composed of approximately seventy percent blacks. [127] The decision to discount this argument was based on the rationale that a white census tract containing a Commission-approved landfill rebutted any discriminatory intent. [128]

To provide further evidence of discriminatory intent, the residents of East Bibb also cited Commission statements acknowledging the existence of "racial and low income discrimination ... in the community." [129] In addition, the residents pointed to procedural deviations in the Commission's decision to allow the landfill's construction in their neighborhood. [130] Neither of these arguments was availing. The court dispensed of the first by reasoning that while the statements were the Commission's recognition of racial

discrimination in the community, they did not imply that the Commission's decision was motivated by such racial animus. [131] The court countered the second argument by concluding that the admitted procedural deviations were harmless. [132]

Finally, the residents claimed the legislative and administrative history of the action demonstrated racial discrimination. [133] The plaintiffs argued that the Commission's ***349** change of heart in first denying and then permitting the landfill's request was suspicious because the elements for the initial denial had not changed before the Commission's subsequent reevaluation and issuance of the landfill permit. [134] The court rejected this argument as well on the basis of its findings that several Commission members had been persuaded that concerns over the location that had motivated their first decision to deny the permit would be alleviated. [135]

The court, therefore, held that the plaintiffs had not met their burden of proof for discriminatory intent. [136] Rather, the court found that the Commission "carefully and thoughtfully addressed a serious problem and that it made a decision based upon the merits and not upon any improper racial animus." [137] In sum, the court determined that the plaintiffs were not deprived of any equal protection under the law by virtue of the Commission's decision to locate a landfill in their community. [138]

The East-Bibb plaintiffs took a somewhat different tack than did the plaintiffs in Bean. Rather than stressing a statistical pattern, the East-Bibb plaintiffs relied heavily on the Arlington Village factors such as the historical actions of the agency in question. Like the Bean decision, the East-Bibb court appears to have applied the law properly. The plaintiffs presented insufficient evidence to prove either procedural bias in the questioned decision or a historical pattern of bias in past decisions. Particularly significant to the East-Bibb outcome was the plaintiff's confusion of the Planning and Zoning Commission's actions with those of other governmental agencies. Legally, a pattern cannot be proven through a comparison of different agencies' administration of different programs. Furthermore, the court recognized the fact that private parties generally choose the desired sites, and the Commission merely grants or denies the request. Consequently, intent to discriminate in siting decisions is difficult to prove.

***350 3. Other Important Decisions**

Other more recent cases have attacked siting decisions through civil rights challenges. In R.I.S.E., Inc. v. Kay, [139] a biracial community organization, calling itself "Residents Involved in Saving the Environment," fought against the decision to site a regional garbage dump close to their community in King & Queen County, Virginia. [140] They argued that the county had violated their civil rights by locating the landfill in their 64% black community. [141] The court used the Arlington Heights factors to evaluate the evidence R.I.S.E. provided. [142] In its analysis, the court found no sufficient evidence of intentional discrimination by the county government. [143] The court rejected any discriminatory motive, finding instead that the county had made an economic and environmental decision. [144]

This case highlights the difficulty of civil rights challenges to siting decisions. Although discriminatory motive need not be the primary or dominant motive in locating waste facilities, it must be one of the motivations. With so many economic, health, safety, and environmental factors involved in such a decision, it is difficult to find sufficient evidence, absent direct proof, from which the court may infer even the slightest racial motivation.

In July, 1991, another suit, El Pueblo para el Aire y Agua Limpio v. Chemical Waste Mgmt. Inc., [145] was filed based on alleged civil rights violations from siting decisions in Los Angeles. [146] The plaintiffs alleged the defendant had engaged in a pattern of siting toxic waste incinerators in minority communities throughout the nation. Currently, the defendant operates commercial toxic waste incinerators in the south side of Chicago, ***351** in Sauget, Illinois, and in Port Arthur, Texas. [147] These communities are all predominantly minority with 80% black and Latino residents in Chicago's south side, 75% black residents in Sauget, and 77% black and Latino residents in Port Arthur. [148] The site over which El Pueblo filed suit was proposed for Kettleman Hill, a community outside Kettleman City, California in which 95% of the residents are Latino and 40% are able to speak only Spanish. [149]

Despite a seemingly clear statistical pattern, the court dismissed the action when the defendants moved it to do so on the basis of ripeness. [150] Chemical Waste argued an injunction was not appropriate because the siting procedures were not yet complete. The plaintiffs had the burden to establish harm to obtain an injunction, and because the harm could not be proven until a siting decision was actually complete, the court was forced to dismiss. [151] Given the history of defeats in environmental cases that have used discriminatory patterns to prove constitutional violations in siting determinations, it is unlikely that the plaintiffs in El Pueblo would prevail should the action go to trial. Although the pattern seems clear, the court will probably be disinclined to infer racial animus from decisions that can be explained easily as purely economic decisions.

In addition to the civil rights claims against Chemical Waste, the plaintiffs had alleged due process violations against Kings County for its refusal to translate the Environmental Impact Report into Spanish. [152] Furthermore, the County had denied the plaintiffs the use of an interpreter at the only public hearing concerning the proposed incinerator. [153] The court postponed its decision on the due process claims until the decision was reached in El Pueblo para el Aire y Agua Limpio v. County of Kings in ***352** Sacramento Superior Court. [154] The plaintiffs achieved a victory in that case where the court ruled that the environmental review documents must be translated into Spanish to ensure "meaningful involvement" by Kettleman City residents. [155]

As the courts in Bean, East-Bibb, R.I.S.E., and El Pueblo I correctly applied constitutional analysis to the facts of those cases, the court in El Pueblo v. County of Kings correctly applied the law as well. The court analyzed the due process argument and found precedent in that area to support the principle that fair proceedings require the parties to be provided with the ability to participate in a meaningful way. Because that right of meaningful participation was denied to the Spanish-speaking residents of Kettleman City, it was proper for the court to order steps to ensure their understanding.

Unlike the constitutional challenges, actions such as El Pueblo II are suits that minority communities have a chance to win, and with limited resources, concentration should be given to the most currently effective litigation. Although many disagree, it is the alternative actions ensuring proper administrative hearings, access to information concerning siting proposals, and other administrative challenges that will be of most benefit to minority communities. [156]

4. The Feasibility of Civil Rights Challenges to Siting Decisions

As the cases above indicate, no civil rights arguments have been successful to date in challenging siting decisions. [157] The ***353** Supreme Court's reluctance to infer discriminatory intent from statistical evidence of an overall pattern was cemented in McCleskey v. Kemp, [158] where a black petitioner tried to use the effects of many uncoordinated decisions to establish racial animus. [159] Having been convicted of killing a white police officer, the petitioner presented a comprehensive study of capital convictions. The study pointed to a disproportionate number of black defendants receiving the death penalty when their victims were white. [160] The Court rejected the petitioner's argument and found the statistical proof of disparate impact to be insufficient to prove racial discrimination. [161] Moreover, the Court reaffirmed its standard that statistics must present "stark" evidence of a pattern before it will infer discriminatory intent. [162]

No reason exists to believe the Court will deviate from its precedent and begin to accept constitutional and civil rights challenges in environmental cases. In past decades, the courts have rejected these arguments on the basis that the plaintiffs have failed to establish necessary elements to show discriminatory intent. Consequently, it would be a waste of time, and a waste of sorely limited funds, for citizens' groups to continue raising such challenges in court. [163] New tactics must be considered.

***354** IV. THE SOLUTION TO THE PROBLEM

Clearly, the solution to years of disproportional burdening of minority communities will not be simple. Because the problem is complex, encompassing social, philosophical, historical, monetary, legal, and even moral aspects, the answers will be complex as well. Although it is a problem with legal repercussions, part of the frustration inherent in trying to reach justice through traditional legal action is, as Luke Cole observes, due to the fact that the law is not an adequate solution. [164] In his correspondence to the Michigan Law Review, Cole noted:

> [t]he siting of unwanted facilities in neighborhoods where people of color live must not be seen as a failure of environmental law, but as a success of environmental law. While we may decry the outcome, the laws are working as they were designed to work. The disproportionate burden of environmental hazards borne by people of color is legal under U.S. environmental (and probably civil rights) laws. [165]

It is necessary, therefore, to widen the scope of possible measures. Individuals and groups working toward a model of environmental justice must embrace a solution comprised of political, legal, and legislative tools. Minorities must focus less on what the law can accomplish, and more on what they can accomplish by fighting with every available means to become loud and visible rather than remain "out of sight and out of mind." Only through what Cole terms "poverty law" will minorities achieve any semblance of justice in environmental decisions that are basically political rather than legal determinations.

*355 A. Using The Legal System

Because traditional equal protection claims have not been successful in the court system, other causes of action must be used either to prevent hazardous waste sites from being located in minority communities or to remedy wrongs already caused by existing sites. Both common law and statutory actions can be helpful in the quest for environmental justice. It is necessary to remember, however, that legal action is just one prong in a multifaceted attack, and in minority communities with often limited resources, such options may be financially out of reach.

1. Common Law Causes of Action

Minority communities could address their existing problems through toxic tort claims. Such actions may be based on four common law theories: nuisance, trespass, negligence, and strict liability. [166] Nuisance suits may be either private or public. [167] If the action is private, the plaintiff must prove that the "defendant's unreasonable use of his property interferes with the reasonable use of the plaintiff's property." [168] For a cause of action to be maintained as a public nuisance claim, the plaintiff must prove the defendant has violated a criminal statute or interfered with the general public good. [169] The plaintiff might also prove the defendant inflicted some special injury to the plaintiff. [170] These nuisance actions could be brought against either the individuals or the industries causing these types of harms.

***356** Scope and causation are the two most limiting factors in nuisance claims. Although the nuisance doctrine will allow current landowners to be held liable for nuisances caused by previous landowners, current landowners are not always required to abate existing nuisances if it is not practicable. [171] Causation, however, is the largest limiting factor in toxic tort cases including nuisance actions. The plaintiff trying to prove harm under any of the tort theories must establish causation. Plaintiffs attempting to do so will find special difficulties inherent in toxic torts. [172]

Plaintiffs also might attempt to recover for toxic injuries by bringing an action in trespass. To prevail in a trespass case, the plaintiff must prove:

> (1) invasion affecting an interest in the exclusive possession of the property, (2) an intentional doing of the act which results in the invasion, (3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest, and (4) substantial damage to the res, or property. [173]

Such an action is particularly useful in instances where polluting substances may leak onto adjacent land or into the groundwater of adjacent land and damage the land, thereby doing injury to the ***357** plaintiff's possessory rights. [174] Moreover, this action may exist in conjunction with the nuisance action. [175]

Two additional potential actions are toxic torts sounding in negligence or in strict liability. In order to establish negligence, the plaintiff must meet the traditional elements of duty, breach of that duty, causation, and actual damage. [176] The usefulness of negligence actions in toxic tort cases is limited by the plaintiff's burden of proof standards. Consequently many attorneys advise their clients to opt for strict liability causes of action. Although it is still necessary to prove causation in strict liability cases, the presumption of liability means the initial burden on plaintiffs is less stringent. [177] To maintain a strict liability suit, the plaintiff either must prove the tortfeasor was engaged in an ultrahazardous activity [178] or an abnormally dangerous activity. [179] Due to the assumption of liability and the sympathy factor involved with plaintiffs injured by such activities, these common law causes of action are easiest for plaintiffs to bring. [180] Nevertheless, the biggest stumbling block under either negligence or strict liability is the inherent difficulties in proving causation.

***358 2. Statutory Rights**

In addition to common law actions, citizens have available to them a limited number of potential actions to prevent harm or to pursue relief. Under both RCRA and the National Environmental Policy Act (NEPA) [181] a citizen's options are limited. Although citizens may challenge a permit for a toxic waste site under RCRA once it has been issued, the only power granted to individuals or activist groups prior to the issuance of the permit is the right to participate in the permitting process. A citizen may do so by writing to oppose the permit or by submitting general comments concerning the proposal. The other route open to citizens is to attend public hearings or meetings relating to the RCRA permit.

Under NEPA any agency proposing major federal actions that might significantly affect the quality of the human environment must submit an Environmental Impact Statement (EIS). [182] Because courts have determined the permitting process under RCRA is the functional equivalent of the EIS in the siting of new solid or hazardous waste facilities, [183] a community's right to contribute to the EIS would be limited to other projects significantly impacting their community and falling under the NEPA criteria. Like RCRA, NEPA requires public notice of hearings and availability of all relevant information for interested persons. The Act requires the agency to make efforts to seek public input in the preparation and implementation of the NEPA procedures. [184] Although the right to participate should not be ***359** denigrated, the public involvement requirements set forth under RCRA, NEPA, and even CWA and CAA, are not as meaningful as a solid ability for citizens to become directly and legally involved in the permitting process.

The above public participation rights are pertinent only before the issuance of the facility's permit. Once a facility is granted a permit or a facility already exists in a neighborhood, citizens have other available actions under the federal statutes. Enforcement measures under RCRA include citizen suits that may be brought under section 7003 of the Act. This enables a citizen to bring a civil action "against parties whose past or present hazardous waste activities contribute to an imminent hazard, under a standard similar to section 7003." [185] This right is only available to citizens if EPA fails to take action against the party, and requires citizens to give proper notice of the intended litigation. [186]

Citizens may also pursue other actions under various environmental statutes such as the CWA [187] or CAA, [188] the Endangered Species Act, [189] or the Emergency Planning and Community Right-to-Know Act. [190] Citizens may also have potential civil rights actions under sections 1982 and 1985 of the ***360** Civil Rights Act. [191] To support a section 1982 claim, the plaintiff may allege that "private or state decisions have adversely impacted the property values of minority residents when their white counterparts were not suffering the same impacts." [192] However, to prevail under Section 1985, the plaintiff must prove a conspiracy, [193] including a showing of race- or class-based discrimination. [194] Consequently, Section 1985 claims, like the 1983 claims discussed above, are limited in their usefulness.

B. Political Activism

While the rights granted by the statutes and common law actions described above provide some protection for communities affected by hazardous wastes, they merely provide for remedial actions or establish participatory rights. By its very nature, a remedial action can provide relief only after a problem has arisen. Minority communities subjected to environmental racism need new legislation that requires authorities to consider environmental justice concerns and that prevents the creation of

disproportionate burdens upon a small segment of America. To create this new legislation, however, the communities must first become empowered. They must become environmentalists with a new agenda and a new focus designed to protect themselves and other minority communities from bearing the brunt of hazardous and solid wastes.

Traditionally, the environmental movement in the United States has focused on conservation and preservation of wilderness areas and wildlife. [195] Environmentalists have concerned themselves with stopping the spread of pollution and with saving natural resources. [196] In addition, the support for such causes ***361** came mainly from middle and upper-middle class whites. [197] Members of minority groups were not solicited by environmental organizations and for the most part did not participate in the environmental movement. [198] Although the black community has a long tradition of protest, demonstrations, and activism in the civil rights arena, that tradition has not carried over into the environmental movement until recently. Consequently, minorities have taken the brunt of dumping, pollution, and locally unwanted land uses (LULUs) without an organized and active group to stand as their advocate. [199] Furthermore, the lack of a significant minority voice in the movement allowed the white-populated groups to perpetuate the NIMBY philosophy of environmentalism. [200] The problem with such a philosophy is that the waste must end up in someone's backyard, and more often ***362** than not, minority communities were slated to receive it. [201]

Environmental groups' early attempts to reach out to poor and minority urban residents who were suffering the effects of pollution were resisted rather than embraced. [202] The root of this resistance came from the perception that environmentalism was an elitist cause. [203] At the core of the conflict between environmentalists and poor minorities, however, was the notion that the environment can only be maintained at the expense of jobs—a sacrifice the minority communities were not in a position to make. [204] Acceptance of this argument began to dwindle when minorities watched industries exploit their communities with the promise of jobs, only to subsequently pull out, leaving them at once laden with environmental problems and without work. [205] As a result, minorities' growing concern about their communities and families have sparked participation in the environmental movement.

Yet minorities and social activists were not willing to join the established environmental movement. The new minority environmentalists wanted the established environmental groups to address the issues that immediately concerned them, instead of traditional environmental concerns rooted in protection and ***363** conservation. Consequently, minorities have taken their own approach. [206] They have formed grassroots environmental groups that may or may not be affiliated with a mainstream environmental group. [207] Rather than work toward broad conservationist goals, these grassroots movements focus on specific areas and issues. [208] In addition, these groups are normally formed by local citizens to address local problems. This means local activists may use their membership in other civic or social groups as an “infrastructure” on which to build an environmental equity movement in their own community. [209]

***364** These grassroots groups rely heavily on civil rights techniques and have struggled to apply them to environmental inequities in their communities. [210] They are instigating protests, organizing neighborhood demonstrations, and forming picket lines. They apply political pressure and bring class action suits against industries and the government. In short, they have translated the procedures that had been successful in advancing the civil rights movement and applied them to propel public awareness and governmental action toward environmental equity. [211]

In addition, the grassroots activists are forcing the mainstream environmental groups to reevaluate their philosophies, their tactics, and their structures. [212] The Big 10 (10 of the largest and most vocal mainstream environmental groups, such as the Sierra Club) are belatedly awakening to the realization that they have done too little for too long to address environmental equity problems. [213] Many of the Big 10 groups have made efforts to rethink their agendas, but others still have miles to go before they make any real progress. [214] Nevertheless, they are aware of the equity concerns surrounding siting decisions and, in many instances, environmental organizations have joined forces to rectify years of environmental injustice.

Through reshaping the way environmentalist organizations work, minorities are beginning to achieve some satisfaction in eradicating environmental racism. Their protests have obtained recognition for their causes and have forced the Big 10 to open ***365** their eyes. Both the merger of mainstream environmentalists with grassroots organizations and the application

of civil rights theories to environmental law continue to be criticized. However, continual restructuring and rethinking of environmentalism is necessary to ensure the success of efforts to control the disproportionate impact of environmental hazards on minority communities.

C. Putting It All Together

Before reaching concrete and effective solutions, it is necessary to set forth certain recognizable principles in the environmental discrimination issue. It is clear that the problem is complex. To declare that federal, state, or local governments are purposely subordinating minority communities would not only be too simplistic but would also be untrue in many instances. The economic, environmental, social, and political factors affecting siting decisions are enormous. Consequently, it would be more realistic to recognize that the government has chosen the options it has viewed as more effective, more efficient, and just plain easier. This is not to say the decisions to site solid and hazardous waste facilities in minority communities more often than in white communities has been a justifiable sacrifice that should be tolerated. The minority communities, disparately affected by inequitable siting decisions and greater overall pollution exposure, should develop a voice and speak out against the federal, local, or state governmental policy of taking the "path of least resistance."

Organization is the key to reaching solutions to discriminatory impact. Although the problem is nationwide and such disproportionate burdening occurs at all levels of the government, the affected minority communities must view themselves first as grassroots local groups. These groups should limit the focus of their movement to the environmental problems in their neighborhoods in order to achieve a strong foundation within the local community. Such groups should draw on the existing infrastructure within their communities. Leaders already active in local churches and civic groups are best equipped to motivate the community into taking action on its own behalf.

Once the local groups have created a strong base, it is ***366** imperative that they become affiliated with larger networks of environmental groups. Minority communities lack the resources, technical knowledge, education, information, and representation that is so necessary to grassroots environmental groups facing complex litigation legislation such as RCRA. National networks will be invaluable in providing the local groups with the know-how they may be lacking. Community groups, however, should not rely upon the network as the primary actor in their "battle." To ensure self-sufficient grassroots movements, the networks should act instead as mentors who teach environmental strategy to local groups.

Local environmental groups also must conserve the financial resources of their communities by exploiting the resources of the area as a whole. The groups should take advantage of all community services that might be useful to provide a voice in environmental decisions. Community health officials, for instance, could help to develop health surveys to demonstrate health risks already attributable to the polluted conditions in the area. Agricultural agents could conduct soil samples to test for present contamination. Legal volunteers could act as advocates and advisors at public hearings. The list of public and private community services that the grassroots movement may use is extensive and is the key to keeping down the costs of community efforts.

In addition to availing themselves of community services, minority communities seeking environmental equity must realize that they will never achieve their goal without sufficient representation in public offices, government agencies, and mainstream environmental groups. Minority communities should form voter blocs to elect minority candidates to local, state, and federal offices where minority representatives can directly address the problem of environmental inequity. Non-minority representatives should not be ignored either. The grassroots groups should develop effective lobbying techniques to make their concerns known. Political pressures against placing solid and hazardous waste sites in minority communities must be equal to, if not greater than, the pressures white communities exert in opposition to LULU's.

Minorities should seek representation in governmental ***367** agencies and mainstream environmental groups as well. EPA has an abysmal record for placing minorities in decision-making positions. Although EPA has not intentionally disregarded minorities, it should seek out and encourage minorities to fill higher level positions in the agency. In turn, members of minority communities must cultivate an interest in pursuing such governmental work. While minorities have been active in public interest agencies, the traditional inclination has been toward such organizations as the Equal Employment Opportunity Commission or other civil rights oriented positions. Mainstream environmental groups must also actively seek minority members. Their leadership is generally white and middle to upper-middle class. Their philosophy has focused heavily on conservationist and preservationist issues rather than environmental equity concerns. These groups must actively recruit minority and low income members. Mainstream environmentalists should be more sensitive to the human issues involved in the environmental movement and should seek to achieve environmental justice. Mainstream environmentalists cannot insist on protection of the environment

at all costs and expect lower income minorities to be attracted at the risk of losing their jobs. Both groups must reach a compromise.

Finally, EPA, politicians, environmentalists, and minority communities must work together to alleviate the impact that the NIMBY syndrome has had on siting decisions. All communities must be made aware that solid and hazardous wastes sites will be built somewhere. If disposal facilities are not sited in white communities, they will, as a matter of course, be sited in minority communities. To ensure that no areas bear the brunt of solid and hazardous waste facilities, communities themselves should discourage knee-jerk opposition. Instead, community organizations should take full advantage of the public participation procedures set forth under RCRA and other environmental laws used to ensure cooperation between EPA, industry, and local citizens in siting decisions. The communities should be given the opportunity for earlier input and continual oversight of the project both before and after completion. Although environmental legislation already provides for some public participation, more is needed. Fear of the health risks created by such facilities promotes the NIMBY syndrome. If the public—including both white and minority ***368** communities—has achieved a more effective voice in the entire process, the fear might be alleviated and opposition lessened. Politics must be removed from environmental law, and the regulations must be allowed to work as they were intended—as scientific and technological decisions based upon what is healthiest and safest for the affected population. Only by doing so will the underrepresented minorities, who now lack political clout, be treated justly under environmental laws.

V. CONCLUSION

Environmental laws are meant to protect the nation's resources and to minimize the adverse impacts pollution will have on our wildlife, our wilderness, and our people. Unfortunately, America's environmental laws have protected unequally. A minority of society bears the majority of environmental hazards incident to our industrialized nation. This disproportionate impact, however, is unjust and must be rectified.

To do so the entire philosophy behind environmental policy in the United States must be rethought. The often unique cultural or historical needs of minority communities must be considered in forming and administering environmental laws. While the current laws may be facially neutral, that neutrality becomes illusory when political and social factors determine the administration of those laws and form environmental policy. Because the laws are not unconstitutional on equal protection grounds, legal actions alone provide little effective remedy for the disparate impact they have on minority communities. Consequently, as this article has tried to illustrate, it is necessary for a mobilized grassroots movement to force legislators and mainstream environmentalists alike to take notice of the problem. Groups seeking environmental justice must mobilize their efforts by using political activism and education as well as the legal system. Only by recognizing the complexity of the problem and its roots in all sorts of political, social, economic, philosophical, legal, and cultural issues can a solution be achieved.

Footnotes

a B.A., 1986; J.D., 1993, University of Kentucky.

1 The problem is not just national but exists around the world. For the purposes of this Article, however, environmental racism will be discussed in the context of United States communities and law. See Gerald Torres, Race, Class, and Environmental Regulation, Introduction: Understanding Environmental Racism, 63 U.COLO.L.REV. 839, 840 (1992).

2 See generally THE UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES SURROUNDING HAZARDOUS WASTE SITES (1987) (hereinafter TOXIC WASTES AND RACE).

3 Marianne Lavelle, Unequal Protection: The Racial Divide in Environmental Law, NAT'L L.J., Sept. 21, 1992, at S3. Altgeld Gardens is a predominantly black community on Chicago's Far South Side. In an area six-by-six miles square, closed steel mills have left 50 abandoned dumps of toxic factory waste. The toxins are so strong that Illinois inspectors were forced to stop their expedition onto a chemical lagoon when their boat began to disintegrate. The area is also home to a toxic waste incinerator that "had illegally shut off air monitors, had been storing 80,000 more gallons of waste than the law allowed, and did not check carefully the types of the waste it was burning" and consequently caused a huge toxic explosion 1991. In addition, "the foothills of the municipal landfill" are within sight of the neighborhood

playground. Despite burgeoning protests the community has yet to obtain a place on the Superfund list. Id. at S5. See also Marcia Coyle, Community Profile, Wallace, Louisiana: Saying 'No' to Cancer Alley. Wallace, Louisiana is located in what industry knows as Chemical Corridor but environmentalists and health specialists have dubbed Cancer Alley. This "alley" is a 100 mile stretch between New Orleans and Baton Rouge where 125 chemical giants pump waste into the air and water. Wallace is on the verge of experiencing the fate of other black communities in the area. It is about to be bought out of existence by Formosa Plastics Corp., a company many consider "a world class environmental outlaw." According to environmentalists, "mere coincidence fails to explain why so many of these communities, squeezed or driven out by these industrial monoliths, are poor and black.... The state offers, and industry accepts, they say, cheap land, cheap water, cheap transportation and cheap lives ... cheap black lives." (Since this article was written, Formosa has stopped its plans to locate in Wallace, citing delays in the permit process caused by the lawsuit as intolerable. See Marcia Coyle, Company Will Not Build Plant, NAT'L L.J., Oct. 19, 1992, at 3).

Id. at S7, Claudia MacLachlan, Community Profile, Tucson, Arizona; Nightmare on Calle Evelina. South Tucson's population is overwhelmingly Hispanic and is plagued with cancer and other life threatening diseases. In 1981 it was discovered that Hughes Aircraft Co. and the United States Air Force had been dumping trichloroethylene (TCE) into unlined pits where it and other chemicals eventually seeped into the underground aquifer from which Tucson draws its water supply. It has been 11 years and the "bulk of the drifting contamination has not been dealt with," and residents "believe they got this stuff dumped on them because they are poor and brown."

Id. at S9, Marcia Coyle, Community Profile, Moss Point, Mississippi; Town Fights Waste Plan. When the white community of Pascagoula protested the town's plans to locate an incinerator near a small neighborhood and school, the city abandoned the idea and moved the location across the Escatawpa River to "mostly black Moss Point." Now that Pascagoula intends to expand the incinerator to encompass medical waste disposal, the residents of Moss Point have had enough. Rev. Elijah Henry Fr. is helping the black population fight. He feels "It's always easier to do these things [environmentally discriminate] to the black community because the attitude is we don't know any better. But often that's simply because we haven't been informed.

Id. at S9, Marcia Coyle, Community Profile, Tacoma, Washington; A Way of Life is Threatened. In Tacoma, Washington the Payallup Tribe's Reservation once included the Commencement Bay area, but now only 1 percent of the tribe's land remains in reservation trust. The rest was "stolen" and is heavily industrialized. Their culture of subsistence fishing is badly damaged due to the high levels of contaminants dumped into the bay and retained in the tissue of the fish. Not only are the fish dying, but the tribe increased deaths from digestive cancer and reduced life expectancies. When the site was investigated for Superfund listing a required health assessment of the area was completed. The Puyallup tribe was not included in the assessment and a requested amendment to correct the omission took 4 years.

Id. at S11, Claudia MacLachlan, Community Profile, West Dallas, Texas; Unto the Third Generation. Lead levels in the Hispanic and Black community of West Dallas are causing debilitating diseases in children there. The area is home to 70 industries, some of which still are "licensed to emit low levels of lead into the air." Lead and other toxins contaminate the air as well as the soil of West Dallas. Although the problem was discovered in the early 1980's, the community has had ineffective cleanup efforts and paperwork for Superfund listing is not yet completed. Residents in the area believe cleanup in a white neighborhood would have been started and completed in the snap of a finger.

4 See generally TOXIC WASTES AND RACE, supra note 2.

5 Rachel D. Godsil, Remedying Environmental Racism, 90 MICH.L.REV. 394, 394 & n. 5 (1991). " 'Hazardous Waste' is the term the Environmental Protection Agency (EPA) uses to describe by-products of industrial production which present serious health and environmental problems." Id. at n. 5 (citations omitted). Hazardous waste may be toxic, ignitable, corrosive, or dangerously reactive. Id., citing 40 C.F.R. §§ 261.20-.24 (1990).

6 See Luke W. Cole, Remedies for Environmental Racism: A View From the Field, 90 MICH.L.REV. 1991, 1991 & n. 2 (1991). Cole stated, "Lawyers and law students are belatedly entering the fray: sociologists, urban planners public health professionals, and activists have written about the disproportionate impact of environmental hazards on poor people and people of color for years." Id.

7 Paul Mohai & Bunyan Bryant, Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards, 63 U. OF COLO.L.REV. 921, 921 (1992) [hereinafter Environmental Injustice]. "A prevailing assumption in this country has been that pollution is a problem faced equally by everyone in society. However, that assumption has become increasingly challenged as greater attention has been given by the media, social scientists, legal scholars, and policy makers to the issues of environmental injustice." Id.

8 See generally ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990); RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE (Bunyan Bryant & Paul Mohai eds., 1992). Both books reiterate the fact that of all components in the disparate impact felt by minorities, race is the main determinant.

9 See generally A. Dan Tarlock, Environmental Protection: The Potential Misfit Between Equity and Efficiency, 63 U.COL.L.REV. 871 (1992) (discussing the need to approach environmental "thought" from an equity viewpoint rather than one of efficiency).

10 See Mohai and Bryant, Environmental Injustice, supra note 7 at 923-24. The authors explore the idea that environmental racism is a class issue and not a race issue.

11 See Godsil, supra note 5, at 400. "The current political climate in middle- and upper-income areas is hostile toward waste facilities generally and hazardous waste facilities particularly. The power of opposition results in costly delays for waste disposal companies and developers. Although civil rights organizations have on occasion successfully opposed the siting of hazardous waste facilities in their communities, minority communities often do not have the political influence or resources to compete with their affluent white counterparts, nor the level of representation in the state legislatures to compete even with poor whites." Id.

12 See Torres, supra note 1, at 839.

13 Id.

14 Id.

15 Id.

16 Id.

17 Id. at 839-840.

18 Id. at 840. See also Dick Russell, Environmental Racism: Minority Communities and Their Battle Against Toxics, 11 THE AMICUS JOURNAL 2 (Spring 1989) (quoting TOXIC WASTES AND RACE, supra note 2, which characterized racism as "more than just a personal attitude; it is the institutionalized form of that attitude.... Racism is prejudice plus power.").

19 See Torres, supra note 1, at 840.

20 See Michael Gelobter, Toward a Model of "Environmental Discrimination in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 65 (Bunyan Bryant and Paul Mohai eds., 1992) (citing Feagin & Feagin, 1986: 20-21).

21 See Torres, supra note 1, at 840.

22 Id. at 840-841.

23 Id. at 840. Torres views the process of placing the label "racism" on an environmental practice as "saying that the predictable distributional impact of that decision contributes to the structure of racial subordination and domination that has similarly marked many of our public policies in this country. We might also be saying that excluding considerations of racial impact in constructing the substantive environmental rules contributes to the subordination of identifiable racial groups." Id.

24 Id. The color-blind approach to creation and enforcement of legislation is dangerous because as Torres notes, "the most common expressions of racism today take an 'aversive form.' Thus hewing to a strict color-blindness defense in the construction of seemingly racially neutral policies may be nothing more than the legal expression of an aversive form of racist behavior." See Thomas F. Pettigrew, New Patterns of Racism: The Different Worlds of 1984 and 1964, 37 RUTGERS L.REV. 673, 690-91 (1985) (discussing the new racism as avoidance of racial interaction and an attempt to ignore the existence of other races); See generally Neil Gotanda, A Critique of "Our Constitution is Color-Blind," 44 STAN.L.REV. 1, 2-3 (1991) (arguing that in the constitutional context maintenance of a color-blind interpretation

"legitimates ... the social, economic, and political advantages that whites hold over other Americans"). The purpose of this Article, however, is not to suggest paternalistic solutions to the disparate impact problem. This Article does view the need for a greater sensitivity to the cultural and ethnic distinctiveness of minority communities as part of the solution. Building into the environmental regulations mechanisms that allow consideration of race and income when making environmental decisions is one way to counter the currently ethno-centric thrust of environmental laws. Discussion of those mechanisms is beyond the scope of this Article, the object of which is to concentrate on the politicizing of environmental law and ways to combat such political influence.

25 See Gelobter, supra note 20, at 64. Gelobter provides a list of environmental studies and the years in which they were conducted.

26 Id. at 65.

27 Id. at 66-68 (providing figures illustrating Gelobter's studies of air particulates and air quality).

28 Id. at 68. "Relative" studies consider pollution and how the environmental regulations have negatively or positively influenced pollution levels over time. A study considering the relative as well as absolute factors of pollution is stronger because it may show that while minority communities are bearing a disproportionate burden of waste and waste facilities now, the environmental laws have actually improved the situation. The premise of this Article does not concede that regulations have improved conditions, but it must be pointed out that neither the GAO nor the United Church of Christ Commission's study (both of which are discussed infra) included relative statistics. These reports, therefore, are not as strong as they otherwise might have been.

29 Id.

30 Id. at 68-69. Gelobter discusses the following studies: a) Gianessi, Peskin, and Wolff, 1977, 1979 and b) Harrison, 1977 both of which used distribution of the costs of pollution to determine environmental discrimination.

31 Id. Gelobter explains the flexibility of such studies by the varied results stemming from the researchers' use of costs of one type of pollutant (Harrison, 1977); multi-pollutants (Gianessi, Peskin, and Wolff, 1977); physical change in the environment plus benefits according to income or race or willingness-to-pay (Baumol and Oates, 1975; Freeman, 1972; Harrison and Rubinfeld, 1977). Because these studies compare different factors, the conclusions are weaker than if the researchers had structured their economic-based studies around the same base factor.

32 Id. at 70-71 (noting that "physical measures are likely to be far more precise for the purposes of determining the distribution of pollution itself. Because they provide a more concrete tool for mobilizing concern, they are also likely to be far more useful in the debate about environmental discrimination.").

33 Id. at 72-73. Gelobter finds location, magnitude, and duration to be three salient characteristics of pollution. He notes that magnitude is often the measure most used to describe environmental racism and is, therefore, usually the dependent variable. Duration is significant but because some studies are not concerned with cumulative effects of exposure but with permissive levels of exposure, it is not always a dramatic confounder. Gelobter thinks, however, that location is the most determinative confounder. If a study fails to control for location, the results may not be as reliable.

34 Neither the GAO nor the Commission study encompasses both methods of study. Furthermore, while the statistics measure location and magnitude, it is not always clear that duration is a confounder for which the researchers adjusted.

35 Charles Lee, Toxic Waste and Race in the United States, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, Ch. 2, 10-12 (Bunyan Bryant and Paul Mohai eds., 1992).

36 Id. at 12. ("For the first time since the late sixties, African American and white activists in the deep South joined together in protest. White and others were responsible for what some describe as a 'merger of the environmental and civil rights movements.' ").

37 Id. at 10-12.

38 U.S. GEN. ACCOUNTING OFFICE, PUB. NO. B-211461, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) [hereinafter GAO STUDY].

39 Id.

40 Id. at 13. ("The GAO study, while important, was limited by its regional scope. It was not designed to examine the relationship between the location of hazardous waste facilities throughout the United States and the racial and socio-economic characteristics of persons residing near them. Nor, prior to our current report, had there been a study to ascertain whether the GAO finding was indicative of any national patterns.") Using Gelobter's model, the GAO study did not effectively adjust for the three confounders, a flaw Gelobter found to be the weakness of most studies. Here the area was too small and could not provide a distinct national or regional pattern. Nevertheless, the study did indicate that such a ratio warranted more study.

41 Id. at 12 (describing the GAO study as a "predecessor" to the United Church of Christ Commission for Racial Justice report).

42 Id. at 13-14. The Commission hoped to highlight the following as the most prominent examples of the problem:
a. The nation's largest hazardous waste landfill, receiving toxic materials from 45 states and several foreign countries, is located in predominantly African American and poor Sumter County, in the heart of the Alabama Black Belt;
b. The predominantly African American and Hispanic Southside of Chicago, Illinois has the greatest concentration of hazardous waste sites in the nation;
c. In Houston, Texas, six of the eight municipal incinerators and all five of the municipal landfills are located in predominantly African American neighborhoods. One of the two remaining incinerators is located in a predominantly Hispanic neighborhood;
d. African American residents of a West Dallas neighborhood whose children suffered irreversible brain damage from exposure to lead from a nearby smelter won a $20 million out of court settlement;
e. Pesticide exposure among predominantly Hispanic farm workers causes more than 300,000 pesticide-related illnesses each year. A large percentage of farm workers are women of childbearing age and children. This may be directly related to the emergence of childhood cancer clusters in McFarland and Delano, California;
f. Navajo Indians were used as the primary workforce for the mining of uranium ore, leading to alarming lung cancer mortality rates. In addition, the Navajo community in Shiprock, New Mexico, where 1,100 tons of radioactive sands and early 100 tons of radioactive waste water flooded the Rio Puerto River, is one of numerous Native American communities near uranium mills and nuclear facilities;
g. Three executives in Illinois were convicted of murder in the death from cyanide poisoning of a Polish immigrant worker. This plant employed mostly Hispanic and polish immigrants who spoke and read little English. The skull and crossbones warning labels were erased from the cyanide drums;
h. Fraying asbestos was discovered in the housing projects of Chicago. Asbestos, a ticking time bomb which causes crippling lung diseases and cancer, is an especially serious problem in substandard housing common to most of the nation's inner cities; and
i. Puerto Rico is one of the most heavily polluted regions of the world. For example, Puerto Rico's underground aquifers have been contaminated by massive discharges from pharmaceutical companies, oil refineries and petrochemical plants. La Ciudad Christiana, a small community near Humacao, is the only community in North America which has been relocated due to mercury poisoning.

43 Id. at 14.

44 Id.

45 See Godsil, supra note 5, at 398. The inclusion of abandoned toxic waste sites is a possible weakness of the study. If the study's purpose was to prove intentional discrimination in siting decisions, CERCLA sites do not contribute to such proof. Environmental regulations in force today cannot be considered a factor contributing to the location of CERCLA sites in minority communities. The study, however, does not purport to use those sites as indicators of discrimination. Instead the study determines race to be the most prevalent variable in the siting decisions for commercial hazardous waste facilities. Toxic Wastes and Race merely views CERCLA sites as another factor adding to the burden minorities must bear in the distribution of pollution risks. Moreover, if racism is viewed broadly as official or unofficial acts done with or without intent, the location of CERCLA sites may be indicative of an industrial attitude that was willing to

pollute in minority communities and move on without fear of retribution. See also Marianne Lavelle and Marcia Coyle, The Federal Government in its Cleanup of Hazardous Sites and its Pursuit of Polluters Favors White Communities Over Minority Communities Under Environmental Laws Meant to Provide Equal Protection for All Citizens, NAT'L L.J., Sept. 21, 1992, at S2, S4. Discussing unequal penalties, the authors cite Professor Bullard as viewing penalties as a "key component of deterrence [of environmental violations].... Violators are driven to minority communities because penalties there are low enough to be discounted as a cost of doing business. 'What the companies are trading off is a minuscule part of the profit.' " Assuming the validity of the penalty statistics and the correctness of Bullard's view that industries see minority communities as cheap places of business, it can be presumed that CERCLA sites established since the implementation of environmental regulations are relevant to intent if only as an indicator that a pattern of lax enforcement in minority areas contributes to some industries' "pollute and move on" attitude.

46 See Lee, supra note 35, at 14.

47 Id.

48 Id.

49 Id. at 15.

50 Id.

51 See Godsil, supra note 5, at 399. "[T]hree of every five blacks and Hispanics live in communities with uncontrolled toxic waste sites. The average minority population is four times greater in areas with UTW sites than in communities without such facilities." The reason for the prevalence of abandoned toxic waste sites in minority communities is unclear. Whether the racial composition was predominantly minority when the industries moved into the area or whether the subsequent drop in property values caused when industries left an area caused an influx of lower-income minority residents is not known. This Article concedes that such facts would be relevant in proving an intent to discriminate, but the purpose of this Note is to focus on the burden minority communities must bear. Abandoned waste sites are part of that burden and should be considered when siting decisions are made.

52 See Lee, supra note 35, at 15. African Americans comprise 11.7 percent of the general population.

53 Id. Lee provides the following chart:

SIX CITIES WHICH LEAD THE HAZARDOUS WASTE LIST

Cities	No. of Sites	Percent African American
Memphis, TN	173	43.3
St. Louis, MO	160	27.5
Houston, TX	152	23.6
Cleveland, OH	106	23.7
Chicago, IL	103	37.2
Atlanta, GA	94	46.1

(Lee used the phrase "Hazardous Waste List" to refer to the National Priorities List.)

54 Id.

55 Although an evident pattern emerges from the statistical data the Commission collected, it is important to recognize the shortcomings of the study as well. The Commission's report has one major flaw that weakens its otherwise effective analysis. Like many of the other environmental discrimination studies, TOXIC WASTES AND RACE failed to adjust for the "location confounder." The study lumps all communities together to determine that "24 percent of all minorities have one hazardous waste facility in their zip code area although they make up only 12 percent of the population." Minorities, however, make up 24 percent of urban populations, so the study without its adjustment actually may indicate that most hazardous waste sites are located in urban areas.

56 Paul Mohai and Bunyan Bryant, Environmental Racism: Reviewing the Evidence, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 163 (Paul Mohai and Bunyan Bryant eds., 1992).

57 Id. at 164.

58 Id. See also Godsil, supra note 5, at 399 (exploring commentators' views that "minority communities are targeted for hazardous waste facilities and other environmental hazards by waste-management firms because their residents are more likely to be poor and politically powerless.... These communities also tend to be more vulnerable to offers of compensation made in exchange for accepting hazardous environmental conditions. Segregated housing patterns are another possible reason that minorities, and blacks particularly, are overburdened by environmental risks.").

59 Bunyan Bryant and Paul Mohai, Environmental Racism: Reviewing the Evidence, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, Ch. 13 at 163 (Bryant and Mohai eds., 1992). See also Paul Mohai and Bunyan Bryant, supra note 7, at 926-27.

60 Bryant and Mohai, Race and the Incidence of Environmental Hazards, supra note 8. The survey compiled the results of 15 reports studying various types of pollution and environmental hazards. Fourteen studies looked at the inequitable distribution of such hazards by income and one did not. Of those fourteen, four found hazards not to be inequitably distributed by income.

61 Id. The survey included 5 studies that did not consider the inequitable distribution of hazards by race. All but 1 of the remaining reports found pollution/environmental hazards to be distributed inequitably by race.

62 Id. Six of the studies did not make a comparison to determine if race or income was the more determinative factor in disparate impact.

63 Id.

64 Marianne Lavelle, Race and Income: Variations on a Trend, The Minorities Equation, NAT'L L.J., Sept. 21, 1992, at S2. The article found race to be more significant than income in fining violators and in the speed with which cleanup is begun and finished.

65 See Lavelle and Coyle, supra note 44, at S4. To analyze the statistics, the NLJ employed Decision Demographics, a non-partisan consulting firm, to provide data on race and income. NLJ then spent eight months developing computer data bases to link the race and income statistics with the legal statistics. The enforcement and waste statistics NLJ compiled were analyzed according to demographic data of their ZIP codes. NLJ used 929 of the 1,214 civil enforcement cases on the EPA's Civil Enforcement Docket. The omitted cases were not considered because various factors made them irrelevant (i.e. the areas were not near any residential communities or the areas such as Puerto Rico had no ZIP Code demographic information). Decision Demographics divided the enforcement data into 4 percentile rankings and compared those with the highest white population to the percentiles with the lowest white population. NLJ obtained data for Superfund cases from EPA publications and from the contractor the EPA had hired to compile such statistics. The same process was followed for Superfund data.

66 Id. at S2.

67 See Lavelle, supra note 63. Although low income communities overall were awarded higher fines than high income communities, the fines assessed under the Clean Water Act and multiple law claims were so far below those assessed in white communities that the statistics indicate the low income neighborhoods actually received lower fines. The racial composition of a community, however, does not vary in its correlation to low fines.

68 Id. The NLJ specifically found the following in civil enforcement cases:
1. Penalties under hazardous waste laws at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population.
2. Under all federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in white communities were 46 percent higher than in minority communities.
3. The average fine [under RCRA] in the areas with the greatest white population was $335,566, compared to $55,318 in the areas with the greatest minority population.
4. In the 28 cases involving multiple law charges, fines were 306 percent higher in white than in minority areas, $239,000 compared to $59,429.
5. Minority communities saw lower average penalties in federal enforcement of the Clean Water Act, by 27 percent; the Clean Air Act, by 8 percent; and the Safe Drinking Water Act, by 15 percent.

69 Id. at S2.

70 Id. See also Marcia Coyle and Marianne Lavelle, Same Ills, Different Solutions, NAT'L L.J., Sept. 21, 1992, at S10 (discussing the swift cleanup action taken in a white community referred to local legal assistance and the 20 year delay in cleanup for a black community of average higher income than that of the white community).

71 Lavelle, supra note 63, at S2. The NLJ found the following: At minority sites, the EPA chooses "containment," the capping off of a hazardous dump site, 7 percent more frequently than the cleanup method preferred under the law, permanent "treatment," to eliminate the waste or rid it of its toxins. At white sites, the EPA orders treatment 22 percent more often than containment. Id.

72 See Marianne Lavelle, Examining EPA's Scoring System, NAT'L L.J., Sept. 21, 1992, at S6. The article provides statistics concerning the methods of cleanup and how the EPA generally arrives at the decision. Quoting Linda Greer, a senior scientist at the Natural Resources Defense Council in Washington, D.C., the article explored the difficulties involved in gauging the complexities of many abandoned waste sites and the problems associated with their cleanup. Ms. Greer explained the lack of consistency in the EPA's cleanup decisions from site to site as caused by the decentralization of the EPA. "Only in the last year has the EPA decided there is some merit in developing soil and cleanup standards and developing cookbook approaches, certain kinds of remedies for certain kinds of sites. This hasn't been implemented yet, but until one year ago, headquarters had abdicated responsibility."

73 Id.

74 Id.

75 See Marianne Lavelle, Negotiations Are Key to Most Fines, NAT'L L.J., Sept. 21, 1992, at S6.

76 Id. ("If settled cases only are considered, fines in white areas still are higher than in minority areas—by 149 percent instead of 506 percent.")

77 Id. The EPA maintains that penalties against polluters depend upon a mixture of science, law, and economics. In addition, EPA must consider good-faith efforts to comply with pollution standards and the history of the violator. EPA also maintains that they consider the ability of the violator to pay the fine, but NLJ cited situations in which small fines have been lodged against "industrial giants" such as Procter & Gamble and General Motors who violate environmental laws in the minority communities.

78 Resource Conservation and Recovery Act, Pub.L. No. 94-580, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991 (1992)).

79 42 U.S.C. §§ 6921-6939 (1992).

80 The 1984 amendments to RCRA prohibit the placement of wastes in salt bed formations, underground mines, or caves unless the Administrator determines that such other placement is "protective of human health and the environment." 42 U.S.C. § 6924(b)(1)(A) (1988).

81 See Godsil, supra note 5, at 403 for a description of the four approaches states tend to adopt to overcome local opposition to siting decisions: (1) super review, (2) site designation, (3) local control, and (4) the incentives approach.

82 See C.F.R. § 272 (1990).

83 See Godsil, supra note 5, at 402 (citing 40 C.F.R. § 272 (1990)).

84 Id.

85 40 C.F.R. § 271.1(c) (1990).

86 40 C.F.R. § 271.4(b) (1990).

87 This Article proposes that the NIMBY syndrome is one of the single most influential factors in creating the disparate impact minorities are experiencing. White, more affluent, and better represented communities are more able to vocally make their opposition to LULU's known. "NIMBY has operated to insulate many white communities from the localized environmental impacts of solid waste facilities while providing them the benefits of garbage disposal." Bullard, supra note 8, at 108.

88 Those communities taking a NIMBY approach must realize that waste, unwanted in their communities, nonetheless must be placed somewhere. More often than not, it ends up in minority communities.

89 PIBBY is attractive to many politicians who react to the white communities' NIMBY opposition with the "not-in-my-term-of-office" (NIMTOF) or the "not-in-my-election-year" (NIMEY) syndromes. Politicians from politically powerful, typically white, middle- and upper-class communities can lobby agencies to remove their communities from the list of potential waste sites or may threaten to tie up the process in litigation. Both prospects tend to scare away industry and cause the agency to look to poor minority communities. Because these communities are politically underrepresented and are generally unorganized, their response is typically the reactionary "why-in-my-backyard" (WIMBY) syndrome. Consequently, politicians, government agencies, and industry representatives view minority communities as places where they can locate sites now and risk facing opposition later.

90 See Godsil, supra note 5, at 404.

91 See generally Robert Bullard, Environmental Blackmail in Minority Communities in Race and the Incidence of Environmental Hazards, supra note 8, at 82 (discussing the misconception that environmental protection destroys jobs and the consequent ability for industries to locate in low-income minority communities with the promise of new jobs but a concomitant disregard for the environment).

92 See generally Kenneth L. Karst, Foreward: Equal Citizenship Under the Fourteenth Amendment, 91 HARV.L.REV. 1, 50-52 & n. 287 (1977) (espousing the view that based on disparate impact alone, the disproportionate burdening of racial minorities should receive more vigorous judicial scrutiny than the Court is currently willing to give).

93 See generally Cole, supra note 6 (finding alternative administrative challenges to siting decisions to be more successful).

94 426 U.S. 229 (1976) (refusing to find racial animus in the disparate impact that resulted from the administration of a written examination given to those applying for positions as police officers).

95 Id. at 242. The Court stated:
[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact ... may for all practical purposes demonstrate unconstitutionally because in various circumstances the discrimination is very difficult to explain on nonracial grounds.
Furthermore, in his concurrence, Justice Stevens observed that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.... This is particularly true in the case of ... compromise, of collective decisionmaking, and of mixed motivation." Id. at 253.

96 See Cole, supra note 6, at 1993.

97 429 U.S. 252 (1977).

98 Id. at 266-68.

99 Id. at 268.

100 Id. at 266. See also Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a city ordinance prohibiting laundries from operating in wooden buildings was unconstitutional due to its application only to Chinese residents); Gomillion

v. Lightfoot, 364 U.S. 339 (1960) (finding geographical redistricting in Alabama was an attempt to segregate black and white voters).

101 Arlington Heights, 429 U.S. at 266.

102 See, e.g., Ammons v. Dade City, Fla., 783 F.2d 982 (11th Cir.1986) (discussing a long history of underrepresentation of minorities, segregation and disproportionate distribution of municipal services). Some commentators endorse communities to rely on the municipal services family of cases as an analogous way to challenge the constitutionality of the disparate impacts arising from environmental laws. In these cases, the Court has been much more inclined to infer racial discrimination from a pattern of disparate impacts in conferring benefits. Consequently, some practitioners feel the Court has been misapplying the law in environmental discrimination cases where it should be no harder to prove intent from a pattern of risks than from a pattern of benefits.

103 See Godsil, supra note 5, at 410. “The establishment of intent as the sine qua non of racial discrimination has created a quite onerous burden of proof for plaintiffs. This burden forces the plaintiff, the party with the least access to evidence of probative motivation, to produce that evidence. Plaintiffs cannot rely on the disparate impact of a governmental action on a racial group to result in a judicial remedy; they must show specific racial animus.” Id. (citations omitted).

104 Id.

105 482 F.Supp. 673 (S.D.Tex.1979).

106 Id. at 675.

107 Id. at 677.

108 Id. at 678.

109 Id. at 680.

110 Bean v. Southwestern Waste Management Corp., 482 F.Supp. 673, 677 (1979).

111 Id.

112 Id.

113 Id.

114 Id.

115 Bean v. Southwestern Waste Management Corp., 482 F.Supp. 673, 677 (1979).

116 Id. at 678 (quoting Plaintiffs' Brief at 7).

117 Bean, 482 F.Supp. at 678.

118 Id.

119 Id. The evidence presented showed that 67.6% of the solid waste sites are located in the half of the city where 61.6% of the minority population resides. Only 32.4% of the sites are located in the half of the city where 73.4% of the whites live. Id.

120 Id. at 679.

121 Bean v. Southwestern Waste Management Corp., 582 F.Supp. 672, 679-80 (1979).

122 Id. at 680.

123 Id. at 680-81 (citations omitted).

124 706 F.Supp. 880 (M.D.Ga.1989), aff'd., 896 F.2d 1264 (11th Cir.1990).

125 Id. at 884-87.

126 Id. at 884.

127 Id. at 885-87.

128 Id.

129 East Bibb Twiggs v. Macon-Bibb County Planning & Zoning Comm'n, 706 F.Supp. 880, 885-86 (M.D.Ga.1989).

130 Id.

131 Id. at 886.

132 Id.

133 Id.

134 East Bibb Twiggs v. Macon-Bibb County Planning & Zoning Comm'n, 706 F.Supp. 880, 886 (M.D.Ga.1989).

135 Id.

136 Id. at 887.

137 Id.

138 Id.

139 768 F.Supp. 1144 (E.D.Va.1991).

140 Id. at 1145.

141 Id. at 1148.

142 Id. at 1149-50.

143 Id. at 1147.

144 Id. at 1150.

145 El Pueblo pana el Aire y Agua Limpio v. Chemical Waste Mgmt. Inc., No. CIV-F-91-578-OWW (E.D.Cal. filed July 7, 1991) (El Pueblo I).

146 Id.

147 Id.

148 Id.

149 Id.

150 See El Pueblo I, supra note 145.

151 Id.

152 Id.

153 Id.

154 Civ. No. 366045, Gunther, J., Ruling on Submitted Matter, Dec. 30, 1991 (El Pueblo II).

155 Id. at 10.

156 See Marcia Coyle, Lawyers Try to Devise New Strategy, NAT'L L.J., Sept. 21, 1992, at S8 (discussing the failed constitutional challenges and possible alternative actions such as Title VI and traditional state administrative law claims).

157 See Cole, supra note 6, at 1992-93 (discussing the failure of obtaining judicial remedies under the Equal Protection Clause of the 14th Amendment, or section 1983 of the Civil Rights Act of 1964 and advocating "Poverty Law," a mixture of political and social activism, alternative litigation, and new legislation).

158 481 U.S. 279 (1987).

159 Id. at 286-87.

160 Id.

161 Id. at 297.

162 Id. at 293.

163 But see R. George Wright, Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury, 23 ARIZ.ST.L.J. 777, 797-99 (1991). Wright explores the idea that a litigant might be able to persuade a court that the statistical evidence in McCleskey is distinguishable from the environmental evidence. The statistics in the waste siting decisions might be viewed as sufficiently "stark" to establish intent. See also Coyle, Lawyers to Try New Strategy, supra note 156, at S8. In discussing the continued insistence on the part of some minority attorneys to view constitutional challenges as feasible, Coyle quoted Michael M. Daniels' statement that "There are two or three stinking little cases that have people throwing up their hands and saying they can't do it," but he added that other civil rights battles have had defeats—voting rights, housing, and school desegregation. Id.

164 See Cole, supra note 6, at 1995.

165 Id. (emphasis in original) (citation omitted).

166 See generally Melissa Thorme, Local to Global: Citizen's Legal Rights and Remedies Relating to Toxic Waste Dumps, 5 TUL.ENVTL.L.J. 101 115-21 (1991).

167 Id.

168 Id. (quoting Ronald Rychlak, Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance, 59 MISS.L.J. 657, 660 (1989)).

169 Id. at 658.

170 Id. at 659. See also Louise A. Halper, Public Nuisance and Public Plaintiffs: Rediscovering the Common Law, 16 ENVTL.L.REP. 10292 (1986).

171 RESTATEMENT (SECOND) OF TORTS § 837 cmt. f (1977). But the RESTATEMENT (SECOND) also does not hold a current landowner liable for failure to abate a nuisance if the landowner did not create the nuisance and if the nuisance is not abatable.

172 See Thorme, supra note 166, at 115 & n. 89. Thorme presents a caveat in footnote 89. Causation is a requisite element to all toxic tort cases, including nuisance actions. She explains that "[p]laintiffs can fail to prove the requisite causal link to their harm when dealing with toxic substances for three reasons: (1) latency periods of fifteen to forty years before illness or cancer may result, (2) difficulties in attributing adverse health effects to a specific pollutant or source, and (3) no generally accepted minimum threshold levels below which would cause no adverse health effects." Id.

173 Id. at 118 (quoting Borland v. Sanders Lead Co., 369 So.2d 523, 523-24 (Ala.1979)).

174 Id. at 118.

175 Id. (quoting Borland v. Sanders Lead Co., 369 So.2d 523, 523-24 (Ala.1979)).

176 WILLIAM L. PROSSER, et al. CASES AND MATERIALS ON TORTS 136 (8th ed. 1982).

177 See Thorme, supra note 166, at 120-21.

178 See RESTATEMENT (FIRST) OF TORTS § 520 (1938); see also Joel A. Mintz, Abandoned Hazardous Waste Sites and the RCRA Imminent Hazardous Provision: Some Suggestions for a Sound Judicial Construction, 11 HARV.ENVTL.L.REV. 247, 295 (1987).

179 To prove abnormally dangerous activity six factors are balanced: (1) existence of a high degree of risk of some harm to the person or property of others, (2) likelihood that the harm that results will be great, (3) inability to eliminate the risk by the exercise of reasonable care, (4) extent to which the activity is not a matter of common usage, (5) inappropriateness of the activity to take place where it is carried on, and (6) extent to which its value to the community is outweighed by its dangerous attributes. Thorme, supra note 166, at 120 (quoting RESTATEMENT (SECOND) OF TORTS § 520 (1977)).

180 See Thorme, supra note 166, at 120.

181 42 U.S.C. § 4332(2)(c)(i)-(v).

182 Id.

183 See Siegelman v. EPA, 911 F.2d 499, 503-04 (11th Cir.1990) (noting that the EPA is not required to prepare an EIS in compliance with NEPA before issuing a permit under RCRA because there may be an implied EIS equivalent in the RCRA Part B permitting process which is functionally equivalent to the EIS).

184 See Cole, supra note 6, at 1995. Cole questions the usefulness of Environmental Impact Statements. He feels that despite clear potential effects on the environment and relevant population most EIS's conclude none exists. “Most environmental impact statements find that there is no ‘relevant population affected,’ although such ‘scientific’ fiction has proved false at other toxic waste sites around the country, where people have become sick or died.” Cole, supra note 6, at 1995.

185 See Thorme, supra note 166, at 140 (citing 42 U.S.C. § 6973(a) & Supp. II (1984)). Under RCRA, the EPA may bring suit to redress the handling, storage, treatment, transportation, and disposal of any solid or hazardous waste which may “present an imminent and substantial endangerment to the public.” 42 U.S.C. § 7003.

186 See Thorme, supra note 166, at 125.

187 33 U.S.C. § 1342(a)(1).

188 42 U.S.C. § 7502(b)(6) (both the CWA and the CAA require permits and public input before those permits are issued).

189 16 U.S.C. § 1538(a)(1)(B). The Endangered Species Act would allow a challenge on the basis that a toxic dump presents a real threat to any endangered species or its habitat. Citizens can commence a civil suit to enjoin the actions of persons in violation of the act.

190 Citizens may intervene in actions brought under this section if facilities do not formulate emergency plans and notify officials immediately of spills or releases.

191 See Thorme, supra note 166, at 142.

192 Id.

193 Id. (citing Smith v. Butler, 507 F.Supp. 952, 953 (E.D.Pa.1981)).

194 Id. (citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

195 See Lee, supra note 35, at 17. See also Bullard, supra note 8, at 1.

196 See Lee, supra note 35, at 14.

197 Id. This has led to a misconception that blacks are not environmentally concerned. In Bullard's DUMPING IN DIXIE, however, Bullard indicated that the results of household surveys he conducted showed environmental issues were high on the list of most of the respondents' priorities. See Bullard, supra note 8, at 79-102.

198 See Lee, supra note 35, at 15. See also Claudia MacLachlan, Tension Underlies Rapport With Grassroots Groups, NAT'L L.J., Sept. 21, 1992, S10 (discussing the failure of mainstream environmental groups to draw members from minority communities).

199 See Lee, supra note 35 at 17.

200 See Bullard, supra note 8, at 96.
There are more than 3,000 environmental organizations in the United States. Some 250 of these organizations operate at the national or multistate level. The nine largest environmental organizations have a combined membership of more than 4 million people. Blacks and other minorities make up a small share of the membership in mainstream environmental organizations. They are also severely underrepresented among the professional staff of these organizations. In 1984, there were just four blacks among the 200 professionals who worked for the ten major environmental groups in Washington, D.C. Clearly, it is not enough to have environmental advocates for poor and minority communities. There need to be more of these individuals on the staffs and boards of the environmental organizations.
Id. at 96 (emphasis in original) (citations omitted).

201 See supra notes 82-86 and accompanying text.

202 See BULLARD, supra note 8, at 11.
Poor and minority residents saw environmentalism as a disguise for oppression and as another “elitist” movement. Environmental elitism has been grouped into three categories: (1) compositional elitism implies that environmentalists come from privileged class strata, (2) ideological elitism implies that environmental reforms are a subterfuge for distributing the benefits to environmentalists and costs to nonenvironmentalists, and (3) impact elitism implies that environmental reforms have regressive distributional impacts.
Id. (emphasis in original) (citations omitted).

203 Id. (discussing further the elitism as it relates to “jobs versus environment”).

204 Id. See also Robert Bullard, Environmental Blackmailing Minority Communities, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, supra note 8, at 82.

205 Id.

206 BULLARD, supra note 8, at 104. Bullard quotes Robert Gottlieb and Helen Ingram, describing the grassroots environmental movement as having the following traits:
Focuses on equity and the urban industrial complex
Challenges the mainstream environmental movement for its conservative tactics but not its goals
Emphasizes the needs of the community and workplace as primary agenda items
Uses its own self-taught “experts” and citizen lawsuits instead of relying on legislation and lobbying
Takes a “populist stance” on environmental issues relying on active members rather than dues-payers from mailing lists
Embraces a democratic ideology akin to the civil rights and women's movement of the sixties.
Id. at 104 (citing Robert Gottlieb & Helen Ingram, The New Environmentalists, PROGRESSIVE, Aug. 1988, at 14-15.

207 See Marcia Coyle, When Movements Coalesce, NAT'L L.J., Sept. 21, 1992, at S10 (discussing the merger of grassroots environmentalists with social justice advocates).

208 See BULLARD, supra note 8, at 14. Bullard finds the type of issues an environmental group addresses will shape the people the group can attract. Those groups that
(1) focus on inequality and distributional impacts, (2) endorse the 'politics of equity' and direct action, (3) appeal to urban mobilized groups, (4) advocate safeguards against environmental blackmail with a strong pro-development stance, and (5) are ideologically aligned with policies that favor social and political 'underdogs' will attract the black community. Id.

209 Id. at 16.

210 Id.

211 See Coyle, supra note 21.

212 See MacLachlan, supra note 192. In 1990, minority coalition environmental groups leveled accusations of racism at the major mainstream environmental groups. They claimed the "Big 10" were guilty of "racist hiring practices and ignoring the serious toxic hazards faced by poor and minority communities." Id.

213 Id.

214 Id. Since the minority coalitions sent letters to the "Big 10" accusing those groups of racist practices, Robert Bullard claims to have seen "tremendous change." The Sierra Club, the National Resources Defense Council, and the Environmental Defense Fund have acted as leaders in the "move to diversify their staffs and boards." According to Bullard, "There are very few organizations that do not recognize they have to change."

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