CHALLENGING THE RACISM IN ENVIRONMENTAL RACISM: REDEFINING THE CONCEPT OF INTENT

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I. INTRODUCTION

> Survival per se; Survival naked and abstract; Survival without any qualitative or quantitative standard of what survives or why is truly one of the strangest intellectual stopping points that one man has ever proposed to another.
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> —Virginia Woolf

Some sixty years ago, W.E.B. Du Bois stated that race is the dominant theme of the twentieth century.[1] Recent congressional debate on whether the United States government should apologize[2] for government-sanctioned, race-based slavery emphasizes that the passage of sixty years has not erased this central theme of American life. Given the twists and turns of American jurisprudence in confronting the issue of race within law and society, one is left to contemplate whether such erasure is attainable.[3] In every attempt at reconciling societal norms

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1. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 13 (Donald B. Gibson ed., 1989).

2. U.S. Representative Tony Hall, D-Ohio, proposed in June, 1996 that African-Americans should receive an apology for 244 years of slavery, igniting a debate in Congress and generating divided reaction, much of it negative, among the public. Although President Clinton initially expressed some interest in the idea, he subsequently backed away, saying instead that he would discuss the matter with his race advisory board. *See generally* Jonathan Alter, *The Long Shadow of Slavery*, NEWSWEEK, Dec. 8, 1997, at 58; Michael A. Fletcher, *Few Legislators Backing Congressional Apology for Slavery*, HOUSTON CHRON., Aug. 10, 1997, at 21; Scott Montgomery, *Apology Idea Stirs Writers*, DAYTON DAILY NEWS, Aug. 17, 1997, at 1A; William Neikirk, *Clinton's Racial Plan is Talk, But No Apology*, CHICAGO TRIB., Oct. 1, 1997, at A8; *Reaction to Proposed Slavery Apology Provides a Window on U.S. Racial Divide*, STAR-TRIB., Aug. 24, 1997, at 16A; Sonya Ross, *President Clinton Won't Apologize for Slavery Yet*, DETROIT NEWS, Aug. 6, 1997, at A5.

3. *See* Shaw v. Reno, 509 U.S. 630 (1993) (race-conscious gerrymandering of

with legal doctrine American courts have used concepts such as neutrality,[4] color blind,[5] community standard,[6] constitutionally balanced,[7] and natural law[8] to provide a more comfortable platform from which racial debate may take place and, in many ways, be muted.

Race-based inequities in the environmental arena underscore Du Bois' charge that race remains a dominant theme of American society. This Article explores the origin of the concept of environmental racism[9] and traces its evolution

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congressional districts is subject to the same strict scrutiny review as other classifications); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (special admissions program for minorities at California state medical school was an unconstitutional classification based on ethnic backround); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (developer and individual plaintiff failed to carry a burden of proof that racially discriminatory purpose was a motivating factor in a rezoning decision); Washington v. Davis, 426 U.S. 229 (1976) (evidence of disparate impact alone is insufficient and plaintiffs must prove purposeful discrimination to demonstrate a constitutional violation); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (public school segregation is inherently unequal and unconstitutional); Plessy v. Ferguson, 163 U.S. 537 (1896) (segregation of passenger cars on train is constitutional so long as facilities are separate but equal); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (in light of recent Supreme Court cases, Bakke's theoretical allowance of affirmative action programs to promote diversity among student bodies was not binding precedent and the law school's affirmative action plan was an unconstitutional racial classification); *see also* Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 18 (1995).

4. *See* Romer v. Evans, 517 U.S. 620 (1996) (reiterating the Court's commitment to the law's neutrality when individual rights are at stake); Adarand Constrs. Inc. v. Pena, 515 U.S. 200 (1995) (strict scrutiny review must be applied to all federal racial classifications, even those that are purportedly benign); United States v. Fordice, 505 U.S. 717 (1992) (facially neutral law was not neutral in fact in light of state's history of de jure segregation).

5. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Justice Harlan preceded his oft-quoted statment with the following:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind....

Id. at 559. Justice Scalia, in a concurring opinion in *Adarand* stated that "[i]n the eyes of government we are just one race here. It is American." 515 U.S. at 239 (Scalia, J., concurring).

6. *See* Reisman v. Tennessee Dep't of Human Resources, 843 F. Supp. 356 (W.D. Tenn. 1993) (identifying biracial child as black based on community standards).

7. *See In re* Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525, 1544 (11th Cir. 1994) (attempting "[t]o assure a proper balance between the...Fourteenth Amendment and the permissible burden placed on innocent persons").

8. *See* Hayes v. Crutcher, 108 F. Supp. 582, 585 (M.D. Tenn. 1952) (holding that segregation is "supported by general principles of natural law").

9. The term "environmental racism" was coined by Rev. Benjamin Chavis

and its subsumption by the "environmental justice" movement. The Article posits that environmental racism, by definition, consists of distinct and identifiable racially-based conduct resulting in an inequitable distribution of environmental burdens on minority communities. Accordingly, the attempt to assimilate environmental racism into the current academic understanding of environmental justice ignores both the origins and the impact of a genuine societal problem.

The Article begins with an overview of the societal changes that contributed to environmental degradation in the United States and in turn spawned the modern environmental movement. Part III discusses the federal statutory scheme enacted in response to the growing public awareness of environmental issues, focusing particularly on legislation regulating the treatment, storage, disposal, and cleanup of solid and hazardous wastes. The Article argues that this waste regulatory scheme fails to address the political and procedural issues surrounding local hazardous waste siting decisions, and that such failure, while racially neutral on its face, results in a disproportionate burden on minority communities. Part IV discusses the emergence of the movement to fight environmental racism, both as a counter-movement against the existing environmental agenda and as a catalyst for social, legislative, and judicial change.

Part V of the Article then traces the recent evolution of the environmental racism movement into a movement for equitable distribution of environmental burdens across all communities, regardless of socioeconomic characteristics. The Article argues that the unfortunate convergence of the concept of environmental racism with general notions of "environmental justice" and "environmental equity" is partly attributable to a failure to recognize that environmental racism exists as a separate and distinct social issue. The Article further contends that the misguided convergence of these social movements, despite their superficial consonance, dilutes the ability of minority communities to obtain redress through the legislative, judicial, or public processes. More important, a failure by plaintiffs' attorneys to maintain focus on racial components of environmental disparities virtually ensures denial of any claims brought pursuant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution or pursuant to the civil rights statutes, legislation whose goals are to remediate race-based discrimination.

Finally, Part VI of the Article discusses the obstacles facing minority plaintiffs when bringing an environmental racism claim under the Equal Protection Clause, while Part VII proposes an expansion of the intent standard established by

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following the publication of a study by the United Church of Christ Commission on Racial Justice which looked at disparities in the siting of hazardous waste facilities. *See* Paul Mohai & Bunyon Bryant, *Environmental Racism: Reviewing the Evidence*, *in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 163, 164 (Paul Mohai & Munyon Bryant eds., 1992). *See also* Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 722 n.6 (1993). Although environmental inequities have also been documented in other areas, this Article focuses on the disproportionate burden on minority communities reflected in the location of hazardous waste facilities.

the Supreme Court in *Washington v. Davis*[10] consistent with the expansive historical interpretation of intent in civil tort law.

II. THE POST-WAR YEARS: WASTE GENERATION AND THE GROWTH OF INDUSTRIAL POLLUTION

A. An Overview

As early as the 1850s, the union of science and technology presaged today's ecological problems. Environmental pollution increasingly has plagued society since the beginning of the Industrial Revolution.[11] Although the advancement of technology slowed in the early part of the twentieth century due to financial strains and manufacturing shortages created by the demands of armed conflict, the years following World War II saw recovery from the Great Depression and a refocus on domestic economic health.[12] Environmental pollution took on new and more health-hazardous forms as improvements in technology and growth in production resulted in a corresponding increase in waste generation.[13] The numbers are staggering. In 1970, off-site disposal of hazardous waste in the United States reached an annual total of nine million metric tons.[14] By 1984, this amount had

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10. 426 U.S. 229 (1976).

11. *See generally* A BRIEF HISTORY OF POLLUTION (Adam Markham ed., 1994).

12. In the twenty year period between 1950 and 1970, disposable income increased by 52%. Environmental Quality: The Tenth Annual Report of the Council on Environmental Quality (1979). The U.S. population grew by 37% to 53 million during the same period and the GNP approximately doubled, with industry and construction experiencing unprecedented growth. For example, the petrochemical industry expanded substantially in the thirty years after the end of World War II, with an increase in production of synthetic organic compounds from less than 10 billion pounds a year to over 350 billion pounds a year, more than 300 times its pre-war levels. Charles Lee, *Evidence of Environmental Racism, The Integrity of Justice*, SOJOURNERS, Feb.–Mar. 1996, at 22, 24. *See also* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENV. L.J. 495, 506 (1992).

13. Indeed the Solid Waste Disposal Act of 1965 emerged from congressional findings that economic growth had resulted in the increased discarding of wastes, exacerbated not just by a growth in population but by its concentration as well. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY (1992); *see also* Collin, *supra* note 12 at 507. However, environmental degradation driven by increasing production was not limited to the effects of hazardous waste disposal.

> Most of our environmental problems are the inevitable result of the sweeping changes in the technology of production that transformed the U.S. economic system after World War II: the new large, high-powered, smog-generating cars, the shift from fuel-efficient railroads to gas-guzzling trucks and cars; the substitution of undegradable and hazardous petrochemical products for biodegradable and less toxic natural products; the substitution of fertilizers for manure and crop rotation and of toxic synthetic pesticides for ladybugs and birds.

Barry Commoner, *Failure of the Environmental Effort*, 18 ENVTL. L. REP. 10195 (1988).

14. Mary Critharis, *Third World Nations Are Down in the Dumps: The Exportation of Hazardous Wastes*, 16 BROOK. J. INT'L L. 311, 314 n.23 (1990). *See also*

increased to at least 247 million metric tons and by 1987 to 275 million.[15] As of 1990, the United States was estimated to be producing one million pounds of hazardous waste each minute.[16] Non-hazardous solid waste also increased as the population expanded. As of 1993, an estimated 207 million tons of municipal solid waste was generated and disposed of annually.[17] An additional 7600 million tons of industrial waste is generated and disposed of on-site.[18]

In the years preceding the environmental awareness of the 1970s, there were few state or federal regulations extant to control waste discharge or disposal practices.[19] Accordingly, industry incentive to implement pollution control devices or otherwise monitor waste discharges was virtually nonexistent. Under the guise of commercial capitalism, industry simply externalized pollution costs into the commons environment wherever possible, discharging contaminants into the air, water, and ground.[20] Expenditures for pollution control technologies represented at

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ANDREW SZASZ, ECOPOPULISM TOXIC WASTE AND THE MOVEMENT FOR ENVIRONMENTAL JUSTICE 12 (estimates of the total amount of hazardous waste generated annually ranged from estimates in 1979 by EPA of 56 million metric tons to estimates by the American Cancer Society in 1989 of between 580 million and 2.9 billion tons).

15. Critharis, *supra* note 14, at 314 n.23. *See also* Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1056 (1994) (estimating civilian generated hazardous waste at 250 million tons per year).

16. Critharis, *supra* note 14, at 339.

17. *Id.* This represents a "4% increase over the amount of municipal solid waste generated in 1990." *Id.* Non-hazardous waste disposal generates its own set of issues, which similarly can be correlated with industrial and population growth. Michael Gerrard estimates that of over 180 million tons of municipal solid waste, 72.7% is land-filled and 13.1% is recycled or recovered. Gerrard, *supra* note 15, at 1071. This Article does not seek to address issues relating to the disposal of non-hazardous waste.

18. Industrial waste includes waste streams from factories, processing plants, mills, and foundries as well as by-products of in-plant waste treatment such as slurries and sludge. *See generally* Gerrard, *supra* note 15. Gerrard estimates 430 million tons of industrial waste annually discharges into "waste ponds, waste piles, landfills and other non-RCRA facilities." *Id.* at 1066.

19. There were some early legislative efforts at pollution control. At the state level, cities passed smoke as well as other pollution ordinances and also utilized zoning regulations to curb growth into residential areas. *See generally* ANDERSON ET AL., ENVIRONMENTAL PROTECTION LAW AND POLICY 156–58 (1990) (tracing legislation from early smoke abatement ordinances in 13th century England to post WWII pollution control acts enacted by American municipalities); Lawrence W. Pollack, *Legal Boundaries of Air Pollution Control—State and Local Legislative purpose and Techniques*, 33 LAW & CONTEMP. PROBS. 331 (1968) (discussing the development of air pollution control legislation). Concurrently, common law nuisance actions became a tool for pollution abatement. Few federal legislative efforts mandated any action by states or private companies; rather, most simply provided vehicles for funding research into pollution management solutions and technical assistance and the gathering of information on environmental health concerns. ANDERSON ET AL., *supra*, at 158. *See, e.g.*, Clean Air Act of 1963, 42 U.S.C. § 1857 (1994); Federal Water Pollution Control Act of 1965, Pub. L. No. 89-234 of 1918; Solid Waste Disposal Act of 1965, Pub.L. No. 89-272, 79 Stat. 992.

20. Warning of impending environmental disaster should human behavior

best a reduction in corporate profit and, in the absence of legislative or judicial coercion, pollution emerged as the "rational choice," shifting the costs of disposal of unwanted waste products from the polluter to the public.[21]

Eventually, the health and ecological repercussions of unrestrained and unregulated waste discharge practices could no longer be ignored. Lead contamination was discovered in every part of the environment.[22] Pollution from motor vehicles and stationary sources contributed to a continuing decline in air quality in many regions of the country, due to excessive amounts of ozone, carbon monoxide, nitrogen oxide, and particulate matter.[23] Nondegradable chemicals such as chlordane, dieldrin, and DDT were widely used as agricultural pesticides despite their broad toxicity and adverse health effects.[24] Uncontrolled discharges from

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towards resource depletion fail to undergo significant modification, Thomas A. Sancton wrote:

> Starting at the dawn of the Industrial Revolution, smokestacks have disgorged noxious gases into the atmosphere, factories have dumped toxic wastes into rivers and streams, automobiles have guzzled irreplaceable fossil fuels and fouled the air with their detritus. In the name of progress, forests have been denuded, lakes poisoned with pesticides, underground aquifers pumped dry.

Thomas A. Sancton, *What on Earth Are We Doing?*, TIME, Jan. 2, 1989, at 24. *See also* A BRIEF HISTORY OF POLLUTION, *supra* note 11, at 61–63 (discussing the flow of toxic contaminants into the Great Lakes and tributaries such as the Cuyahoga River, flowing into Lake Erie, where the level of pollution was so extreme the river caught fire in 1969).

21. Percival et al., notes:

> In 1985, the Office of Technology Assessment (OTA) reported that up to 10,000 sites could need to be placed on the National Priorities List (NPL)...OTA estimated that total Superfund cleanup costs 'could easily be $100 billion—out of total costs to the Nation of several hundred billion dollars, and it could take 50 years to clean 10,000 sites'...Other estimates of the total cost of environmental cleanup have ranged from $500 billion to more than $1 trillion.

ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 201–02 (1992). *See also* Gerrard, *supra* note 15, at 1061 (state "mini-Superfund" lists total more than 19,000 sites).

22. Current levels of lead contamination are hundreds of times higher than in pre-industrialized society. Joel Schwartz & Ronnie Levin, *Lead: Example of the Job Ahead*, EPA J., Mar.–Apr. 1992, at 42. Lead exposure can occur through numerous pathways. For example, lead pipes and pipe connections can result in the leaching of lead into the water supply. Lead is emitted into the air from auto exhaust. Even the use of lead-based paints in housing was found to correlate with lead poisoning, particularly in children. Clarice E. Gaylord & Geraldine W. Twitty, *Protecting Endangered Communities*, 21 FORDHAM URB. L.J. 771, 776 (1994).

23. States and municipalities adopted various regulatory measures in an effort to control what was perceived to be growing air pollution problems since the latter part of the nineteenth century. These regulatory measures included smoke ordinances prohibiting burning of high-sulfur coal or requiring modest pollution control devices, designed to abate the smoke generated by thousands of coal-burning hearths, as well as the growing number of stationary industrial sources. ANDERSON ET AL., *supra* note 19, at 157.

24. *Averting A Death Foretold*, NEWSWEEK, Nov. 28, 1994, at 72.

manufacturing operations and poorly managed hazardous waste disposal facilities are generated from 650,000 generators; at least 600,000 sites pose a threat to human health and the environment.[25] The public, and by extension the legislature, began to focus on the fact that the assimilative capacity of the environment was in jeopardy.[26]

B. Community Impact

The health risks and resource hazards created by pollution in the United States also had a disturbing distributive impact. Contrary to general public perception that environmental hazards are borne equally, the risks and accompanying burdens of exposure to environmental contaminants were discovered to be distributed disproportionately across racial and class lines.[27] "Minority and low-income residential areas (and their inhabitants) are often adversely affected by unregulated growth, ineffective regulation of industrial toxins, and public policy decisions authorizing locally unwanted land uses that favor those with political and economic clout."[28] Numerous studies of environmental hazards/risks with race and income included as variables, found disparities either by race or income, with race being the more significant variable in almost seventy-five percent of the studies.[29] Hazards found to be disproportionately distributed across minority communities include exposure to lead;[30] exposure to

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25. *See* Michael Andrew O'Hara, *The Utilization of Caveat Emptor in CERCLA Private Party Cleanups*, 56 LAW & CONTEMP. PROBS. 149, 162 (1993); Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 190 (1996).

26. *See infra* Part II Section C and Part III.

27. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter UCC REPORT]; *see also* Henry M. Peskin, *Environmental Policy and the Distribution of Benefits and Costs, reprinted in* RICHARD L. REVSZ, FUNDAMENTALS OF ENVIRONMENTAL LAW AND POLICY 117 (1997); Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 792–806 (1993) (discussing the benefits and burdens of environmental laws and the distributional effect on population groups).

28. ROBERT D. BULLARD, DUMPING IN DIXIE 8 (1994). "Residential segregation today makes people of color vulnerable to toxic 'attacks' in much the same way that segregation in the 19th century made African-Americans vulnerable to less subtle attacks." *Id.*; *see also* Luke W. Cole, *Empowerment As the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 628 n.24 (1992) (citing Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 340 (1991)).

29. *See* BENJAMIN GOLDMAN, NAT'L WILDLIFE FEDERATION, NOT JUST PROSPERITY: ACHIEVING SUSTAINABILITY WITH ENVIRONMENTAL JUSTICE 8 (1994) (discussing National Wildlife Study reviewing sixty-four studies of environmental disparities that included race and income as variables); *see also* Mohai & Bryant, *supra* note 9, at 167 (reviewing fifteen studies of environmental hazards reflecting both race and income bias, with race being a more significant variable than income).

30. *See* Gaylord & Twitty, *supra* note 22 at 776–77; *see also* Deborah W.

pesticides;[31] exposure to air and water pollutants;[32] siting of municipal landfills, incinerators, and polluting industrial facilities;[33] and occupational hazards.[34]

Denno, *Considering Lead Poisoning As a Criminal Defense*, 20 FORDHAM URB. L.J. 377 (1993) (discussing the effect of lead poisoning and the link between lead poisoning and minority groups); Ronald Robinson, *West Dallas Versus The Lead Smelters*, *in* UNEQUAL PROTECTION, ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 92–93, 95 (Robert D. Bullard ed., 1994) [hereinafter UNEQUAL PROTECTION] (noting that all of the lead smelters in Dallas were located in African American or Hispanic communities and that at least 11 dump sites were located in West Dallas which has always been predominantly African-American).

31. U.S. farmers use about 1.2 billion pounds of pesticides each year. Ivette Perfecto & Baldemar Vasquez, *Farm Workers: Among the Least Protected They Suffer the Most From Pesticides*, EPA J. Mar.–Apr. 1992, at 13. Over 313,000 farm workers are estimated to suffer from pesticide-related illnesses each year and 800 to 1000 die from pesticide exposure. *Id.* at 13. Ninety percent of the farm workers in the United States are African-American or Hispanic. *Id.* at 13–14. *See* Jane Key, *California's Endangered Communities of Color*, *in* UNEQUAL PROTECTION, *supra* note 30, at 173 (89% of California's 750,000 farm workers are Mexican); Michael Haggerty, *Crisis at Indian Creek*, *in* UNEQUAL PROTECTION, *supra* note 30, at 23–42 (correlating relationship between pesticide exposure and minorities, particularly Hispanics).

32. For example, in 1990 57% of whites, 65% of African-Americans and 80% of Hispanics lived in 437 counties and cities that had failed to meet EPA ambient air quality standards. D.R. Wernette & L.A. Nieves, *Breathing Polluted Air, Minorities Are Disproportionately Exposed*, EPA J., Mar.–Apr. 1992, at 16–17.

> [A] total of 33 percent of whites, 50 percent of African Americans, and 60 percent of Hispanics live in the 136 counties in which two or more air pollutants exceed standards. The percentages living in the 29 counties designated as nonattainment areas for three or more pollutants are 12 percent of whites, 20 percent of African Americans and 31 percent of Hispanics.

Id. See GOLDMAN, *supra* note 29, at 14 (citing study analyzing over 4000 industrial facilities hazards in air, groundwater, and radiation and finding a "'significant correlation between such hazards and percentages of people of color but not for people with lower incomes"). Goldman also identifies ten studies on ambient air pollutants which find environmental disparities by race or income, several of which found greater racial than income disparities. *Id.* at 15.

33. *See* UCC REPORT, *supra* note 27, at 13, 14; GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) [hereinafter GAO REPORT]; Mohai & Bryant, *supra* note 9 at 4; Robert P. Bullard, *Environmental Justice: A New Framework For Action*, ENVTL. L. NEWS, Spring 1996, at 3.

34. A prime example of occupational hazards visited upon minorities include Gauley Bridge, West Virginia where of the New Kannawha Power Company's virtually all black workforce, 500 black workers died and 1500 were disabled by silicosis as a result of working on the Hawks Nest tunnel over a two-year period during the 1930s. Lee, *supra* note 12, at 22. New Kanawha's contractor subsequently revealed at congressional hearings that the company intentionally exposed the workers to a deadly hazard, stating "'I knew I was going to kill these niggers, but I didn't know it was going to be this soon.'" *Id. See* George Friedman-Jimenez, *Achieving Environmental Justice: The Role of Occupational Health*, 21 FORDHAM URB. L. J. 605 (1994) (discussing studies finding African-Americans at higher risk for occupational diseases and injury). *See, e.g.*, Ivette Perfecto & Baldemar Velaquez,

Some of these disparities have been recognized for over twenty years.[35] More unexpected, however, was the discovery that throughout the nation there existed an irrefutable nexus between the presence of hazardous waste or industrial facilities and minority communities.[36] The roots of the disparity seemed on their face innocuous and grounded in sound economic practice. Land disposal has been the preferred option for industrial wastes disposed of off-site, mainly for economic reasons.[37] Incineration and other waste disposal methods simply carry a higher cost.[38] Moreover, responsibility for building and siting disposal facilities for industrial wastes rested with a private sector largely uninformed and relatively unconcerned about potential environmental ramifications.[39] These factors, together with the absence of effective environmental legislation, served to encourage private waste disposal siting decisions that were driven by the same low land and development cost considerations used by the waste generating industry in general.[40] The public sector was equally at fault. Localities seeking inexpensive solutions to municipal hazardous waste disposal problems similarly sought to site disposal facilities at the lowest cost tempered only by existing political conditions.[41]

Farm Workers: Among the Least Protected, EPA J., Mar.–Apr. 1992, at 13–14.

35. *See* Paul Mohai & Bunyan Bryant, *Race, Poverty and the Environment, The Disadvantaged Face Greater Risks*, EPA J., Mar.–Apr. 1992, at 8 (citing to 1971 Council on Environmental Quality study reporting inequities in distribution of environmental risks and noting nine other studies also published during 1970s). *See, e.g.*, Schwartz & Levin, *supra* note 22; Gaylord & Twitty, *supra* note 22, at 776–77 (1994); Robert D. Bullard, *Environmental Justice For All*, *in* UNEQUAL PROTECTION, *supra* note 30, at 3, 19–20; Donald E. Lively, *The Diminishing Relevance of Rights: Racial Disparities in the Distribution of Lead Exposure Risks*, 21 B.C. ENVTL. AFF. L. REV. 309 (1994).

36. *See* UCC REPORT, *supra* note 27, at xiii; GAO REPORT, *supra* note 33, at 3.

37. *See* Gerrard, *supra* note 15, at 1091 (stating that "AHW [hazardous waste] disposal facilities tended to be built...where land was cheap"). The manner or method of on-site disposal of hazardous waste, believed to account for eighty percent of hazardous waste generated, is unknown. SZASZ, *supra* note 14, at 12–13.

38. "The average incinerator disposal fee [today] is $56 a ton, twice the $28 average at dumps." Jeff Bailey, *Up in Smoke: The Fading Garbage Crisis Leaves Incinerators Competing for Trash*, WALL ST. J., Aug. 11, 1993, at A1.

39. *See* Gerrard, *supra* note 15, at 1090–91. Professor Bullard, citing to work by Southern historian David R. Goldfield, notes that southern ecology has been shaped in part by "lax enforcement of environmental regulations and industrial strategies that had little regard for environmental cost." BULLARD, *supra* note 28, at 28.

40. Gerrard, *supra* note 15, at 1091. Luke Cole adds that historical discrimination against minorities, including lack of political and economic power, exclusion from decision-making bodies, discrimination in housing and land use policies, governmental neglect, and, ironically, the success of environmental laws, have all contributed to industry's tendency to seek inexpensive land in low income neighborhoods. *See* Cole, *supra* note 28, at 628.

41. Over 360 new municipal solid waste landfills opened between 1986 and 1991. *See* Gerrard, *supra* note 15, at 1072. "Because local protest can be costly, time-consuming and politically damaging, siting decision makers often...[choose] sites in neighborhoods that are least likely to protest effectively." Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1002 (1993).

Economic realities, combined with other siting considerations, such as location near industrial concentrations, easy access to transportation routes, and the targeting of neighborhoods least likely to organize effective resistance,[42] resulted in an "inordinate concentration" of industrial facilities, landfills, and toxic waste sites in communities predominately inhabited by African-Americans and Hispanics.[43] In addition to the burden it places on natural resources, pollution has come to add a modern caustic dimension to poverty, as industry has continued to sacrifice environmental balance for profitability.

C. The Emergence of Modern Environmentalism: Increased Environmental Awareness and the Lack of Minority Participation

The unconstrained growth of pollutants following World War II became a focus of interest as ecologists and scientists sought to identify not just the scientific cause of environmental degradation but also the correlative risks and hazards presented to human health.[44] Existing discourse on the religious, philosophical, and ethical underpinnings of man's relation to and interaction with nature and the environment gradually began to encompass writings and research on the ecological effect of an increasingly industrial and technologically advancing society.[45] Publications such as Aldo Leopold's *A Sand County Almanac*[46] in 1949 and Rachel Carson's *Silent Spring*[47] in 1962, cautioned against the potentially devastating

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42. Gerrard, *supra* note 15, at 1047, 1091. *See generally* Been, *supra* note 41, at 1002; Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994); SZASZ, *supra* note 14, at 105–08.

43. UCC REPORT, *supra* note 27, at 23. Low-income blacks and other minority groups, tend to be concentrated in urban industrial communities. *Id.* Andrew Szasz writes in ECOPOPULISM,

> [t]he burden of living with industrial waste has always been unevenly distributed, falling more heavily on poor than well-to-do, more heavily on black and brown than on white. It was the inevitable, though not necessarily intended, consequence of normal business logic, of both generators and disposal firms chosing the least expensive option in a regulation-free business environment.

SZASZ, *supra* note 14, at 106.

44. "For decades scientists have warned of the possible consequences of all this profligacy. No one paid much attention." Sancton, *supra* note 20, at 24.

45. RACHEL L. CARSON, SILENT SPRING (1962); ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949); PERCIVAL ET AL., *supra* note 21, at 20 (1992); PLATER ET AL., *supra* note 13, at 12–14 (1990); CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (1974). For a discussion of environmental philosophies and ethics, see generally RODERICK NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1988); DAVID PEPPER, THE ROOTS OF MODERN ENVIRONMENTALISM (1984); HENRY DAVID THOREAU, THE ANNOTATED WALDEN (1970); MICHAEL ZIMMERMAN ET AL., ENVIRONMENTAL PHILOSOPHY (1993).

46. LEOPOLD, *supra* note 45.

47. CARSON, *supra* note 45. Chemical companies threatened lawsuits to block the publication of Silent Spring, galleys of which were circulated prior to its publication. The book subsequently became a best seller "hailed as one of the century's most important." *Averting A Death Foretold*, *supra* note 24, at 72.

consequences of technological innovations that casually introduced environmentally harmful compounds without regard to the impact on other layers of the biota.[48]

While there existed considerable debate over the environmental impact of pollution, environmentalism as a cause or theme nevertheless failed to take root in the wider public consciousness until the early 1970s.[49] Perhaps the deprivation of the war years and the unprecedented economic growth that followed dulled any dissent to the ecological consequences of business expansion. Eventually, however, the proliferation of toxic waste sites and groundwater contamination converged with the emergence of a myriad of other pollution problems to shift the public perception of pollution from that of a singular, localized problem to a pervasive national issue. Interest in environmentalism surged as technological advancements in communications permitted the nationwide news broadcast of local environmental disasters around the nation.[50] Environmental groups experienced a jump in both membership and contributions.[51] New environmental organizations formed.[52]

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48. Leopold's and Carson's argument not only profoundly influenced efforts to develop an ecological ethical paradigm, but also set the course for modern environmentalism. Their argument that preservation of ecological diversity was not only morally mandated but in society's long-term economic interests as well was premised on the combined thesis that all life on earth is part of a "biotic pyramid" and thereby interrelated. *See generally* RACHEL CARSON, THE SEA AROUND US (1979); CARSON, *supra* note 45, at 50.

49. Through the late nineteenth century and early twentieth century, environmental activism principally fell within the "conservationist" or "preservationist" schools of thought, progenitors of the modern environmental movement. Conservationists, led by Gifford Pinchot, operated within a broad theory of the efficient use of natural resources, utilizing scientific principles in making choices. Preservationists, led by John Muir, emphasized the wonders, delights, and sometimes the divinity of wilderness and nature which they looked upon as possessing their own aesthetic, spiritual, and moral values. ANDERSON ET AL., *supra* note 19, at 3–4. The two movements shared some common principles, but eventually split, with preservationism becoming subordinated to the conservation movement until the birth of modern environmentalism in the 1970s. *Id.* at 2–3. *See generally* ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY (Celia Campbell-Mohn et al., eds., 1993) (discussing the history of environmental law) [hereinafter RESOURCES TO RECOVERY].

50. *See, e.g.*, SZASZ, *supra* note 14 at 38–47 (discussing media coverage of Love Canal and listing of environmental disasters such as the Kepone contamination of Chesapeake Bay, PCB contamination of the Hudson River, Three Mile Island and growing public interest in environmental issues); *California Coast Incident*, N.Y. TIMES, Jan. 31, 1969, at 50 (Santa Barbara Oil Spill of 1969).

51. Environmental group membership increased from 500,000 to 2.5 million members over 15 years. RESOURCES TO RECOVERY, *supra* note 49, at 35. *See also* JACQUELINE V. SWITZER & GARY BRYNER, ENVIRONMENTAL POLITICS 9–10 (1998) ("The Sierra Club's membership grew ten-fold from 1952–1969, and The Wilderness Society expanded from twelve thousand members in 1960 to fifty four thousand in 1970.").

52. Rachel Carson's publication of *Silent Spring* in 1962, targeting the bioaccumulative effect of DDT, spawned the creation of the Environmental Defense Fund in 1967 by a group of scientists taking up her cause to ban pesticides. The Friends of the Earth spun off from the Sierra Club in 1969, generating in turn a spin-off of its own, the

This surge in environmental activism by way of mainstream environmental groups was typically male, middle-class to upper-middle class, and white. [53] Despite indications that minorities and low-income groups were bearing the brunt of pollution hazards, African-Americans and Hispanics were involved on a token level at best, and few minority members served on environmental organizational staffs or boards of directors.[54] Varying theories have been proposed to explain this lack of minority participation, most of which fault an alleged divergence between minority and environmental agendas. Historically, organizational goals of mainstream environmental groups focused on maintaining open space and biodiversity, with a heavy emphasis on conservation, preservation, and outdoor recreation. This mainstream environmentalist perspective has been described as "Arcadian" or one that is "anti-urban and pro-pastoral,"[55] positing that mainstream environmentalists seek to prioritize and redistribute environmental threats, rather than eliminate them.[56] As a result, environmentalists, legislators, local governments, agencies, and politicians could influence outcomes based on whatever environmental prioritization agenda was deemed most politically or economically expedient.[57] Given the overwhelming "whiteness" of the those in

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Environmental Policy Institute. And in 1970, the Natural Resources Defense Council came on the scene as the first celebration of Earth Day approached. *See* PERCIVAL ET AL., *supra* note 21, at 3–4. Other organizations that emerged during this period included the Center for Science in the Public Interest, African Wildlife Foundation, Council on Economic Priorities, Save the Bay, Greepeace, and League of Conservative Voters. SWITZER & BRYNER, *supra* note 51, at 9–10.

53. Lee, *supra* note 12, at 22; Cole, *supra* note 28, at 640.

54. Robert W. Collin notes:

> In May of 1991, The Wilderness Society had no people of color on its board, and minorities only occupied four out of the 80 professional positions. The Sierra Club had one out of 15 directors; the Audubon Society had two people of color out of 33 directors. At the National Wildlife Federation, 19 out of the 283 professional staff were people of color.

Collin, *supra* note 12, at 517 n.161. *See also* BULLARD, *supra* note 28 at 171–85; Anne E. Simon, *Ethics, Ecology, and Power: the Environmental Justice Movement*, LAND USE & ENV'T FORUM 213. Some mainstream environmental groups specifically excluded minorities from membership. Charles Jordan & Donald Snow, *Diversification, Minorities, and the Mainstream Environmental Movement*, in VOICES FROM THE ENVIRONMENTAL MOVEMENT: PERSPECTIVE FOR A NEW ERA 71, 75–78 (Donald Snow ed., 1991); Philip Shabecoff, *Environmental Groups Told They Are Racist in Hiring*, N.Y. TIMES, Feb. 1, 1990, at A16. Letters were sent in 1990 by grassroots organizations in New Orleans, Louisiana and Alburquerque, New Mexico to mainstream environmental organizations including the Sierra Club, the National Wildlife Federation, and the Natural Resources Defense Council, asserting racism in their hiring practices and calling for more mainstream involvement in grassroots organization challenges. MARK DOWIE, LOSING GROUND 146 (1995).

55. Peter M. Manus, *The Owl, the Indian, the Feminist and the Brother: Environmentalism Encounters the Social Justice Movements*, 23 B.C. ENVTL. AFF. L. REV. 249, 285–86 (1996).

56. *See id.* at 286.

57. *See id.* at 286–87.

positions of power, "environmental decision-making is already stacked against the country's minorities, who as a group have fewer resources and less political representation with which to fund, research, and otherwise influence the environmental prioritization."[58]

In addition, mainstream environmental goals arguably conflicted with market interests in economic development, threatening jobs and the economic welfare of communities already struggling under the effects of historical discrimination.[59] Environmental agendas were increasingly viewed with suspicion and distrust by minority communities that could ill afford to jeopardize an already fragile economic stability. The common theme underlying attempted rationalization of low minority participation asserted as its premise that minority communities were too immersed in the daily struggle for survival or too focused on achieving a social agenda of civil rights to have either the time or the resources for involvement in environmental concerns.[60] Those resources that were available were directed towards civil rights goals, seeking equal access and ending government-sanctioned discrimination in areas such as housing, employment, and education, leaving little time for much else.[61]

> Community activists have to live with the results of environmental groups' compromises with industry and the government. Thus while the legal-scientific groups are bickering with the government and chemical companies about how many parts per million of certain chemicals are 'safe' for release into the atmosphere, citizens groups are pressing for the elimination of the chemicals themselves...."

Cole, *supra* note 28, at 644. *See also*, Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement, in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 33 (Robert D. Bullard ed., 1993).

58. Manus, *supra* note 55, at 287.

59. *See* BULLARD, *supra* note 28, at 10–14. *See also*, Lazarus, *supra* note 27, at 788 ("Environmentalists seen [by minority leaders] as ignoring both the 'urban environmental' and the needs of the poor....").

60. Bullard noted:

> Why were black organizations late in challenging the environmental imbalance that exists in the United States? There is enough blame to go around. Black organizations and their leaders have not been as sensitive to the environmental threat to minorities as they have been to problems in education, housing, jobs, drugs and more recently the AIDS epidemic. In some cases, black leaders have operated out of fear of erosion of hard fought economic gains by some environmental reform proposals.

BULLARD, *supra* note 28, at 127–29. *See also* Lazarus, *supra* note 27, at 824–25; Charles Lee, *Toxic Waste and Race in the United States, in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 9, at 20–21; Paul Mohai, *Black Environmentalism*, 71 SOC. SCI. Q. 744 (1990); Paul Mohai & Bunyon Bryant, Is There A "Race" Effect on Concern for Environmental Quality? (paper delivered at meeting of the Rural Sociological Society, Des Moines, Iowa, August, 1996 (on file with author)); Marc Poirier, *Environmental Justice/Racism/Equity: Can We Talk*, 96 W. VA. L. REV. 1083, 1086 (1994).

61. In fact, minority communities are just as likely to care about the environment. Studies have shown blacks and whites were equally sympathetic or active in the environmental movement, and similarly equally supported environmental protection.

The result, whatever the cause, was that absent a minority presence, mainstream environmental groups took little, if any, notice of issues relating to race, class, and discrimination in the provision of environmental services or imposition of environmental burdens.[62] Instead, this movement lobbied, protested, and utilized the media and the courts to reduce further resource degradation and increase recreational opportunities; pressure was exerted on state and federal elected officials and government agencies to pass and enforce environmental protection laws and regulations.[63] New legislation was then added to the growing arsenal of technical, legal, and lobbying expertise of mainstream organizations in an assault upon continued environmental degradation. Even as the environmental movement matured, its orbit still did not expand to include environmental issues relevant to minority communities, but rather aimed at tightening the growing body of environmental regulations, utilizing the courts to force compliance with existing

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Blacks were more likely than whites to say that environmental laws were inadequate. Paul Mohai, *supra* note 60, at 745. *See generally* UCC REPORT, *supra* note 27, at xi–xii. *See also* BULLARD, *supra* note 28, at 3 ("Ecological concern has remained moderately high across nearly all segments of the population."); Regina Austin & Michael Shill, *Black, Brown, Red and Poisoned*, *in* UNEQUAL PROTECTION, *supra* note 30, at 53 (observing that minority involvement in environmental issues has reflected a multidimensional approach); Poirier, *supra* note 60, at 1086; Paul Mohai & Bunyon Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COL. L. REV. 921 (1992); Charles Lee, *A Matter of Survival: Building an Inclusive Environmental Movement*, SOJOURNERS, July 1990, at 35; Peter Callahan, *Environmental Racism: When Civil Rights Are Used to Protect More Than Individual Liberty*, 16 OMNI, July 1, 1994, at 8, *available in* 1994 WL 13480325. In a report entitled *"We Speak for Ourselves: Social Justice, Race, and the Environment,"* issued at the People of Color Environmental Summit held in Washington, D.C. in October, 1991, Dana A. Alston stated "Communities of color have often taken a more holistic approach than the mainstream environmental movement, integrating 'environmental' concerns into a broader agenda that emphasizes social, racial and economic justice." Karl Grossman, *The People of Color Environmental Summit*, *in* UNEQUAL PROTECTION, *supra* note 30, at 272, 289. *But see* Lazarus, *supra* note 27, at 824–25 ("[O]pinion surveys taken of blacks reportedly suggest that they are less concerned about the environmental and even where concern doesn't exist, are less likely to translate that concern into action directed at these issues.").

62. In discussing the need for environmental poverty law, Luke Cole contends that environmental laws "legitimate the pollution of low income neighborhoods." Cole, *supra* note 28, at 642. *See, e.g.*, Lee, *supra* note 61, at 35 (Peggy Shepard of West Harlem Environmental Action noted that "the Earth Day organizing committee in New York City did 'literally no outreach' to minority communities. 'Our issues and concerns were simply forgotten during the planning process.'"); Poirier, *supra* note 60, at 1088 (noting that environmentalists put little value on discourse relating "nature [to] different social groups with disparate power [or] access to environmental 'goods or bads'").

63. *See* RESOURCES TO RECOVERY, *supra* note 49, at 35. "The *Environmental Law Reporter* has published over 5000 federal court decisions. These decisions are paralleled by many thousands of administrative decisions." *Id. See also* John H. Adams, *The Mainstream Environmental Movement, Predominantly White Memberships Are Not Defensible*, EPA J., Mar.–Apr. 1992, at 25.

statutes and laws, and opposing corporate and political efforts to repeal hard-won environmental gains.[64]

III. THE DEVELOPMENT OF A COMPREHENSIVE FEDERAL LEGISLATIVE RESPONSE

A. The Basic Statutory Scheme

The growing popularity of mainstream environmental issues did not go unnoticed.[65] State and local governments began to enact varying environmental legislation that was increasingly more stringent.[66] At the same time, federal legislators cognizant of the political advantage environmental issues could provide at the polls, enacted new environmental laws that were national in scope.[67] In some

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64. BULLARD, *supra* note 28, at 14. In March, 1990, the Southwest Organizing Project, joined by a number of minority activists, addressed the following to ten mainstream environmental organizations:

> Your organizations continue to support and promote policies which emphasize the clean-up and preservation of the environment on the backs of working people in general and people of color in particular. In the name of eliminating environmental hazards at any cost, across the country industrial and other economic activities which employ us are being shut down, curtailed or prevented while our survival needs and cultures are ignored. We suffer the end results of these actions, but are never full participants in the decision-making which leads to them.

Austin & Shill, *supra* note 61, at 69–70.

65. Quoting Theodore White, THE MAKING OF THE PRESIDENT 45 (1972), Percival et al., states that "by 1970 'the environment[al] cause had swollen into the favorite sacred issue of all politicians, all TV networks, all goodwilled people of any party.'" *See* PERCIVAL ET AL., *supra* note 21, at 4. *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 404 (1971) ("growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation designed to curb the accelerating destruction of our country's natural beauty").

66. E. Donald Elliott et al., *Toward A Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 326 (1985) *reproduced in part in* AN ENVIRONMENTAL LAW ANTHOLOGY (Robert L. Fischman et al. eds., 1996). For examples of state environmental legislation ranging across a number of areas, see ARIZ. REV. STAT. ANN. §§ 49-541–49-550 (West 1996) (motor vehicle emissions); CAL. HEALTH & SAFETY CODE §§ 41850–41866 (West 1996) (Agricultural burning); CAL. HEALTH & SAFETY CODE §§ 44300–44384 (West 1996) (Air Toxics "Hot Spots" Information and Assessment Act of 1987); MD. CODE ANN., ENVIR. § 4-406–4-411 (1996) (oil spillage, control, and cleanup); MICH. STAT. ANN. §§ 14.58(1)–(209) (Law. Co-op. 1994) (State Pollution Statutes); NEV. REV. STATS § 445A.645 (Michie 1996) (radioactive and hazardous waste discharge); N.J. STAT. ANN. 13:1K-6–13:1K-14 (West 1991) (Environmental Cleanup Responsibility Act); N.Y. ENVTL. CONSERV. LAW §§ 38-0101–38-0111 (McKinney 1997) (regulation of the use of chlorofluorocarbon compounds); R.I. GEN. LAWS § 46-12-3 (1996) (waste from seagoing vessels).

67. It had become increasingly apparent that piecemeal legislation and general footdragging by the states had done little to slow the decline of environmental resources. Some have attributed state failure to implement existing environmental regulations or adopt

of the first legislation reflecting this new environmental focus by the federal government, Congress passed the National Environmental Policy Act[68] ("NEPA") in 1969 that stated as its purpose "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment...."[69]

Other legislation followed, from amendments to existing but ineffective regulatory schemes[70] to completely new legislative efforts. Several of the statutes

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new legislation to a "race of laxity" or "race to the bottom," fueled by competition for industry. "Calls for more stringent pollution control in the nation's heavily industrialized areas were met with threats of industrial relocation by the polluters who, simultaneously, were being wooed to relocate by less developed areas willing to trade environmental amenity values for the economic benefits of increased economic development." PLATER ET AL., *supra* note 13, at 776. See Mssrs. Elliott, Ackerman, and Millian, rejecting interest group politics as a cause for the spate of environmental statutes during this period. Elliott, *supra* note 66. See also Kristin Engel, *State Environmental Standard Setting: Is There a "Race" and is it "to the Bottom"?*, 48 HASTINGS L.J. 274 (1997) for a discussion of, among other things, the merits of the the race-to-the-bottom rationale in explaining the development and content of federal environmental laws. For examples of early legislative efforts initiated during this period, see The Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (1994); Land and Water Conservation Fund Act, 16 U.S.C. §§ 460l-4–460l-11 (1994); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (1994); Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1994); Coastal Zone Management Act, 16 U.S.C. §§ 1451–1464 (1994); Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431–1445 (1994).

68. 42 U.S.C. § 4321 (1994). NEPA was signed into law by President Nixon on January 1, 1970. Unfortunately, NEPA is a statute with no teeth. It imposes no substantive requirements on agency decision-making. Rather, it simply requires agencies to take environmental considerations into account during the decision-making process. Once the procedural requirements of NEPA have been met the agency retains complete discretion over the final decision itself. In essence, then, NEPA only protects against uninformed decision-making, limiting the court's role to inquire whether the agency "considered" environmental consequences. *See, e.g.*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

> [O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject "itself within the area of discretion of the executive as to the choice of the action to be taken."

Id. at 227–28 (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

69. 42 U.S.C. § 4321 (1994).

70. For example, the Clean Air Act of 1963, Pub. L. No. 88-206 § 3(c)(2) (codified as amended in scattered sections of 26 U.S.C.) which itself was the successor to the Air Pollution Control Act of 1955 ("APCA"), authorized the now dismantled Department of Health, Education and Welfare to undertake an air pollution research program. *See also* Pollack, *supra* note 19, at 331. Under the APCA, HEW's authority was limited to the regulation only of pollution that crossed state boundary lines. Intrastate pollution was considered purely a local matter over which HEW had no regulatory authority, although federal funding was made available to states as a method of encouraging them to develop and implement state pollution control programs. HEW was authorized to compile and publish criteria reflecting scientific knowledge of the harmful effects of a

enacted during this period were surprisingly strict. Most sweeping were statutes targeting air[71] and water pollution.[72] Numerous environmental statutes were enacted between 1969 and 1979,[73] ranging from legislation dealing with public water supplies[74] to legislation of pesticides.[75] With the passage of the Resource Conservation and Recovery Act[76] ("RCRA") in 1976, Congress purportedly "eliminated [the] last remaining loophole in environmental law—unregulated land disposal of discarded materials and hazardous waste."[77]

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pollutant on public health or welfare "for informational purposes." The Air Quality Act of 1967 did establish a full regulatory program addressing ambient air quality but left implementation primarily with the states. *Id.*

71. The Clean Air Act of 1963, which had authorized only limited regulation of national air pollution problems, was amended in 1970 to provide the newly created Environmental Protection Agency ("EPA") with authority to establish national ambient air quality standards ("NAAQS") for "criteria pollutants." Criteria pollutants are defined as pollutants that "cause and contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." 26 U.S.C. § 108(a)(1)(a-b) (1994). EPA has currently identified six criteria pollutants: sulfur dioxide, nitrogen dioxide, suspended particulates, lead, carbon monoxide, and ozone, with hazardous air pollutants regulated under 26 U.S.C. § 112 (1994). NAAQS are standards that are set in terms of maximum concentrations, with reference to the ambient air levels of pollutants that would result in harm to human health. *See* 26 U.S.C. §§ 107–110; 40 C.F.R. §§ 50.4–50.12. Once again primary responsibility for the implementation of the NAAQS was left to the states, with EPA retaining authority to develop and administer a plan on behalf of a non-complying state. Amendments in 1977 and 1990 further strengthened the requirements on nationwide compliance with air quality standards, as the deadlines established by Congress in the 1970 amendments proved ineffective and impracticable and reflected clear legislative intent to reduce the emission of air pollutants.

72. The modern Clean Water Act, 33 U.S.C. §§ 1251–1266 (1994), born of amendments to the Federal Water Pollution Control Act in 1972, similarly reflected this federal agenda on national pollution control, making it unlawful to discharge pollutants into navigable waters without a permit and mandating, among other things, the creation of the National Pollution Discharge Emissions System ("NPDES") permitting system. Like the Clean Air Act, the Clean Water Act similarly imposed deadlines on the achievement of swimmable and fishable waters, and mandated the implementation of different control technologies by industry.

73. These statutes included among them: The Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1534 (1994); The Federal Insecticide, Rodenticide and Fungicide Act Amendments ("FIFRA"), 7 U.S.C. §§ 136–136y (1994); The Safe Drinking Water Act ("SDWA"), 12 U.S.C. §§ 300f–300j-26 (1994); The Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992k (1994); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6908 (1994); Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601–2671 (1994).

74. Safe Drinking Water Act, 12 U.S.C. §§ 300f–300j-26 (1994).

75. FIFRA, 7 U.S.C. §§ 136–136y (1994).

76. 42 U.S.C. §§ 6901–6908 (1994).

77. "Without a regulatory framework, such hazardous waste will continue to be disposed of in ponds...or on the ground in a manner that results in substantial [or] irreversible pollution of the environment." H.R. REP. No. 94-1491 (1976), *reprinted in* 1977 U.S.C.C.A.N. 6238, 6241.

B. Regulating the Disposal of Hazardous Waste: RCRA and CERCLA

As with many of its siblings, RCRA was born of amendments to existing, non-regulatory legislation and constituted a wholesale revision of the Solid Waste Disposal Act of 1965.[78] RCRA was enacted principally as a preventive measure, designed to control solid waste disposal and prevent improper waste handling and disposal practices from occurring. Commonly referred to as a "cradle to grave" regulatory scheme for hazardous waste, RCRA regulates the hazardous waste management process from the generation of the waste stream to its disposal.[79] RCRA set certain deadlines for the Environmental Protection Agency ("EPA") to promulgate regulations designed to implement a comprehensive waste management and tracking program.[80] Ultimately, RCRA requires that all owners or operators of treatment, storage, and disposal facilities ("TSDFs") obtain a permit to continue operation, and imposes through regulation a series of notification and tracking mechanisms. Through amendments in 1984, RCRA also set up a program to phase out dangerous land disposal practices—commonly referred to as the "land ban"[81]—and further required TSDFs that wished to continue operating to remediate any prior releases of hazardous wastes at the facility prior to obtaining a RCRA-required permit.[82] RCRA was also the first legislation to mandate that new facilities

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78. The Solid Waste Disposal Act generally authorized the HEW, predecessor to the Departments of Education and Health and Human Services, to conduct and fund research and to provide training for new methods of waste disposal; it further provided financial assistance to states for solid waste disposal planning. It imposed little to no regulatory requirements on waste facilities. 42 U.S.C. §§ 3251–3254(f) (1994).

79. Hazardous waste is regulated under Subtitle C and accompanying regulations. 42 U.S.C. §§ 6921–6939 (1994); 40 C.F.R. §§ 260.1–260.41 (1998).

80. Due to EPA's failure to meet these deadlines in a timely manner and, with respect to some matters, to issue any regulations at all, Congress passed the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), which contained Congressionally imposed deadlines. RCRA's implementing regulations are found at 40 C.F.R. §§ 240–271 (1998).

81. 42 U.S.C. § 6924(a) (1994). This Congressional objective is reflected in § 1002(b)(7), which provides:

> "[C]ertain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous waste."

82. *See* 42 U.S.C. § 6924(u) (1994) (applicable to Part B permitted TSDFs) and § 6924(h) (applicable to interim status TSDFs). Facilities in existence at the time of RCRA's passage were permitted to continue operation under interim status by filing a Part A application and meeting certain minimal requirements, with a more complicated Part B application to be filed subsequently in accordance with EPA regulations. With RCRA's reauthorization, interim status facilities were further required to institute certain facility upgrades by November 8, 1985 in order to retain their interim status. Part B applications were required to have been submitted, and EPA to grant or deny the permit applications by November 8, 1988. *See also* Gerrard, *supra* note 15, at 1101; MAXINE I. LIPELES, ENVIRONMENTAL LAW HAZARDOUS WASTE 77 (3d ed. 1997). A number of smaller facilities shut down, either declining to embark upon the lengthy Part B permit process and requirements to retain interim status, or upon failing to obtain a Part B permit. "According

meet certain siting criteria.[83]

What soon became apparent, however, was that even with RCRA's vaunted cradle to grave regulatory scheme, its provisions afforded the federal government no effective process to deal with the cleanup of inactive or abandoned hazardous waste sites, or sites presenting an immediate danger to human health or the environment.[84] Although RCRA § 7003 afforded the government some recourse to seek remediation of hazardous waste contamination, prior to the passage of the 1984 amendments it was unclear whether § 7003 "reached parties whose [conduct] occurred wholly in the past, and it provided no mechanism for the EPA to act immediately to conduct a cleanup itself...."[85]

The severity of this deficiency was exacerbated by the discovery of the environmental disasters of Love Canal[86] and Times Beach.[87] In response to the

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to EPA figures, two-thirds of the nation's 1600 land disposal facilities went out of business on November 8, 1985, rather than try to meet the loss of interim status ("LOIS") requirements of § 3005(e)(2)... By November 8, 1988...only 168 land disposal facility permits had been issued." *Id.*

83. 42 U.S.C. § 6924(b) (1994).

84. RCRA does contain both corrective action and cleanup provisions. *See, e.g.*, 42 U.S.C. § 6924 (1994). RCRA's cleanup provision authorizes EPA to compel the cleanup of contamination in circumstances where the "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(a). This section was amended in 1984 to clarify its application to past and present conduct. *See also* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986) (imposing liability for present and future conditions of past acts).

85. LIPELES, *supra* note 82, at 276. 42 U.S.C. 6973(a) authorizes the EPA to, among other things, bring suit against any person who has contributed to or is contributing to hazardous waste management practices which "may present an imminent and substantial endangerment to health or the environment...." This section was amended in 1984 to include past or present generators, transporters, owners or operators of TSDFs within its scope. The section as amended, was held to apply retroactively. *See Northeastern Pharm. & Chem.*, 810 F.2d at 734.

86. Love Canal, in Niagara Falls, New York, is one of the most infamous hazardous waste sites in the United States. The town built a public school on top of reclaimed land that had previously been used by Hooker Chemical and Plastics Corporation as a dump site for chemical wastes. A residential subdivision was built next to the site. In the 1970s, public authorities discovered that hazardous chemicals had entered the water supply, resulting in the ultimate evacuation of over seven hundred families. Property in the Love Canal area became worthless. *See* Book Review, 82 MICH. L. REV. 849 (1984) (reviewing ADELIN G. LEVINE, LOVE CANAL: SCIENCE POLITICS AND PEOPLE (1982)); Timothy B. Wheeler, *"Toxic Waste Cleanup Sluggish"*, BALTIMORE SUN, May 19, 1996, at 1A.

87. Times Beach similarly focused national attention upon the growing problem of hazardous waste contamination. In 1971, a waste oil dealer sprayed dioxin-contaminated oil on dirt roads all over the town of Times Beach, Missouri to keep the dust down. Dioxin, one of the most toxic substances ever produced, bioaccumulates in fatty tissue and is linked to, among other health effects, cancer, weakened immune systems, and damaged reproductive systems. Times Beach residents, for years unaware of the hazard, had noted that birds seemed to die at alarming rates, that pets developed fatal illnesses, and that there

resulting public outcry, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act[88] ("CERCLA"), to fill the void remaining in the panoply of existing environmental legislation. Often referred to as the "Superfund," CERCLA specifically was designed to provide a comprehensive federal scheme to address environmental problems at the post-disposal stage.[89] CERCLA sought not only to enable quick governmental response to imminent dangers presented by abandoned or inactive hazardous waste sites but to ensure their cleanup either by those responsible for the contaminants[90] or by the government through the Superfund.[91] As incentives towards compliance by private parties, CERCLA contained provisions permitting the imposition of civil penalties of up to $25,000 daily for failure to comply with a § 106 administrative order

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were health problems in virtually every home. *See* Debbie Howlett & Rae Tyson, *Toxicity of Times Beach 'no longer in doubt'*, USA TODAY, Sept. 13, 1994, at 10A; Rae Tyson, *'No Safe' Exposure to Dioxin*, USA TODAY, Sept. 13, 1994, at 1A. Since a recommended government buyout in 1982, all 2200 residents have moved out. *See also* Michael Mansur, *Incinerator: Next Step For Dioxin Approval Could Be Given Soon for Destroying Times Beach Pollution*, KANSAS CITY STAR, Jan. 21, 1996, at B1.

88. 42 U.S.C. §§ 9601–9626 (1994).

89. CERCLA was modeled on New Jersey's Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11 (West 1991). *See generally* AL GORE, EARTH IN THE BALANCE 6–7 (1993). 42 U.S.C § 9506 established a "Superfund" and authorized EPA to use fund monies to respond to releases or threatened releases of hazardous constituents into the environment. 42 U.S.C. § 9504(a)(1) (1994). Initially authorized at $1.6 billion, the Superfund increased with the Superfund Amendment and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, reauthorizations in 1985 to $8.5 billion. The Superfund is funded through taxes levied upon feedstock, chemical, and petroleum sales. The EPA was charged under the statute with the development of a prioritized list of sites, the National Priority List, determined to have met specified criteria and therefore eligible for cleanup under the Superfund. 42 U.S.C. § 9601 (1994). There are numerous critics of CERCLA's regulatory scheme as inefficient, slow, and expensive. The common theme among them is that the number of sites that have actually been cleaned up since CERCLA's inception are few, have taken years of studies and costly testing, and that millions are being spent on attorney and consultant fees with relatively little, in comparison, going to the actual site cleanup. *See* Andrew R. Klein, *Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-based Approach*, 21 HARV. ENVTL. L. REV. 337, 345–53 (1997); John H. Cushman, *Superfund in Shambles Indecision Fiscal Gridwork Taking Toll*, DENVER POST, Jan. 26, 1996, at 1A; Val Walton, *Superfund Cleanups Slow, Costly*, BIRMINGHAM NEWS, Mar. 4, 1997, at 1A.

90. S.REP. NO. 848, 96th Cong. 2d Sess. 13 (1980) (reflecting adoption of the "polluter pays" principle of hazardous waste remediation). *See* State of New York v. Shore Realty, 759 F.2d 1032 (2d Cir. 1985).

91. Sections 106 and 107 provided the vehicles through which the EPA could compel remediation by responsible parties and seek recovery of all costs expended by the government should the EPA conduct the cleanup. CERCLA liability is strict, and may be joint and several. More significantly, the courts have uniformly held, with little disagreement, that CERCLA may be retroactively applied to impose liability for contamination that occurred prior to its enactment. *See* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986); *see also* United States v. Olin, 107 F.3d 1506 (11th Cir. 1997) (reversing United States v. Olin, 927 F. Supp. 1502 (S.D. Ala. 1996) which was one of the few opinions to refuse to apply CERCLA retroactively).

seeking cleanup,[92] as well as damages in a § 107 action of up to treble the final cleanup costs.[93] Accordingly, the passage of CERCLA completed the main legislative environmental program and, together with RCRA, the two pieces of legislation became the principal federal statutes regulating hazardous waste.

C. A Principal Failure of the Federal Statutory Scheme

This complex federal legislative scheme for environmental protection focused on end-of-the-pipe control—controlling pollution at the end of the manufacturing or pollution-producing process. The aim was to regulate and distribute environmental impact risks through traditional corporate risk assessment and management theories. Taken as a whole, the central failure of the federal environmental statutes and their accompanying rules and regulations is that they assume a neutral and homogeneous geographic community where the impact of decisions are broadly borne.[94] Both judicial and administrative forums have embraced this theory of community in rejecting the argument that race and/or ethnicity are variables to be considered in analyzing the impact or legality of environmental regulatory decisions. More importantly, in both of these forums the reasoning has assumed that within the "community standard" theory the showing of a disproportionate burden, standing alone, is insufficient to warrant injunctive or judicial relief.

RCRA, for example, directs EPA to develop standards for the design, construction, and operation of hazardous waste facilities. In order to comply with RCRA, proposed disposal sites must satisfy certain designated criteria, such things as geologic soundness, climatic conditions suitable for land disposal, and access to good transportation systems.[95] The EPA has taken the position that as long as a proposed facility meets the requirements of RCRA and its implementing regulations, the permit must be issued even though there may be attendant social ramifications on the surrounding community.[96] Accordingly, in *In Re Chemical Waste Management Inc.*, EPA Region V approved Chemical Waste Management of Indiana's federal application for a landfill permit.[97] The petitioners, the City of New Haven and two citizens, challenged Region V's decision based on an asserted failure by the EPA to comply with Executive Order No. 12,898[98] to consider

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92. *See* 42 U.S.C. § 9609(b)(1) (1994).

93. *See* 42 U.S.C. § 9609(c) (1994).

94. *See infra* notes 95–104 and accompanying text.

95. *See* 42 U.S.C. § 6924 (1994).

96. *See In re* Chemical Waste Management of Ind., Inc. Permittee, No. IND 078 911 146, 1995 WL 395962, at *5 (Envtl. App. Board, June 29, 1995).

97. *See id.* at *2.

98. Executive Order 12,898 signed by President Clinton on February 11, 1994 was entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations." Together with the Presidential Memorandum, the Order directed USEPA and sixteen other federal agencies to form an Interagency Working Group on Environmental Justice ("Working Group") to identify and address "disproportionately high and adverse human health or environmental effects on minority...and low-income populations" of their programs and activities. Federal agencies were further directed by the

"environmental justice" issues in the issuance of the permit, and that this failure constituted, among other things, an abuse of discretion.[99] The EPA Appeals Board, in reviewing petitioners' claims, concluded that there was no legal basis upon which the permit could be denied solely based on racial effect or socio-economic composition of the affected community.[100]

Another example of the statutory assumption of community homogeneity is reflected in the Clean Air Act provisions and implementing regulations that permit states to establish emissions discharge allowance programs, in essence allowing companies to purchase the right to continue to pollute.[101] These programs contemplate a reduction in overall pollution for the benefit of the greater

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Executive Order to:

> 1) develop strategies to ensure federal programs don't result in inequitable environmental risks;
> 2) address environmental justice issues in EIS statements for federally-sponsored projects;
> 3) ensure that low-income communities and minority communities have access to public information relating to health or environmental planning; and
> 4) conduct activities and programs that affect human health or the environment in a manner that does not discriminate on the basis of race, color or national origin.

Executive Order 12,898, 59 Fed. Reg. 7629 (1994).

99. *See In re Chemical Waste Management*, 1995 WL 395962, at *3.

100. *See id.* at *6. The Appeals Board did find that there were areas in the RCRA permitting scheme that allowed EPA discretion in complying with the Executive Order despite RCRA's constraints. One such area involves the omnibus clause of RCRA § 3005(c)(3) which gave EPA the authority to include in the permit those terms or conditions necessary to insure that the facility does not have an adverse impact on the health or environment of the surrounding community.

> Thus under the omnibus clause, if the operation of a facility truly poses a threat to the health or environment of a low-income or minority community, the omnibus clause would require the Region to include in the permit whatever terms and conditions are necessary to prevent such impacts. This would be true even without a finding of disparate impact.

Id. However, in September, 1997, the EPA rejected a state air emissions permit sought by Shintech Corp. for a polyvinyl-chloride plastics plant to be built between New Orleans and Baton Rouge. The permit was rejected under Title V of the Clean Air Act on technical grounds. In a letter announcing the decision, Carol Browner, EPA Administrator, stated, "[i]t is essential that minority and low-income communities not be disproportionately subjected to environmental hazards," and that the state permitting process should take these concerns into account. Curtis Wilkie, *EPA Rejects Permit for La. Plastics Plant*, BOSTON GLOBE, Sept. 12, 1997, at A10. *See also* Maria Giordano, *Shintech Assesses Loss of Permit, Long Delay May Threaten Plant*, NEW ORLEANS TIMES-PICAYUNE, Sept. 12, 1997, at A1 (The EPA will address claims of environmental racism and civil rights claims challenging proposed Shintech plant if the state process does not.).

101. *See* Title IV of the Clean Air Act Amendments of 1990, 42 U.S.C. § 76510 (1994); 40 C.F.R. §§ 73.70–73.71 (1997). *See generally* Manley W. Roberts, *A Remedy for the Victims of Pollution Permit Markets*, 92 YALE L.J. 1022 (1983) (discussing advantages and disadvantages to pollution permit markets and their impact on potential "hot spots").

population—through the purchase or trading of pollution credits, or the retirement of offending sources.[102] Referred to as "smog markets," these programs and others like it provide companies with flexibility in operating their facilities while meeting air quality requirements. In California, the South Coast Air Quality Management District ("AQMD") set up such a program under which manufacturers based in the Los Angeles area could, among other things, buy and scrap older polluting cars in exchange for pollution credits that would allow them to continue to emit an equal volume of pollutants as those discharged by the now-retired vehicle.[103] However, since there is no reduction in facility emissions, the residents and workers surrounding the polluting facility remain exposed to higher pollution levels, and therefore bear more of the risk, even though the overall air quality of the region may benefit.[104]

A more fundamental problem, however, exists within the guidelines and structure of RCRA and CERCLA. Both statutes purport to regulate generator or TSDFs activity at the manufacturing and disposal points, as well as to provide a vehicle for remediation of contaminated land. Yet neither takes into account the distribution of environmental risks or burdens that hazardous waste sites and

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102. One such program is set forth in Title IV of the Clean Air Act Amendments of 1990 known as the Acid Rain Program. In an effort to reduce acid rain, the Acid Rain Program sets up an allowance trading system in order to reduce sulfur dioxide emissions, a major contributor to acid rain. The principal emitters of sulfur dioxide are fossil fuel-fired power plants. These power plants are allotted a certain number of tradable allowances, each of which permits the issuance of one ton of sulfur dioxide during a given year. Allowances are determined based on past fuel usages as well as statutory emissions limitations. The EPA also sets aside approximately 2.8% of the total annual allowances to be allocated to power plants in a Special Allowance Reserve. Each year the EPA holds an allowance auction whereby a portion of allowances to be allocated to utilities can be purchased by the highest bidder. Bidders can bid for any quantity of allowances (out of the total available) and there are no restrictions on price. The auctions are held by the Chicago Board of Trade on the EPA's behalf. In addition to allowances made available by the EPA, "utilities that are allocated allowances, or others that have purchased allowances held in the Allowance Tracking System, can offer their allowances for sale in the EPA auctions and set a minimum price for those allowances." ENVIRONMENTAL PROTECTION AGENCY, EPA 430-F-92-017, ALLOWANCE AUCTIONS 3 (1998).

103. Marla Cone, *Civil Rights Suit Attacks Trade in Pollution Credits*, L.A. TIMES, July 23, 1997, at A1. The Regional Clean Air Incentives Market ("RECLAIM") program instituted by the AQMD was an emissions trading program designed to reduce emissions of two major ozone precursors by a fixed percentage each year. Sources that reduce their emissions below their allowances earn credits that can be sold to other sources. SWITZER & BRYNER, *supra* note 51, at 181–82.

> Despite the setbacks and modifications, the AQMD has become a model of regional cooperation and innovation, and there has been substantial improvement in air quality over the last decade. Other states and air quality districts consider the Los Angeles proposals, particularly the emissions trading scheme, to be on the cutting edge of air pollution regulation and have adopted many of the rules to meet their attainment needs.

Id. at 182.

104. *See* SWITZER & BRYNER, *supra* note 51, at 182.

TSDFs impose on population groups. The siting of hazardous waste facilities is generally considered one of the most unwanted land uses, giving rise to substantial public fear and concern for community health and safety.[105] As demonstrated by the outrage over Love Canal and Times Beach, great public concern over environmental siting issues is usually fueled by the direct impact of the actual or threatened contamination and degradation on human lives or property values, a decidedly homocentric view.[106] Concern for the environment, although present in public response to hazardous waste sites, tends to play a secondary role—expressed more as a concern that environmental degradation will directly have an impact on human quality of life.[107]

Unfortunately, with the exception of a few limitations imposed by RCRA[108]

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105. The predominant concern is the impact on health, "particularly the health of one's children." Gerrard, *supra* note 15, at 1139. *See also* Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 FORDHAM URB. L.J. 689 (1994). McDermott argues that public fear, although reasonable, is often misplaced and unsupported by generally accepted scientific evidence. "There are wide gaps between perceived risks and actual risk in this area, and quite frankly, the waste management industry shares the fault for this." *Id* at 693. Jane Seigler, arguing an industry perspective, contends the public significantly misperceives the risk posed by RCRA permitted facilities. "Moreover, public concern tends to focus on the sub-set of off-site commerical hazardous waste disposal facilities despite the fact that the entire off-site commercial hazardous waste industry handles only four percent of the hazardous waste generated in this country." Jane Seigler, *Environmental Justice: An Industry Perspective*, 5 MD. J. CONTEMP. LEGAL ISSUES 59, 60 (1993/1994). *See also* Kelly Michele Colquette & Elizabeth A. Henry Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL L.J. 153, 183 (1991) (location of hazardous waste facility in community has adverse psychological effects); Rodolfo Mata, *Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model*, 13 VA. ENVTL. L.J. 375, 377 (1994) ("Many residents fear exposure to hazardous wastes in light of the risk of explosions or accidents while hazardous wastes are being transported and the risk of waste [mis]handling.").

106. There has not been a willingness on the part of the general public to adopt an environmental ethic recognizing the normative rights of nature. Aldo Leopold in *A Sand County Almanac* posited that "[a] thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise." In his articulation of an environmental ethic, Leopold ignored, among other things, the tendency of human behavior to maximize personal gain. Certainly any ethic which is attractive enough to be espoused by a sufficiently large population segment to lead to change in environmental attitudes will have to give recognition to human utilitarianism. *See* LEOPOLD, *supra* note 45. *See also* PLATER ET AL., *supra* note 13, at 12–15 (questioning whether there can be a moral-legal basis for an environmental ethic beyond utilitarianism).

107. *See generally* Michael Raphael, *Pollution Fight Takes New Tack Civil Rights Law Wielded in Suit*, NEW ORLEANS TIMES-PICAYUNE, June 1, 1996, at A5; Seigler, *supra* note 105, at 61. There are of course exceptions, typified by actions brought by environmental organizations to preserve specific valued resources.

108. 42 U.S.C. § 6924 (1994). RCRA specifies minimum technological requirements as well as placement guidelines, prohibiting placement in, for example, certain land formations such as underground mines, salt beds, or caves. 42 U.S.C. § 6924(b)(1)(A) (1994).

and CERCLA,[109] there is no federal regulatory program governing the siting of hazardous waste facilities or polluting industries. States are delegated responsibility under RCRA to initiate their own hazardous waste programs, and they retain considerable flexibility in structuring their siting decision-making policies and processes.[110] "[Siting] is a legal, emotional, political and sometimes irrational decision."[111] Industrial facility siting remains within the discretion of private companies, unfettered either by federal and often even state influence or regulation. Siting decisions for commercial hazardous waste disposal facilities are typically made at the local level, and are heavily influenced by politics and private industry.[112] And yet the siting of hazardous facilities and waste disposal sites fundamentally affects the population group at risk when the contamination purported to be avoided by RCRA's "cradle to grave" regulatory scheme or remediated under CERCLA occurs.[113]

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109. Under 42 U.S.C. § 9604 (1994), before the President will agree to take remedial action under CERCLA, the state must assure the availability of a hazardous waste disposal facility with adequate capacity for "the destruction, treatment or secure disposition of all hazardous wastes that are reasonably expected to be generated by the State during the next twenty year period following...." § 9604(c)(9)(A) (1994).

110. States seeking authority from the EPA to administer the RCRA program must submit a program that is consistent with the federal program and provides for an enforcement mechanism. 42 US.C. § 6926(b) (1994). RCRA further affords states wide latitude in imposing more stringent requirements than RCRA provisions call for. 42 U.S.C. § 6929 (1994). *See* Collin, *supra* note 12, at 511; *see generally* Mata, *supra* note 105.

111. McDermott, *supra* note 105, at 699

112. A prime example is Wallace, Louisiana, an economically poor, almost one hundred percent African-American town. Already home to several large petrochemical plants, Wallace's population had dropped by almost one-half since 1980, leaving a mostly elderly population with little political clout. Wallace was rezoned in 1989 by St. John's Parish "further converting it from residential to commercial and heavy industrial use. The purpose of the rezoning was to attract yet another industrial giant, Formosa Chemicals, to the Parish and thereby creat jobs and taxable income." Gaylord & Twitty, *supra* note 22, at 775. *See also* Austin & Shill, *supra* note 61, at 54 ("[T]he compatibility of pollution with preexisting uses might conceivably make some sites more suitable than others for polluting operations. Pollution tends to attract other sources of pollution."); Cole, *supra* note 28, at 646 ("In the end, it is those with political clout who win in the administrative process or siting decision."). For a discussion of siting processes, see generally Naikang Tsao, *Ameliorating Environmental Racism: A Citizens Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366 (1992); Been, *supra* note 41; Gerrard, *supra* note 15.

113. The Agency for Toxic Substances for Disease Registry ("ATSDR") findings correlate proximity to hazardous waste sites with a "small to moderate" increased risk of certain birth defects and, although less well-documented, some cancers. Other ATSDR findings include elevated exposure levels of various metals and PCBs at twelve sites, cardio-vascular abnormalities, respiratory and sensory irritation and dermatitis. Deeohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L.J. 671, 686 (1994). The ATSDR is mandated under SARA to conduct health assessments for each site listed on the National Priority List. There are currently over 1200 sites on the NPL. *See also* Gaylord & Twitty, *supra* note 22, at 771–72 ("Continuous exposure to toxic pollutants from

IV. THE PARADIGM OF DISPROPORTIONATE IMPACT: THE EMERGENCE OF ENVIRONMENTAL RACISM AS A LEGAL THEORY

Minority communities soon discovered that among the vast array of environmental protection statutes enacted by the federal government, none adequately dealt with the unique problem presented by the siting of hazardous waste disposal facilities. Many of the commercial hazardous waste disposal facilities and landfills could not have been sited under EPA's current rules.[114] A recent EPA review reflected that of the twenty-one currently existing commercial facilities, two-thirds would fail current siting criteria for protecting groundwater while ninety percent threatened release of hazardous wastes.[115] Moreover, the stringent siting restrictions imposed by RCRA resulted in the continuation and expansion of existing landfills.[116] As of 1983, only one new commercial hazardous waste facility had been sited since RCRA's passage in 1976.[117] As of 1987, of twenty-seven commercial landfills in the United States, nine were in the South; four of the nine were in minority zip code areas.[118] Three of the five largest

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multiple sources has been associated with significant increases in the rates of cancer, asthma, chronic bronchitis, emphysema and other respiratory diseases, reproduction and birth defects, immunological problems and neurological disorders."); Colquette & Robertson, *supra* note 105, at 183; Samara F. Swanston, *An Environmental Justice Perspective in Superfund Reauthorization*, 9 ST. JOHN'S J. LEGAL COMMENT. 565, 565 (1994) ("proximity to hazardous waste sites is correlated with birth defects and cancer and neurotoxic defects"); Harvey L. White, *Hazardous Waste Incineration and Minority Communities*, *in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, A TIME FOR DISCOURSE, *supra* note 9, at 126–30 (discussing threat to human health associated with exposure to hazardous substances and toxic emissions from hazardous waste incinerators).

114. Facilities in existence at the time of RCRA's passage were permitted to continue operation under interim status by filing a Part A application and meeting certain minimal requirements, with the more complicated Part B application to be filed subsequently. Gerrard, *supra* note 15, at 1100. "The old landfills still operating under interim status are subject to far laxer rules than are new units.... Old hazardous waste incinerators under interim status are also subject to far laxer standards than are those with new permits. Certain facilities are also allowed to expand their capacity considerably while still under interim status." *Id.* at 1101. With the implementation of RCRA's new siting criteria and rules, it has become difficult to site a new facility. Seigler, *supra* note 105, at 63.

115. Gerrard, *supra* note 15, at 1099.

116. "In an extension of the doctrine in zoning law that prior non-conforming uses may continue, hazardous waste facilities have been held to have vested rights to continue their operations and in some states, the 'natural expansion doctrine' even requires municipalities to allow landfills and similar facilities to expand." *Id.* at 1100. *See also* Michael B. Gerrard, *The Role of Existing Environmental Law in the Environmental Justice Movement*, 9 ST. JOHN'S J. LEGAL COMMENT. 555, 569 (1994) (discussing grandfathering of existing facilities).

117. In December 1982, the EPA permitted the IT landfill in Ascension Parish, Louisiana. GAO REPORT, *supra* note 33, at 12. As industrial and municipal wastes have increased, existing landfill space has become scarce. In the early 1990's predictions were that eighty percent of existing landfill space would be closed within twenty years. Collin, *supra* note 12, at 507.

118. UCC REPORT, *supra* note 27, at 13–22.

commercial landfills in the United States are located in areas where African-Americans and Hispanics predominate.[119]

The growing awareness of issues of inequity in the distribution of hazardous land uses in minority communities formed the catalyst for what began as a movement to redress perceived "environmental racism." Despite the mounting body of evidence of inequitable treatment across a range of environmental hazards, the movement against environmental racism focused principally on the narrow issue of toxic waste disposal and the siting of polluting facilities in African-American and Hispanic communities.[120] The presence of such facilities generated a real and tangible concern about accompanying hazards to residents' health and well-being and provided a focal point around which community action galvanized.

Grassroots organizations quickly sprang up challenging locally unwanted land uses ("LULUs").[121] Challenges to environmental threats took the form of protests, demonstrations, picketing, boycotts, and petition drives,[122] incorporating civil rights strategies that had been so effective in the social justice arena. As a result, while mainstream environmental groups were pushing a conservation and preservation agenda, African-American and other minority communities had embarked on a more specific and particularized agenda—protest of inequities both in the siting of hazardous waste disposal sites or landfills and in the location of

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119. *See id.* The largest landfill is located in Emelle, Alabama, which is over seventy-five percent African-American. The fourth largest landfill is located in Scotlandville, Louisiana, an area which is ninety-three percent African-American, and the fifth largest site is in Kettleman City, California, which is over seventy-five percent Latino. *Id.*

120. Dr. Michael S. Greve has posited that such a narrow focus resulted from a desire by environmental racism advocates to "forge a coalition with the environmental establishment—a constituency with which poor minorities have virtually nothing in common and whose concerns are antithetical to their actual interests." Michael S. Greve, *Environmental Justice or Political Opportunism?*, 9 ST. JOHNS J. LEGAL COMMENT. 445, 478 (1994) (Symposium on Environmental Justice). The siting of both industrial facilities as well as commercial hazardous waste disposal sites were targeted. *See, e.g.*, Lee, *supra* note 12, at 25.

121. *See generally* Callahan, *supra* note 61; BULLARD, *supra* note 28; Lee, *supra* note 12, at 22–25. Some examples of the increasing success of local organizations include the prevention of the siting of a commercial low-level radioactive waste incinerator in southeastern North Carolina by the Center for Community Change, which is currently fighting the location of a regional chemical waste treatment plant. Also, residents of Hancock County, Georgia prevented the proposed placement of a garbage incinerator. Lee, *supra* note 12, at 25. *See also* Gabriel Gutierrez, *Mothers of East Los Angeles Strike Back*, *in* UNEQUAL PROTECTION, *supra* note 30, (discussing environmental activism in Latino communities); Cynthia Hamilton, *Concerned Citizens of South Central Los Angeles*, *in* UNEQUAL PROTECTION, *supra* note 30, at 207 (relating community organizational efforts in South Central Los Angeles to combat environmental pollution and oppose hazardous waste facility siting).

122. BULLARD, *supra* note 28, at 18. As early as 1972, African Americans in the Gullah islands off South Carolina successfully defeated efforts of a chemical company to build a processing plant through community protests and utilization of the legal system. EPA J., Mar.–Apr. 1992, at 19.

polluting industries.[123] What emerged from these protests was the fundamental belief in communities of color that the location of hazardous facilities and waste disposal sites in their neighborhoods was not by chance.[124] Rather, it was the result of purposeful siting of toxic facilities targeting blacks and other disfavored minority groups in a racially discriminatory fashion.

V. MINORITY REACTION: THE SEARCH FOR EMPIRICAL EVIDENCE OF PURPOSEFUL ENVIRONMENTAL RACISM

Awareness of siting inequities extended beyond the usually localized sphere of grassroots protest into mainstream American consciousness in 1982 with the publicity surrounding the siting of a toxic waste landfill in rural Warren County, North Carolina. The state of North Carolina planned to dispose of over 6000 truckloads, comprising 40,000 cubic yards, of PCB-contaminated soil in the predominantly African-American community.[125] The opposition to the siting of the landfill took the form of nonviolent protests that resulted in over five hundred arrests[126] and focused national attention on the as yet unnamed phenomenon of

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123. Protests were not limited to just siting issues.

> A high correlation has been discovered between characteristics associated with disadvantage (i.e. poverty, occupations below management and professional levels, low rent, and a high concentration of black residents [due to residential segregation and discriminatory housing practices]) and poor air quality. Individuals that are in close proximity to health-threatening problems (i.e. industrial pollution, congestion, and busy freeways) are living in endangered environs.

BULLARD, *supra* note 28, at 8. Note that the Clean Air Act and the Clean Water Act, when they were enforced, were at the very least designed to minimize the amount of pollutants discharged by industry into the air or water.

124. For example, in Kettleman City, California the 78.4% Latino population protested the location of California's first commercial hazardous waste incinerator proposed by Chemical Waste Management. California's two other Class I hazardous waste landfills are located in communites that are between 50–72% Latino. Tsao, *supra* note 112, at 366. Chemical Waste Management operated three other incinerators, all in poor black neighborhoods, as well as the largest hazardous waste disposal facility in the country, located in predominantly black Sumter County, Alabama. Linda R. Prout, *The Toxic Avengers*, EPA J., Mar.–Apr. 1992, at 48 . *See also* BULLARD, *supra* note 28.

125. Craig Fluorney, *In the War for Justice, There's No Shortage of Environmental Fights*, DALLAS MORNING NEWS, July 3, 1994, at J8 . Following a review of information from Warren County health officials, as well as information from North Carolina's Department of Crime Control and Public Safety, the General Accounting Office ("GAO") noted that North Carolina state officials had an original pool of ninety potential site locations. According to a state Environmental Impact Statement, all but eleven were eliminated because they did not meet certain evaluation standards. Nine of the remaining eleven were then rejected based on detailed subsurface investigations leaving only sites in Chatham and Warren Counties. According to the North Carolina Attorney General, because the Chatham site was publicly owned by the county, who refused to sell, the Warren County site was the only available site that met the evaluative criteria. GAO REPORT, *supra* note 33, at 9.

126. *See* BULLARD, *supra* note 28, at 37.

environmental racism. The Warren County protests "brought a sharper focus to the convergence of civil rights and environmental rights and mobilized a nationally broad-based group to protest these inequities."[127] The widespread publicity of the Warren County protests spurred action by the GAO, at the behest of the U.S. Delegate for the District of Columbia, Walter E. Fauntroy,[128] to conduct a study in 1983 on the siting of hazardous waste landfills and their correlation with the racial characteristics of the surrounding community.[129]

The GAO Report focused specifically on the racial and socioeconomic characteristics of offsite landfills located in EPA Region IV, comprising eight southeastern states including North Carolina.[130] The GAO Report concluded that within the region, although African-Americans comprised only twenty percent of the population, three of the four commercial hazardous waste landfills were located in predominantly African-American communities.[131] One, the Emelle facility located in Sumter County, Alabama and operated by Chemical Waste Management, is the largest hazardous waste site in the country.[132] The GAO Report further identified a strong correlation between race, poverty, and location of hazardous waste facilities.[133]

In response to the GAO Report, the Commission for Racial Justice of the United Church of Christ ("UCC") undertook a nationwide and comprehensive study culminating in the issuance in 1987 of *Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* ("UCC Report").[134] The UCC Report looked at demographic patterns associated with 1) commercial hazardous waste facilities;[135] and 2) closed or abandoned sites which present a danger to human

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127. *See id.* at 38.

128. Delegate Walter E. Fauntroy of the Congressional Black Caucus was a participant in the 1982 Warren County protests, as was Reverend Leon White of the United Church of Christ's Commission for Racial Justice, Rev. Benjamin Chavis, and Fred Taylor of the Southern Christian Leadership Conference. *See id.* at 37–38.

129. *See* GAO REPORT, *supra* note 33, at 1.

130. *See id.* The country is divided into nine regions. The eight states in Region IV include Alabama, Mississippi, Kentucky, Georgia, Tennessee, Florida, North Carolina, and South Carolina.

131. *See id.* Although not discussed in the GAO report, at the time the landfills were sited, all four of the host communities were predominantly black. Marco Masoni, *The Green Badge of Slavery*, 2 GEO. J. ON FIGHTING POVERTY 97, 99 (1994).

132. The host community was ninety percent black in 1980, and the two communities located within four miles of the facility were eighty-four and sixty-nine percent black respectively. *See* Clarice L. Hasler, *The Proposed Environmental Justice Act: "I Have A (Green) Dream"*, 17 U. PUGET SOUND L. REV. 417, 422 (1994).

133. *See id.*

134. *See* UCC REPORT, *supra* note 27.

135. Commercial hazardous waste facilities are facilities used for the treatment, storage or disposal of hazardous wastes, and which "[accept] hazardous wastes from a third party for a fee or other remuneration." UCC REPORT, *supra* 27, at xii. The study looked at 415 operating commercial hazardous waste facilities treating waste "off site." The location of off site treatment facilities was thought "more likely to be influenced by factors other than proximity to industrial activity, such as land values or degree of local opposition." *Id.*

health or the environment ("uncontrolled toxic waste sites"[136] or "UTS"), and listed on the Comprehensive Environmental Response, Compensation Liability Act Information System ("CERCLIS") by EPA. The UCC Report attempted to correlate facility or site location with certain community[137] variables including, among others, minority percentage and mean household income.[138] Going further than the GAO study, the UCC Report concluded not just that race was correlated with hazardous waste site location, but that race was the single best predictor of where hazardous waste facilities were located.[139] According to the UCC Report, race is a better predictor than poverty, property values, home ownership, the presence of uncontrolled toxic waste sites, or amounts of hazardous waste generated by industry.[140] The study asserted that the likelihood that siting of such waste facilities in minority communities had occurred by chance was virtually zero, and that underlying factors correlated to race clearly played a role in facility location.[141] The UCC Report also found that uncontrolled toxic waste sites were

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at 9–10.

136. *Id.* at xii. Uncontrolled sites were included to determine whether factors such as land use, zoning, transportation access, or physical site traits affected site location. *Id* at 10.

137. Community was defined within the study by residential 5-digit ZIP code areas. *See id.* at 9, 11. A community's racial composition was determined by its minority percentage of the population. *Id.* at 10.

138. The other three variables used in the study were mean home value, pounds of hazardous waste generated per person, and number of CERCLIS sites per 1000 persons. *Id.* at 10.

139. *Id.* at 23.

140. *See id.* at 13. Some of the major findings set out in the report included the following:

> —Race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities. This represented a consistent national pattern.
>
> —Communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic residents. In communities with two or more facilities or one of the nation's five largest landfills, the average minority percentage of the population was more than three times that of communities without facilities (38 percent vs. 12 percent).
>
> —In communities with only one commercial hazardous waste facility, the average minority percentage of the population was twice the average minority percentage of the population in communities without such facilities (24 percent vs. 12 percent).
>
> —Although socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant. This remained true after the study controlled for urbanization and regional differences. Incomes and home values were substantially lower when communities with commercial facilities were compared to communities in the surrounding counties without facilities.

Id. at xiii.

141. "The results of the study suggest that the disproportionate numbers of racial and ethnic persons residing in communities with commercial hazardous waste facilities is not a random occurrence, but rather a consistent pattern. Statistical associations between

concentrated in African-American and Hispanic communities.[142]

The UCC Report was followed in 1990 by an investigation by the *National Law Journal* focusing on the regulatory response to hazardous waste contamination and specifically considering whether there was any correlation between agency action and community demographics. The *National Law Journal* published a special issue that contained a series of articles examining inequities in EPA treatment between minority and non-minority communities.[143] Included among its most significant findings was that the penalties imposed by EPA as well as the scope of remedial or cleanup actions at hazardous waste sites differed between sites located in white versus minority communities.[144] The study reported that at sites located in white communities, agency action was faster, cleanup remedies were superior,[145] and penalties imposed on waste generators were stiffer[146] than at sites located in minority communities. In fact, agency penalties were discovered to be five hundred percent higher in communities with the largest percentages of whites than those with the largest percentages of minorities for violations of environmental laws such as CERCLA.[147] In accord with the GAO study and the conclusions reached by the UCC, the *National Law Journal* study also found that this racial imbalance occurred more often than not regardless of the economic status of the community.[148]

Other more localized studies were also undertaken. In Los Angeles County, race and industrial land use variables were a stronger predictor of TSDF

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race and the location of these facilities were stronger than any other association tested." *Id.* at 15.

142. *Id.* at 23. The UCC reported that "three of every five Black and Hispanic Americans lived in communities with uncontrolled toxic waste sites." *Id.* at 13. In addition, African Americans were "fairly overrepresented" in those Standard Metropolitan Statistical Areas ("SMSA") with the largest uncontrolled toxic waste sites. *Id.* at xiv.

143. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1.

144. *See id.* at S2.

145. Cleanup remedies proposed by EPA and reviewed by the *National Law Journal* include treatment or containment. Treatment results in the destruction of hazardous waste through incineration or other methods. Containment remedies range from simply fencing a site to preclude access by passersby to capping a site, leaving the waste in place underneath. The *National Law Journal* study showed that treatment was chosen over containment 22% times more frequently where the site was in a white community. In minority communities, containment was chosen 7% more frequently than treatment. *See id.*

146. *See id.*

147. *See id.* Richard Lazarus criticized the *National Law Journal* study's division of white communities into four quartiles, ranging from those with the greatest percentage of whites to those with the least percentage of whites. "For their Superfund data, the comparison was between communities with a white population of more than 98.3% and those with a white population of less than 84.1%. For their enforcement data, the corresponding percentages were 97.9% and 79.2% respectively." Lazarus, *supra* note 27, at 818 n.125. The subsequent comparison of the most white and least white or "minority" communities was misleading, according to Lazarus.

148. Lavelle & Coyle, *supra* note 143, at S2.

location than income.[149] This study of TSDF locations concluded: "In short, communities most likely to host a TSDF are working class, heavily minority neighborhoods located near industrial activities. The minority population living in [census] tracts within one half-mile of a large capacity TSDF (9.4% of the total County minority population) is over four and one half times the number of Anglo residents."[150] Similar findings resulted from studies conducted in the Detroit[151] metropolitan area. Collecting extensive demographic data for a limited geographical area, the study authors examined demographic trends at varying distances from TSDFs. Statistical analysis yielded the conclusion that the "relationship between race and the location of hazardous waste facilities in the Detroit area is independent of income" with race as the best predictor.[152] Dr. Robert Bullard reported a strong correlation between race and the siting of municipal solid waste landfills and incinerators in Houston.[153] According to research conducted by Dr. Bullard, de facto zoning resulted in one hundred percent of Houston's city-owned landfills location in well-established African-American communities.[154] Three of the four privately owned landfills sited during the 1970s were located in mostly African-American communities.[155] Empirical data from these studies as well as a number of others conducted since the release of the UCC

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149. Joel T. Boer & James I. Saad, *In Whose Back Yard? The Demography of Population Proximate to Hazardous Waste Facilities in Los Angeles County*, ENVTL. L. NEWS, Spring 1996, at 10 (citing their study, *Hazardous Waste Facilities in Los Angeles County: Demographic Characterization of the Potentially Affected Population).*

150. *Id.* at 14. The authors summed up as follows:

> Given two neighborhoods of equal economic standing and with equal percentages of industrial activity, the community inhabited by a greater number of minorities will be more likely to have a TSDF in its midst. Overall, minorities are more than twice as likely as Anglos to be living in a census tract located within a one mile radius of at least one large capacity TSDF in Los Angeles County. The statistical analysis of this study has confirmed what many local community groups have claimed for years: environmental inequity exists in the distribution of hazardous facilities in Los Angeles County.

Id. at 15.

151. Mohai & Bryant, *supra* note 9, at 170–72, concluding that the percentage of minority population increased with proximity to hazardous waste sites, with African Americans "overrepresented in areas near commercial waste facilities in proportion to their percentage of the population." *Id.* Study results showed that the minority population increased from 15% at more than 1.5 miles from a hazardous waste site to 44% within less than one mile. *Id.* at 171.

152. *Id.* at 174.

153. Robert D. Bullard, *Environmental Racism and 'Invisible' Communities*, 96 W. VA. L. REV. 1037, 1039–40 (1993–1994). *See* BULLARD, *supra* note 28, at 51–52.

154. *See* Bullard, *supra* note 153, at 1039.

155. *Id.* at 1040. "The city closed its waste disposal facilities in the early 1970s and contracted out waste disposal services with private firms.... The private waste disposal industry followed the discriminatory waste facility siting pattern that had been established by the all-white Houston City Council." Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 459–60 (1994).

Report found correlations between race and the siting of hazardous waste facilities.[156] Only a few studies have concluded that no such correlation existed, one of which was conducted by a large waste management conglomerate.[157]

Shortly after the issuance of the *National Law Journal* study, the University of Michigan's School of Natural Resources held a conference on the relationship between race and environmental hazards.[158] As an outgrowth of this conference, the EPA was prompted to create the Environmental Equity Workgroup ("Workgroup"), with staff from all EPA offices and regions across the country.[159] The Workgroup's mandate was to "evaluate the evidence that racial minority and low income people bear a disproportionate risk burden[;]...[r]eview current EPA programs to identify factors that might give rise to differential risk reduction, and develop approaches to correct such problems[;]...[r]eview EPA risk assessment

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156. *See* Benjamin A. Goldman et al., *Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* I 13–18 (1994), *in* ENVIRONMENTAL PROTECTION AND JUSTICE, 169 (Kenneth A. Manaster, ed., 1995). Benjamin A. Goldman also reviewed over sixty-four studies of environmental disparities ranging from siting of hazardous facilities to pesticide exposure, concluding that they provided an "overwhelming body of empirical evidence" of environmental disparities among minority and low income communities with racial disparities found more frequently than disparities due to income. GOLDMAN, *supra* note 29, at 8. When compared for significance, however, race proved more significant "in nearly three-quarters of the tests (22 out of 30)." *Id.*

157. This study was undertaken by WMX Technologies Inc, a global environmental services company providing services such as waste management programs, energy recovery and environmental technologies and engineering resources. Chemical Waste Management is WMX's hazardous waste management subsidiary. McDermott, *supra* note 105, at 691, 693 n.16. The study was commissioned by National Planning Data Corporation and released in December, 1991. WMX looked at demographics of the thirteen solid and hazardous waste disposal systems it operated. Utilizing 1980 census data, the WMX study concluded that 76% of its disposal facilities are located in communities with white population equal to or greater than the host state average. However, the study acknowledged that some facilities, such as the Chemical Waste Management incinerator in Emelle, Alabama, and the WMX facility in Kettleman City, California are located in minority communities. *Id.* at 697, 701. *But see* GOLDMAN, *supra* note 29, at 13–14 (criticizing WMX's analysis and reexamining its results, asserting that in fact WMX waste facility distributions may reflect disparities by race).

158. The Conference on Race and the Incidence of Environmental Hazards was organized by Paul Mohai and Bunyan Bryant, professors in the University of Michigan School of Natural Resources, following the conclusion of their study on the distribution of commercial hazardous waste facilities in the Detroit metropolitan area. The conference convened in January of 1990 and included participants ranging from EPA and other federal agencies to professors to Michigan state and local government officials. Mohai & Bryant, *supra* note 35, at 7.

159. The Environmental Equity Workgroup was established by then EPA Administrator William K. Reilly in July 1990, and was formed following a meeting between Reilly and conference leaders at a 1990 University of Michigan School of Natural Resources Conference on Race and the Incidence of Environmental Hazards. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. 230-R-92-008, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 6–7 (1992) [hereinafter REDUCING RISK].

and risk communication guidelines[;]...[and] [r]eview [EPA's] institutional relationships...[with] external groups."[160] The stated goal was to ensure that environmental hazards were not being disproportionately distributed across population groups. The Workgroup defined environmental equity as comprised of three principal components of concern: 1) the environmental policymaking process; 2) the administration of environmental protection programs; and 3) the distribution and effects of environmental problems.[161] The Workgroup submitted its report to the Administrator in 1992, having generally found a paucity of data segregating environmental health effects by race or income.[162] Nonetheless, the Workgroup determined that low-income and minority populations experience disproportionate hazardous environmental exposures to certain pollutants compared to other population groups.[163] The report concluded as well that environmental inequities are "deeply rooted in historical patterns of commerce, geography, state and local land use decisions, and other socio-economic factors that effect where people live and work."[164]

The consistent conclusion based on the empirical evidence, including each of the studies undertaken by the government, has been that environmental hazards and burdens fall disproportionately upon the poor and minority communities who bear the effect of waste siting decisions with race correlating more strongly than income. Early scholars and articles addressed the phenomenon of disproportionate siting as one of "environmental racism," or discriminatory siting of hazardous waste facilities in minority neighborhoods.[165]

VI. REDEFINING ENVIRONMENTAL RACISM

A. Rejection of the Empirical Evidence

Despite the evidence of race-based inequities in the distribution of toxic waste facilities, critics of the "environmental racism" theory attack either the methodology underlying the empirical studies[166] or the conclusions drawn from the empirical evidence.[167] Methodological criticisms have challenged the parameters

160. *Id.* at 7–8.

161. *Id.* at 8.

162. *Id.* at 11–17.

163. *Id.* at 12–17. The Workgroup also found that Black age-specific death rates, for all age groups between 0 and 84 were higher than the Caucasian rates, and that a significantly higher percentage of black children compared to white children have unacceptably high blood lead levels. *Id.* at 11.

164. *Id.* at 8.

165. *See* Cole, *supra* note 28; Collin, *supra* note 12; Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991).

166. This article does not attempt to analyze whether the methodologies used were or were not accurate.

167. For example, the UCC Report acknowledged that 57% of African Americans and Hispanics, 53% of Asians, 46% of Native Americans and 53% of whites lived near one

used to define "minority community,"[168] population densities,[169] the statistical significance of the results,[170] and the failure of environmental justice studies to include information regarding the correlation between the actual population risk and exposure.[171]

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of 18,000 uncontrolled waste sites. The most glaring defect in a number of studies that look at existing waste disposal facilities, however, is that the makeup of the community at the time the facility originally was sited is not considered in determining whether the siting was discriminatory. Dr. Bullard, addressing that concern as it related to his findings on environmental siting disparities in Houston, stated: "The historical record is clear, Black Houstonians did not follow garbage dumps and incinerators.... The waste facilities moved into established African American neighborhoods. The racial characteristic of Houston's African American neighborhoods...was established before the waste facilities were sited." Bullard, *supra* note 155, at 460. Bullard also critiques Professor Vicki Been's effort to update the Houston studies and her contention "'that market dynamics have been largely ignored by the current research on environmental justice.'" Been, *supra* note 41, at 1392. Responding to the question of demographic makeup at the time of facility siting, Professor Vicki Been looked at the demographic characteristics of the communities studied by the GAO Report and found that all four Southeastern waste sites were predominantly African-American at the time the facility was sited. *Id.* at 1398–400. Been suggested additional research was necessary to determine the "chicken or the egg" question in other communities; that is, whether the host community was minority at the time of siting, or whether the community became predominantly minority subsequent to siting. In a subsequent article, Been

> found no substantial evidence that the facilities that began operating between 1970 and 1990 were sited in areas that were disproportionately African American. Nor did we find any evidence that these facilities were sited in areas with high concentrations of the poor;... We did find evidence that the facilities were sited in areas that were disproportionately Hispanic at the time of the siting. The analysis produced little evidence that the siting of a facility was followed by substantial changes in a neighborhood's socioeconomic status or racial or ethnic composition.

Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9 (1997).

168. Christopher Boerner articulated the concern that "[d]efining minority communities as those areas where the percentage of nonwhite residents exceeds that of the entire population means that a community may be considered 'minority' even if the vast majority of its residents are white." CHRISTOPHER BOERNER ET AL., ENVIRONMENTAL JUSTICE? (1994), *reprinted in part in* ENVIRONMENTAL PROTECTION AND JUSTICE, *supra* note 156, at 167. *See also* Lavelle & Coyle, *supra* note 143, at S4 (criticizing the *National Law Journal* definition of majority and minority communities).

169. Population density figures do not include information as to the actual number of persons exposed to a given environmental hazard, leaving open the possibility that more minorities might be exposed to a hazard in a large non-minority community than in a smaller minority community. Lavelle & Coyle, *supra* note 143, at S4.

170. Terence J. Centner et al., *Environmental Justice and Toxic Releases: Establishing Evidence of Discriminatory Effect Based on Race and Not Income*, 3 WIS. ENVTL. L.J. 119, 148 (1996).

171. Christopher Boerner, in addition to addressing other methodological criticisms, argued that "health risks are a function of actual exposure, not simply proximity

A more frequent criticism asserts that the use of zip codes as opposed to census tract data to establish the boundaries of the "community" renders the data less reliable. A study by the University of Massachusetts-Amherst ("UMass"), where census tract data as opposed to zip codes was used to compare demographics, found minorities were no more likely to live in neighborhoods[172] with commercial hazardous waste facilities than in neighborhoods without them.[173] Waste Management Inc., using the same methodology employed by the UCC Report, contends that of 130 waste disposal units in their system,[174] 76% were in communities with a white population equal to or greater than the host state average.[175] However, an update of the UCC Report authored by Benjamin

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to a waste facility." BOERNER ET AL., *supra* note 168. This argument overlooks the fact that public perception of risks generate alarm, referred to by some as "outrage," regardless of whether the actual risk is substantial, and that playing a significant role in public risk perception is whether the risk is encountered voluntarily. Peter M. Sandman, *Risk Communication: Facing Public Outrage*, EPA J., Nov. 1987 at 21, 21–22, *reprinted in* PLATER ET AL., *supra* note 13, at 79.

172. Neighborhoods were defined in the study by census tract.

173. The study concluded that there was "no consistent, statistically significant pattern of racial or ethnic discrimination in the distribution of commercial TSDFs". Goldman et al., *supra* note 156, at 171. *But see* Bullard, *supra* note 155, at 467. The UMass study was funded by Chemical Waste Management. "The ChemWaste-funded study has some severe limitations.... First, any waste study that uses pre-1990 census tracts as the unit of analysis as a stand-in for 'neighborhoods' will be limited to examining only facilities in Standard Metropolitan Statistical Areas ("SMSA").... Therefore, many rural areas, small cities, and towns are omitted." *Id.* Bullard points out that the UMass studies failed to include the Emelle and Kettleman City facilities, two of the largest hazardous waste facilities in the country, both of which are located in rural communities that are over 90% African-American and Latino, respectively, as well as other facilities located outside of SMSAs. *See id.* at 467–68. Bullard also criticized the lack of data provided on the siting of hazardous waste incinerators and that the study failed to differentiate among TSDFs. *See id.* at 468. More significantly, according to Bullard, the UMass study provided no

> definitive answers to the issue of TSDFs siting disparities that were found in the regions of the United States where people of color are overrepresented.... One would not expect to find siting disparities in African American neighborhoods in Maine, Vermont, New Hampshire, Utah, Idaho, or Montana—where there are few African American neighborhoods. Just as waste sites are not distributed randomly across the landscape, neither are people of color neighborhoods.

Id. at 468–69. Another 1994 study also using census tracts as the unit of analysis similarly found that "ATSDFs are no more likely to be located in tracts with higher percentages of blacks and Hispanics than in other tracts." *See* Boer & Saad, *supra* note 149, at 11 (citing Anderson et al., *Hazardous Waste Facilities: Environmental Equity Issues in Metropolitan Areas*, 18 EVALUATION REV. 123, 135 (1994)). The Los Angeles study used census tract data and reached a contrary conclusion at least on the local level.

174. This includes not only hazardous waste, but also solid waste and waste-to-energy units.

175. Seigler, *supra* note 105, at 63. Seigler criticizes the UCC Report for, among other things, its failure to provide information on the demographics of communities prior to the siting of the facility, or of the sites that have been closed down. Of the several thousand facilities that had applied for and received interim operating permits under RCRA, fewer

Goldman, using 1990 census data and again using zip codes as the defining parameter, found "a continued disturbing correlation between the location of hazardous waste facilities and communities where people of color live."[176] Goldman acknowledges the contradictory findings of the UMass study, asserting that its conclusions are due largely to design decisions, but contends that other studies using census tracts as the geographic unit found "significant disproportionate impacts by race."[177]

The most prominent and frequent criticisms, however, question whether the empirical evidence supports the inference or conclusion of racial bias or whether it merely reflects an economic reality.[178] In other words, detractors contend it is not race per se that defines and determines siting decisions but rather a community's location on the socio-economic scale.[179] These economic realities

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than 170 facilities subsequently received RCRA Part B permits. The remainder closed down.

176. Goldman et al., *supra* note 156, at 170–72. The data was updated to 1993 and analyzed 530 commercial hazardous waste treatment, storage and disposal facilities.

177. *Id.* at 172. Goldman points to several design decisions which he asserts could have affected the UMass conclusions. First, that the study focused only on metropolitan areas or rural counties with commercial hazardous waste sites, thereby increasing the percentage of minorities in the control areas. Second, disparities were looked at only as they related to black and Hispanic communities; Asian and Native Americans were excluded. Finally, when the UMass researchers combined census tracts they in fact found racial disparities. "Their results suggest that there may be a complex pattern of white enclaves within black areas with waste facilities. Since they also found that the white enclaves had higher levels of industrial employment, their findings suggest that there may be an imbalance between the distribution of beneficial employment effects (only in the white enclaves) and potentially adverse environmental effects (in both the white enclaves and the surrounding black areas) of commercial hazardous waste sites and associated industries." *Id.*

178. *See, e.g.*, McDermott, *supra* note 105, at 699–700; Michael Raphael, *Pollution Fight Takes New Tack Civil Rights Law Wielded in Suit*, NEW ORLEANS TIMES-PICAYUNE, June 1, 1996, at A5; Centner et al., *supra* note 170, at 144–45; Mitchell Satchell, *A Whiff of Discrimination?* US NEWS & WORLD REP., May 4, 1992, at 34–35. *Cf. Pollution and the Poor*, ECONOMIST, Feb. 15, 1992, at 18 (faulting economic analysis that concluded that polluting industries should be shifted from the first to third world because value of human life in the third world is less). The UCC Report also found socio-economic status to be relevant in commercial facility siting location, although not as statistically significant as race. UCC REPORT, *supra* note 27, at xiii.

179. *See* Mohai & Bryant, *supra* note 61, at 923–24 (questioning whether "minorities [are] disproportionately impacted simply because they are disproportionately poor" and concluding that racial implications are unavoidable). The poor tend to live in areas of lower land values, often more rural, as well as areas closer to existing industry, again tied to lower land values. *Cf.* Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 345 (1992–1993). Chase argues:

> While it is true that minorities are disproportionately below the poverty line, whites form the majority of the poor; therefore the 'correlation between race and hazardous waste siting supports the conclusion that race, and not simply economic vulnerability affects siting decisions.' To illustrate, although waste incinerators is 89% higher than the national

focused on cost as the primary consideration. Kent Jeffreys, Director of Environmental Studies for the Competitive Enterprise Institute, testified before a congressional subcommittee that "[p]oor people and minorities do not attract polluters. Low-cost land does, and for the same reasons that it attracts poor people."[180] The UCC Report acknowledged that land values tended to be cheaper in poorer neighborhoods and therefore more attractive to polluting industries.[181]

Economic proponents fail to take into account, however, that race also plays a significant role.[182] Faced with limited financial resources,[183] exclusionary

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> average, the average income of those communities is only 15% less than the national average.

Id. (quoting Godsil, *supra* note 165, at 400).

180. Testimony of Kent Jeffreys, Director of Environmental Studies for the Competitive Enterprise Institute, before the House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Mar. 3, 1993 *in*, ENVIRONMENTAL PROTECTION AND JUSTICE, *supra* note 156, at 186.

> In many industrial regions, including most of those now condemned as physical evidence of 'environmental racism'...[e]mployers motivated by the capitalist urge to make a profit (and regardless of their personal racism or lack thereof) hired the best workers they could find at the lowest wage they could pay.... [T]his often worked to the advantage of the economically disadvantaged, especially minorities.... In addition, workers preferred to live close to their place of employment, for obvious reasons. Thus, they moved to the general vicinity of the pollution sources. This resulted in one of the largest internal migrations in American history as rural-born African Americans moved to industrial urban areas.... How ironic that the very economic forces that eventually spawned the civil rights movement would be condemned as environmental racism today.

Id. See also Maria Ramirez Fisher, Comment, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENVTL. L.J. 449, 458–59 (1994) ("A classical economic analysis of waste-facility siting decisions suggests that these facilities are located where it is the least costly to build, manage, and maintain them.").

181. *See* UCC REPORT, *supra* note 27, at 16. *See also* Godsil, *supra* note 165, at 400 (asserting that the unwillingness of whites to move into neighborhoods with as little as 20% black population results in a smaller pool of buyers in minority areas thereby lowering housing prices and at the same time land values); Been, *supra* note 41, at 1016–18 (arguing that insufficient research existed on whether market dynamics may determine whether percentage of African-Americans in host communities increases after siting of facility and citing study suggesting that the minority percentage increases and property values decline).

182. *See generally* Richard J. Lazarus, *Distribution in Environmental Justice: Is There A Middle Ground*, 9 ST. JOHN'S J. LEGAL COMMENT. 481 (1994) (arguing that race, economics, and politics are related dependent variables).

> The fact that African-Americans and persons of color generally have less economic power, less choice, are less able to resist the risks caused by environmental degradation; is that unrelated to racism? To say that their immediate cause may, in some instances, be market forces is not to say it is unrelated to race.

Id. at 483 (citations omitted).

183. *See* Bullard, *supra* note 155, at 445–48 (explaining that financial lending practices limit minority mobility and job opportunities).

and expulsive[184] zoning practices, and discrimination in employment and housing, minorities, particularly African-Americans, find their mobility limited. Therefore, unlike other groups, African-Americans and other racial minorities are for practical purposes unable to move out when polluting industries move in.[185] As industry tends to take the path of least resistance, a facility is more apt to be located not only in a community with cheaper land values but also in a community lacking in political power or social status as well.[186] Minority communities, especially low income minority communities, tend to be unorganized, to be less involved in political processes, to lack resources, and be under represented on governing bodies,[187] thereby deprived of both information about and the ability to influence siting decisions.[188]

A report authored by Cerrell Associates for the California Waste Management Board in 1984, *Political Difficulties Facing Waste-to Energy Conversion Plant Siting*, profiled neighborhoods most likely to organize effective resistance against incinerators as follows:

> All socioeconomic groupings tend to resent the nearby siting of major facilities, but middle and upper socioeconomic strata possess better resources to effectuate their opposition. Middle and higher socioeconomic strata neighborhoods should not fall within the one-mile and five-mile radius of the proposed site.[189]

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184. Explusive zoning permits changes in zoning practices that allow incompatible or disruptive uses into black neighborhoods which then diminishes their quality and stability. *See* Cole, *supra* note 28, at 628 n.25.

185. Professor Kathy Northern argues that those critics who contend that minorities could simply relocate overlook the fact that many do not live near environmental hazards by choice, but are effectively forced to remain.

> The widespread practice of housing the economically disadvantaged, a group containing a disproportionate number of racial and ethnic minorities, in large public housing projects further exacerbates the problem of exclusionary practices. Those who rely upon public housing often are forced to live in economically depressed areas, or in close proximity to environmental hazards. Indeed, public housing projects frequently are proposed to be, or are built on or adjacent to, industrial complexes and other hazardous waste landfills.

Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 522 (1997).

186. *See* BULLARD, *supra* note 28, at 60–64; Charles Russell, *Environmental Equity: Undoing Environmental Wrongs to Low Income and Minority Neighborhoods*, 5 J. AFF. HSG. & COMM. DEV. L. 147, 150–51 (1995–1996).

187. Minorities are clearly underrepresented on a national level. *See* Lazarus, *supra* note 27, at 808, 819–22. Representation is also poor in federal agencies, including the EPA which as of 1994 employed only 57 minority workers out of 746 managers or management officials. *See* Fisher, *supra* note 180, at 463. *See also* Colquette & Robertson, *supra* note 105, at 169. ("[P]olitical participation is characterized by the exclusion of lower socio-economic groups.").

188. *See* Lazarus, *supra* note 27, at 808, 819–22.

189. *See* CERRELL ASSOCS., INC., POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING (1984).

Political reality thus becomes a root cause as well of disproportionate siting impacts.[190] In fact, based on the Cerrell Associates recommendation, the California Waste Management Board proposed to locate an incinerator in South Central Los Angeles. South Central Los Angeles is a low-income predominantly minority community. "With timeliness in mind, the Board narrowed its list of potential sites to areas where the residents were not likely to delay the incinerator's construction with years of litigation and political maneuvering."[191]

Economic critics of the "environmental racism" theory also argue that there are trade-offs at play in mitigating siting disputes and point out that minority communities have in many instances supported siting toxic facilities in their communities.[192] The possibility of jobs and other perceived economic benefits induce city leaders in poorer communities suffering from "rising unemployment, extreme poverty, a shrinking tax base, and a decaying business infrastructure"[193] not only to welcome, but to actively encourage, the location of a toxic facility in their community.[194] These communities become ripe for exploitation by polluting industries anxious to avoid a NIMBY[195]-triggered protest. Economic incentives and

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190. *See generally* Lazarus, *supra* note 27, at 806–25. Professor Lazarus asserts that political advantage determines environmental benefit and burden distributions, with decisionmakers more responsive to constituents with the greatest political power and overall seeking the path of least political resistance to the proposed course of conduct. *See also* Gerrard, *supra* note 15, at 1129. ("The bypassing of the normal siting studies and the placement of the nation's [hazardous waste] repository in a state with little political power, Nevada, is one obvious example. Another illustration presented itself in 1981, when the Arizona legislature designated a spot for the state's [hazardous waste] facility, bypassing the home counties of the state senate's majority and minority leaders.") (citations omitted); Chase, *supra* note 179, at 346; Colquette & Robertson, *supra* note 105, at 167–70.

191. Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 984 (1993). *See also* Austin & Schill, *supra* note 61, at 70–71 ("Polluters know that communities comprised of low-income and working class people with no more than a high school education are not as effective at marshalling opposition as communities of middle or upper income people.").

192. *See* Chase, *supra* note 179, at 346 ("Low-income communities sometimes solicit the location of hazardous waste facilities in order to boost their local economy and provide jobs."). *See also* Lazarus, *supra* note 27, at 808–09 (stating that opposition is difficult when the siting of a facility "offers the possibility of immediate short-term economic relief"); PETER YEAGER, THE LIMITS OF THE LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 87 (1991) (relating one town's joy at the decision to site a nuclear power plant in their community).

193. BULLARD, *supra* note 28, at 84.

194. *See id.* Professor Northen describes the promise of economic incentives as a "carrot" which is "often combined with [a] stick—companies threaten that a change in environmental enforcement practices, or opposition to toxic facility siting, will result in plant closures, layoffs, tax revenue depletion, and economic dislocation." Northern, *supra* note 185, at 528. The promised carrot, however, often never materializes. *Id.*

195. NIMBY is an acronym for "Not-In-My-Backyard" and is used to describe the efforts of a community to organize in opposition to the siting of a locally unwanted land use.

monetary inducements pave the way for unopposed facility siting[196] because, as one commentator asserted, if

> many low income communities are to lift themselves out of poverty, they must support the construction of job creating projects.... [R]ecycling plants, sewage treatment plants, sewage sludge treatment units,...any many others are, ironically, environmentally both necessary and controversial. It is past time to abandon the reflexive notion that every major construction is an evil that must be fought.[197]

A clear example of the impact of economic incentives is found in the Emelle incinerator operated by Chemical Waste Management ("CWM"). The Emelle facility in Sumter County, Alabama is the nation's largest hazardous waste treatment, storage, and disposal facility.[198] Sumter County is rural and poor, nearly 70% of the population is black,[199] and 90% of the black residents lived in poverty at the time of siting.[200] According to WMX Technologies, of which CWM is a subsidiary, the Emelle facility has brought substantial revenues into a county which, at 14.4%, had one of the state's highest infant mortality rates.[201] Since the siting of the Emelle facility, the infant mortality rate dropped to 8.5%, lower than the state infant mortality rate of 11%.[202] Emelle employs 300 people on an annual payroll of $10 million, with 60% of the employees living in Sumter County.[203] The revenue brought in by the landfill, in addition to providing employment, has been used to improve schools, build the local fire station and town hall, as well as improve health care delivery.[204]

Such economic inducements arguably serve to equalize any imbalance between risks encountered and benefits received from the presence of toxic facilities in the neighborhood.[205] Yet at least one study of the views and perceptions

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196. Chase, *supra* note 179, at 346 (relating instance of a Los Angeles City Councilman who supported the location of a hazardous waste incinerator in his district in exchange for the establishment of a $10 million community fund). *See also* Carolyn M. Mitchell, *Environmental Racism: Race as a Primary Factor in the Selection of Hazardous Wastes Sites*, 12 NAT'L BLACK L.J. 176, 178 (1990–1993) (discussing, among other things, "environmental blackmail" of lower income Indian communities).

197. Michael B. Gerrard, *Building Environmentally Just Projects: Perspective of a Developers' Lawyer*, 5 ENVTL. L. NEWS, Spring 1996, at 33.

198. *See* Conner Bailey & Charles E. Faupel, *Environmentalism and Civil Rights in Sumter County, Alabama*, *in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, A TIME FOR DISCOURSE, *supra* note 9, at 140.

199. *See* Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 108–09 (1996–1997).

200. *See id.*

201. *See* McDermott, *supra* note 105, at 698 n.37, n.38.

202. *See id.* at 698 n.38.

203. *See id.* at 698.

204. *See id.* Alabama state tax laws require that Sumter County receive a portion of the tax on hazardous waste disposed of at the Emelle facility. *See id.*

205. *See* BULLARD, *supra* note 28, at 91 (referring to the jobs-versus-the-environment tradeoff as "environmental blackmail"). *See also* Vicki Been, *Compensated*

of residents of minority communities with hazardous waste facilities reflected that after all the health, environmental, and economic factors associated with industrial facilities were taken into account, over seventy percent of the respondents nonetheless saw the facilities as more of a burden than a benefit.[206] The growing grassroots activism in the black and minority communities also belies the claim that such facilities are welcomed wholeheartedly.[207] And residents in areas such as "Cancer Alley" in Louisiana,[208] Chester Township, Pennsylvania,[209] Chicago, Illinois,[210] Portsmouth, Virginia,[211] and other cities[212] are beginning to loudly voice their opposition to the continued pollution of their communities.

Siting Proposals: Is It Time to Pay Attention?, 21 FORDHAM URB. L.J. 787 (1994) (providing a comprehensive discussion of different compensated siting proposals); Bullard, *supra* note 33, at 14, (disussing buyout settlement by industry with minority communities in Cancer Alley); Colquette & Robertson, *supra* note 105, at 170–75 (discussing statutory negotiation and compensation schemes); Gaylord & Twitty, *supra* note 22, at 775 (discussing voluntary buyout and relocation agreements between affected communities and private industry); Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk Based Representations and Equitable Compensation*, 56 OHIO ST. L.J. 329, 357–68 (1995) (discussing various issues related to compensation approaches).

206. *See* BULLARD, *supra* note 28, at 94–95.

207. *See supra* notes 166–91 and accompanying text.

208. *See* Marcia Coyle, *Saying 'No' To Cancer Alley*, *in* UNEQUAL PROTECTION, *supra* note 30, at 5 (profiling Wallace, Louisiana's struggle against the siting of PVC manufacturing plant); White, *supra* note 113, at 135–39 (discussing reaction of Alsen, Louisiana on location of hazardous waste incinerator in that community); Beverly H. Wright, et al., *Coping With Poisoning In Cancer Alley*, *in* UNEQUAL PROTECTION, *supra* note 30, at 110–22 (discussing communities that comprise Cancer Alley and their efforts to respond to polluting industries); Mildred Foster, *Justice and the Environment*, NEW ORLEANS TIMES-PICAYUNE, Sept. 8, 1997, at B4; Bill Grady, *Jackson Leads Protest at N.O. Chevron Station*, NEW ORLEANS TIMES-PICAYUNE, June 6, 1997, at A6.

209. *See* Michael Raphael, *Environmental Racism Do Minority Neighborhoods Get an Unfair Share of Waste Facilities?*, PITTSBURGH POST-GAZETTE, June 2, 1996, at B4.

210. *See* Bullard, *supra* note 33, at 14–15, 18 (discussing pollution on Chicago's southside and the presence of 50 commercial hazardous waste landfills, 100 factories and 103 abandoned waste dump sites in southside minority communities); Gaylord & Twitty, *supra* note 22, at 772–73 (describing extensive groundsoil and groundwater contamination on Chicago's southside); Marianne Lavelle, *An Industrial Legacy*, *in* UNEQUAL PROTECTION, *supra* note 30 at 3 (profiling the Altgeld Gardens project on Chicago's southside and describing how residents began meeting in churches and living rooms to plan protests of industrial pollution permeating neighborhood); Janita Poe, *Incinerator Generates a Bias Issue City Wants to Rebuild Humboldt Park Site*, CHICAGO TRIB., Jan. 2, 1996, at 1.

211. *See* Marianne Lavelle, *Poor Residents Say EPA Hasn't Got the Lead Out*, NAT'L L.J., Oct. 24, 1994, at A1.

212. *See, e.g.*, Lavelle & Coyle, *supra* note 143; Charles P. Lord & William A. Shutkin, *Environmental Justice and the Use of History*, 22 B.C. ENVTL. AFF. L. REV. 1 (1994) (profiling cases involving communities in Boston and Vermont seeking environmental justice); Mitchell, *supra* note 196, at 177–80 (profiling minority communities contending with environmental hazards); Sam Howe Verhovek, *Racial Rift Slows Suit for 'Environmental Justice'*, N.Y. TIMES, Sept. 7, 1997 at 32 (federal lawsuit alleging environmental racism in toxic tort claims in Houston, Texas).

B. Defining the Terms in the Environmental Debate: The Concept of Environmental Racism

As inquiry into the correlation between race and the distribution of environmental burdens progressed, scholars and academicians from different disciplines joined civil rights activists in their efforts to identify and analyze the issue and develop a response. There are numerous scholarly works on the cause, impact, future, and proposed solutions to a problem that has galvanized grassroots organizations seeking control over environmental degradation in their communities.[213] The movement, although primarily a political mobilization of community organizations, has necessarily also sought remedies through the legal system. Towards that end, scholars and other prominent thinkers have explored different legal forums available to challenge environmental disparities and to propose changes in the law, government policy, and the legal standards applied by the courts. Through much of the discourse, however, runs a failure to clearly identify and define the parameters of the debate. More fundamentally, particularly in the legal arena, there has been a failure to distinguish environmental racism, environmental equity, and environmental justice as separate social movements, requiring different strategic approaches.

1. The Sociological Concept of Racism in the United States

"Racism...is the manifestation of a person's tendency to attach significance to an individual's race."[214] In the United States, racism emerged as the systematic disenfranchisement of blacks.[215] Historically, Biblical imagery associating the color black with death, despair, evil, darkness, and myriad other negative images was commonplace.[216] An established referent of "black," virtually

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213. *See, e.g.*, RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE, *supra* note 9; Boyle, *supra* note 191; Colquette & Robertson, *supra* note 105; Fisher, *supra* note 180; Lazurus, *supra* note 27; McDermott, *supra* note 105; Northern, *supra* note 185; Meredith J. Bowers, Note, *The Executive's Response to Environmental Justice: Executive Order 12,898*, 1 ENVTL. L. 645 (1995).

214. Boyle, *supra* note 191, at 940. The United Church of Christ adopted the following definition of racism:

> Racism is racial prejudice plus power. Racism is the intentional or unintentional use of power to isolate, separate and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude.

UCC REPORT, *supra* note 27, at ix. Racial discrimination is an "institutional process of exclusion against an outgroup" based on a characteristic peculiar to that group.

215. In the U.S Constitution, blacks were considered "three fifths" of a person. U.S. CONST., art. I § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

216. *See* BARRY N. SCHWARTZ & ROBERT DISCH, WHITE RACISM ITS HISTORY,

all of it negative, became incorporated into daily life by the English when colonizing the United States and translated into an historical association justifying the structural oppression of black and brown skinned peoples in American society.[217]

Massive amounts of scholarship and study have been devoted to efforts to rationalize, defend, explain, or theorize racial inequality and its roots.[218] A prominent sociological theory of the cause of racial inequality is conflict theory.[219] Conflict theory presumes that inequality stems from competition among different groups for scarce resources.[220] Racism emerges where the differentiating characteristic among groups is race or ethnicity, and the ideology underlying the assertion of rights by a dominant group is the "belief that one racial or ethnic group is inferior to another and that unequal treatment is therefore justified."[221] Under the conflict perspective, the issue is not really racial difference, the most easily differentiated physical characteristic. Rather, the conflict arises through the use of such differences to create and preserve inequality.[222]

PATHOLOGY AND PRACTICE 6 (1970). Shakespeare's Titus Andronicus, Macbeth, and Othello all contain negative associations with the color black and dark-hued skin. Works by other literary luminaries also reflect racial stereotyping. *See* F. SCOTT FITZGERALD, THE GREAT GATSBY (1925); JOHN STEINBECK, OF MICE AND MEN (1937); MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1884).

217. Franz Fanon, discussing white perceptions and definitions of blacks, wrote "[t]he Negro is an animal, the Negro is bad. The Negro is mean. The Negro is ugly; look, a nigger.... The little boy is trembling because he is afraid of the nigger...Mama, the nigger's going to eat me up." FRANZ FANON, BLACK SKIN, WHITE MASKS 113–14 (1967). Although historically in America blacks have borne the brunt of racist attitudes and behaviors, other minority and ethnic groups have also been victims of racial and ethnic discrimination.

218. *See, e.g.*, BULLARD, *supra* note 28; WILLIAM M. BANKS, BLACK INTELLECTUALS (1996); RACIAL DISCRIMINATION IN THE UNITED STATES (Thomas F. Pettigrew ed., 1994); SCHWARTZ & DISCH, *supra* note 216; Boyle, *supra* note 191; Lawrence, *supra* note 165.

219. IAN ROBERTSON, SOCIOLOGY 290 (3d ed. 1987).

220. Racial inequalities develop where three basic conditions are met: (1) there are at least two socially identifiable groups with visible physical differences; (2) competition exists between groups for valued resources, such as land or power, such that members of one group will deny other groups full access to resources out of self-interest; and (3) the groups are unequal in power, thereby enabling one to control such scarce or desired resources. Inequalities then become "structured" into the society. *See id.*

221. *Id.*

222. Conflict theory predicts a reduction in hostilities where the subordinate group is able to gain greater equality with the dominant group.

> The history of American race relations supports this view: the strong hostilities that originally existed against Japanese, Irish, Italian, and other immigrants has gradually lessened as these groups have gained entry to the broad American middle class, where they are seen as equals rather than as rivals. Antipathy is now greatest against those groups, such as Blacks or Chicanos, who remain relatively impoverished—and this sentiment is strongest among low-status whites who feel most threatened by the economic progress and competition of the minorities.

Id. at 291.

Race relations between whites and blacks in the United States have clearly fallen within the bounds of this structural and ideological framework. Given the predisposition to view "black" as "bad," a supporting ideology of blacks' "inferiority" was easily adopted by whites to justify their enslavement.[223] Slavery in America flourished as a matter of economic incentive, with black labor more profitable than the increasingly protected imported white labor.[224] As reliance on the black labor pool became more pronounced, resort to moral and racial inferiority justifications permitted the stripping of black legal rights, resulting in the systematic disenfranchisement of even the free black person.[225] Even after the abolition of slavery, the enactment of the Black Codes prohibited blacks from most occupations, and were designed to circumvent Reconstruction measures.[226] The

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223. George Washington Dargin, a chancellor in South Carolina, stated in a decree addressing a pleading of trustees seeking to carry out the manumission of slaves in a will:

> A free African population is a curse to any country, slaveholding or non-slaveholding; and the evil is exactly proportionate to the number of such population. This race, however conducive they may be in a state of slavery, to the advance of civilization, (by the results of their valuable labors,) in a state of freedom, and in the midst of a civilized community, are a dead weight to the progress of improvement. With few exceptions they become drones and *lazaroni*-consumers, without being producers. Uninfluenced by the higher incentives of human action, and governed mainly by the instincts of animal nature, they make no provision for the morrow, and look only to the wants of the passing hour.

PETER CHARLES HOFFER, THE LAW'S CONSCIENCE 116–17 (1990) (quoting Morton v. Thompson, 6 Rich. 370, 372 (S.C. 1854).

224. Slave labor formed the foundation for Southern economy.

> [T]he Industrial Revolution, based upon the crops raised by slave labor...was made possible by world trade and a new and astonishing technique; and finally was made triumphant by a vast transportation of slave labor through the British slave trade in the eighteenth and early nineteenth centuries.... Victory [in the Civil War], however, brought dilemma; if victory meant full economic freedom for labor in the South, white and black, if it meant land and education and eventually votes, then the slave empire was doomed, and the profits of Northern industry built on the Southern slave foundation would also be seriously curtailed....

W.E.B. Du Bois, *Three Centuries of Discrimination*, *in* RACIAL DISCRIMINATION IN THE UNITED STATES *supra* note 218, at 7–8.

225. Recently, Professor Edwin Hoffman stated:

> Label African-Americans inferior to whites, as Thomas Jefferson bluntly did, and non-slave-owning whites could accept slavery. He, like so many Founding Fathers, owned slaves.... Even Lincoln campaigned as a racist, telling voters: "I am not, nor ever have been in favor of bringing about in any way the social and political equality of white and black races and I as much as any other man am in favor of having the superior position assigned to the white race."

Edwin Hoffman, *Every Generation Has Oppressed Blacks Apology for Slavery Is Appropriate*, CHARLESTON GAZETTE, Aug. 28, 1997, at 5A.

226. *See* Slaughter House Cases, 83 U.S. 36, 70 (1872). After Reconstruction was

eventual de jure termination of Jim Crow laws, which had served to segregate public areas,[227] schools,[228] residential areas,[229] and most aspects of daily life,[230] did little to change the African-American position overall.[231] Racial discrimination has continued to modern times with racism, historically manifested through dominant or overt characteristics, becoming instead aversive, incorporating subconscious racial beliefs about the subordinate position of minorities.[232]

Sociologists and other scholars uniformly agree that African-Americans have held a subordinate position in societal stratification, continuing to the present day.[233] Racism has permeated virtually every social and economic classification in the United States. Discrimination remains in housing,[234]

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abandoned in 1877, there was a rise in racial violence as the Klu Klux Klan grew in the post-Reconstruction South, causing the lynching or murder of at least 2500 blacks between 1885 and 1900. Tom Morganthau & Mark Rambler, *Slavery's Lesson Plan*, NEWSWEEK, Dec. 8, 1997, at 67.

227. Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor and City Council Of Baltimore City v. Dawson, 350 U.S. 877 (1955) (public beaches); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (public parks).

228. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

229. Shelley v. Kraemer, 334 U.S. 1 (1948). *See* Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 740–41 (1993) (discussing invalidation of discriminatory zoning practices); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547 (1979).

230. *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (finding unconstitutional ordinances mandating segregation on city buses); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151 (1914) (affirming the denial of an injunction against the use of segregated train accommodations); Plessy v. Ferguson, 163 U.S. 537 (1896) (approving law separating blacks and whites).

231. Unlike most immigrants, African-Americans do not move "on and up." Karl E. and Alma F. Taeuber, in questioning whether the housing patterns of blacks were similar to other immigrant groups, observed that although traditional immigrant housing patterns saw more recent immigrants displacing older groups at the bottom of the socio-economic ladder, "[t]he limited data now available suggest that the Negroes may soon be left alone at the bottom of the social and economic scale." Karl E. & Alma F. Taeuber, *Are the Housing Patterns of Blacks Like Those of Immigrants*, *in* RACIAL DISCRIMINATION IN THE UNITED STATES, *supra* note 218, at 86, 89.

232. Boyle, *supra* note 191, at 940–45. *See also* Lawrence, *supra* note 3 (positing that modern racism is reflected in our denial of its existence despite evidence to the contrary).

233. *See* ROBERTSON, *supra* note 219, at 292; Robert D. Bullard, *In Our Backyards: Minority Communities Get Most of the Dumps*, EPA J., Mar.–Apr. 1992, at 11. *See generally* WILLIAM A. BANKS, BLACK INTELLECTUALS, RACE AND RESPONSIBILITY IN AMERICAN LIFE (1996).

234. Housing discrimination tends to restrict mobility of minorities. American cities reflect a high degree of racial segregation, with blacks even more residentially segregated than Orientals, Hispanics, or any nationality or minority group. "[Segregation of Negroes] is evident in the virtually complete exclusion of Negro residents from most new suburban developments of the past fifty years as well as in the block-by-block expansion of Negro residential areas in the central portions of many large cities." Theodore G. Clemence,

education,[235] access to the political process,[236] the provision of public services,[237] and treatment within the judicial process.[238] African-Americans lag behind whites

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Residential Segregation in the Mid-Sixties, in RACIAL DISCRIMINATION IN THE UNITED STATES *supra* note 218, at 53, 54. Segregated housing was ensured not just through "white flight" as blacks began to move into white sections, but through racial zoning, restrictive covenants, or over rigid zoning ordinances. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (state judicial enforcement of private restrictive covenants violates the Equal Protection Clause); Hurd v. Hodge, 334 U.S. 24 (1948) (invalidating judicial enforcement of racially restrictive covenants); City of Richmond v. Deans, 281 U.S. 704 (1930) (affirming the enjoinment of an ordinance prohibiting intermarried couples to reside in certain buildings); Baker v. City of Kissimmee, 645 F. Supp. 571, 576–77 (M.D. Fla. 1986) (detailing practice by city council to segregate housing); Charles Abrams, *The Housing Problem and the Negro, in* RACIAL DISCRIMINATION IN THE UNITED STATES, *supra* note 218, at 41, 45–46; *see also* Colquette & Robertson, *supra* note 105; Dubin, *supra* note 229.

In addition, whites typically don't seek housing in areas with even a twenty percent African-American population. Chase, *supra* note 179, at 345. *See generally* Bullard, *supra* note 155, at 446 ("The nation's ghettos, barrios, and reservations, are kept isolated and contained from the larger white society through well-defined institutional practices, private actions and government policies."); Robinson, *supra* note 30, at 99–101 (contending that steering and segregation policies forced African-Americans into "segregated, unsafe and polluted public housing").

235. De facto segregation of schools continues. White flight from urban cities to the suburbs also resulted in a loss of the tax base, leading to inferior urban schools. *See, e.g.*, John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337 (1996).

236. The Voting Rights Act of 1965 was passed to cure racial discrimination in voting, which Congress recognized as an "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966). *See* Shaw v. Reno, 509 U.S. 630 (1993); City of Rome v. United States, 446 U.S. 156, 182 (1980).

237. *See, e.g.*, Ammons v. Dade City, 783 F.2d 982, 985 (11th Cir. 1986) (finding discriminatory intent in providing street paving and street resurfacing services); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) (lack of sanitary sewers in minority communities and ninety-seven percent of town's unpaved streets in minority communities); Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986) (finding disparity in street paving and resurfacing); Dowdell v. City of Apopka, 511 F. Supp. 1375 (M.D. Fla. 1981), *modified* 698 F.2d 1181 (11th Cir. 1983) (finding intentional discrimination in provision of municipal services).

238. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (disparity in imposition of death penalty between black and white defendants); Batson v. Kentucky, 476 U.S. 79 (1986) (exclusion of blacks from jury through use of peremptory challenges). Disparities are also found in the sentencing phase. *See* Ronald J. Ostrow, *Crack Sentencing Disparity Reduction Gains Ground*, L.A. TIMES, July 22, 1997, at A12 (noting possession of five grams of crack receives mandatory minimum of five years versus possession of five hundred grams of cocaine powder to receive the same punishment and "96% percent of those prosecuted for crack possession are black or Latino....").

in education, wealth,[239] employment,[240] and home ownership.[241] The shift in the manifestation of racism from a dominant, openly oppressive form to a covert, unconscious, but no less innate belief in white superiority, at best simply serves to provide racist actions with a veneer of legitimacy.[242] That racism would carry over into the environmental context should cause little surprise.[243] Inequities in the siting of hazardous waste disposal facilities in the United States are arguably equally reflective of the same long-standing pattern of discrimination towards blacks and other minorities.[244]

2. The Great Divide: Distinctions with Differences

The grassroots environmental movement that began in earnest in Warren County[245] was initially labeled a movement against environmental racism. Environmental racism, as originally conceived, included the charge of racism as an integral component of documented disparate treatment in the distribution of

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239. "Average Negro family income consistently remained near 55 percent of the white income. [B]etween 1947 and 1970, the average income gap between white and Negro families widened from $2700 to $3700." Lester C. Thurow, *Poverty and Discrimination: A Brief Overview in* RACIAL DISCRIMINATION IN THE UNITED STATES, *supra* note 218, at 240–41. *See* Robert L. Crain, *School Integration and Occupational Achievement of Negroes, in* RACIAL DISCRIMINATION IN THE UNITED STATES, *supra* note 218, at 206, 207 ("Occupational opportunities for Negroes will be limited until there is at least partial racial assimilation...present patterns of racial segregation in social relations and in housing could limit sharply the occupational achievement of Negroes for many years."); Ellis Cose, *Memories In Blood*, NEWSWEEK, Dec. 8, 1997, at 68 (citing sociologist estimates that "middle class blacks...earn 70 percent of the income of middle-class whites but possess only 15 percent of the wealth").

240. *See* ROBERTSON, *supra* note 219, at 300 ("[U]nemployment rates for blacks are typically double those of whites....").

241. *See* John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying a Noun*, 15 LAW & INEQ. J. 99, 122, nn.100–06 (1997).

242. Lazarus notes that:

> People routinely make sterotypical judgments about others based on racial identity.... [I]t is not at all unlikely—and indeed, it may be probable—that racist attitudes and false stereotypes have influenced various decisions relating to environmental protection. Certainly there is no reason to suppose that environmental protection is somehow immune from actions based on societal attitudes that, while widely condemned, are nevertheless prevalent.

Lazarus, *supra* note 27, at 807.

243. "The distributional inequities that appear to exist in environmental protection are undoubtedly the product of broader social forces.... Distributional inequities are very likely rooted in past and present racial hostility, racial stereotypes, and other forms of race discrimination." *Id.* at 825. *See supra* notes 232–42 and accompanying text.

244. Past and existing racial discrimination has had the effect in many communities of excluding minorities from holding positions of power on those governing boards or in those agencies responsible for making the decisions as to where hazardous facilities will be sited. Poverty and exclusionary housing practices make it difficult for blacks to move away from the hazard. Boyle, *supra* note 191, at 970–71.

245. *See supra* notes 125–29 and accompanying text.

environmental risks and burdens across communities. The studies and research undertaken during the early days of the movement sought to examine whether siting disparities were directly and causally attributable to race based discrimination, corroborating emerging community perceptions. As time passed and the debate grew, activists and scholars began using the terms "environmental justice" and "environmental equity" both concurrently with and more often in place of "environmental racism" to describe the environmental inequities reflected by the data. The three terms came to be used synonymously and interchangeably despite their ostensibly different objectives and theoretical baseline.[246]

Environmental equity, however, represents a theoretical shift away from a focus or reliance on an underlying racial component to environmental action. Environmental equity has been defined as "involv[ing] evenly balancing the siting of potentially environmentally hazardous facilities among communities of all backgrounds."[247] William K. Reilly, former EPA Administrator, commented that "environmental equity means fairness. It speaks to the impartiality that should guide the application of laws designed to protect the health of human beings and the productivity of ecological systems on which all human activity, economic activity included, depends."[248] The underlying premise of environmental equity is that fairness in environmental decision-making would result in even distribution of environmental risks and burdens, with all groups bearing a proportionate share.

The concept of environmental justice extends the objective beyond the distributive justice goals of environmental equity and seeks more than just proportionate burden-sharing. Environmental justice has come to stand for "a movement to relieve all communities of the burden of emissions by curtailing waste generation and preventing all pollution."[249] At its extreme, environmental

246. *See, e.g.*, Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523 (1994) (referring to the issue of disparities in environmental siting as one of environmental justice); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 228 nn.21–22 (1997) (noting the usage of equity, justice and racism and concluding that "the term 'justice' better captures the combination of distributional and political issues that the movement confronts"); Lazarus, *supra* note 27, at 790 (environmental justice or equity are more politically attractive and less divisive); Mank, *supra* note 205, at 330 (using environmental justice "because it refers to a range of issues broader than racism.") Mitchell, *supra* note 196, at 177 (categorizing exposure to environmental hazards in all minority communities as environmental racism); Poirier, *supra* note 60 (discussing the political developments on "environmental justice/racism/equity" and using the terms jointly as well as separately).

247. McDermott, *supra* note 105, at 689.

248. William K. Reilly, *Environmental Equity: EPA's Position*, EPA J., Mar.–Apr. 1992, at 18. The EPA Environmental Workgroup, in its report issued February 1992, targeted the administration of environmental programs, the environmental policy-making process, and the distribution and effects of environmental problems as the main concerns of environmental equity. REDUCING RISK, *supra* note 159, at 8. *See also* Mata, *supra* note 105, at 380 ("'[E]nvironmental equity' is the equal distribution of environmental risks (including risks associated with hazardous waste facilities) across race, ethnicity and income.").

249. McDermott, *supra* note 105, at 689. A statement of the Principles of Environmental Justice, developed at the First National People of Color Environmental

justice ultimately subscribes to technology forcing legislation designed to change modern industrial processes, with zero tolerance for waste discharge in any form. Although distilling a consensus definition has proven illusive, many commentators seem to agree that both environmental racism and environmental equity would be encompassed by the broader concept of environmental justice.[250]

There may be several explanations for the shift in the portrayal of the environmental racism movement to one of environmental justice or equity. First, the charge of racism carries with it a high moral and social stigma.[251] Increasingly, American culture has rejected racism, or at least the public expression of racist attitudes, as immoral and unacceptable. To the extent that racism has indeed become aversive, "an aversive racist's conscious mind will not allow itself to entertain raw racist messages from the unconscious because guilt, logic, and reason all reject such messages as 'wrong.'"[252] Overt racism in today's market can create a public relations or political nightmare, as reflected by the highly negative publicity accompanying reports of exclusionary and discriminatory policies of Avis Rent-A-Car,[253]

Leadership Summit in 1991, included a demand for the "cessation of the production of all toxic hazardous wastes and radioactive substances and that all past and current producers be held strictly accountable to the people for detoxification and no contamination at the point of production. Simon, *supra* note 54, at 214.

250. *See* Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 604 (1996) (suggesting environmental racism is simply a subset under the umbrella of environmental justice); Deb Starkey et al., *Environmental Justice: A Matter of Perspective*, 12 NO. 4 NAAG NAT'L ENVTL. ENFORCEMENT J. 3 (1997) (environmental justice encompasses both racism and equity and is "the achievement of equal protection from environmental and health hazards for all people...."); *see also* Kaswan, *supra* note 246, at 221 (environmental justice includes both a distributive and political component).

Other definitions of environmental justice make no real distinction between "justice" and "equity," equating both as focusing on the distributional effects of environmental burdens or hazards. *See* Rae Zimmerman, *Issues of Classifications In Environmental Equity: How We Manage Is How We Measure*, 21 FORDHAM URB. L.J. 633, n.1 (1994) ("Justice, however, focuses more on procedures to ensure fair distribution. Fairness refers to where one group or individual disproportionately bears the burdens of an action."); Torres, *supra* at 603 (environmental justice examines "the distributional effects of environmental policy"). Two environmental law practitioners collapse "justice" and "racism," asserting that environmental racism "suggests the existence of the right to a pollution-free environment." Roliff Purrington & Michael Wynne, *Environmental Racism: Is a Nascent Social Science Concept a Sound Basis for Legal Relief?*, 35 APR HOUS. L. 34 (1998).

251. Racism is a dramatic word. It implies disintermediation; a complete separation of the human corpus from humanity.

252. Boyle, *supra* note 191, at 944. *See* Lawrence, *supra* note 3, at 6–9 (discussing the collective denial of American public to the continuing presence of racial subordination).

253. *See* Pradnya Joshi, *Avis May Face Federal Probe*, NEWSDAY, Oct. 18, 1997, at A31; Lisa Miller, *Avis Again Is Accused of Discriminating Against Minorities Seeking to Rent Cars*, WALL ST. J., Oct. 15, 1997, at A4; Lisa Miller, *Justice Department Probes Allegations That Avis Practiced Discrimination*, WALL ST. J., Oct. 17, 1997, at B6. The state of Pennsylvania, after a three year undercover investigation, filed suit against Avis

Denny's[254] and the corporate behemoth Texaco.[255] Police departments in several cities have suffered significant image problems as allegations of racist comments, attitudes, and behavior by police officers towards blacks have surfaced.[256] Fuzzy Zoeller's remarks on the Masters win by golf phenomenon Tiger Woods led to Zoeller's termination as spokesperson for K-Mart.[257] Thus, environmental "racism" may no longer be "comfortable" or politically correct.[258]

Also not to be overlooked is the political reality faced by environmental plaintiffs in the judicial system and its impact on the perceived feasibility of environmental racism as a movement. Lacking proof of clear discriminatory animus, plaintiffs filing complaints pursuant to the Equal Protection Clause have been forced to rely on evidence of disproportionate impact to prove their cases. Professor Torres explains that "the failure to draw careful implications from tight logical structures that effectively left only one compelling reading of the facts meant that, in the absence of the remnants of Jim Crow, mere inequality is not legally actionable...."[259] Environmental plaintiffs asserting race-based challenges to siting decisions encountered an inhospitable arena and, unable to show purposeful discrimination, were uniformly unsuccessful.[260] This lack of success in turn discouraged a continued focus on race as a basis, or at least the primary basis,

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with the Pennsylvania Human Relations Commission alleging Avis executives knew Avis franchises had a policy barring minorities from renting cars and took no action. *See Pennsylvania Sues Avis After 3-year Probe Claims Brass Knew Franchise Had Policy Barring Blacks*, RECORD-NORTHERN J., Oct. 15, 1997, at B1. Allegations of discrimination by Avis franchisees have also been publicized in Florida, New Jersey, and Mississippi. *See* James T. Madore, *New Avis Discrimination Suit*, NEWSDAY, Oct. 15, 1997, at A19.

254. *See Denny's Will Pay $46 Million to Settle Racial Bias Cases*, ATLANTA J. & CONST., May 25, 1994, at F3.

255. *See* Sharon Walsh, *Chairman Says Texaco Is Battling Racial Bias*, WASH. POST, July 30, 1997, at D9; Sharon Walsh, *Texaco Probe Finds No File Shredding; Bias Case Report Says Other Records Withheld*, WASH. POST, July 15, 1997, at C1.

256. It is difficult to forget the video of Rodney King being beaten by Los Angeles police or the racist remarks of Mark Furhman, a Los Angeles police officer, that were highly publicized during the trial of O.J. Simpson. *See also* Andrea Ford, *United by Anger Bias: Black Men Confirm Court Opinion That Police Often Stop African American Motorists Because of Their Race. LAPD Official Calls Ruling 'Thoughtless and Reckless'*, L.A. TIMES, Nov. 6, 1996, at B1.

257. *See* Phil Richards, *Zoeller Heads Home After Missing Cut, He Gets More Bad News as Club-Maker Dunlop Drops His Endorsement Contract*, INDIANAPOLIS STAR, Aug. 16, 1997, at D3; Anthony Violanti, *Who's Sorry Now? When Celebrities Goof, It's Time For An Exercise in the Art of the Apology*, BUFFALO NEWS, Nov. 21, 1997, at G20.

258. *See* Lazarus, *supra* note 27, at 790 (stating that the term environmental justice is politically comfortable).

259. Torres, *supra* note 250, at 606. Torres points out that given the differing conclusions reached from the available data, although it could be said that "something was wrong," a clear causal relationship between the perceived disparities and race was missing. *Id.*

260. *See infra* Part VII and accompanying notes.

for challenge and contributed to the shift away from "environmental racism" as a viable theory for judicial intervention.[261]

Yet another factor contributing to the deconstruction of environmental racism is the assertion by social justice advocates that environmental burdens should be shared by all society, regardless of race, ethnicity, or economic status. This rhetoric, as it must, inevitably recharacterizes the environmental racism movement into a broader concept of equity across all populations, with its goals and purpose deflected from remediation of the very real disproportionate burden experienced by people of color. The focus on race-based targeting disappeared as commentators sought to respond to those critics who were contending that market forces, demographics, and location on the socio-economic ladder accounted for the disparities observed. Although these criticisms failed to recognize that demographics and socio-economic status were the manifestation of historical oppression in housing, education, and employment, discourse has increasingly focused on the concept of disproportionate impact on populations—"justice" or "equity"—with discriminatory animus relegated to an afterthought.

It has been suggested that the real challenge is selecting a term that best describes all aspects of the issues,[262] melding notions of racism, equity, and justice into one all-encompassing paradigm. Such an approach, although facially appealing, necessarily ignores genuine differences in the ideological underpinnings of each and parallel rules of law. The objectives of environmental racism, environmental equity, and environmental justice, although peacefully coexisting and in many respects overlapping, nonetheless are not identical. Use of the terms synonymously obscures those differences that do exist.

Environmental racism, and indeed the environmental racism movement, neither began as nor continues to be a cry of "justice for all." Environmental racism necessarily retains as its focus race-based bias in siting decisions and seeks as its remedy amelioration of racially discriminatory conduct. Its challenge is to the use of race as the intentional or unintentional basis of siting decision-making. The targeted conduct falling afoul of its rhetoric is therefore narrowly circumscribed. Environmental equity, on the other hand, at least as currently identified, arguably *would* use race, as well as other criterion, as a consideration in achieving an equitable distribution across communities. Environmental equity seeks balance based essentially on demographic—race, income, class—characteristics. Upperclass neighborhoods would share equally in the burdens imposed on lowerclass neighborhoods. Similarly, white communities would find not only that they were not immune to the placement of hazardous waste facilities in their backyards, but that they were unable to shift through NIMBY-type protests the

261. Roliff Purrington and Michael Wynne, both environmental law practitioners, assert "[environmental racism] as a basis for assertions of legal liability, recovery of damages, and equitable relief...should be approached by the judiciary with great caution. It introduces inflammation, emotionalism, and social conflict, untethered to a precise legal doctrine or precedent." Purrington & Wynne, *supra* note 250, at 38. Purrington and Wynne suggest that plaintiffs should instead seek relief in the political and legislative arenas. *Id.*

262. *See, e.g.*, Kaswan, *supra* note 246, at 228 n.21 (selecting "environmental justice" as the more appropriate term).

siting of those facilities elsewhere to a minority community. With its emphasis upon doing equity across population groups, environmental equity advocates presumably become less concerned, if concerned at all, with issues of racism in facility siting.[263] Environmental justice appeals to eliminate waste dilute the localized concern even further.

Environmental racism, however, looks to more than just equitable distribution of risks and hazards. While those challenging environmental racism would support the goals of environmental justice and a waste free environment, such a laudable long-term goal does not deal with the short-term reality of race based discrimination. Thus, although there is a synergy between the concepts and overlap in certain areas, environmental racism, environmental equity, and environmental justice also address different issues. Accordingly, and perhaps most importantly, what environmental racism permits that environmental justice and environmental equity do not is a broader panoply of remedies. Disparities due to environmental racism permit closer judicial scrutiny in challenges under the Equal Protection Clause of the Fourteenth Amendment[264] well beyond the minimum scrutiny applied to the economically disadvantaged[265] or to the general population. Remedies further are available under the hard won civil rights statutes,[266] avenues of relief unavailable for race-neutral inequalities.

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263. It is of course possible that environmental equity advocates believe that in the course of achieving equitable distribution, racial animus is necessarily redressed.

264. In addition to claims under the Equal Protection Clause, environmental plaintiffs have other litigation options as well. Claims have also been brought effectively challenging environmental disparities, but asserting violation of environmental statutes, toxic tort injuries, or common law claims such as nuisance and trespass as the focus rather than equal protection. *See* Cole, *supra* note 28, at 637–39 (examining social reform). *See also* Mitchell, *supra* note 195, at 187–88 (discussing availability of California Environmental Quality Act, patterned after NEPA). Not to be overlooked are potential administrative and legislative solutions.

265. The Supreme Court has refused to classify the poor as a suspect class triggering strict scrutiny and requiring a showing of a compelling state need. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Classifications based on wealth, as well as other classifications not involving a suspect class, will not be overturned so long as there is a rational relationship to a legitimate government end and they do not restrict fundamental constitutional rights such as the right to privacy, the right to vote or to freely travel. *See* NOWAK & ROTUNDA, CONSTITUTIONAL LAW 753 (1991)

266. See Aiello v. Browning-Ferris, Inc., 24 ENVTL. L. REP. 20,771, 1993 WL 463701 (N.D. Cal. Nov. 2, 1993) and Rozar v. Mullis, 85 F.3d 556 (11th Cir. 1996), which involve challenges to waste siting decisions pursuant to 42 U.S.C. §§ 1983 and 1985, among other claims. In both cases, however, the civil rights claims were dismissed as time-barred. At least one case recently has been filed under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1994), which precludes the federal government from providing federal monies to programs and activities that discriminate. *See* Diane Schwartz, *Environmental Racism: Using Legal and Social Means to Achieve Environmental Justice*, 12 J. ENVTL. L. & LITIG. 409 (1997) (discussing complaint filed with EPA and HUD for Title VI violations); Marla Cone, *Civil Rights Suit Attacks Trade in Pollution Credits*, L.A. TIMES, July 23, 1997, at A1. *See also* Lazarus, *supra* note 27, at 832 (discussing NAACP v. Gorsuch, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1992) where plaintiffs challenged the

There is significant political value in challenges based on constitutional and civil rights violations. Such claims focus attention on the inequitable distribution of environmental burdens across the country, establishing precedent for use in other cases in other jurisdictions.[267] The social impact and stigmatization arising from the identification of racist conduct also should not be overlooked.[268] Charges of racism have spurred an otherwise inactive government into quick and decisive action.[269] To the extent that instances of racism in the siting of hazardous

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adverse effect of a PCB disposal facility under Title VI, as well as under Equal Protection). Under Title VI, plaintiffs can satisfy their burden with a showing of discriminatory impact; a showing of discriminatory intent is not required, thus avoiding the obstacles presented under equal protection. State action is satisfied where state programs receive federal funds. *See generally* Lazarus, *supra* note 27, at 835 (discussing various federal statutes that make monies available to states for research, training and development of pollution control strategies, among other things).

267. *See* Serena Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 223, 251 (1995) (Among the limitations of anticipatory nuisance to redress environmental disparities is that it "would not easily lend itself to a strategic approach to litigation nationwide or to coordinate among community groups.... Furthermore, successful challenges may be of little precedential value due to differences in the facts and circumstances of each case.").

268. Gerald Torres writes:

> Racism is one 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.

Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 839 (1992). *See also* Torres, *supra* note 250, at 603–04 (the term racism should be reserved as one of "special opprobrium").

269. *See, e.g.*, GAO REPORT, *supra* note 33; REDUCING RISK, *supra* note 159. In 1992 the Office of Environmental Equity was formed, and subsequently renamed Office of Environmental Justice, with an executive steering committee comprising officials from other EPA branches. Among other things, the office operates a grant program targeted toward community environmental education projects, as well as supporting the implementation of environmental justice considerations throughout the agency. The EPA also established a National Environmental Justice Advisory Council as well as a policy work group to insure that environmental justice issues were not only being considered, but that affected communities had input. At the same time, a number of bills were introduced into Congress seeking to mandate consideration of potential environmental disparities, including the Environmental Justice Act of 1993, H.R. 2105, The Environmental Equal Rights Act of 1993, H.R. 1924, the Environmental Health Equity Information Act of 1993, H.R. 1925, and the Waste Export and Import Prohibition Act, H.R. 3706. Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, 36 ENV'T, May 1994, at 10. *See also* Bullard, *supra* note 33, at 15–16 (referencing proposed legislative amendments and bills aimed at including community demographics as considerations in environmental decisionmaking, including "fair share" legislation in New York City "designed to ensure that every borough and every community within each borough bears its fair share of toxic facilities"); Deeohn Ferris, *New Public Policy Tools in the Grassroots Movement: The Washington Office on Environmental Justice*, 14 VA. ENVTL. L.J. 711 (1995) (discussing

waste facilities can be identified, the effect and impact should be remedied. "The mere filing of a formal complaint provides a very powerful and visible statement by minorities regarding their belief [not simply] that distributive inequities exist in environmental protection,"[270] but that these inequities are causally tied to their race.

To this end, clearly defining the terms to be used in the debate on environmental inequities is paramount. As aptly noted by Professor Robert Collin, "[g]overnment, industry, academia and, perhaps most significantly, the public understand and define the problem differently."[271] Until there is a general acceptance of basic definitions underlying the concepts involved, there can be no real progress towards either a social or a legal remedy.

3. Defining Environmental Racism

Deriving a workable definition of environmental racism is a demanding task. In the early history of the movement, Benjamin Chavis defined environmental racism as "racial discrimination in environmental policymaking, in the enforcement of regulations and laws. It is racial discrimination in the deliberate targeting of communities of color for toxic waste disposal and siting of polluting industries...."[272] As the empirical evidence correlating race with environmental disparities mounted, differing definitions were proffered. Some looked to sociological explanations of racism in crafting a definition. Professor Bullard, author of the seminal *Dumping In Dixie*, maintains that at fault is "institutional racism," manifested through governmental, legal, economic, political, and military institutions within which black/minority participation has been conspicuously absent.[273] Bullard utilizes as a working definition of environmental racism "any policy, practice or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups or communities based on race or

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response at both federal and state level to issues of environmental disparities raised by grassroots movement); Gaylord & Twitty, *supra* note 22, at 779–83 (discussing various legislative acts and amendments addressing and/or including provisions for consideration of environmental impact on disadvantaged communities at federal and state level); Hasler, *supra* note 132, (regarding the status of the proposed Environmental Justice Act of 1993); Steven A. Herman, *Enforcement Helps Realize EPA's Commitment to Environmental Justice to Improve People's Lives*, 12 No.9 NAAG NAT'L ENVTL. ENFORCEMENT J. 9 (1997) (discussing actions taken by the Office of Enforcement and Compliance Assurance to integrate environmental justice concerns into agency programs).

270. Lazarus, *supra* note 27, at 829. *See also* Bullard, *supra* note 153 (discussion of subsequent prohibition by Houston City Council of dumping at controversial landfills and restricting construction of waste disposal sites near schools following decision in *Bean*).

271. Collin, *supra* note 12, at 499. Some contend that the environmental equity debate, and therefore the terms used to describe it, is an evolving one. Gerald Torres, *Keynote Address: Changing Way the Government Views Environmental Justice*, 9 ST. JOHN'S J. LEGAL COMMENT. 543 (1993–1994).

272. Benjamin F. Chavis, Jr., *Foreword to* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, *supra* note 57, at 3.

273. BULLARD, *supra* note 28, at 15, 24–26.

color."[274] In another definitional effort, Professor Torres attempted to dissect the term positing that "environmental" modifies "racism" and that one has to have a clear idea of what is racist in order to be able to determine what is "environmentally" racist.[275] Professor Torres defined racism by relating it to the concepts of domination and subordination, at the core of conflict theory.[276] "When seeking to determine whether an activity is racist, the one characteristic that must be present is one of domination and subordination. The action need not necessarily be one of intention...."[277] Instead, according to Professor Torres, the distributive impact of a decision can be analyzed in terms of whether it contributes to the subordination of identifiable racial groups.[278] In the environmental context, this would seem to suggest that inequities in the distribution of environmental burdens upon an identifiable racial group would be sufficient basis in itself upon which to charge racism, where those burdens negatively affect health, welfare, or well-being.

To define environmental racism broadly strips the term "racism" of its historical and social referents to race as a motivating factor in the challenged action. Conduct truly motivated by racial animus must therefore be separated from conduct that "random[ly], fortuitous[ly], and uninfluenced by the decision-maker's beliefs, desires and wishes"[279] visits an adverse burden on minorities. Under existing legal precepts, a failure to separate racist actions from random effect can only serve to limit the ability of minority plaintiffs seeking to obtain redress for perceived environmental inequities in the judicial system. Disproportionate impact, without more, is not unconstitutional.[280]

A broad-based definition more importantly dilutes the force of environmental racism into a more palatable, less controversial, and certainly less damning concept, leading inevitably to its reconstruction as a concept of general equity.[281] The argument has been made that it is necessary to move beyond the

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274. Bullard, *supra* note 153, at 1037.

275. Torres, *supra* note 268, at 839.

276. *Id.* at 839–40. *See also supra* note 267 and accompanying text.

277. Torres, *supra* note 268, at 840.

278. "[W]hen we label an environmental practice as an example of environmental racism we are 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." *Id.*

279. Lawrence, *supra* note 165, at 322. It has been argued that in light of the historical oppression of minorities in the United States and the institutionalization of racism in modern society, no decision can be uninfluenced by racist beliefs. *Id.* at 322, 330. *See* Boyle, *supra* note 191, at 942–45.

280. R.I.S.E. Inc. v. Kay, 768 F. Supp. 1141 (E.D. Va. 1991) (disproportional impact of siting decisions on minority community insufficient to show discriminatory intent); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) *aff'd without opinion* 782 F.2d 1038 (5th Cir. 1986) (statistical evidence failed to show purposeful pattern of discrimination). And, while certain statutory schemes contemplate evidence of disparate impact to establish a presumption of illegality, the evidence may be rebutted and often is.

281. It is possible that this reconstruction of environmental racism stems in part from frustration with the judicial system's refusal to date to afford relief to plaintiffs

legal construct of what is recognizable as racism in order to understand its pervasiveness; there is no distinct "phenomenon" of environmental racism, only a manifestation of historical racism.[282] Among the premises underlying this argument is that the historical and cultural heritage of Americans incorporates discriminatory beliefs and attitudes about racial differences and the inferiority of minorities, particularly African-Americans. These discriminatory beliefs are inculcated in the individual either through explicit articulation by dominative racists or absorbed on an unconscious level though observation of community attitudes, behaviors, and interactions between groups.[283] Individual behavior is then influenced by unconscious racial motivation derived from these discriminatory cultural beliefs.[284] Such aversive or unconscious racism cannot be detected under the existing legal standard of intent in standard Equal Protection analysis, which seems to recognize only the dominative form of racism, requiring plaintiffs to prove conscious or purposeful discrimination—difficult to do where racial animus is unexpressed.[285] Accordingly, the legal construct of racism is not reflective of modern racist behavior and permits otherwise racially motivated conduct to go constitutionally unchecked.[286] A second but corollary premise construes environmental racism as the consequence or effect of racism in housing, education, and employment; accepting the existence of environmental racism necessarily requires understanding of discrimination in these areas as well.[287] Under this precept, environmental racism is looked at not as a behavior, and therefore traditionally actionable, but rather as an explanatory construct for a sociological phenomenon.

For purposes of sociological debate, a shift beyond the legal paradigm of what is recognizable as racism may indeed be imperative; however, from a historical or legal perspective, the discomfort lies in presumptively appending the "racism" label to any institutional decision or outcome where minorities are in any way differentially or adversely affected, even tangentially. This approach would presume that at a minimum unconscious racism was necessarily at work due to ingrained cultural or historical discrimination in other areas. This presumption would be even stronger in any decision where the decision-making body is dominated by non-minorities, simply because all non-minorities would be

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challenging siting decisions as racially discriminatory under the umbrella of environmental racism as currently constituted. Such an effort is misguided.

282. Foster, *supra* note 9, at 735, 738. *See also* Northern, *supra* note 185, at 598 n.187 ("Environmental racism is thus less prescriptive and more descriptive of forces that manifest themselves in racially disparate outcomes in hazardous environmental exposure.").

283. Lawrence, *supra* note 165, at 322–23; Boyle, *supra* note 191, at 963–64.

284. "Even the most thorough investigation of conscious motive will not uncover the race-based stereotype that has influenced his decision." Lawrence, *supra* note 165, at 343.

285. *See infra* Section V.

286. *See* Boyle, *supra* note 191, at 957–61. Boyle asserts that the desegregation cases in the North and West, or in suburban school districts that didn't participate in the desegregation of urban schools, "troubled the Court because the defendant communities did not display the traits of dominative racism commonly associated with racial discrimination." *Id.* at 958.

287. Foster, *supra* note 9, at 733–34, 737.

presumed to be influenced by unconscious biases and normative judgments against minorities.[288] No workable legal standard would or could exist under such circumstances against which to determine conduct constitutionally infirm or socially unacceptable.

Accordingly, "derivative racism," or inequity that occurs as a consequence of the effects of past discrimination, while perhaps sociologically sound, necessarily dilutes the historical strength of the term "racism" as it applies to behavior and the visceral reactions its use evokes.[289] The meaning and impact of "racism" would fundamentally change in a way that could only be detrimental to minority interests. The line should not be blurred. The "peculiar institution" of slavery and its aftermath have substantially scarred the American psyche. To ignore this fact is to embark upon a course where remedies, by definition, can never address the wrong; and the healing process is at best elongated and at worst Sisyphean. A better approach is to more sharply define the concept of environmental racism consistent with historical and legal constructs, and to necessarily include discriminatory animus, whether conscious or unconscious, as a component. And as defined, environmental racism stands clearly apart from notions of environmental justice or environmental equity.

Bullard's formulation provides perhaps the best starting point for articulating a legal definition of environmental racism. Building on the idea of differential implementation of policies and practices, environmental racism should be defined as discrimination in the creation, implementation, and enforcement of environmental policies, regulations, or laws where race is a motivating factor in the outcome or direction. This definition is arguably narrow in the sense that it requires that there be some race-based animus and some individual or group "actor." In this sense it is consistent with existing Supreme Court precedent.[290] Racism, as a behavior, is "active" not passive. The definition is broad in the sense that it does not exclude racism operating on an unconscious level. Nor does it reject sociological and socio-psychoanalytical theory that contemporary racism is often the result of the influence of unconscious social attitudes.[291] Conduct driven by unconscious negative stereotypes, premised on the underlying belief of white

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288. Such a presumption would legitimate an already prevalent African American view that every adversity encountered in day to day life can be attributed at least in part, if not wholly, to racism by whites. Nor could minority communities be assured of representation of their interests simply by the presence of members of the minority goup on decisionmaking boards. "Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majoritiy's negative attitudes towards the minority." Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring).

289. This is not to contend that "derivative racism" or the present effects of past discrimination are insignificant nor worthy of redress. They are. Rather, I assert that there should be precision in the choice of terms used in their description and argue that the term "racism" should be limited to conduct, conscious or unconscious, motivated by discriminatory animus.

290. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

291. *See generally* Lawrence, *supra* note 165.

superiority, fundamentally includes race as a motivating and impermissible factor. As cogently argued by one scholar, "[t]o appreciate the meaning of environmental racism, then, one must acknowledge the institutionalization of unconscious biases, exclusionary processes, and normative judgments that influence racially meaningful social structures, which in turn manifest racially disparate outcomes."[292] The challenge lies with the judicial system to recognize the influence of unconscious behavior on the common historical experience of race relations in the United States, and to develop a legal paradigm that forbids both intentional and unintentional racially discriminatory conduct in assessing the merits of environmental racism claims under the Constitution.

VII. JUDICIAL REJECTION UNDER THE EQUAL PROTECTION CLAUSE

A. Washington v. Davis *and the Equal Protection Standard*

To date, environmental racism claims under the Equal Protection Clause have fared poorly in the courts. Under the standard established by the Supreme Court in *Washington v. Davis*[293] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[294] plaintiffs are required to show evidence of racial animus or discriminatory intent in order to prevail; evidence of discriminatory or disproportionate impact alone is insufficient.

Until the decision in *Washington v. Davis*, equal protection jurisprudence had been heavily influenced by two Supreme Court precedents, *Palmer v. Thompson*[295] and *Griggs v. Duke Power Co.*[296] *Palmer* stood for the proposition that discriminatory purpose was irrelevant to equal protection analysis, due largely to language in the opinion rejecting inquiry into legislative motivation as inappropriate.[297] *Griggs*, a Title VII discrimination case, was viewed as establishing that proof of disproportionate impact would suffice to shift the burden to the defendant not only in statutory cases, but in cases brought under the Equal Protection Clause as well.[298] *Washington v. Davis* represented a square rejection of

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292. Foster, *supra* note 9, at 735. The argument that environmental racism is not a separately identifiable phenomenon but rather a manifestation of historical discrimination, however, confuses the terms. Environmental racism can be separately defined and identified as a behavior or conduct based on actual decisionmaking in the environmental arena. The consequences of historical discrimination simply permit it to flourish. Environmental racism as a sociological idea is better termed "derivative environmental discrimination" on the theory that it derives its discriminatory characteristics from the lingering effect of past discrimination rather than present racially motivated or racist actions.

293. 426 U.S. 229 (1976).

294. 429 U.S. 252 (1977).

295. 403 U.S. 217 (1971).

296. 401 U.S. 424 (1971).

297. *Palmer*, 403 U.S. at 225.

298. *See, e.g.*, Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975); Castro v. Beecher, 459 F.2d. 725 (1st Cir. 1972).

the *Griggs* standard in constitutional cases.[299] According to the Court, the Constitution requires a showing of discriminatory intent; evidence of disproportionate impact is relevant only to the extent that it helps prove discriminatory intent.[300]

> Necessarily, an 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.... Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under [equal protection] simply because it may affect a greater proportion of one race than of another.[301]

The Supreme Court reaffirmed *Washington v. Davis* the following year in *Village of Arlington Heights v Metropolitan Housing Development Corp.*[302] Elaborating on the *Washington* intent standard, the *Arlington Heights* Court acknowledged that governmental decision making rarely involves a single motivating purpose, but rather often involves multiple actors, thereby requiring resort to circumstantial evidence to prove discriminatory intent. Accordingly, the Court outlined several factors which could provide proof of discriminatory intent. These factors included: (1) the impact of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the decision at issue; (4) any substantive or procedural departures from the normal decision-making process; and (5) the legislative or administrative history of the challenged decision.[303] The Court specifically cautioned that this list of factors did not purport to be exhaustive. The *Arlington Heights* opinion suggests that proof of any one of these factors would be sufficient to create an inference of discriminatory intent. A showing of disparate impact, for example, similar to that found in *Yick Wo v.*

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299. In *Washington*, plaintiffs-respondents challenged the use of a verbal skills test for the selection of police officers as racially discriminatory. Plaintiffs argued that the test, Test 21, had a "highly discriminatory impact in screening out black candidates." Washington v. Davis, 426 U.S. 229, 235 (1976). The Court of Appeals, reversing a grant of summary judgment in favor of the city, held that the disproportionate impact of the test was sufficient to establish a violation of the Equal Protection Clause. *Id.* at 237.

300. *See id.* at 240–42. Despite strong statements in the opinion that "disproportionate impact" is not enough to show a violation of equal protection, Justice White did not fully rule out the possibility that disproportionate impact could, in limited situations, be sufficient. "It is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Id.* at 242.

301. *Id.* at 242.

302. 429 U.S. 252 (1977). *Arlington Heights* involved a challenge by the Metropolitan Housing Development Corp. to town's denial of a rezoning request which would have permitted the development of racially integrated low and moderate income housing in the Chicago suburb of Arlington Heights, Illinois.

303. *Id.* at 266–68.

Hopkins[304] or *Gomillion v. Lightfoot*[305] could suffice to meet a plaintiff's burden. Nothing in *Arlington Heights* requires a plaintiff to introduce proof of each consideration in order to satisfy the discriminatory intent requirement. Nor does *Arlington Heights* mandate that the courts engage in any more of a balancing effort than they would otherwise undertake in evaluating the plaintiff's proof.[306]

Meeting the *Washington* intent standard has proven increasingly difficult in racial discrimination cases brought under the Equal Protection Clause, particularly as racism has evolved into less overt forms. Both *Washington* and *Arlington Heights* have been roundly criticized by civil rights activists and academics.[307] Some critics have argued that in establishing the intent standard, the court was requiring proof of characteristics of dominative racism, reflective of historical experience with racist behavior.[308] Focusing on discriminatory animus as the sole test for determining whether official action is racist precludes equal protection remedies where aversive or unconscious racism is at work and accordingly falls short of achieving the goal of the Equal Protection Clause.[309] Professor Lawrence, for example, questions the appropriateness of judicial imposition of value choices that condemn intentional discriminatory conduct but hold unintentional racially stigmatizing conduct as constitutionally acceptable.[310]

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304. 118 U.S. 356 (1886) (striking ordinance where its application resulted in denial of laundary permits to all Chinese applicants).

305. 364 U.S. 339 (1960) (rejecting city's efforts to redraw city boundary to exclude almost all black voters).

306. Subsequent cases in the municipal services area have seemed to look to whether the plaintiff has introduced evidence of each of the factors enumerated in *Arlington Heights*. *See id.* at 348.

307. *See generally* Lawrence, *supra* note 165; Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Robert G. Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. FORUM 961. *But see* Mank, *supra* note 205, (arguing the legitimacy of the intent requirement in distinguishing intentional from unintentional conduct and proposing the establishment of a representation and compensation process for hazardous waste siting decisions).

308. Boyle, *supra* note 191, at 958. Indeed at the time *Washington* was decided, the United States was just emerging from the civil rights struggle and ongoing efforts to deal not only with continuing segregation in education, but discrimination in housing, employment, and areas.

309. *See generally* Boyle, *supra* note 191; Lawrence, *supra* note 165; The Supreme Court has consistently stated the "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." McLaughlin v. Florida, 379 U.S. 184, 192 (1964). *See also* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (core purpose is to do away with all governmentally imposed discrimination based on race).

310. *See* Lawrence, *supra* note 165, at 383–86. Lawrence argues that "all conduct with racially stigmatizing meaning" should violate the constitutional protection of equality rather than intentional discriminatory conduct alone. *Id.* at 386. This approach allows judges to base their decisions on the values that reflect the entire American culture instead

> [T]o the extent that existing constitutional doctrine—particularly the *Davis* intent requirement—embraces the antidiscrimination principle as a neutral and, therefore, appropriate basis upon which to overrule a conflicting majoritarian value choice, it interprets that principle as only forbidding governmental decisions that self-consciously aim to disadvantage a minority group selectively.[311]

Other scholars have also questioned the validity of the Court's concerns, expressed in *Washington*, that a standard that did not include an intent component would unduly limit legislative discretion, disrupt governmental decision-making, and would impose costs on "blameless" individuals while benefiting those not directly harmed.[312]

Criticisms notwithstanding, the Supreme Court has been reluctant to overturn the intent requirement established some twenty years ago.[313] This standard has proven an insurmountable barrier to those plaintiffs challenging the siting of solid waste landfills on the basis of environmental racism. In each instance, the disparate effects, shown by introduction of statistical evidence, have been held insufficient to meet the plaintiff's burden of proving discriminatory intent under the Equal Protection Clause.

B. Challenges to Environmental Racism Under the Fourteenth Amendment

In 1979, plaintiffs in *Bean v. Southwestern Waste Management Corp.*,[314]

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of simply imposing the status quo.

311. *Id.* at 383. Lawrence acknowledges criticisms against and arguments supporting the continued viability of the intent standard, but suggests a hermeneutical approach to constitutional interpretation. Judges should recognize that there are conflicting perspectives at play in defining the values that reflect cultural tradition, and should base constitutional decisions "on their own sense of what values best reflect our cultural tradition, so long as the conflicting perspectives competing to define those values are made explicit." *Id.* at 386.

312. *Id.* at 353–54. According to the Supreme Court in *Washington*, a different rule might "invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." Washington v. Davis, 426 U.S. 229, 248 (1976). Clearly at issue becomes the correlation between race and other classifications such as wealth. Accordingly, laws that classify or adversely affect the poor would be vulnerable to attack because of their concomitant adverse impact or simply disproportionate impact on African-Americans, and government programs that were more readily accessed or available to the wealthy, would become equally vulnerable. The intent doctrine, then, provided a vehicle through which race could be separated from other classifications. Daniel Ortiz described the intent function as a protective as well as condemnatory one. Ortiz argued that if wealth or some other legislative classification "served as mere pretexts for race, intent condemned them. If they did not, intent preserved them from searching scrutiny. Intent aimed, in other words, to separate racial proxies from mere racial cohorts." Ortiz, *supra* note 307, at 1139.

313. In *Washington*, the Court censured lower courts whose decisions permitted plaintiffs to proceed based on a showing of disproportionate impact alone. 426 U.S. at 244.

314. 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).

sought a preliminary injunction enjoining the Texas Department of Health's ("TDH") decision to grant a permit to Southwestern Waste Management Corporation to operate a landfill in their community. The plaintiffs argued that TDH's decision reflected a pattern or practice of racial discrimination in the siting of solid waste disposal facilities.[315] The plaintiffs also argued that the TDH approval of the permit was discriminatory in light of the permit approval process and the history of landfill placement in Houston.[316] The court acknowledged that statistical proof can rise to the level sufficient to prove discriminatory purpose, but it rejected plaintiffs' claims, holding that their statistical evidence alone failed to prove a clear pattern or practice of discrimination, and that plaintiffs further had failed to present evidence of purposeful discrimination.[317]

Despite the outcome, this was a case where the specter of discriminatory purpose loomed large and resort to an unconscious racism argument was unnecessary. Northwood Manor in Houston, the proposed landfill site, was a predominantly black (over seventy percent), middle-income suburban residential community.[318] Over eighty-three percent of the residents were homeowners.[319] The profile of the community made it an improbable choice for a landfill. The proposed site was close to a predominantly black high school and a residential neighborhood. Indeed, in 1970, eight years earlier, when the area and the school were predominantly white, a siting proposal to place a municipal landfill in the same general area was *rejected* based on reasons which included among them that the landfill would be too close to a school, would lower property values, and would create health hazards from rats and rodents.[320] However, in 1978, after the racial makeup of the community had changed, the landfill was built. And, of thirteen disposal facilities owned and operated by the city from 1920 through the early 1970s, all but one were in black neighborhoods, easily attributable to "a form of *de facto* zoning."[321] Three of four privately-owned landfills were located in black neighborhoods.[322] Professor Bullard dismissed market dynamics as an explanation stating, "Black Houstonians did not follow the garbage dumps and incinerators....

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315. *See id.* at 677.

316. *Id.* at 678.

317. *See id.* at 677. The court analyzed the statistical data presented by the plaintiffs for seventeen sites operating with TDH permits as of 1978. The court looked at the percentage of minority population in those areas and found the data presented did not support the plaintiffs' claims.

318. *See id.* at 677; *see also* Bullard, *supra* note 153, at 1038 (stating that the target area was over eighty percent black).

319. *See* Bullard, *supra* note 153, at 1088.

320. *See id.* at 1039.

321. BULLARD, *supra* note 28, at 51. Of these disposal facilities, eight were garbage incinerators and five were city-owned and operated landfills. The court in *Bean* looked at minority communities as defined by census tracts, rather than neighborhoods within those tracts. Bullard argues that "[t]he use of census tracts as a proxy for neighborhoods omits a large slice of Houston's waste-facility siting history.... Use of the census tract as the unit of analysis makes 'invisible' the pre-1950 siting disparities." Bullard, *supra* note 155, at 464. Bullard also discusses Professor Been's use of census tract data in her studies. *Id.*

322. Bullard, *supra* note 155, at 459–60.

The racial character of these neighborhoods was established *before* the waste facilities were sited."[323] The *Bean* court did look at the factors that entered into TDH's decision approving the permit, but clearly did not believe that these factors sufficed to show the requisite discriminatory purpose. Instead, the decision was deemed simply "unfortunate" and "insensitive."[324]

> Land use considerations alone would seem to militate against granting this permit.... If this Court were TDH, it might very well have denied this permit. It simply does not make sense to put a solid waste site so close to a high school, particularly one with no air conditioning. Nor does it make sense to put the land site so close to a residential neighborhood. But I am not TDH and for all I know, TDH may regularly approve of solid waste sites located near schools and residential areas, *as illogical as that may seem.*[325]

Seven years after the *Bean* decision, in *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb County Planning and Zoning Commission*,[326] plaintiffs also challenged a decision to grant a permit authorizing the siting of a landfill in a community that was sixty percent black. As in *Bean*, the court held that the plaintiffs had failed to establish evidence of a pattern or practice of discrimination. The court further held that there were no triggering events or sequence of events which would indicate discriminatory purpose by the Commission.[327] Again, as in *Bean*, the site was to be located in a predominantly African-American community.[328] The Commission initially had voted to deny the application for several reasons, including proximity to a residential area, and increases in noise and traffic due to the heavy trucks that would pass through the community.[329] The Commission on rehearing granted the landfill application after imposing certain conditions on its operations. Beyond a showing of disproportionate impact—the siting of the landfill would have a greater impact on the African-American community nearby—plaintiffs were unable to demonstrate any of the other factors set out in *Arlington Heights*. The other landfill approved by the Commission was located in a majority white census tract.[330] The court found no evidence of a pattern of discriminatory decisions, infirmities in the historical background of the decision, or deviations from Commission procedures.[331]

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323. Bullard, *supra* note 153, at 1040 (emphasis in original).

324. Bean v. Southwestern Waste Management, 482 F. Supp. 673, 680 (S.D. Tex. 1979).

325. *Id.* at 679–80 (emphasis added).

326. 706 F.Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

327. *See id.* at 885–86.

328. *See id.* at 884.

329. *See id.* at 882.

330. The *East-Bibb Twiggs* court looked at the census tract as defining community parameters. The court rejected plaintiffs' argument that two landfills were located in a County Commission District that was approximately seventy percent black. *See id.* at 884–85.

331. Of concern is the court's comment that the historical evidence of racism presented by the plaintiffs focused on conduct by other agencies, which was deemed of little value to a determination of discriminatory intent by the agency in the case before it. *See id.*

R.I.S.E. Inc. v. Kay[332] met a similar fate. In *R.I.S.E.*, the Board of Supervisors of King and Queen County approved the operation of a solid waste landfill with the Chesapeake Corporation on a 420-acre site, referred to as the Piedmont site.[333] First, the County Board approved a resolution to rezone the site from agricultural to industrial use.[334] The population within a one-half mile radius from the site was sixty-four percent African-American; eighty percent of the families along the route along which landfill traffic would travel were African-American.[335] Three other landfills approved by the Board in 1969, 1971, and 1977 were located within a one-half mile radius of communities that were between ninety to one hundred percent African-American at the time of development.[336] There was one landfill in a white community. This landfill, the King Land landfill, was a private waste disposal facility sited at a time when the County had no zoning ordinances.[337] Upon learning of the landfill's operation, the County quickly implemented zoning ordinances under which it refused to grant the King Land facility a "nonconforming" use or a variance, resulting in its closure.[338] The court found that the proposed landfill placement would have a disproportionate impact on African-Americans. The court further acknowledged that the County had historically located waste disposal facilities in minority communities.[339]

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at 885

332. There are two opinions in *R.I.S.E. Inc. v. Kay*. The first, reported at *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1141 (E.D. Va. 1991), denied the defendant's motion for summary judgment on the claim for Equal Protection. The second decision, reported at *R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), followed the bench trial held by the trial judge on the constitutional claims. The Fourth Circuit in an unpublished opinion affirmed the trial court's findings of fact at trial.

333. *See R.I.S.E. Inc. v. Kay*, 768 F. Supp. at 1144.

334. *See R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1141, at 1142. The County Board approved the site despite the concerns of black residents about the resulting impact on property values in the adjacent neighborhood. *See id.* at 1143

335. *See R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1144, at 1148.

336. *See id.*

337. *See id.* at 1148–49. As a result it was unnecessary for the owners to get county approval at the time the facility was sited.

338. *See id.* at 1149.

339. *See id.* Among the court's findings, however, was that with the exception of the Board members responsible for the 1977 landfill siting, none of the current Board members were serving on the Board at the time of the approval of the sites, a factor that may have had some impact on the court's conclusion that there was no discriminatory animus motivating the current Board. Also, only two of the current members were serving on the board during the 1977 landfill development. *See id.* at 1148. However, the restriction of the court's inquiry to only the current siting board serves to severely limit inquiry into substantive departures from normal procedures. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977) ("[S]ubstantive departures too [from normal procedural sequence] may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached."). As is common with reference to the U.S. Supreme Court and other judicial bodies, the decision maker in this context should be understood to mean the governing body as an institution, regardless of the individual members who comprise it at any given point in time.

Notwithstanding, the court upheld the County's decision, stating that the Board seemed "more concerned about the economic and legal plight of the county as a whole than the sentiments of residents who opposed the placement of the landfill in their neighborhood."[340] In *R.I.S.E.*, as in *Bean* and *East-Bibb Twigg*, the court was unwilling to find purposeful discrimination in violation of the Equal Protection Clause.

A strong argument exists that the district court decisions in *Bean* and *R.I.S.E.* were simply wrongly decided[341] under the existing *Arlington Heights* standard. Admittedly, the reliance on statistical proof in discriminatory siting cases, without more, is insufficient.[342] Typically, the number of solid waste facilities in a given area will be so small as to make meaningful statistical analysis impossible. But the statistical evidence available, combined with the other proof presented, should have mandated a different result in both cases. In *Bean*, the court acknowledged that the decision to site the facility in Northwood Manor was "illogical."[343] The TDH clearly deviated from its determination of what factors were important in a siting decision when the proposed site was in a black community as opposed to a white community. The *Arlington Heights* Court specifically identified substantive departures from criteria usually considered important as probative in determining "racially discriminatory intent."[344] Justice Powell's majority opinion stated

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.... Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face.[345]

When the history of both public and private landfill placement in the city reflects a concentration in African-American communities,[346] a finding of discriminatory

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340. *R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1144, at 1150.

341. The facts of *East-Bibb Twigg* are less compelling.

342. "When enforcing the general equal protection guarantee, the Court will not allow legislative or administrative rules to be overturned on the basis of statistics alone unless the statistical proof is so great that it establishes a clear and convincing case that the legislation had to be adopted for a discriminatory purpose...." NOWAK & ROTUNDA, *supra* note 265, at 531. *But see* Gomillion v. Lightfoot, 364 U.S. 339 (1960), where the court found statistical proof so overwhelming, the town districting plan could only have been enacted for a discriminatory purpose.

343. The court also raised as issues relevant to establishing discriminatory intent at trial the proximity of waste sites to minority communities within the census tracts stating that if the sites within predominantly Anglo census tracts were located next to minority communities, "the outcome of this case would be quite different." Bean v. Southwestern Waste Manag. 482 F. Supp. 673, 680 (S.D. Tex. 1979). Other relevant inquiries included how the waste sites were selected and the factors that entered into the decision to grant the permit. *Id.*

344. Arlington Heights, 429 U.S., at 267–68.

345. *Id.* at 266.

346. The *Bean* decision may also have suffered from the parameters used to

purpose under the *Arlington Heights* factors should not have been easily dismissed and indeed seems warranted. The *Bean* siting decision is certainly one where race appears to have played a significant role.

Similarly, in *R.I.S.E.*, the court should have given more weight to the historical placement of County-approved landfills, all of which were in African-American communities, particularly in light of the Board's actions upon discovering a facility operating in a white community. The *R.I.S.E.* court found that among the reasons the Board denied a variance to the King Land landfill was that permitting the landfill's continued operation would result in a significant decline in property values of the adjacent properties.[347] Nonetheless, the same concern was expressed by the minority community but apparently deemed unimportant by the Board in approving the Piedmont site.[348] Furthermore, the rezoning of the proposed site from agricultural to industrial use is indicative of improper motive.[349] The court's belief that the County was "more concerned about the economic and legal plight of the County as a whole,"[350] does not exclude racial bias as a motivating factor. Indeed, the *R.I.S.E.* court stated in ruling on defendants' summary judgment motion

> The evidence provided by the plaintiffs on the disparate impact of county landfill placement on black residents, the contrast between official responsiveness to white resistance to landfill development and apparent nonresponsiveness to the concerns of black residents, and departures from normal procedures in giving approval for the landfill suggests that the decision to locate the landfill in a

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define community. The statistical proof produced by the plaintiffs was based on census tract data. This data showed that at least fifty percent of the wastes sites operating in the city were located in census tracts with less than twenty-five percent minority population. Professor Bullard notes however that when neighborhoods are examined, it became apparent that facilities were concentrated in predominantly black neighborhoods. For example Bullard notes that:

> The Alameda Plaza neighborhood consists of block groups inside census tract 332. In 1970, the census tract consisted of a white majority. However, the block groups that comprised the Alameda Plaza neighborhood (the only neighborhood adjacent the two permitted Holmes Road landfill sites) had an African American majority population. By 1980, the entire census tract was mostly African American.

Bullard, *supra* note 155, at 461.

347. *See* R.I.S.E. Inc. v. Kay, 768 F. Supp. 1144, 1149 (E.D. Va. 1991). The court also found that environmental contamination present at the King landfill in the white community was a significant factor in explaining its closure by the Board, implying that race was not the motivation. The court seemed to seize on this fact as a basis for finding discriminatory intent was lacking despite the fact that the Board was also concerned with property values in the white area.

348. *See id.* at 1149.

349. "Expulsive zoning often designates black residential areas for industrial or commercial uses, a practice which results in the eventual displacement of blacks from these areas." Collin, *supra* note 12, at 509.

350. *R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1144, at 1150.

> predominantly black community may have been motivated by discriminatory intent.[351]

Nonetheless, the court at trial proceeded to conclude that the plaintiffs had failed to introduce sufficient evidence of discriminatory intent.[352] Under *Arlington Heights*, however, the issue is whether *one* of the factors influencing the challenged decisions was impermissible and unconstitutional under the Equal Protection Clause. The issue is not whether the improper consideration was the *sole* motivating concern. To the extent that race is a motivating factor—a conclusion buttressed by the Board's reaction when faced with the presence of a facility in a white community—there could be no justification for the challenged conduct.[353]

Neither did the *Bean* nor *R.I.S.E.* courts look beyond the few factors set out in *Arlington Heights* in determining discriminatory intent. The Supreme Court expressly cautioned that the enumerated factors were "not exhaustive," although the *Bean* and *R.I.S.E.* decisions seem to adopt these factors as a rigid and inflexible test in pursuing the chimerical notion of color-blind constitutionalism. Nor did the *Arlington Heights* Court assert that the factors should be given a narrow reading.[354] To the extent that other circumstances surrounding the decision to site the landfills in African-American communities were probative, they should have been taken into account. The courts could have done so and still remained within the strictures of *Washington* and *Arlington Heights*.

Bean and *R.I.S.E.* are cases where intentional discrimination in the siting of waste facilities seems facially apparent. Certainly others exist.[355] Prior lack of

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351. R.I.S.E. Inc. v. Kay, 768 F. Supp. 1141, 1143–44 (E.D. Va. 1991).

352. The district court appeared to give weight to the fact that two out of five members on the Board were black, both of whom were recently added to the Board as a result of redistricting and both of whom voted in favor of the siting. *R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1144, at 1146.

353. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (stating that "[a]t the very least, the Equal Protection Clause demands that racial classifications...be subjected to the 'most rigid scrutiny'"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect...[and] courts must subject them to the most rigid scrutiny"); Strauder v. West Virginia, 100 U.S. 303 (1879) (holding that a statute not allowing black men to serve on juries was discrimination based on race and amounted to a denial of the equal protection of the laws to a colored man when he is put upon trial).

354. Courts addressing claims of discrimination in the provision of municipal services have evinced a willingness to interpret the factors broadly. *See, e.g.*, Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986).

> Although none of these four factors are necessarily independently conclusive, the totality of the relevant facts supports a court's findings that Defendants and their predecessors have engaged in a course of conduct which inescapably evidences discriminatory intent and which is the cause and reason for the present disparity in: (1) street paving and (2) street resurfacing.

Id. at 588.

355. For example, a study done in Baton Rouge looked at the number of hazardous waste sites requiring clean up in Baton Rouges' ten largest white communities

success should not discourage such claims from being brought and pursued as violative of equal protection.[356] At the time of its adoption, the Equal Protection Clause was directed towards preventing governmental discrimination against African-Americans. Government decision-making that has the purpose of disadvantaging one class of persons over another based on race is considered "suspect" and subject to strict judicial scrutiny, and such classifications can be justified only by a showing of a compelling state interest.[357] A claim of environmental racism challenges those types of race-based decisions. While the current formulation of the intent standard may prove daunting in many cases, there are nonetheless those instances in which the racial bias of the decision is evident. Such claims should be pursued without hesitation. The debate remains as to the fate of environmental racism claims where the race-based motivation is less immediately apparent.

VIII. THE INCLUSION OF UNCONSCIOUS MOTIVATION IN EQUAL PROTECTION JURISPRUDENCE

Several scholars have proposed solutions to the obstacles faced by environmental plaintiffs in equal protection cases, ranging from adopting a heightened form of scrutiny[358] to adopting an "unconscious racism" cultural

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and ten largest minority communities. Between the two sets of communities there were a total of 19 hazardous waste sites, a significant number in and of itself. Fifteen of the hazardous waste sites had been sited in the ten largest minority communities. Disparities also existed in the volume distribution of hazardous waste in Baton Rouge. The white communities had less than one percent of the hazardous wastes. Even though the minority communities were significantly smaller, they had more than ninety-nine percent of the hazardous wastes. On its face, the flag of impermissible racial factors is raised by a situation with such disparities. Bryant & Mohai, *supra* note 9, at 131–32.

356. The lack of success of plaintiffs in environmental siting cases has led some commentators and lawyers to discourage the pursuit of claims under the Equal Protection Clause. *See* Cole, *supra* note 246, at 540–41 (equal protection claims should fall at the bottom of the litigation strategy hierarchy, relating civil rights attorneys' view of an equal protection claim as a "certain loser"); Leslie Ann Coleman, *It's the Thought That Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L.J. 447, 492 (1993) ("Case law, however, demonstrates that minorities taking action through the Equal Protection Clause...will not find judicial relief."); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 445 (1994) ("Equal protection claims can redress only in the most egregious cases...[and] such claims decontextualize the governmental action that is challenged.").

357. The Supreme Court noted

> Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

358. Under a heightened level of scrutiny, once plaintiffs prove discriminatory impact, then the burden would shift to the defendants to prove that the suspect class was

test.[359] The Supreme Court has been unresponsive. This Article proposes that the virtually impossible burden environmental plaintiffs face under the current Equal Protection standard can be lightened, while still addressing the concerns expressed by the Supreme Court in *Washington* regarding undue limitations on legislative discretion and imposing costs on "blameworthy" individuals.[360] First, when the challenged official conduct involves the exercise of discretion in the application of allegedly facially-neutral criteria, traditional judicial deference refraining from inquiry into subjective legislative and administrative motivation should not be afforded. Second, where facially-neutral criteria in fact can be characteristically associated with a disproportionate percentage of a suspect class, "invidious purpose" is met upon a showing that the government official or body knew with "substantial certainty" that application of the criteria would result in the disadvantaging of the suspect class. This latter proposal urges the adoption of the intent standard utilized in civil tort law as the appropriate measure for discriminatory animus.[361]

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adequately represented in the decision-making process. If the plaintiffs had not been adequately represented, then the court would be required to determine if the defendants adequately accounted for the interests of the class. If the plaintiffs were adequately represented and the decision-making process was not defective, then the state would only have to show a rational basis for the challenged action. *See* Fisher, *supra* note 180, at 470–71.

359. Under this proposal, the challenged action would be evaluated to determine if it was "racially significant," that is, whether a significant portion of the population would view the action in racial terms. If so, then it would be presumed that society shared unconscious racist attitudes that necessarily influenced the decision. No other evidence of discriminatory intent would be needed. *See id.*; *see also* Coleman, *supra* note 356, at 482 (proposing replacing intent standard with "effects" test); Lawrence, *supra* note 165, at 355–62.

360. Admittedly, such an expansion would require a different approach to how 'intent' has been treated by the Court under the Equal Protection Clause. Essentially, the Court is being asked to recognize that under the existing interpretation, plaintiffs face "a crippling burden of proof" as unconscious racism is effectively "immune from Constitutional scrutiny." Batson v. Kentucky, 476 U.S. 79, 92 (1986).

361. *See infra* Part VIII B. Professor Kathy Northern proposes the creation of an "environmental racism tort." Under Professor Northern's proposal, the intent necessary to maintain a claim of environmental racism could be shown where the defendant acts with substantial certainty "that its decision to site the facility will result in a minority community shouldering more than its proportionate share of the city, state, region, or nation's environmental burden." Northern, *supra* note 185, at 583. Professor Northern distinguishes the "environmental racism tort" from Equal Protection because it would circumvent the need to prove discriminatory animus. Under this tort, intent is measured using disparate impact on a minority population as the standard, and utilizing traditional tort analysis. *Id.* This Article proposes in Part VIII B that Equal Protection analysis should expand to include the tort theory of intent and that such an expansion would not require reliance on disproportionate impact to show discriminatory animus.

A. Consideration of Subjective Purpose or Motivation

In the realm of equal protection, the Supreme Court has insisted upon strict adherence to proof of discriminatory intent yet, at least by its expressed language, resisted inquiry into legislative or government motivation as a way to satisfy that intent.[362] In *Palmer v. Thompson*,[363] the Court rejected appellants' claim that the closing of all city-operated swimming pools in Jackson, Mississippi was unconstitutional because it was "motivated by a desire to avoid integration."[364] The Court would not consider evidence that then Mayor Allen Thompson had publicly announced the city's intention to preclude any "intermingling" of the races at the swimming pools.[365] Justice Black, writing for the majority, stated that the Court had never "held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[366] Justice Black acknowledged that several Supreme Court decisions contained language suggesting that legislative motivation was relevant to the question of constitutionality, but asserted that their focus was on the "actual effect of the enactments, not upon the motivation which led the States to behave as they did."[367] Relying on the prior decisions of *Fletcher*

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362. The Court has been willing to inquire into legislative motivation in cases involving the Establishment Clause. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

363. 403 U.S. 217 (1971).

364. *Id.* at 224. *See also* Evans v. Abney, 396 U.S. 435 (1970) (upholding return of segregated park to testator's heirs to avoid desegregation, resulting in loss shared by both blacks and whites equally).

365. *See* Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 96–98.

366. *Palmer*, 403 U.S. at 224.

367. *Id.* at 225. The decisions themselves are not as unambiguous as Justice Black suggests. Indeed in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972), and *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), the Court seemed to look to the "effect" of the legislation in question as proof of underlying discriminatory purpose, that is, motivation. In *Gomillion*, the Court overturned an Alabama statute that redefined Tuskeegee city boundaries in such a way as to alter the shape of the city from a four-sided square to a twenty-eight sided figure, allegedly removing virtually all of the city's four hundred black voters, but none of the white voters, from within city limits. "[T]he conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their municipal vote." *Gomillion*, 364 U.S. at 341. In *Griffin*, the Court enjoined the closing of the public school system by the County following receipt of an order to desegregate. Finding that the closing was solely to ensure "that white and colored children in Prince Edward County would not under any circumstances, go to the same school," the Court held that regardless of any non-racial reasons that might support a State's allowance of the county's closing public schools, "the object must be a Constitutional one." *Griffin*, 377 U.S. at 231. A similar withdrawal from a county school district was invalidated in *Wright*, where the Court again focused on the discriminatory effect of the action stating, "we have focused on the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system." *Wright*, 407 U.S. at 462. *But see* Wright v. Rockefeller, 376 U.S. 52, 56 (1964) (rejecting a claim of racial gerrymandering, and noting that there had

v. Peck[368] and *United States v. O'Brien*,[369] Justice Black maintained that judicial review of subjective legislative motivation continued to be both improper and fraught with pitfalls,[370] rejecting any interpretation of past precedent as supporting subjective legislative inquiry.[371]

Despite the Court's articulated position in *Palmer*, its decisions have reflected the Court's willingness to, under certain circumstances, presume impermissible purpose and discriminatory effect of a law where a collective discriminatory animus motivated the law's enactment.[372] For example, cases dismantling Jim Crow in the South implicitly recognized that the motivation of the legislators enacting segregation legislation was to discriminate against blacks. This recognition effectively inferred a discriminatory motivation from virtually any legislation in the former slave-holding states that disadvantaged blacks.[373] The net

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been insufficient proof that the legislature was either "motivated by racial considerations or in fact drew the districts on racial lines").

368. 10 U.S. 87 (1810).

369. 391 U.S. 367 (1968).

370. The concerns expressed by the Court in *Palmer* included the purported difficulty in ascertaining motivation, and the fact that legislation stricken based on "improper motivation" presumably could simply be reenacted by the legislature for ostensibly different, constitutionally sound reasons. *See Palmer*, 403 U.S. at 225. Interestingly, Justice Black noted that the lower court in *Palmer* had looked at the city's purpose in closing the pools, including substantial evidence that the council was motivated by legitimate safety and economic considerations. *Id* at 225. Professor Paul Brest, in an article discussing the *Palmer* decision and the reviewability of legislative motivation, argued that the Court "failed to elucidate its functional arguments against judicial review of motivation, and failed entirely to consider the arguments that might favor such review." Brest, *supra* note 365, at 101. Brest argued that legislative motive in fact plays a proper role in equal protection analysis and even more strongly, that motivation is always relevant. Brest raised a number of questions relating to the Supreme Court's position on legislative motivation:

> Even if legislative motivation is often difficult to ascertain, is the inquiry inevitably so problematic that it should never be undertaken? Why must the inquiry be complicated by searching—as Mr. Justice Black assumed one must search—for 'sole' or 'dominant' motivation? Moreover, why is it 'futile' to invalidate a law enacted for impermissible reasons just because it could be readopted for valid reasons? And, finally, what policies might support the invalidation of an otherwise permissible law enacted for illicit reasons?

Id. at 102.

371. *See Palmer*, 403 U.S. at 225.

372. Boyle asserts that the Supreme Court has been willing to soften the *Washington* standard where racism seemed obvious but evidence of intent was "thin." Boyle argues that where the Court has been comfortable discrimination was at work, it has been more receptive to plaintiff's proof of discriminatory impact. Boyle, *supra* note 191, at 960.

373. Without question, southern segregationist laws and laws resulting in black political disenfranchisement were designed to perpetuate and continue the structural oppression of blacks. The social construct of white supremacy, threading through much of the law of southern (as well as northern) states, was undermined with the almost wholesale

effect of the Court's rulings was to impute subjective discriminatory purpose into a law that had a disproportionate impact based upon a long-standing social history of discrimination presumed to have motivated enactment of the law.[374] Arguably, drawing an inference in such circumstances remains consistent with the *Washington v. Davis* test if the history of pervasive societal and governmentally-supported racial animus is interpreted as simply reflecting the "historical background of the decision" or "[t]he specific sequence of events leading up to the challenged decision."[375] But these considerations implicitly, if not expressly, call for inquiry into subjective legislative motivation, although in a group rather than individual context.[376]

Disagreement on this point may be partially due to the lack of clarity surrounding judicial use of the term's legislative motivation, consideration of which is purportedly improper, and legislative purpose. Professor J. Morris Clark has argued that the two terms have functionally equivalent referents,[377] asserting that the Court's distinction between the two terms arises from a "difference in the Court's ability to establish the referents by reliable evidence."[378] Accordingly, the Court is unwilling to look to "motivation" as a reason for holding a law unconstitutional where a finding of invidious purpose is unsupported by sufficiently clear evidence of the causative legislative goals.[379] No such disability exists where the "purpose" is reflected by the effects of the legislation[380] as, for

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invalidation of laws supporting a segregated social structure. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Guinn v. U.S., 238 U.S. 347 (1915). *See also* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

374. A similar approach was taken by the Eleventh Circuit in addressing the alleged disparate provision of municipal services, where "the magnitude of the disparity, evidencing a systematic pattern of municipal expenditures in all areas of town except the black community, is explicable *only* on racial grounds." Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1186 (11th Cir. 1983) (emphasis added). *See also* Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986).

375. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

376. In fact, this may be the real distinction. The suggestion from cases such as *Gomillion*, *Griffin*, or *Wright* is that it is the "group" purpose that is inferred from the discriminatory effects of the official action at issue. The distinction made by Justice Black in *Palmer* was that these cases did not support inquiry into "subjective" legislative motivation, where "subjective" arguably meant "individual" motivation. However, inference of group purpose, as reflected by the effects of the action, would not be improper.

377. *See* J. Morris Clark, *Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978)

> Common and judicial use of the term 'legislative purpose' is generally the same as the use of "legislative motivation." Purpose generally refers to causative purpose—that is, motivation. Thus, one can enquire interchangeably of either the legislature's purposes or motivations in passing a given law or its purposes or motivations in using a particular means to the end thus identified.

Id. at 961.

378. *Id.*

379. *Id.* at 962.

380. *See id.*

example, in *Gomillion.* Purpose then becomes a focus on empirical data, usually looking to the manner in which the law is administered.[381]

In their discussions of the type of evidence disparate-impact plaintiffs should rely on to show discriminatory intent, *Arlington Heights* and *Washington* depart from the rigid position expressed in *Palmer* rejecting any inquiry into legislative motivation or intent. In *Arlington Heights*, Justice Powell concedes the relevance of legislative or administrative history to issues of discriminatory intent,[382] although concomitantly admonishing that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government."[383] Particularly to be avoided except in extraordinary instances, cautioned Justice Powell, would be eliciting testimony from legislative members concerning the purpose of the official action taken.[384] Judicial deference to administrative and legislative purpose remains a priority in judicial review. Justice Stevens, in a concurring opinion to *Washington*, suggested that objective evidence of intent would in most cases be more probative than "evidence describing the subjective state of mind of the actor."[385]

There are valid criticisms of any motive-centered theory or inquiry of race discrimination for constitutional purposes. Kenneth Karst warns that motive-centered inquiry into the good faith of an official's conduct will impair race relations, poisoning any existing and future relationship between the official and

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381. If Clark is correct, and there is no referential difference between "motivation" and "purpose," then inquiry into a law's purpose necessarily is an inquiry into its motivation. Or perhaps, more accurately, the law's purpose is driven by the motivation of those who pass it. As aptly stated by Tussman and tenBroek, "[h]ostility, antagonism, prejudice—these surely can be predicated not of laws but of men; they are attitudes, states of mind, feelings, and they are qualities of law-makers, not of laws." Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 358 (1949). It is the bringing to bear of these biases on the passage of legislative acts that renders the legislation constitutionally infirm.

> Viewed in this light the prohibition against discriminatory legislation is a demand for purity of motive. It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility, or, alternatively, of favoritism, and partiality. The imposition of special burdens, the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the proscribed motives replace a concern for the public good as the 'purpose' of the law, there is a violation of the equal protection prohibition against discriminatory legislation.

Id. at 358–59. Accordingly, where "motivation" is affected by attitudes of "[h]ostility, antagonism, [and] prejudice," whether conscious or unconscious, then surely the law's "purpose" is equally tainted. *Id.* at 59.

382. "[This is] especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

383. *Id.* at 268 n.18.

384. *Id.*

385. Washington v. Davis, 426 U.S. 229, 253 (1976).

the affected community, and that courts will give officials the "benefit of the moral doubt" when proffered race neutral reasons for a decision.[386] "[A] judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect."[387] Theodore Eisenberg argues that the cost of motive-centered analysis includes the judicial invalidation of an otherwise beneficial law due to a mistaken attribution of illicit motive to the decision-maker.[388] Eisenberg also cautions that tensions between the legislative, judicial, and executive branches will increase as well, where the judiciary views its function as permitting subjective motive inquiry.[389]

Although there may indeed be cases where motive analysis results in too high a cost,[390] where official action involves the balancing, weighing or assessment at the administrative level of a number of factors, inquiry into subjective governmental motive, even to the point of testimony on the stand, becomes particularly appropriate if the outcome is discriminatory effect on a suspect class.[391] In *Batson v. Kentucky*,[392] the Court was willing not only to infer purposeful

386. Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164–65 (1978).

387. *Id.*

388. Theodore Eisenberg, *Reflections On A Unified Theory of Motive*, 15 SAN DIEGO L. REV. 1147, 1148 (1978).

389. *Id.*

390. *See, e.g., id.* at 1152. *But see* John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160–61 (1978) ("[A]nalysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right).").

391. The court historically has accorded less deference to administrative decisions where the application of a facially neutral law is undertaken in such a way as to reflect a clear pattern of racial discrimination, as for example, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo*, the Court struck down a San Francisco ordinance that prohibited operating a laundry in a wooden building without a permit from the Board of Supervisors. Where the ordinance was applied in such a way as to deny permits to all Chinese applicants, and to grant permits to all but one non-Chinese applicant, "whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration...with a mind so unequal and oppressive as to amount to a practical denial by the State of [equal protection]." *Id.* at 373. Cases decided subsequent to *Yick Wo* have reaffirmed the Court's recognition that the discriminatory application of a facially neutral law or regulation is equally prohibited by the Fourteenth Amendment." Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances...the denial of equal justice is still within the prohibition of the constitution." *Id.* at 373–74. *See also* Castenada v. Partida, 430 U.S. 482 (1977) (reflecting clear pattern of discrimination in jury selection process and permitting plaintiffs to establish prima facie case based on showing of disproportionate impact).

392. 476 U.S. 79 (1986). *Batson* involved a challenge to the prosecutor's use of peremptory challenges to exclude blacks from the jury venire. More significantly, *Batson* eviscerated the heart of *Swain v. Alabama*, 380 U.S. 202 (1965), which had only permitted

discrimination from the exclusion of blacks from juries, but did not hesitate to add "[w]hen circumstances suggest the need, [the trial court must] undertake a 'factual inquiry' that 'takes into account all possible explanatory factors' in the particular case."[393] Unquestionably, the inquiry is not an easy one. Justice Marshall, in a concurring opinion in *Batson*, expressed concern that the government official could lie as to his true motivation, or convince himself that his motives were legal.[394] Marshall also regarded the role that unconscious racism might play to be a significant danger.

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts".... Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice.[395]

In short, processes involving wide discretion in the balancing, prioritizing, or

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a challenge to a prosecutor's allegedly discriminatory use of peremptories where the defendant could show a systematic exclusion of blacks from numerous juries. *Batson*, 476 U.S. at 79. Justice Powell described *Swain* as "plac[ing] on defendants a crippling burden of proof" and rendering the prosecution's peremptory challenges "immune from constitutional scrutiny." *Batson*, 476 U.S. at 92–93. *Batson* allowed the defendant to challenge the prosecutor's exclusion of blacks from the jury venire in the defendant's specific case, based on prosecutorial conduct. "The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford 'protection against action of the State through its administrative officers in effecting the prohibited discrimination.'" *Id.* at 88 (quoting Norris v. Alabama, 294 U.S. 587, 589 (1935)).

393. *Batson*, 476 U.S. at 95. The Court in *Batson* explained the plaintiff's prima facie case as follows: 1) the defendant is a member of a racial group capable of being singled out for differential treatment; and 2) members of his race have been excluded from or substantially underrepresented on the venire; and 3) venire selected under practice providing opportunity for discrimination. *See id.* at 94–95 (citations omitted); *see also* Cassell v. Texas, 339 U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1947); Pierre v. Louisiana, 306 U.S. 354 (1939).

394. *See Batson*, 476 U.S. at 106. Although Justice Marshall believed that a trial court was "ill-equipped to second guess" facially neutral reasons given by government officials supporting their decision, Justice Powell, writing for the majority, stated "[w]e have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.* at 97.

395. *Id.* at 106. Justice Marshall argued that peremptories of both the prosecution and the defendant should be banned, contending that that would not be too great a price to pay in ensuring that the criminal justice system remained free from bias and prejudice against the accused. *But see* Tussman & tenBroek, *supra* note 381, at 361 ("The doctrine of discriminatory legislation—in essence a demand for purity or integrity of purpose or motive—though meaningful enough in many contexts is poorly adapted to the task of judicial review.").

application of criteria quite simply are entitled to the least judicial deference. Such processes permit the introduction of unconscious, covert discriminatory animus in application, regardless of the facial neutrality of the criteria employed and should be no less subject to the strictures of equal protection than conscious overt discriminatory animus.[396]

Environmental siting cases involve just such discretionary application by government officials of various criteria. The resulting decisions are discretionary by their nature and permit the introduction of bias and prejudice into the decision-making process either consciously or unconsciously. Where the result disadvantages a racial group, inquiry into the motivation or purpose of the official or decision-making body could bring to light biases and prejudices which may in fact have had an impact on the process and reflect an invidious purpose sufficient to satisfy *Washington* and *Arlington Heights*. As argued by Justice Marshall in his dissenting opinion in *Personnel Administrator of Massachusetts v. Feeney*,[397] and by Justice Powell in *Arlington Heights*, the inquiry is not whether the illicit motivation formed the sole basis for the decision, simply that it formed *a* basis.[398] A searching scrutiny of official motivation is not only key in ascertaining discriminatory intent but would not jeopardize the Court's interest in avoiding undue limits on legislative discretion and imposing costs only on blameworthy individuals.

B. Advocating an Expansion of Intent: Adoption of the Tort Concept of "Substantial Certainty" in Equal Protection Challenges to Environmental Siting Decisions

There is a synergy between the concept of intent for purposes of tort law[399] and the goals the Supreme Court has articulated in *Washington v. Davis*. The tort standard is a more appropriate standard against which intent should be measured, particularly in cases involving the application by government officials of racially neutral selection criteria, at the heart of hazardous waste site selection. The better approach recognizes not simply the creation of an inference of

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396. For example, a finding by a governing board that property values near site *A* would be less affected by a proposed landfill than property values near site *B* takes on a different meaning where the community surrounding site *A* is minority and site *B* is white.

397. 442 U.S. 256, 282 (1979).

398. Further, the implication in *Feeney* that, for the plaintiff to prevail, discrimination against women must have been the principal cause of the legislation's enactment is incompatible with the Court's prior explications of the role of discriminatory intent. In *Arlington Heights*, the Court acknowledged that legislatures were rarely motivated by a single concern. "Thus, the critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment." *Id.* at 282.

399. "One factor affecting the development of tort law is the moral aspect of the defendant's conduct—the moral guilt or blame to be attached in the eyes of society to the defendant's acts, motives, and state of mind.... Of course, if we say that all liability rests on 'fault' then the 'fault' must be 'legal' or 'social' fault, which may but does not necessarily coincide with personal immorality." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 21–22 (5th ed. 1984).

discriminatory intent, but rather allows for a presumption of such, where government action carries with it inevitable and foreseeable adverse consequences to a protected class.

Tort law incorporates the notion that a defendant has, by his or her wrongful act or omission, caused harm to the plaintiff. "The root idea of tort law is that the defendant must be...'at fault,' or 'culpable,' for liability to attach."[400] The concept of intent as it has developed in the law is grounded in the notion that a person "intends" the natural and probable consequences of his action.[401] Tort law, particularly, embraces this notion in evaluating intentional tort claims, looking to whether the actor acted with "purpose or design" or with "substantial certainty" that the result would occur. It is neither foreign to the law, nor to the courts, to impose fault-based liability upon a defendant whose conduct could be substantially certain to result in a given outcome.

Prosser breaks down this common sense concept as follows:

> (1) it is a *state of mind* (2) about *consequences* of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act.[402]

The *Restatement (Second) of Torts* further explains that where the actor has knowledge or substantial certainty that a given result will occur he or she will be "treated by the law as if he [or she] had in fact *desired* to produce the result."[403] This conception of intent thus pulls within its ambit actions that, regardless of

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400. Snow v. City of Columbia, 409 S.E.2d 797, 799 (S.C. Ct. App. 1992). The advent of intentional tort theory was in the late 1800s. Prior tort actions, brought in trespass, did not require an allegation of intentional harm for liability to attach. Rather, liability was strict and based on the fact that the injury had occurred. Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 448 (1990).

401. In American criminal jurisprudence, intent is required along with a guilty act. Intent is expressed in terms of *mens rea*, and the level of intent required for conviction differs, depending on the crime. One of these levels of intent is *knowingly*, which means that a person has the requisite intent when it is reasonably certain that his conduct will have a probable result and he is aware that his conduct will probably have that result. *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW 164–67 (15th Ed. 1993). In each area of the law, the search is for what the actor "meant."

402. KEETON ET AL., *supra* note 399, at 34 (emphasis in original).

403. RESTATEMENT (SECOND) OF TORTS, § 8A, cmt. b (1965) (emphasis added). An oft-cited case on what will satisfy the "intent" requirement is *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955). In *Garratt*, five-year-old Brian Dailey had pulled a chair out from under the plaintiff as she was in the process of sitting down on it. The trial court found for the defendant Brian finding that he had not intended to injure the plaintiff or to play a trick on her. The Washington Supreme Court remanded the case, holding that the appropriate standard for determining intent was not just whether Brian desired to cause the plaintiff to be injured, but whether he could know with "substantial certainty" of the consequences of his actions when he moved the chair. *Id.* at 1095.

subjective "good" or "bad" animus, are certain to produce harmful or "tortious" consequences.

Adoption of this constructive intent standard in equal protection cases serves several purposes. First, it ensures that the focus remains on "fault-based" conduct, clearly a concern of the *Washington* court. A governmental body would be held to have been "at fault" where the decision-making process (the application of facially race-neutral criteria) is one that carries with it the opportunity to discriminate, and where the application of such criteria virtually ensures a racially-biased result.[404] In such instances, "the result bespeaks discrimination,"[405] and the presumption of purposeful discrimination can be drawn because the government body charged with applying criteria would be presumed to "intend" the racially discriminatory result. Second, by focusing on the effect or consequences of an action, such a standard would reach conduct motivated by unconscious discriminatory animus. The purpose of the action would be determined by those natural and probable consequences that are substantially certain to occur. Where those consequences are to disadvantage a suspect class, and in fact such a disadvantage occurs, discriminatory animus would be presumed regardless of whether the animus was overt.

This notion of "natural and probable" consequences in the context of claims under the Fourteenth Amendment is not an unfamiliar one to the Supreme Court. However, its treatment in Supreme Court jurisprudence once again highlights not only the continued inconsistency in established equal protection dogma, but also the Court's unexplained insistence that intent for purposes of an equal protection claim must be defined and interpreted more narrowly than it is traditionally in the common law. In *Personnel Administrator of Massachusetts v. Feeney*,[406] Justice Stewart, writing for the majority, rejected claims by the appellee challenging a statutorily mandated veteran's hiring preference on the basis that the preference operated in such a way as to virtually exclude women from non-clerical civil service employment.

Troubling in the *Feeney* decision was the Court's insistence that the historical discrimination against women in the military in effect permitted the state of Massachusetts to enact policies that extended the discrimination of women to other areas by grounding the gender preference in the facially gender-neutral language of "veterans." The fact that a few women might qualify is insufficient to relieve the statute of its discriminatory character. Presumably the fact that a few blacks might have met the requirements of certain voting or literacy tests, and that some whites might not, did not prevent the Court from finding that such measures,

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404. Thus, the inquiry presumes invidious purpose based upon the certainty of the consequences without requiring review into individual subjective intent, although such evidence of course would be probative as well.

405. Hernandez v. Texas, 347 U.S. 475, 482 (1954). *See* Batson v. Kentucky, 476 U.S. 79 (1986).

406. 442 U.S. 256 (1979).

although facially neutral, could only have been enacted to ensure the continued disenfranchisement of blacks.[407]

Unquestionably, concessions made by the appellee that the Massachusetts legislation was not discriminatorily enacted were inconsistent with an argument that discriminatory purpose within *Washington v. Davis* had been satisfied.[408] It would seem, however, that if, as the Court concedes, the Massachusetts legislature necessarily knew that its statute created a gender-preference almost to the point of excluding all women from civil service jobs, arising as it did out of discrimination against women in the military, *and* that such consequences were intended, within its customary meaning in civil and criminal law, surely its purposes then must have included within it purpose to discriminate. Notwithstanding, under the Court's reasoning, even though the "enlistment policies of the Armed Services may well have discriminated on the basis of sex...the history of discrimination against women in the military is not on trial in this case."[409] Such a rationale allows an actor to perpetuate unequal treatment through neutral laws that incorporate underlying discriminatory policies and thereby in themselves result in discrimination, but escape constitutional scrutiny as "unintentional" within the meaning of *Washington v. Davis.*

The appellee in *Feeney* argued that there was a presumption that the legislature must have intended "the natural and foreseeable consequences" of its actions.[410] The Court conceded that the legislature surely had to be aware of the adverse consequences of the veterans' preference on non-veterans as well as the fact that most veterans were male. "It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended in the sense that they were not volitional or in the sense that they were not foreseeable."[411] The *Feeney* Court nonetheless insisted that a distinction existed between

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407. Admittedly, given the circumstances surrounding the institution of such devices, this may have been the only conclusion that could be reached.

408. Reviewing the history of veterans' preference statutes the Court noted that Massachusetts had consistently defined veteran status to include both male and female veterans, and that both the appellee and the District Court had conceded that the absolute preference created by the statute was not established for the purpose of discriminating against women. *Id.* at 275–76. In addition, the statute clearly served a legitimate purpose. The court acknowledged that because of military policy few women could achieve the status of veteran and accordingly, every veterans preference was "inherently gender-biased." *Id.* at 277. Nonetheless, the Court found the relevant distinction to be between veteran and non-veteran, not between men and women. *Id.* at 280.

409. *Feeney*, 442 U.S. at 278.

410. "Where a law's consequences are that inevitable, can they meaningfully be described as unintended?" *Id.*

411. *Id.* In a dissenting opinion, Justice Marshall, joined by Justice Blackman, disagreed with the majority's characterization of Massachusetts legislative history. "The legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations." *Id.* at 284 (Marshall, J. dissenting).

"discriminatory purpose" and volitional intent or awareness of consequences.[412] Justice Stewart expressed the relevant query as whether the legislation was enacted at least in part "because of" not just "in spite of" its discriminatory impact.[413] Language in the opinion suggests that the Court summarily rejected the notion of discriminatory intent derived from the foreseeability of adverse consequences. Yet, upon closer scrutiny, *Feeney* permits the creation of an *inference* of discriminatory intent where the foreseeable consequences are adverse to an identifiable class. The consequences are presumably to be weighed together with other evidence of discriminatory intent offered by the plaintiff, an action consistent with *Arlington Heights*.[414]

Lower courts addressing challenges to disparities in the provision of municipal services in fact have interpreted *Arlington Heights* to include consideration of whether the foreseeable outcome resulted in a deprivation on the minority community.[415] Accordingly, the court in *Baker v. City of Kissimmee* stated: "[t]hus, 'actions having a foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose,' and adherence to a challenged action with full knowledge of the predictable effects is one factor, among others, which may be considered in determining purpose."[416] This Article contends that the appropriate inquiry is not just whether adverse consequences are foreseeable, creating an inference merely "probative" to the question of discriminatory intent,[417] but whether the disadvantaging or deprivation of a minority community is "substantially certain." Where such an outcome is substantially certain, and in fact occurs, a presumption of invidious purpose arises that is sufficient to shift the burden to the government.

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412. *Id.* at 279.

413. *Id.* The distinctions by the *Feeney* Court in assessing "discriminatory intent" derived from a comparison of conduct "because of" as opposed to actions taken "in spite of" discriminatory impact lack real substance. The "because of" versus "in spite of" dichotomy articulated by the *Feeney* Court could equally be viewed as the adoption of a policy or practice "because" it *favors* a preferred class over a non-preferred class. It is difficult to fathom how such favoritism becomes any more constitutionally sound solely through its interpretation as favoritism towards a preferred class rather than bias against a non-favored class. The adverse consequences remain the same under either characterization.

414. "When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when as here the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof." *Id* at 279.

415. *See* Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla 1986). It is entirely possible that had the courts in *Bean* and *R.I.S.E.* at a minimum included knowledge of the predictable effects of their decision as a factor to be considered in their inquiry into whether the plaintiffs had shown invidious purpose, as in *City of Kissimmee*, the balance might have shifted in favor of the plaintiffs.

416. *Baker*, 645 F. Supp. at 587.

417. Under *Arlington Heights*, forseeability is simply one of the factors to be considered. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp. 429 U.S. 252, 266 (1977).

In claims asserting environmental racism in hazardous waste siting decisions, this standard can assist in overcoming the difficulty presented by a lack of adequate statistical evidence on a site by site basis. Hazardous and municipal waste siting decisions are virtually always made at the local level, by municipal and county boards and commissions. Despite the efforts of environmental justice advocates, environmental policymakers implicitly accept that waste, whether residential or industrial, must be placed somewhere. Such a "pragmatic environmental choice" typically involves a weighing process of any number of factors, many of which appear racially neutral. Factors that weigh prominently in site selection include: (1) the geological suitability of the proposed site; (2) area property values; (3) low population densities; (4) proximity to industry facilities and transportation systems and other land use considerations; and (5) whether the population is one which is historically politically disenfranchised with limited resources to oppose a siting decision. As sociological data and studies have indicated, historical discrimination—in housing, employment, zoning, and education—has concentrated minority communities in areas with low property values, close to industry and transportation systems, and has resulted in lower levels of home ownership for minorities than white communities. Thus many facially race-neutral site selection criteria in fact are not.[418] Accordingly, adoption and application of such criteria can in many instances carry not just the possibility but rather the "substantial certainty" of placement of hazardous waste facilities in minority communities; thus, the governmental decision-maker will have "intended" such a one-sided, or discriminatory outcome.[419] Governmental bodies cannot be permitted to ignore existing data reflecting the effects of historical discrimination,

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418. *See, e.g.*, United States v. Fordice, 505 U.S. 717, 719 (1992) (facially neutral law in fact was not neutral in light of historical discrimination). "[T]here may still be state action that is traceable to the state's prior de jure segregation and that continues to foster segregation." *Id.* at 729.

419. A similar approach seems to have been taken by the Court in the venire cases. In *Batson*, for example, the Court held that proof of systematic exclusion raised an inference of purposeful discrimination, and proof of underrepresentation combined with a practice that afforded the opportunity to discriminate would satisfy the requisite "purposeful discrimination" under *Washington v. Davis*. Batson v. Kentucky, 476 U.S. 79, 94–95 (1986). "This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse." *Id.* By asserting that the Court was unwilling to attribute the absence of blacks on juries to chance, Justice Powell in *Batson* was effectively saying that the prosecutor knew, with substantial certainty, that the natural and probable results of his exercise of his peremptory challenges would be the exclusion of blacks from the jury. Decisions such as *Batson*, among others, implicitly expand intent to include "substantial certainty" where the process through which a decision is made allows subjective discrimination, whether consciously or unconsciously. *See also* Yick Wo v. Hopkins, 118 U.S., 356, 362 (1886). Although in *Yick Wo* the plaintiffs introduced evidence of a pattern of discrimination, the Supreme Court in *Batson* specifically rejected any requirement that the plaintiff prove a "pattern of official racial discrimination" in order to prove a violation of equal protection. *Batson*, 476 U.S. at 95.

whether or not government-sponsored, where it is that very discrimination that has laid the foundation for current inequalities to continue.[420]

Certainly the siting process itself necessarily carries with it the opportunity for discriminatory application and the introduction of prejudices, conscious and unconscious, into the decision-making.[421] Where a plaintiff can show 1) that he or she is a member of a racial group capable of being singled out for differential treatment; 2) that a siting decision resulted in the disadvantaging of that racial group; and 3) that the siting procedure is one that allows "those to discriminate who are of a mind to discriminate,"[422] using siting criteria which correlate to socio-economic and demographic characteristics of minority communities, then purposeful discrimination should be presumed and the burden placed on the government to demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result."[423] To lighten an environmental plaintiff's burden in this manner is neither inconsistent with prior Supreme Court precedent in the equal protection arena,[424] nor an expansion of the concept of intent that demands the abandonment of the *Washington v. Davis* standard, however misplaced such a standard may be.

This expansion of the intent standard in cases involving a high degree of official discretion in criteria application in no way suggests that a waste disposal facility can never be sited in a minority community. A decision-maker's discretion is not unduly restricted, clearly a concern of the *Washington* Court, and the presumption created is rebuttable. There will undoubtedly be a number of

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420. *See* Northern, *supra* note 185, at 587 (arguing that in proving the tort of environmental racism, "evidence that the decision to site the facility was based...upon a recognition that minority citizens tend to have less political or economic influence...or are less organized within a given city or state...may be probative of the requisite intent").

421. In terms of the introduction of prejudices, T. Alexander Aleinikoff notes:

> Social science research suggests that stereotypes serve as powerful heuristics, supplying explanations for events even when evidence supporting nonstereotypical explanations exists.... Because cognitive racial categories predispose us to select information that conforms to existing categories and to process information in such a way that it will fit into those categories, they are self-justifying and self-reinforcing. And because we adopt racial categories more through a process of cultural absorption then rational construction, we are likely to be unaware of the role that categories play in the way we perceive the world.

T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUMBIA L. REV. 1060, 1067–68 (1991).

422. *Batson*, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

423. Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

424. The plaintiff is not required to show evidence of disparate impact from which the court should infer intentional discrimination; rather, the plaintiff shows that the decision-maker knew that the factors he or she employed in conducting the siting decision were substantially certain to result in a siting that burdened a minority community and that did in fact burden such a community. Thus, the intent required to violate equal protection can be inferred from one siting alone rather than a number of sitings that would be required under an inference drawn from disparate impact analysis.

circumstances in which the decision-making body can demonstrate that the adverse impact is a result of truly neutral selection criteria and procedures. One such example is where viable non-minority sites were considered but rejected for geological (that is, non-sociological) reasons, such as their proximity to a salt formation, water table, or mine.[425] Alternatively, the government could demonstrate that its siting process specifically considers community characteristics, such as the presence of existing hazardous facilities in the target communities, in an effort to insure that environmental burdens are equitably borne.[426] The siting process could also require the appropriate governmental decision-maker to undertake a NEPA-like inquiry, examining the likely impact of the site upon the community, including the health, environmental, scenic, historical, or recreational aspects of an area, and limiting political influences in the decision-making process. Simply including private citizens and community representatives from potentially affected areas in the planning and approval process might assist in reconciling competing interests in hazardous waste facility siting, shifting the focus from non-neutral criteria, and insuring that community interests and equities are not ignored.

Expanding intent to include the idea that a person intends that which he or she can be "substantially certain" will occur simply subjects to closer scrutiny waste-siting decisions placing hazardous facilities in minority communities that rely for their validity on criteria which, due to the effects of historical discrimination, consistently correlate with socioeconomic, demographic, and political characteristics of minority communities.[427] This expanded notion of intent further accepts as a premise that racism manifests in unconscious as well as conscious forms, and refuses to permit governing officials to dismiss discriminatory outcomes as an unfortunate result of a neutral process, occurring "in spite of" harmful effects where the process by its nature relies on non-neutral

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425. Nor is the government precluded from showing, for example, that cost is an overriding consideration, supporting its use of low-cost land as a criterion, where the government is able to support its argument by proof that cost consistently drives or overrides other factors in its overall decision-making. The consistent focus on cost considerations by a decision-making body would be probative that the use of low-cost land as a criteria in siting decisions was not just pre-textual.

426. It is arguably possible that a governmental decisionmaking body's consideration of the racial characteristics of targeted communities could be appropriate where the effort by the government was to insure that the risks and hazards of waste facilities were equitably distributed. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 246 (1976)

> [W]e think the District Court correctly held that the affirmative efforts [to] recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race....

In contrast to *Croson*, *Adarand*, and *Wygant*, the government would not be imposing a quota or creating a "preference," but rather affirmatively attempting to insure, to the extent possible, equal distribution of environmental burdens.

427. I in no way suggest either that all minority communities are low income or close to industrial areas. Nor do I suggest the converse, that no white communities possess similar socio-economic and demographic characteristics.

criteria.[428] But the burden should rest where it belongs. When, through the exercise of subjective discretion, government policies and practices result in discrimination against a racial minority, those practices must be carefully scrutinized. Proof of adverse impact combined with a practice that not only affords the opportunity to discriminate, but also relies for its validity on criteria that in application are simply "euphemisms" for a racial group clearly satisfies Supreme Court precedential requirements of "purposeful discrimination." Such "tacit" or "implicit" or "derivative" government-sanctioned discrimination is no less racist under its veneer of neutrality.

IX. CONCLUSION

Race-based discrimination pervades throughout most if not all aspects of American life. Disparities in the environmental arena simply add to the litany of burdens faced by minorities in this country. Federal statutory law in its unrelenting focus on pollutants has been unresponsive in addressing the social consequences of modern pollution practices. This legislative failure has facilitated the ease with which discrimination can flourish unchecked.

The prevalence of environmental disparities in the siting of hazardous waste facilities across the country lays a foundation for suspicion of racism at work in individual siting cases. It is imperative that the judiciary recognize that traditional notions of racist conduct must be discarded in light of societal changes. Concurrently, conceptions of discriminatory intent for constitutional inquiry must be expanded to bring unconscious, but no less discriminatory, motivations within its ambit. The transition of racism from overt to covert and unconscious forms does not mean that racism has disappeared; it simply means that there is no longer the clear, unequivocal legislatively structured inequality found during the post-*Plessy* era. The Equal Protection Clause can and should provide a remedy not only in cases of clear discriminatory animus, but also in those cases where siting decisions reflect the incorporation of discriminatory stereotypes or beliefs through the application of facially neutral selection criteria. Discriminatory animus is no less discriminatory because it is hidden.

The assimilation of environmental racism into the broader, more socially accepted framework of environmental justice suggests a form of mental arson clearly rejected by the Supreme Court in virtually every other Fourteenth Amendment case of moment. The pure survival of neutral principles, for their own sake, is truly one of the strangest intellectual stopping points that one man has ever proposed to another.

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428. It also acknowledges that while every localized siting decision may not be racially based, the consistent correlation across the country of hazardous facility location and minority communities reflects that some form of discrimination must necessarily be at work.