

## **An Ounce Of Preemption Is Worth A Pound Of Cure: State Preemption Of Local Siting Authority As Means For Achieving Environmental Equity**

**By Tessa Meyer Santiago**

### **I. INTRODUCTION**

Between 1920 and the late 70's, the all white city council in Houston (a city with no zoning laws), sites eight out of every ten solid waste sites in black neighborhoods even though blacks comprised no more than twenty five percent of the city's population at any one time.[1] In 1983, the government officially realizes that three out of four hazardous waste off-site landfills in one Environmental Protection Agencies Region are situated in majority black communities.[2] The dirtiest zip code in California belongs to a mostly black and Latino neighborhood.[3] Over seventy one percent of blacks and fifty percent of Latinos in the Los Angeles basin live in the areas with the most polluted air. Only thirty four percent of the white population do.[4] The Louisiana Energy Services proposes the nation first privately owned uranium enrichment plant be built in Claiborne Parish, Louisiana. The plant would be located within a mile and a quarter from two mostly black communities where the per capita earning is only \$5,800 a year and the black population is two and a half times greater than the Louisiana average.[5]

A meeting to decide the expansion of a toxic waste dump situated just eight miles west of tiny Buttonwillow, California (population fifty percent Latino who work on farms and in the oil fields) is attended mostly by white people in suits; only three Latinos are in attendance. The suits will decide to double the size of the dump, making it the largest capacity in the United States, and will increase the dump's intake from just petroleum waste to more than 450 types of highly toxic substances.[6]

### **Defining Environmental Racism**

The above are just several examples of what appear to be environmental racism. It would of course be entirely possible to explain many of these siting decisions on neutral criteria: cheap land values, the porosity of the soil, character of surrounding industry etc. However, the existence of neutral criteria does not mean there is no de facto discrimination. Racism undoubtedly plays some role in many of these siting decisions. Exactly what form that racism takes is questionable.

Some environmental justice advocates believe active racism on the part of decision-making administrators is the catalyst for siting locally undesirable land uses (LULUs) such as hazardous waste facilities, solid waste disposal systems, and contaminating industrial sites, in minority communities. Representative of these advocates, Robert Bullard believes that minority neighborhoods are deliberately chosen as "sacrifice zones" for the general populace at large.[7] If that were the case, equal protection plaintiffs would have little trouble proving discriminatory intent.

More common is an unconscious racism that pervades much of American decisionmaking. To identify and rectify this official apathy towards communities of color we must focus on outcomes. Consequently, environmental racism occurs when administrative decisions have a disparate impact on communities of color. The United Church of Christ study defined environmental racism to include both intentional and unintentional decisions that cause minority communities to bear a disproportionate burden of environmental hazards.[8] This disproportionate burden can be caused by government action or inaction.[9] Either way, it is still environmental racism.

I'll define environmental racism the second way but with a broader scope: if the siting decision requires a community to bear a burden disproportionate to the immediate benefit the immediate community

reaps, then the act is discriminatory. Even when a decision is made solely on economic conditions, but impacts a community disparately, that decision still discriminates. Notice, I have eliminated the mention of race altogether in my definition.[10] Proving racist intent, Part II of this essay will show, is almost impossible under current environmental jurisprudence. It is hard to figure out exactly what factor race plays in most siting decision. Even the lowest evidentiary burden-proving a racially-based, unjustifiable disparate impact-is a high litigation standard requiring statistical analysis of similarly situated but differently raced communities.

Remedying only racially motivated discrimination also unnecessarily limits the scope of this remedy. Poverty is probably the most constant characteristic of environmentally burdened communities and yet the law provides no relief. True advocates of environmental justice should recognize that whenever any community is required to bear a disproportionate burden of a state's environmental hazards discrimination is at work. It might be discrimination based on income level, race, and religious preference or lifestyle choices. Whatever the motivating factor, if that community is forced to bear a disproportionate burden because of its defining characteristic, it's environmental discrimination. A focus on environmental discrimination will implicitly protect race and poverty without making those factors part of the claim. Identifying and targeting disproportionate burdens also counteracts a facially neutral system of decisionmaking that is in fact loaded with political and economic inequalities.

To remedy the perceived disproportionality, people have sued to prevent the siting of LULUs, formulated legal theories that promise more favorable outcomes to environmental plaintiffs, and suggested changes in the site selection procedures.[11] However, when environmentally harmful facilities are proposed for disadvantaged communities, most notably communities of color, it is unclear whether our legal system can actually produce an equitable result.[12]

Once a claim comes to trial, too many factors weigh against a plaintiff's verdict in court. Consider the presumption of administrative good faith, the plaintiff's burden of proof, the sophisticated and complex evidence required to meet that burden, and the justifiable discriminatory reason that pardons the defendant's decision. Recent cases and judicial approaches seem to indicate that the results will virtually always discriminate.[13]

Reworking judicial remedies to give plaintiffs a fighting chance in court seems a little too late. Significant momentum gathers when a deep pocketed, heavily vested interest begins negotiations with local decisionmaking bodies. By the time rather naïve, politically inexperienced neighbors take notice and can create an effective response, the cards are stacked against them. The odds of favorable decision do not increase upon the plaintiff's appeal for relief. Environmental justice jurisprudence is still in its infancy and current constitutional burdens of proof are too high for environmental plaintiffs to win on the merits. Pleas for intervening relief are almost always denied.

In response to the lean of the judicial system, I propose a remedy that slants the other way, a remedy based on the central premise of equal environmental protection for all neighborhoods.[14] This remedy starts at the root of the discriminatory siting practices: the local land use board. At the heart of discriminatory siting practices is a longstanding refusal (deliberate, indifferent or unconscious) of local land use boards to treat all neighborhoods with equal respect and decency. White neighborhoods are valued over those neighborhoods of color. Industry, commercial uses and LULU are placed in area of less value, most often neighborhoods of color.

To remove as much of the rotten root of environmental racism as possible, I propose a state regulatory scheme with the single mandate to ensure that all communities within the state or region bear their fair share obligation of environmental burdens. The goal is environmental equity.

Precedent exists for such a legislative action. A similar federal land use plan was proposed in the early 1970s and almost passed both the House and the Senate. Federal preemption of local land use authority is common where the risk to public health is high. Some states already preempt local land use authority in order to carry out those high-risk federal regulations. This remedy merely limits local authority when the socioeconomic risks are high i.e., those siting decisions that may disparately impact minority areas thereby creating segregative effects and causing rapid neighborhood decline. Using existing zoning

and land use law, this state board would ensure that the minimum protections afforded white neighborhoods are extended to all neighborhoods throughout the region or state.

Part I of this essay has provided examples, a working definition of environmental discrimination and introduced the proposed remedy. Part II will show why the plaintiff seldom meets the burden of proof in environmental justice cases. I will discuss the judicial remedies of the equal protection clause of the Fourteenth Amendment, and Title VI and VIII of the Civil Rights Act. I will also examine the inability of the National Environmental Protection Act (NEPA) and the Resource Conservation and Recovery Act (RCRA) to consider socioeconomic impacts during the permitting process. Part III examines two remedies suggested by environmental justice advocates Popovic and Dubin: recognizing a right to a healthful environment and granting a right to the protective zoning of minority neighborhoods. I believe these remedies fall short by providing just another cause of action with which a plaintiff can present her case. However, recognizing the right of all people to enjoy a similar standard of environmental protection and recognizing the significant role zoning law can play in ensuring that protection is a good place to start. Part IV presents the state regulatory scheme, including a discussion of all relevant threshold standards, burdens of proof, siting procedures, standards of review etc. I will show through the use of precedent that this idea is merely an extension of practices already in place in other areas of the law.

## **II. PLAINTIFF'S BURDENS UNDER THE CURRENT JUDICIAL REMEDIES**

### **The Equal Protection Clause: Trying to find the smoking gun**

Plaintiffs bringing an equal protection<sup>[15]</sup> claim must find the smoking gun of discriminatory intent. The Supreme Court has established the elements of an equal protection claim: First, only state and local government actions which are either discriminatory on their face or which back private action are subject to equal protection scrutiny.<sup>[16]</sup> Second, the government action must be invidiously discriminatory i.e. it must treat people who are similarly situated differently without justification.<sup>[17]</sup> Lastly, an equal protection claim must prove actual intent to discriminate.<sup>[18]</sup> The mere disparate impact of an otherwise neutral statute or regulation is not sufficient to show intent to discriminate.<sup>[19]</sup>

Most equal protection environmental plaintiffs fail to prove discriminatory intent.<sup>[20]</sup> Courts will not consider the part facilities play in negatively impacting a neighborhood and decline to find discriminatory intent when neighborhoods were not minority at the time of the original siting.<sup>[21]</sup> Courts will also not consider the cumulative effect of facilities sited by different agencies.<sup>[22]</sup> Courts decline to find discriminatory intent absent "a clear pattern, unexplainable on grounds other than race"<sup>[23]</sup> and the use of race-neutral criteria prevents the creation of a clear pattern.<sup>[24]</sup>

Unless a plaintiff can find actual intent to discriminate in a siting decision, she will have no success under the equal protection clause. This task is even more difficult when defendants must meet only the rational basis test. Race-neutral factors can mask racist motive and serve as a separate and equal basis for the siting of an environmentally affecting land use in a minority neighborhood.

### **Title VIII: Keeping a complete factual record**

Title VIII, or the Fair Housing Act<sup>[25]</sup>, has been described by Ralph Santiago Abascal as the most the civil rights "statute with perhaps the broadest reach" for environmental justice purposes.<sup>[26]</sup> Two provisions of Title VIII are worth examining. Forty two U.S.C §3604(b) makes it unlawful to discriminate against any person "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of service or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." Forty two U.S.C. §3617 makes it unlawful to threaten, coerce, intimidate, or interfere with anybody's exercise or enjoyment any right granted or protected by Section 3604 of Title VIII.

In land use decisions, Title VIII might be implicated if a community can support their claim that a rezoning that allows inappropriate uses in residential communities are closely related to the "provision

of services or facilities" for sale or rental of housing.[27] Once the nexus to housing is proven, the plaintiff must then prove the segregative effect. Crawford found that as of 1999, no land use cases had been successfully decided using Title VIII.[28] In my research, I have not been able to find any cases from 1999 onward. Abascal himself suggested using a Title VIII claim in the Buttonwillow situation. His claim asserted that the expansion of the dump would result in increased segregation of Buttonwillow.[29] Such a segregative effect violated the FHA. Ruling on a series of motions, the judge assigned to the case dismissed the Title VIII claim.[30]

The drawback is that Title VIII actions are designed to work when plaintiffs can show actual harm to a particular piece of property.[31] Plaintiffs who wish to show that a proposed action may result in harm to a community will not be able to use Title VIII because a successful claim depends upon a full record with specific showing of damage to a particular piece of property. Additionally courts have interpreted the prohibition against using threats, coercion or intimidation to actually require a physical act designed to threaten the person.

Procedurally, the plaintiff must bring suit within a relatively short two years.[32] The claim must be filed within one year of the discriminatory housing practice.[33] Such a relatively rapid response using a new environmental justice theory is unlikely given the political and socio-economic realities of most affected neighborhoods. The Buttonwillow residents only used the Title VIII claim because Luke Cole had intervened on their behalf to represent them. Not many local residents are able to retain one of the leading advocates for environmental justice to represent them in court.

#### **Title VI: Overcoming the justification of race-neutral criteria**

The purpose of Title VI of the Civil Rights Act[34] is to combat discrimination by entities receiving federal funds, and to provide citizens with effective protection against discrimination.[35] Those people who belong to a protected class and who have been harmed by a discriminatory action funded by the federal government may bring a claim. Typically Title VI environmental cases are brought against state and local government agencies that approve the permit rather than against the private permit applicant.[36] They may bring Section 601 or Section 602 claims.

Section 601 plaintiffs must prove discriminatory intent just like plaintiffs filing an equal protection claim.[37] A plaintiff bringing a Section 602 claim[38] need only prove disparate impact because "discrimination is barred which has that effect even though no purposeful design is present." [39] A 602 plaintiff must prove that the proposed project or action will have a disparate impact on a minority community.[40] A showing of circumstances that raise an inference of discriminatory impact is not sufficient; the plaintiff must prove discriminatory effect.[41] Once that disparate impact is shown, the burden of proof switches to the government agency to show a "substantial, legitimate justification"[42] or a "legitimate, nondiscriminatory reason"[43] for the siting decision. Only unjustified disparate impacts are prohibited.[44] Recent Title VI cases suggest that courts will allow as justification concerns such as safety or efficiency, significant cost savings, and the unavailability of physically suitable alternative sites.[45]

Once a defendant has presented a legitimate reason, the plaintiff may then prove that the defendant's reason is either pretext or that the defendant failed to adopt an alternative practice or location that would have been less discriminatory and still been able to accomplish the agency's purpose. These alternative locations must be either equally effective or comparably effective, depending upon the jurisdiction.[46]

There are several quite high hurdles for Section 602 plaintiffs to clear. Depending on the jurisdiction, they may not have standing to bring their claims. Standing has been denied to Title VI plaintiffs under the intended beneficiary doctrine.[47] Even after the Court's ruling in *National Credit Union Administration v. First National Bank & Trust Co.*,[48] standing still has not been resolved. In *Seif v. Chester Residents Concerned for Quality Living*,[49] the Supreme Court vacated a Third Circuit decision[50] to recognize standing to bring a private claim under Section 602. Relying on the Supreme Court dismissal of *Seif v. Chester*, the court in *New York City Environmental Alliance v. Giuliani* declined to find an implied private right of action under 602 regulations.[51] It denied the plaintiffs'

request for an injunction to bar the city from selling off community gardens as sites for housing developments because, lacking a private right of action, the plaintiff was not likely to succeed on the merits.

It is not clear then whether agency regulations spurred by Section 602 actually create a private right of action for individuals to file suit in federal courts. Perhaps what is allowed is a complaint filed with the administrative agency that promulgated the regulation. That complaint would be subject to the very limited judicial review of the agency's administrative decision.[52]

Under this review, the EPA will normally not find a Title VI violation when a facility meets requisite health standards. To the EPA, a properly functioning facility equally protects all those it affects and will not be enjoined under a civil rights claim.[53] Perhaps the only bright spot in the administrative review is the lengthy time process involved. EPA's footdragging adds considerable cost to the project and, if the EPA delays too long, the permit application might withdraw their petition and locate elsewhere.[54] For a persistent applicant, the delay in consideration does not necessarily mean a denial of the permit.

With regards to the burden of proof, Title VI plaintiffs must be able to point with specificity to acts, dates, and decisions that prove discriminatory intent. Alternatively, they must also be able to show with specificity (ideally through statistical comparison of relevant data) a discriminatory effect caused by the siting decision.[55]

Even if plaintiffs present a prima facie case, their claim might be time-barred. Courts require plaintiffs under Title VI to file suit within the statutory period that runs from the date of the first civil rights violation or the latest date at which the plaintiff could have been made aware of the harm. Plaintiffs who wait until the intended project is in the final approval stage[56] or completed[57] will lose their claims under Title VI, even if bringing the claim earlier means they lack sufficient proof.

The most crucial problem with a Title VI complaint is that the definition of disparate impact, affected population, cumulative burden, mitigation and justification has not been clearly laid out. Thus the plaintiff's burden of proof is subject to some judicial interpretation. A consistent result is not possible.

### **Federal Regulations: proving discriminatory effect without assessing the human component of "human environment"**

The federal regulations currently available to environmental plaintiffs do not offer much in the way of hope for a verdict as they preclude the mandatory assessment of socioeconomic impacts. While there are many statutes under which a plaintiff can bring a claim,[58] I'll focus on the two main statutes: The National Environmental Policy Act (NEPA) and the Resource Recovery and Conservation Act (RCRA). Neither statute must take into account socioeconomic impacts of proposed facilities nor allow for an EIS or equivalent review on socioeconomic impact only.

NEPA applies only to major federal actions that may have a significant effect on the quality of the human environment.[59] These limitations thus exclude all siting decisions made by state agencies and private industry, all federal actions that are not major or that have an insignificant i.e., local, effect on the human environment.[60] Most significantly, human environment is analyzed mostly under technical factors. CEQ regulations define the "human environment" as including not only "the natural and physical environment" but also the relationship of people to the environment.[61] However, socioeconomic effects alone cannot trigger an EIS. NEPA is triggered only when impacts on the physical environment are the primary effects stemming from the federal action.[62] So, if a facility would have a major impact on a local Hispanic community but would operate within technical compliance of environmental standards, those Hispanic neighbors would have no cause of action under NEPA because sociological factors alone will not trigger an EIS review.

A major complaint with NEPA is that the review process is triggered too late in the planning process to be effective.[63] By the time the EIS process is started, significant planning is complete and the report notes, alternatives and strategic choices are foreclosed.[64] Additionally, the public comment period

has been described as a way for administrators to take "a crude preference tally" of the public's desire for such a facility, rather than a way for meaningful deliberation.[65] Even the EPA has acknowledged that many Title VI administrative complaints would have been avoided through the early, meaningful involvement of affected communities in the permitting process. Of particular interest is the fact that this earlier public comment will serve, according to the EPA, to fairly treat affected communities with regards to their "quality of environment and public health." [66]

RCRA was the federal government's first comprehensive legislation regarding waste management.[67] Through RCRA, Congress intended to provide a broad plan for the resolution of the nation's problems with hazardous and non-hazardous waste such that wastes are managed in "a manner, which protects human health and the environment." [68] The plan also contains a provision allowing for citizen suits.[69] Under RCRA, location of the waste sites and permitting is delegated to state environmental agencies.[70]

RCRA's environmental review process is different from that under NEPA. RCRA is essentially a permitting process. Applicants filing under RCRA must show that their waste facility meets the RCRA standard for environmental impact-proximity to floodplain, coastal waters, ground and surface waters etc. Unlike NEPA, a RCRA permit application does not require the government to assess socioeconomic factors and impacts. RCRA also does not require the consideration of alternate site or mitigating measures.

President Clinton's Executive Order [71] does expand the environmental assessment of RCRA and now the Agency, may in its discretion, focus on the health and environmental impacts of a vulnerable community.[72] If such deleterious impacts are bound to occur, the agency may issue the permit on the condition that steps are taken to avoid those impacts altogether.[73] If measures could not be taken to ensure against those negative impacts, the permit could be denied altogether.[74]

This ability to take into account socioeconomic factors under RCRA is limited. The EPA does not have the power to "redress impacts that are unrelated or only tenuously related to human health and the environment." [75] The scope of studies to determine effects is also limited to "the highly technical judgement" of the probable dispersion rate of pollutants through the neighboring community.[76] The Agency could not reject a RCRA permit "based solely up on the alleged social and economic impacts upon the community" if those concerns were unrelated to an environmental impact.[77] If an applicant meets the technical requirements, the permitting Agency must issue the permit "regardless of the racial or socioeconomic composition of the surrounding community" and "regardless of the economic effect of the facility on the surrounding community." [78]

This kind of judicial scrutiny does not offer much hope to the environmental plaintiff. I suppose it would be possible to rework the federal regulations to mandate a Racial Impact Statement for each significant action. However, this still would affect only those federal actions significant enough to be considered major. Private industry and state actions remain unaffected by reworking federal regulations like NEPA and RCRA. One could also broaden the scope of NEPA to include all actions taken by any authority that may significantly impact the environment. Such federal involvement in traditionally local land use decisionmaking is unprecedented. Most federal preemption occurs in those areas where the health risk associated with a particular industry is high and immediate if procedures are not strictly followed, e.g., nuclear waste and toxic waste. Even regulations promulgated to clean up the environment depend heavily on state implementation, e.g. The Clean Air Act, the Clean Water Act.

## **Critique**

Challenges under environmental laws, particularly under NEPA, are only procedural hurdles for the defendant to correctly jump over.[79] A plaintiff can only enforce compliance with the procedure. There are no substantive standards regarding siting and the concentration of environmentally harmful land uses.[80] RCRA does have siting standards and will consider geological factors and population density but will not consider socioeconomic impacts and burdens.

As shown, judicial remedies have not been favorable to environmental plaintiffs. The remedy with the

most potential, Title VI, is still in its infancy. Courts do not have an effective disparate impact jurisprudence that can offer consistent results to Title VI plaintiffs. Siting decisions are fraught with complexities: social, racial, geographic, economic, socio-economic, environmental and political. Courts still need to decide whether and how any of these factors will be considered.[81]

Under the judicial remedies, the burden of proof rests initially with the plaintiff. Administrative decisions are presumed to be nondiscriminatory in intent and effect. The plaintiff must produce enough evidence of, at the very minimum, an unjustifiable discriminatory effect. Such statistics are hard to come by, especially for citizen groups in the early stages of a project. These plaintiffs will most certainly lose any request for an injunction, as they are not likely to win on the merits.

With all judicial remedies, the standard of review is too low to actually allow a plaintiff a favorable verdict. The rational basis test favors the defendant in any siting claim. A rational, race-neutral decision defeats a claim of discriminatory intent.[82] Strict scrutiny would be a more favorable standard. But many neighborhoods in which sites are located are more predominantly poor than a particular minority group. The only way to trigger strict scrutiny under the current constitutional jurisprudence is to add poverty as a suspect class.[83] Almost all other discriminatory intent can be diluted by the use of zip codes as units of calibration rather than traditional neighborhoods, or by the use of strictly economic factors such as land value and soil porosity.[84]

The timing of the judicial remedy is Johnny come lately. Most plaintiffs can only bring a cause of action when a harm has already been suffered i.e., the permit has already been granted or the construction has already begun. Worsham suggests taking action early in the permitting authority and permittee's decisionmaking process, so as to influence the parameters of alternatives considered.[85] However, rallying neighborhood groups takes time and often experience. Such an early intervention is probably not going to happen, particularly in neighborhoods that are traditionally excluded from the political process.

Lastly, and perhaps at the root of most plaintiff's failure to even meet the evidentiary threshold, is the gap in the current law. The greatest challenge is the disconnect between the laws designed to protect the environment and the civil rights laws designed to rectify overt racial discrimination. Neither body of law is designed to prevent the kinds of racist decisionmaking that permeates decisionmaking bodies from the federal to the local level. Most discriminatory siting decisions are not made with overtly racist intent. However, because the political and social system as currently designed and operating marginalizes communities of color and keeps most pluralistic voices out of the decisionmaking process, siting decisions can be approved on supposedly neutral criteria but still have a racist effect.[86] This systematized racism is just as dangerous as racism with specific intent.[87]

### **III. EXISTING PROPOSALS**

Two proposals provide solid foundation from which to create a remedy for environmental discrimination.

Neil Popovic, an attorney with the Sierra Club Legal Defense Fund, suggests creating a private right of action granted under a state constitution for a violation of human rights stemming from environmental discrimination.[88] He cites as precedent the Draft Declaration of Principles of Human Rights and the Environment, and wishes to use this international law to create state legislation that would recognize a right to a healthy environment.[89]

Some state constitutions already recognize a right to a healthful environment.[90] Other states include policy statements in favor of environmental protection or at least make a reference to the need for natural resources and environmental protection.[91] However, the statutory language does not grant a right of citizen enforcement nor a claim for environmental discrimination.[92] If a right of enforcement is mentioned, its contents are not clearly defined.[93] Some states prefer to allow government enforcement rather than citizen action.[94]

Popovic argues that a healthful and healthy environment is not an expansion of human rights as

presently defined but instead is part of the full spectrum of human rights.[95] But U.S. courts have been reluctant to recognize the right to a healthy environment. In *MacNamara v. County Council of Sussex County*,[96] adjacent property owners protested the rezoning of land for an electric power station. They claimed the excessive noise to which the rezoning made them subject violated due process.[97] The court found that while the plaintiffs did have valid health concerns, these did not violate a constitutionally protected interest. The right to a healthful environment was not protected by the Constitution and thus could not give rise to a due process claim.[98]

Even if a right is granted, all a plaintiff has is a cause of action. She still bears the burden, under a rational basis test, of proving arbitrary and capricious decisionmaking, and proving unjustifiable harm based on discriminatory intent.

Popovic is correct when he suggests that each person is entitled to a particular kind of environment. It is perhaps not necessary to go so far as to recognize an independent right. What is needed is a remedy based on "equal concern and respect" for all neighborhoods.[99] Environmental justice claims that white environments have been more heavily protected than minority environments. Equal environmental protection has not been evenly applied in most communities. A remedy that legislatively creates the same kinds of protections that have always been applied (whether consciously or not) to white neighborhoods can produce the same kind of effect as recognizing a new right under the constitution.

One such remedy using zoning law to protect minority neighborhoods is suggested by Professor Jon Dubin.[100] He likens the systematic segregation and discrimination experienced by black neighborhoods[101] to the discrimination suffered in segregated schools[102] and calls for the same kind of broad injunctive relief fashioned by the district courts.

While feeling the full force of exclusionary zoning, minority neighborhoods have not been afforded the full force of protective zoning. Professor Dubin found few cases that directly challenge the lack of protective zoning.[103] However, there are numerous cases that refer to the proliferation of incompatible land uses and zoning within black neighborhoods.[104] Local land planners seemed intent on displacing black residences with industrial and commercial zoning or were using incompatible zoning to confine residents to particular portions of a city.[105]

As a remedy to this institutionalize approach to discriminatory zoning, Professor Dubin turns to the federal court's broad remedial power.[106] The federal court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." [107] The court can redress, even reverse the continuing effects of historic land use discrimination through this remedial power. He believes that the sweeping language of several decrees equalizing municipal services through the use of the court's remedial powers furnish a firm basis for securing the right to equality of zoning protection.[108]

Dubin is correct to call for an equality of protection through the use of zoning. Zoning is the law that designed to accomplish exactly what environmental justice advocates seek: the exclusion of business from residential areas.[109] In *Village of Euclid v. Ambler Realty Co.*,[110] the Supreme Court upheld the use of the police power to separate incompatible uses and to protect residential areas and residential environments from the pressures of growth and industrialization.[111] The Supreme Court has held that it is constitutional for states and local governments to regulate the environment by way of zoning law,[112] thereby combating any "undesirable secondary effects" that business may produce in the zoned area.[113]

However, going to the courts to seek this protection would prove time consuming and probably futile. The "roving commission to do good" theory of the district court's remedial power[114] is losing favor. Most remedies favored by courts are those that are narrowly tailored to the specific harm suffered. De facto segregation is not the jurisdiction of the court. Damages are more preferable than injunctions, and injunctions are only issued on a showing of irreparable, unjustifiable harm.[115] What would be more effective is an administrative body devoted to ensuring both the equality of zoning protection and the equality of environmental protection.

## Considerations

A remedy for environmentally racist siting decisions should have the following characteristics. Firstly, a focus on prevention. Judicial remedies seem to focus on curing past harm. What is needed is a preemptive approach that eliminates the threat of harm before the harm occurs.[116] The central concern of such a remedy is "How can a community and economy come together to encourage economic growth without harming social and cultural communities already in place and without requiring one group to bear a disproportionate share of the noxious effects of that economic growth?" In order to accomplish this task, both technical and soft criteria must be considered in the siting impact assessment, including an assessment of the socioeconomic impact of the facility on the surrounding neighborhood.[117] Some factors to be included in the risk assessment may include poverty or minority status, cumulative effect of all industries on the neighborhood, use of historic neighborhoods as units of measurement, benefit/burden of impacts of site, and a cost/benefit approach that includes more than just cost of remedy or containment. Other factors worth implementing are a positive, early intervention that establishes criteria and guidelines by which prospective businesses can gauge their compliance; a shift in the burden of proof such that permit applicant proves compliance rather than the plaintiff proves harm; and meaningful community participation in the decisionmaking process.

Most significantly, the remedy, at its heart, must recognize the pervasive nature of unintentional, systematized racism. Access to political power and decision-making process is limited to "white guys in suits." The Court in *Arlington Heights* suggested that "departures from the normal procedural sequence might also afford evidence that improper purposes are playing a role" in decision-making.[118] This begs the question: what if the normal procedural sequence is so loaded with racist assumptions that compliance results in a disparate impact? Under the current jurisprudence, this procedural compliance may coat many a discriminatory decision with legality. The *Arlington Heights* standard only works to deter discriminatory siting decisions when the decisionmaking itself is not slanted towards favoring minority areas over mixed or majority populated areas.

Remediating an underlying bias is perhaps the most difficult of remedies to implement. Most decision-makers are unaware of their own biases. The effect however, still discriminates. Congress recently recognized the difficulty in fighting this latent bias in the area of religious land uses. Religious land use plaintiffs could not successfully bring claims under current First Amendment jurisprudence. Proving intent to discriminate was too difficult. So Congress passed a legislative amendment that recognized the inherent religious bias in land use legislation: The Religious Land Use and Institutionalized Persons Act (RLUIPA).[119] Under this Act, Congress clarified the burdens of proof necessary to prove religious discrimination in a land use context. I suppose a similar remedy could be proposed for environmental justice plaintiffs: the Environmental Discrimination Land Use Act with similar adjustments to the burdens of proof. I offer this, however, to show that Congress created a remedy to recognize and rectify what has always been a latent bias.

## IV. PROPOSED REMEDY

Building on Popovic, Dubin and the intent of RLUIPA, I suggest the creation of a state regulatory board that has final approval power over all siting decisions of new land uses that may significantly effect the human environment.

The essential characteristics of this remedy are

- Creating a state body that preempts the local police power to approve new sites for environmentally burdensome facilities.
- Assuming environmental equity as an operating principle and mandating a fair share environmental obligation for all suitable sites within the region or state.
- Triggering state board review whenever any siting decision may significantly affect the human environment.
- Legislatively mandating a risk assessment process that includes both technical and so-called soft criteria.

- Removing land use decisions from the private industry by using a forward looking siting scheme in which the state designates suitable sites
- Using referendums and community veto power to approve/disapprove land use decisions and mitigating offers.
- Establishing "inordinate burden" as the legal standard to determine site suitability.
- Reversing the burden of proof to make the permit applicant prove compliance with federal and state environmental standards, including inordinate burden standards.
- Using well-established land use law rather than still evolving civil rights jurisprudence to resolve siting disputes, including perhaps the establishment of a special land use court to hear these disputes.

The remainder of this section will now address each component in turn, suggesting both precedent and policy reasons for its adoption.

### **A state body that preempts the local police power to approve new sites for environmentally burdensome facilities**

A body larger than the local municipality is needed to authorize these siting decisions. I have designated it as a state body, but it could also be a regional body depending on the size of the state.

Under this regulatory scheme, the state board preempts the local municipality's power to control the siting of new environmentally affecting land uses. The Supreme Court held in *Euclid* that there may be "cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."<sup>[120]</sup> This is exactly that kind of case. Where the environmental, physical and social health of an area may be threatened by the imposition of a new land use, the state retains control of that land use decision. In this way, local bias and value-laden zoning and land use decisions are preempted.<sup>[121]</sup>

This proposed board would function similar to the advisory boards established to manage growth and development,<sup>[122]</sup> with one significant difference: the board preempts the siting authority of local land use boards. The regional/state perspective provided by a body of larger jurisdiction avoids the localism associated with most discriminatory siting decisions. This larger view also allows for the regional balancing of economic needs and environmental burdens. In this way, economic development can still be encouraged while providing equal environmental land use protection for burdened-most often minority and poor-neighborhoods.

An argument against local control. Most states have delegated the police power to the local government unit through enabling statutes and land use decisions are now made at the local level.<sup>[123]</sup> These enabling statutes were thought to encourage local autonomy and represented a firm faith in the power of democracy. Zoning and land use decisions thus assumed a highly localized, even parochial character.

During the era of legally enforced separation of the races, several southern cities enacted strict racial zoning ordinances designating separate residential districts for whites and blacks.<sup>[124]</sup> Zoning has also been used to exclude minorities from certain areas.<sup>[125]</sup> More recently, zoning has been criticized for procedural inadequacies: lax enforcement, favoritism, and lack of consistency with planning and excessive rigidity in some cases and flexibility in others.<sup>[126]</sup> As early as 1960, zoning had been described as an ugly sore, completely lacking in a code of administrative ethics. Babcock describes the zoning of the 60s as "a process under which multitudes of isolated social and political units engage in highly emotional altercations over the use of land, most of which are settled by crude tribal adaptations of medieval trial by fire, and a few of which are concluded by confessed ad hoc injunctions of bewildered courts."<sup>[127]</sup>

At the root of the current dissatisfaction with zoning is the local nature of the decisionmaking process. This was meant to encourage local autonomy. However, local autonomy in these kinds of siting decisions might be precisely what is not needed. Professor Briffault describes the down side of encouraging local autonomy:

The virtues of local autonomy tend to be greatly exaggerated. Localism reflects the territorial economic and social inequalities and reinforces them with political power. Its benefits accrue primarily to a minority of affluent localities, to the detriment of other communities and to the system of local government as a whole. Moreover, localism is primarily centered on the affirmation of private values. Localist ideology and localist political action tend not to build up public life, but rather contribute to the pervasive privatism that is the hallmark of contemporary American politics. Localism may be more of an obstacle to achieving social justice and the development of public life than a prescription for their attainment. [128]

This widespread dissatisfaction with the zoning and land use power as presently implemented does not mean that zoning is neither a valuable power nor a significant place to start when seeking to properly situate environmentally affecting industry.

Argument against a federal zoning board. To leap from a local regulatory scheme to a federal scheme is somewhat ambitious. During the reform movement of the 1970's, Senators Udall and Jackson introduced the National Land Use Policy Act (NLUPA).[129] Senator Udall viewed this legislation as necessary because there was no order or policy to cope with the competition between speculators and conservationists for land development.[130]

Under this act, states would receive federal funding to devise comprehensive land use programs that would protect environmentally fragile areas by regulating development.[131] The bill required states to establish detailed land use planning requirements and agencies as a condition of eligibility to receive federal funds.[132] The bill was viewed as shifting power away from the local governments to the state and federal government.[133] It passed easily in the Senate in 1974, and was only defeated by four votes in the House.

The Senate's favorable reception to a larger than local land use agency indicates that this kind of remedy is not so far off base. A state authority that functions without federal supervision appeases those concerned with the state's loss of power but still is able to encourage a more regional perspective with regards to land use decisions.

State or Regional Authority. The kind of state authority suggested is not without precedent. Most states have begun to assume some kind of responsibility for problematic land uses.[134] Measures have already been taken above the municipal level in the creation of metropolitan, regional, and even state plans that serve as guides for municipalities in land use zoning and the development of infrastructures.[135] These planning agencies operate in advisory capacities, as municipalities have not yet been required to surrender their zoning prerogatives to state and regional planning agencies.

With regards to hazardous waste sites governed under RCRA, some states have preempted local authority and formed siting boards with the sole responsibility to site hazardous waste facilities within the state.[136]

Some states have created state oversight committees that require local compliance with state objectives. In anticipation of NLUPA passing, Colorado passed a Land Use Act in 1974[137] which created a state Land Use Commission to oversee all land use and activities declared by statute to be of state interest.

In 1990, Washington enacted the Washington Growth Management Act.[138] Under this act, the largest and fastest growing counties had to adopt comprehensive management plans.[139] These plans had to include issue of land use, housing, capital facilities, transportation and rural land use.[140] The state included thirteen goals for the purpose of "guiding local governments in adopting comprehensive growth management plans." [141] Section 12 of the Act provides the regulatory teeth: all local land-use regulations and land-use decisions must be consistent with the comprehensive plans.[142] The mandated plan, together with the Section 12-consistency requirement, appears to change the plan from being merely an advisory document to a document with some force of law.[143] Because the Legislature intended for consistency to be the standard, reviewing courts should apply stricter scrutiny and require tighter consistency than in the past.[144]

States have also assumed a measure of control over traditionally purely local decision through creating state environmental quality laws patterned after the National Environmental Policy Act (NEPA).[145] State environmental protection statutes (SEPA) function similarly to NEPA.[146] They require that state and local agencies (some state acts include municipalities) must evaluate land use decisions for environmental impact. In the alternative, they may provide authority to reject certain proposals because of unacceptably negative impacts on the environment.[147] If the act applies at the municipal level, this makes zoning decisions, subdivision approvals and the issuance of various permits all subject to environmental impact assessment.[148] One court has already decided that the Washington SEPA applies to county decisions regarding rezoning property.[149]

Some states require an EIS if a project significantly impacts social and economic interests unrelated to physical effects.[150] But these states are in the minority. Most states require a connection between the physical impact of the land use and the social effect, e.g., a connection between building a suburban shopping center and the probable impact that would have on causing downtown social decay (Washington). The Washington Supreme Court ruled in this scenario that an EIS must take into account the social decay that would result from the physical effect of the new shopping center.[151]

### **Assuming environmental equity as an operating principle and mandating a fair share environmental obligation for all suitable sites within the region or state**

This board's sole mandate is to ensure that all suitable communities within the area (whether it is regional or state) host their fair share of land uses that may significantly affect the environment.

The judicial concept of fair share obligation arose in zoning and housing disputes.[152] Communities in the path of expanding cities and population growth zoned their communities to exclude certain types of housing. The courts established a fair share obligation in which municipalities were required to bear their fair share of the low-income housing.[153] California now mandates by statute that communities bear their fair share of all housing types.[154] In a similar manner, all suitable communities within the region or state will be required to bear their fair share of the environmental burden.

### **Triggering state board review whenever any siting decision may significantly affect the human environment**

Board review would be triggered for all those industries that may significantly impact the human environment. This standard has been used with success in a NEPA analysis. However, the definition of human environment would be established legislatively to actually include the human aspect of environment, including considerations of public health, socioeconomic welfare, racial composition and poverty.

Review is triggered only on applications for new industries or facilities in a community. It is true that some communities already bear a disproportionate burden. However, past discrimination is outside the scope of this regulatory scheme-especially given the disinclination of courts to fashion broad remedial schemes such as the one suggested by Dubin. What this remedy hopes to accomplish is to even out the burden over time.

### **Legislatively mandating a risk assessment process that includes both technical and so-called soft criteria**

Under current zoning law, comprehensive plan and zoning decisions are made by considering the expert opinions of "the philosopher, the city planner, the economist, the sociologist, the public health expert, and all other professionals concerned with urban problems.[155] The *Haas* decision[156] sets forth the kinds of experts who should be involved in determining an appropriate use of land. These included not only economists who can determine the best use of the land in a financial aspect, but also the sociologist and the public health expert. This inclusion of sociological and public health factors differs from the approach taken under judicial review of federal regulations.

As previously shown, under the federal regulations, compliance with the technical standards is all that is legally required. Also, most permit applications are considered in a vacuum.[157] For example, in Pennsylvania, the siting process does not consider cumulative impact of current facilities and the proposed facility, nor the disproportionate placement of facilities in the host community, nor the demographics of a proposed host site. All the proposal need do is comply with federal regulations, and technical and environmental assessment.[158]

Under land use and zoning law, the administrative body must take into account socioeconomic factors in deciding appropriate uses for land. Had such a mandate been in operation when the federal government sited their hazardous waste off-site landfills,[159] the racial composition of those communities would have alerted the siting authority as to the potential for racial discrimination.

### **Removing land use decisions from the private industry by using a forward looking siting scheme in which the state designates suitable sites**

There are two ways of siting an industry that affect the environment. Firstly, and the way that is most common and most detrimental to disadvantaged communities is the ad hoc approach. In this approach to siting, applicants determine the site according to their own set of criteria. Once they have selected a site, they approach the decisionmaking board for whatever permission is necessary: a permit, a rezoning, a license etc.[160]

The problem with ad hoc siting is that private industry invariably chooses the site and determines local land use patterns. Developers have cost incentives to choose the cheapest, most suitable land, which is often land inhabited by the poor, most often poor minorities.[161] Because political opposition is likely to be more effective in wealthy communities, developers will continue to choose those areas in which they will not experience siting delays and potential litigation.[162]

The second method is that of advance site designation. The board studies the needs of the state, determines the type and number of facilities needed, and then reviews sites around the state to potentially fill that needs. Permit applicants then have an inventory of sites from which they may choose.[163] Advance siting has been used successfully with hazardous waste facilities in a number of states. Only two states continue to use the local control of land use regulations concerning hazardous waste.[164]

In the case of environmentally damaging land uses, the state siting board in cooperation with the local agency would identify land sites able to accommodate certain kinds of industries. As part of the consideration process, the board could consider economic factors, suitability of land for a particular industry, the affect on neighboring communities and the cumulative effect of adding this kind of industry to the area.[165] If a number of sites are concentrated in minority areas, the board could remove sites until the impact of industry is spread equally throughout different communities. In this way, the disparate impact is avoided and a fair share status is achieved.

If no other site in a municipality is actually more suitable than a site in an area that is already disproportionately burdened, or if an existent facility wants to expand, the board may respond in two ways. Either make the industry to locate in a different region, or, with the approval of the affected neighborhood, work out a mitigating offer that offsets the burden.

Two mechanisms already exist in land use law that could enable an equitable result under this scenario: conditional or special use zoning and the zoning referendum. In conditional use zoning, the developer is issued permit that remains valid only as long as certain conditions are met.[166] The conditions imposed by the board can be those requiring the developer to take all steps possible to mitigate environmental effects. The penalty for failing to abide by the permit conditions is loss of the permit.[167]

As well as internal regulations, as part of the conditional use, the developer can be made to offer actual benefits to the affected community. Theoretically, the developer compensates the community for the social costs of the facility.[168] This compensation may eliminate opposition to the facility but only on the condition that the benefits offered outweigh the burden of its presence.

There are some that criticize the offering of mitigating benefits. They characterize these as bribes or blood money.[169] There is the danger that wealthy communities will pay to allow the disadvantaged to bear the risks the wealthy can afford to escape.[170] Realistically though, what does an agency do when an existing industry desires to expand and it is situated in an already burdened neighborhood? Offering a mitigating benefit to offset the particular community burden seems a reasonable compromise. Particularly when the affected community, not just its elected officials,[171] decides upon those benefits at large.

If for example, the California state board decided in the Buttonwillow dump expansion issue[172] that this really was the best site for a number of economic and geographical reasons, the residents of that community could have engaged in a mitigation dialogue with Laidlaw. In this way, the directly burdened community i.e., only Buttonwillow, not the surrounding white farming areas of Kern County, could have reserved for themselves a certain percentage of jobs at the facility and the contribution of hard benefits to the community such as schools, educational programs, libraries, sporting facilities, medical clinics etc.

### **Using referendums and community veto power to approve/disapprove land use decisions and mitigating offers**

Creating the opportunity for public participation in the siting decision is vital to a facility's long term health. Public participation is crucial to the long term success of this siting board. California passed preemptive state siting scheme that barred public participation in the 1970s. It backfired. It is instructive to consider what went wrong.

In 1977, California found it difficult to site a liquefied natural gas (LNG) facility anywhere in the state.[173] The combination of regulations and local opposition formed a formidable partnership. In an attempt to cut through the red tape, the legislature passed Senate Bill 1081[174] that said, "notwithstanding any previously enacted legislation or regulatory requirements, California will designate an LNG terminal site within a year."

Instead of looking for ways to work within the existent regulatory framework, the legislature and governor sought to preempt them.[175] Municipalities were not going to be involved in any siting decision. The Public Utilities Commission (PUC) made all siting decisions.[176] Whereas the Coastal Commission had previously analyzed energy companies proposals, now they were relegated to selecting sites-even though those sites might have environmentally degrading consequences. The final siting decision would be made by the PUC, who was free to select any site on the Coastal Commissions ranked list.[177] In their rush to show their support for a valuable industry and to appear encouraging to further energy development, the legislature and the governor didn't speed up the environmental review process; they short-circuited the mandated environmental reviews altogether.[178] Consequentially, those who were opposed to the project had no recourse but to go to court to seek relief.[179] Which they did.

On the other hand, both Minnesota and New Jersey have completely preempted local land use controls for hazardous waste sites, but have "attempted to reduce the sting by giving local communities adequate opportunity for input in a multi-step siting process." [180] In Minnesota, for example, a state board selects six candidate sites, each from a different county. Local communities are then on early warning. While citizens cannot prevent a site, they can impose reasonable "construction, inspection, operation, monitoring and maintenance" conditions.[181]

The lesson to be learned from these three state preemptive actions is that environmental regulations, public participation requirements and the technical analyses required are adopted because they preserve public safety in a very real way.[182] Eliminating delay in siting and construction cannot come at the expense of public safety. Ways need to be found to bring all parties who have a stake in the siting decision to the table so that statewide needs can be balanced with local concerns.

A question to consider is whether the community should have veto power over state siting decisions. A land use mechanism currently exists to allow community veto power over a rezoning decision. In some

states the electorate can use initiative[183] and referendum[184] powers to carry out or veto zoning changes. These ballot box decisions have been characterized as direct democracy.[185] A similar system can be used to ensure community approval of any mitigating offers. Allowing a veto of siting decisions might render this remedial scheme superfluous. Also, a community that previously has not had to bear its fair share would be able to use the initiative to block the designation of suitable sites. A system of reasonable community-imposed standards seems to be the most desirable.

Imagine however the different result if the minority residents of Houston[186] could have engaged in a referendum to veto the siting of the seventh, eighth and ninth solid waste landfills in their neighborhoods. Requiring all state siting decisions to pass a referendum in the affected community would go a long way to garnering community support and to equitably siting these facilities throughout a region.

There will, of course, be opposition to the designation of a site for suitability.[187] However, given the factors that have been considered prior to the designation, a more just result seems likely. The need to encourage industry and allow for economic growth is balanced against the need to spread the burden of living next to these sites. Additionally, designating certain land areas for these kinds of uses will alert the public to the potential facility. The public participation could then begin as to the appropriateness of the zoning decision-prior to the introduction of a heavy player with a vested interest in the zoning.

### **Establishing "inordinate burden" as the legal standard to determine site suitability**

In keeping with the underlying principle of environmental equity, all considerations of land uses, permit applications and claims for relief will be considered under the "inordinate burden" standard. This was first promulgated in Florida as the Bert J. Harris Private Property Rights Protections Act.[188] This legal standard was originally adopted to create a private cause of action for a regulatory taking. In Florida, the determination of "inordinate burden" is left to the judiciary.[189] In this case, the legislature can define an inordinate burden.

The inquiry would be similar to that laid out by the Supreme Court in *Dolan v. City of Tigard*.<sup>[190]</sup> (Even though that was a takings case the analysis of the effect is similar.) In *Dolan*, the Court invalidated a regulation that required the deeding of private property in exchange for a permit to expand an electrical supply store. The Court found that bearing a burden disproportionate to the benefit accrued in the context of new land development is unconstitutional. If a developer cannot be required to pay more than its fair share for infrastructure improvements at the subdivision stage, why is it lawful to force the same community to bear a disproportionate share of environmental burdens?

The procedural nature of the Harris Act is also worth considering. Upon rejection of a development permit, an applicant can file a notice of claim.<sup>[191]</sup> The government must then advise the property owner of the permissible land uses on that property.<sup>[192]</sup> If the government fails to declare the permissible land uses within six months of the notice of claim, then the claim is ripe.<sup>[193]</sup> The proposed remedy already has this procedure built into it. Firstly, the state land use board has identified suitable sites and permissible land uses. This determination has been reached using the inordinate burden standard i.e., what is the burden that this proposed use would have on the neighboring community.

A second consideration of the particular land use suitability maybe conducted upon application for a permit. Again the inordinate burden standard can be used to weigh the evidence. If a site is approved and perchance the neighboring community files suit, the inordinate burden standard would be the standard used to determine the legality of the proposed project. Using this standard would allow preventative designations of land sites and would allow plaintiffs a fighting chance at a positive verdict as neither direct evidence of discrimination nor a disparate impact based on comparison is required.

### **Reversing the burden of proof to make the permit applicant prove compliance with federal and state environmental standards, including inordinate burden standards**

Using the inordinate burden standard and the consideration of all relevant expert opinions, the siting

and approval process should be weighted toward the neighboring community. Additionally, I suggest reversing the burden of proof such that the applicant must prove compliance rather than requiring the plaintiff to prove harm.

In court, these kinds of applicants will not easily be able to meet the burden of proof; particularly, if it is changed such that the applicant must show no harm. Currently, in most cases, the burden is on the civil rights/environmental plaintiff to show harm. Professor Perry suggests the burden of proof should be on the defendant (or in the case of a petition, the applicant): "Because racism is still a pervasive feature of American life, infecting more official decisionmaking than we like to admit, the doubt should be resolved in the challenging party's favor; the presumption should be that the decision is race-dependant."<sup>[194]</sup>

The burden of proof in these kinds of cases should be on the applicant to show that their facility does not harm the neighboring community.<sup>[195]</sup> This will even out the imbalance between the powerful industrial interest and the unsophisticated neighborhood movement-particularly in communities of color. In some land uses cases, courts have already switched the burden of proof so that the applicant just now show the public need for a zoning change.<sup>[196]</sup> Requiring the defendant/applicant to bear the burden of proof in these kinds of cases is consistent with land use law.

Secondly, the constitutional standard for zoning requires that some rights be violated. For a zoning ordinance to be unconstitutional, it must be shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>[197]</sup> Granted, the zoning power is "not infinite and unchallengeable."<sup>[198]</sup> However, the standard of review is dictated by the nature of the right affected rather than by the power being exercised. When a "zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest."<sup>[199]</sup> Substantial government interests upheld in court include the preservation of property values,<sup>[200]</sup> maintaining population density,<sup>[201]</sup> preserving the residential nature of a neighborhood by excluding business,<sup>[202]</sup> and curbing the aesthetic<sup>[203]</sup> and environmental<sup>[204]</sup> impact.

This works in favor of the state regulatory authority. Most applicants in siting decisions have either bought the land they propose to use hoping that a zone change will be approved or a permit will be issued under a non-conforming use. They might also delay buying land until various siting options are considered. Thus there are no real property rights involved here. There are no rights to a particular zoning decision.<sup>[205]</sup> Nor are there any vested rights in getting a permit<sup>[206]</sup> as the applicant is on notice through the state site inventory list that his proposed land use is not acceptable. Presenting a prima facie case will be difficult.

Thirdly, federal courts will not lightly assume the role of zoning board. As stated in *Doherty v. City of Chicago*, "federal courts are not boards of zoning appeals."<sup>[207]</sup> In order to show that denial of a permit violates due process, a plaintiff must first show a constitutionally protected right to a permit and then must show that the government deprived him of that interest without using proper procedures.<sup>[208]</sup> Courts are reluctant to overturn the decision of land use boards, particularly when that board can show legislative intent to consider socioeconomic and environmental health factors in determining land use.

### **Using well-established land use law rather than still evolving civil rights jurisprudence to resolve siting disputes, including perhaps the establishment of a special land use court to hear these disputes**

Environmental Plaintiffs. If, for some reason, a community must file suit to prevent an undesirable land use, the rational basis test still has some teeth in land use decisions. You do not need to have strict scrutiny in order for a plaintiff to win a case. Zoning decisions are made on the microlevel where lines are being drawn and neighbors are always being impacted differently. With zoning you do not need to show discriminatory intent, you need only show that the decision was arbitrary and capricious. In fact, one court has gone so far as to say that the power wielded by the zoning board is a judicial power, not an administrative one.<sup>[209]</sup> This reclassifying allows the reviewing court to move beyond the arbitrary and capricious standard of review, and to enlarge the scope of review on appeal.<sup>[210]</sup>

Strict scrutiny might be available to environmental plaintiffs on appeal. Some courts have found that where legislative intent is clear, that the administrative decision is examined to find consistency with that legislative intent. In effect, the reviewing court uses strict scrutiny on appeal to determine that the board's decision is consistent with legislative intent.[211]

Permit Applicants. I expect though, under this scheme, that most claims for relief will be for applicants denied land use permits. Most complaints that arise will be those of applicants denied rezoning, conditional use permits or non-conforming uses. Current land use law suggests that those industries denied permits will not be able to easily overturn the board's decision.

On appeal, the discretionary power of the state land use authority need only meet the rational basis test for denying a rezoning application. The power however does not stretch to allowing a nonconforming use in what was primarily zoned a residential area. Land use law also will not allow the applicant to easily change the designated land use through spot zoning, conditional use, special use or variance appeals.

Spot zoning-the rezoning of a small piece of land contrary to the use of the surrounding land-will probably not survive judicial scrutiny.[212] This enforcement of protective zoning preserves communities of color from encroaching industry and nonconforming uses. When reviewing variance decisions, the courts "must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which the variance is sought." [213] And here's the kicker: "The variance can be sustained only if all legislative requirements have been satisfied." [214] Applicants for a variance will find it very difficult to overcome the legislative intent manifest in a state board with the mandate of ensuring an equitable impact.

Special or conditional use permits could potentially be issued by a local body thus circumventing the state zoning authority. Traditionally, local administrative boards hear special use and conditional use permits. However, in many cities, the legislative body retains the power to issue permits for certain uses that have a community-wide impact.[215] The state body can preempt the decisionmaking authority for special use permits associated with these zones.

When considering special use permits, the decisionmaking body must consider the effect of the land use on the neighboring community.[216] Other factors include future conditions, the need for facilities, proximity to residences, impact of workers in a neighborhood, litter and traffic, and public convenience and welfare.[217] The board has the discretion to deny the special use if it adversely affects the neighboring community. Legislative standards govern the board's decision making process. In this case, the most relevant standard will be to ensure an equitable impact amongst all communities in the area. The standard could also include a burden of proof requirement that the applicant show compliance with all conditions.[218]

Applicants who seek to overturn the state-imposed zoning scheme through the traditional land use devices will have difficulty meeting the burden of proof. The state scheme should be upheld under review.

States could also consider creating a special land use court that would hear and decide land use controversies. Oregon established the Land-Use Board of Appeals (LUBA) which has the power to review all land-use decisions of local government, state agencies and special districts.[219] Given the courts' reluctance to serve as zoning boards of appeal, the creation of a special court with judges well informed on legislative intent, siting criteria and procedures might help establish uniformity through the state.

### **Considering the Opposition**

Exactly how feasible is this remedy? And at what political and economic cost?

Similar state and federal schemes already exist that preempt control over areas that are considered of state and federal interest. Environmental discrimination and disproportionate burdens could easily become another compelling government interest.

Creating a state scheme such as this would require a significant investment of funds. Clarifying a private right of action under a statute similar to RLUIPA would cost considerably less. However, this remedy strikes at the root of what causes environmental racism: the latent bias inherent in all land use decisionmaking.

What is primarily required is a state willing to dedicate its resources to ameliorating the inequity with which its citizens and their surrounding environments are treated.<sup>[220]</sup> Perhaps states with a larger percentage of minorities would be a good place to start, e.g., Mississippi, Alabama, California and Oklahoma.

## V. CONCLUSION

Environmental racism exists where communities of color are made to bear a disproportionate burden of a siting decision. Preventing undesirable land uses in minority neighborhoods through judicial remedies is an uphill challenge. Courts assume the decision was made in good faith. The plaintiff then needs to overcome this presumption.

Very few plaintiffs meet the burden of proof under current judicial remedies. Equal protection plaintiffs need to find the smoking gun of discriminatory intent. Civil rights plaintiffs under Title VI and VIII need to compile a body of evidence that shows either disparate impact or actual impact on housing opportunities. The burden of proof on all plaintiffs is to show an actual harm which harm resulted from discriminatory decisionmaking.

A successful remedy would change the burden of proof and trigger both technical and soft criteria at a preliminary stage. Creating a state authority under the police power that selects and approves all environmentally sensitive land use sites would accomplish this goal. Firstly, the state establishes a list of sites with preapproved uses. These sites would be selected according to a list of factors that must include the impact on neighboring communities, the burden that the community is asked to bear, as well as socio-economic impacts and public health concerns. Industries wishing to locate or expand within the state would select from this list of sites. The burden on the applicant would be to show that first, the proposed facility complies with all local/state zoning requirements, and second that the proposed facility is in compliance with all federal regulations. In this way, the burden is on the applicant to show no harm.

The remedy also raises the burden of proof for the applicant/defendant on review. Under a constitutional analysis, the defendant merely had to find a rational basis for his decision. Under land use law, the permit applicant will have difficulty meeting the burden of proof associated with the normal land use devices that allow non-conforming uses.

Creating a preventative remedy that intervenes at a preliminary stage to protect the health-economic, social, psychological as well as physical-of the surrounding community makes the most sense. This remedy uses long-established land use law to extend equal protection of all neighborhoods rather than relying on the still developing jurisprudence of civil rights-based environmental claims. This remedy removes the value-laden decisionmaking of local boards and replaces it with a regional perspective that considers both local interests and regional concerns. By using this remedy environmental equity is actually possible.

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## Endnotes

[1] See Robert D. Bullard, *Building Just, Safe and Healthy Communities*, 12 TUL. ENVTL. L. J 373, 394 (1999).

[2] See U.S. GENERAL ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES*, 1983.

[3] See Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 17-19 (Robert D. Bullard, ed., 1993).

[4] See *id.*

[5] See Nuclear Regulatory Comm'n, Draft Environmental Impact Statement for the Construction and Operation of the Claiborne Enrichment Center, Homer, Louisiana 3-108 (1993).

[6] See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 82 (2001).

[7] ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 32 (1994).

[8] See COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NAT'L REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTES SITES 395 (1987).

[9] Neil A.F. Popovic, *Pursuing Environmental Justice With International Human Rights and State Constitutions*, 15 STAN. ENVTL. L. J. 338, 356 (1996).

[10] And by so doing have probably eliminated myself from contention in this competition.

[11] See Daniel Kevin, "*Environmental Racism: and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*," 8 VILL. ENVTL. L. J 121, 121 (1997).

[12] See KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE 157 (2nd ed. 2000).

[13] See *id.*

[14] See 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, 1008 (1993).

[15] See U.S Const., amend. XIV, §1.

[16] See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[17] See *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

[18] See *Akins v. Texas*, 325 U.S. 398, 403-404 (1945); see also *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973) (holding that the essential element of de jure segregation is a present condition that directly results from "intentional state action.")

[19] See *Washington v. Davis*, 426 U.S. 229, 238 (1976) which stated that the Court has not embraced the proposition that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." The Courts however have found that in the case of municipal services that a greatly disparate impact is circumstantial proof of intent to discriminate. See also *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972) and *Ammons v. Dade City*, 594 F.Supp. 1274 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986).

[20] For a discussion of the following cases see Donna Gareis-Smith, *Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57, 65-70 (1994); also Philip Weinberg, *Equal*

*Protection*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 10-14 (Michael B. Gerrard ed., 1999).

[21] See *Bean v. Southwestern Waste Management*, 482 F. Supp. 673 (S. D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986)(finding that 59 percent of landfills were in areas that were less than 25 percent minority when the landfill opened. Eighty-two percent of all landfills were in areas less than 50 percent minority.)

[22] See *id.* In both *Bean* and *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning and Zoning Commission*, 706 F. Supp. 880 (M. D. Ga. 1989), *aff'd*, 896 F. 2d 1264 (11th Cir. 1989), the courts refused to take into consideration the landfills and waste sites run by other agencies. The judicial approach is to consider only the singular act of the defendant in and of itself, not in concert with all other siting decisions approved by the defendant agency or by all agencies who operate within that area.

[23] *Village of Arlington Heights v. Metropolitan Housing Development Co.*, 429 U.S. 252 (1977). In this case, the plaintiff claimed that one-family zoning in a Chicago suburb was racially motivated because it excluded apartments. The plaintiff had sought a rezoning of land to allow it to build multi-racial apartment buildings. The court stated that the requisite intent to discriminate may be shown from circumstantial evidence but held that the plaintiff had failed to make a satisfactory showing. The land had been zoned one-family dwellings before the plaintiff bought the land and the village had taken no overt actions to ensure that multi-racial apartment buildings would not be built.

[24] See *R.I.S.E Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991) (finding no discriminatory intent when a landfill permit was granted for an area of northern Virginia that was 64 percent black. The county for repeated operating and environmental violations closed another landfill, which was privately owned and operated in a predominantly white area. The court found that the county had selected the regional landfill not on the racial composition of the neighborhoods but because one was so obviously superior to the other when comparing environmental suitability.)

[25] 42 U.S.C. §§3601-3631 (1998).

[26] Ralph Santiago Abascal, *Tools for Combatting Environmental Injustice in the 'Hood: Title VIII of the Civil Rights Act of 1968*, 29 Clearinghouse Review 345 (1995). Abascal's theory under Title VIII is that discriminatory siting of environmental LULUs denies people of color access to environmentally safe housing and worsens the quality of the neighborhood. Those with the capacity to leave do, leaving behind mainly people of color who are joined by more of the same because of the lower housing values. This cycle perpetuates segregated residential housing patterns. See *id.* at 348.

[27] See COLE, *supra* note 6, at 129.

[28] See Colin Crawford, *Other Civil Rights Titles*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 69, 70 (Michael B. Gerrard ed., 1999).

[29] See COLE, *supra*, note 6, at 95.

[30] See *id.* at 97.

[31] See *Coalition of Bedford-Stuyvesant Block Association, Inc. v. Cuomo*, 651 F. Supp. 1202, 1210 (E.D.N.Y. 1987).

[32] See Crawford, *supra* note 28, at 83.

[33] See *id.*

[34] 42 U.S.C. 2000d (1988).

[35] See *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

[36] See Bradford C. Mank, *Title VI*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 23 (Michael B. Gerrard ed., 1999).

[37] See *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983).

[38] See *id.* Section 602 of Title VI provides that federal agencies that grant funds can promulgate regulations require fund recipients to refrain from engaging in practices that cause discriminatory effects. Several federal agencies including the EPA have promulgated regulations that prohibit fund receiving agencies from engaging in practices that both intentionally discriminate or that have discriminatory effects on a protected class.

[39] See also *Latinos Unidos de Chelsea v. Secretary of Hous. & Urban Dev.*, 799 F.2d 744, 785 n.20 (1st Cir. 1986) (holding that "under the statute itself, plaintiffs must make a showing of discriminatory intent; under the regulations, plaintiff simply must show a discriminatory impact."); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) ("Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance.")

[40] See *Ferguson v. City of Charleston*, 186 F. 3d 469 (4th Cir. 1999); *New York Urban League, Inc. v. New York*, 71 F. 3d 1031, 1036 (2d Cir. 1995); see also Richard J. Lazerus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. Rev. 787, 838 (1993).

[41] See *Johnson v. Uncle Ben's Inc.*, 657 F.2d 750, 753 (5th Cir. 1981).

[42] *New York Urban League*, 71 F.3d at 1036.

[43] See *NAACP v. Medical Ctr. Inc.*, 657 F.2d 1322, 1331(3rd Cir. 1981).

[44] See Mank, *supra* note 36, at 39.

[45] See *id.*

[46] See *id.* See also Julia B. Latham Worsham, *Disparate Impact Lawsuits under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?* 27 B.C. ENVTL. AFF. L. REV. 631, 699-702 (2000) describing the difficulty of proving pretext in a siting decision. Because plaintiffs will not be able to find either discriminatory animus or show that an alternate was reasonable, they will seldom meet the burden of proof.

[47] In *Bryant v. New Jersey Dept. of Transportation*, INSERT CITE, plaintiffs protested the building of a highway and tunnel through one of the last stable, middle-class black neighborhoods in Atlantic City, New Jersey. The district court judge initially dismissed the suit because the plaintiffs failed to plead, under the Simpson doctrine that they were the intended beneficiaries of the federal funds. Failing to establish a nexus between the federally funded program and their right to sue, the plaintiffs had failed to show that even if the highway and tunnel project did receive federal funds, the plaintiffs were not the intended beneficiaries of those funds. Because they failed to bear the burden to establish their jurisdictional right to sue, the court dismissed for lack of standing. However, eight days after the decision, the Supreme Court decided *National Credit Union Administration v. First National Bank & Trust Co.* This decision established that for a plaintiff to fall within the zone of interests, a court did not have to find that Congress specifically intended to benefit the plaintiff. The court in reconsidering *sua sponte Bryant I* found that the statutory requirements for standing for Title VI plaintiffs had changed. Rereading UDOT's regulations pursuant to Section 602, the court found that the regulation forbids any action that has a racially discriminatory effect. Because the plaintiffs claimed just that in their complaint, they now had standing to pursue a Title VI claim. The motion to dismiss was reversed and the claim allowed to proceed..

[48] 522 U.S. 479 (1998).

[49] 522 U.S. 927 (1998).

[50] In *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Penn. 1996), the plaintiffs filed suit on the grounds that the processes used to grant a waste permit had the effect of discriminating against Chester residents (who were mostly black) by forcing them to bear a disproportionate burden of resultant pollution. The District Court dismissed without prejudice the first claim because the plaintiffs claimed only a discriminatory effect rather than actual intent to discriminate. The court also dismissed with prejudice the second and third claims that claimed that the defendants had violated EPA regulations under Title VI. The court found that there is no private cause of action under the EPA civil rights regulations promulgated pursuant to Section 602. On appeal, the Third Circuit reversed the trial court and found that a private right of action did exist under Title VI and its implementing regulations. See *Chester Residents Concerned For Quality Living v. Seif*, 132 F.3d 925, 927 (3rd Cir. 1997). The court also pointed out that injunctive and declaratory relief are available in discriminatory effect cases. *Id.* at 930.

[51] 50 F. Supp. 2d 250, 255 (S.D. N.Y. 1999).

[52] See Bradford C. Mank, *Is There a Private Right of Action Under the EPA's Title VI Regulations?*, 24 COLUM. J. ENVTL. L. 1 (1999). *But see also* Gareis-Smith, *supra* note 17, at 73 in which she interprets *Guardians Ass'n* to provide an implied right of action on behalf of those who have been subjected to unlawful discrimination under Title VI.

[53] See Cheryl Hogue, *Draft Revision of Guidance for Processing Civil Rights Complaints Expected Mid-1999*, 29 ENVTL REP. (BNA) 1807 (Jan 15, 1999).

[54] See Mank, *supra* note 36, at 45-48, for a description of Shintech's attempt to site a plastics facility in Saint James Parish, Louisiana. Title VI petitions were filed in Sept. 1997 challenging the Louisiana Dept. of Environmental Quality's approval of the project. One year later, the EPA still had not reached a final decision. Shintech withdrew its application, and replaced it with a smaller plastics plant in a more diversified community. The delays caused by the EPA refusal to come to a final decision apparently drove construction costs beyond the point of feasibility.

[55] See *The South Bronx Coalition for Clean Air v. Conroy*, 20 F.Supp. 2d 565 (S.D.N.Y. 1998), where the claim alleged minority residents of the Bronx would suffer the noxious effects of the garbage from the solid waste transfer station to a greater extent than the white residents would. It also alleged that the actions of the defendants were part of policy to site environmentally obnoxious activities in minority neighborhoods. See *id.* at 571-72. The complaint offered no factual support to the claims of intentional discrimination. With regards to its disparate impact claim, the complaint offered a few statistics of population percentages, and asthma attacks, then advised the court to take judicial notice that the South Bronx is poor and minority and Long Island is middle class and white. The court found their allegations to be conclusory and general and, in keeping with the pleading requirements, dismissed both their intentional discrimination and disparate impact claims. See *id.* at 572-73.

[56] See *The Jersey Heights Neighborhood Ass'n v. Parris Glendening*, 2 F.Supp.2d 772 (D. Md. 1998)(holding plaintiff's claims time barred because they waited until the highway project had received final funding and approval in 1997 even though the actual location had been chosen as an alternate route in the 70s.)

[57] See *Goshen Road Environmental Road Action Team v. U.S. Dept. of Agric.*, 891 F.Supp. 1126 (E.D.N.C. 1995), *aff'd* 1996 U.S. App. LEXIS 32909 (4th Cir. 1996), *aff'd* 1999 U.S. App. LEXIS 6135 (4th Cir. 1999) (recommending denial of the TRO because did not have a strong likelihood of success: they had delayed filing a claim for ten years and watched while the application, review, funding, condemnation, clearing, construction and initial operation occurred. The defense's claim that the plaintiff's were time-barred was likely to win at trial.)

[58] See Sheila Foster, *Impact Assessment*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ASSESS DISPROPORTIONATE RISKS 256, 280-85 (Michael B. Gerrard, ed.,

1999). Other statutes and regulations include Safe Drinking Water Act, Clean Air Act, National Historic Preservation Act.

[59] 42 U.S.C. §4332(2)(C).

[60] The court classified as minor a federally funded housing project, stating that it must meet a threshold size before an EIS was required. *United Neighbors Civic Ass'n of Jamaica, Inc. v. Pierce*, 563 F. Supp. 200 (E.D. N.Y. 1983).

[61] 40 C.F.R. §1508.14.

[62] *See Foster, supra* note 58, at 262.

[63] *See COLE, supra* note 6, at 111.

[64] *See id.*

[65] Eileen Guana, *The Environmental Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L. J 3, 65 (1998) *quoted in* COLE, *supra* note 6, at 111.

[66] Letter from EPA's Office of Civil Rights re Select Steel, October 30, 1998, *cited in* Sheila Foster, *Public Participation*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ASSESS DISPROPORTIONATE RISKS 185, 209 (Michael B. Gerrard, ed., 1999).

[67] 42 U.S.C §§6901-6987.

[68] 42 U.S. C. §6902 (a) (1995).

[69] 42 U.S.C. §6972. For an example of a citizen suit, *see Blue Legs v. United States Environmental Protection Agency*, 668 F. Supp. 1329 (D. S.D. 1987). For a critique of the effectiveness of citizens suits, *see* Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311 (1998).

[70] 42 U.S.C. §6902 (b).

[71] Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 3. C.F.R. §859 (1994), *reprinted in* 42 U.S.C. §4321.

[72] *See Foster, supra* note 58, at 279.

[73] *See id.*

[74] *See id.*

[75] *In re Chemical Waste Management of Indiana, Inc.*, RCRA Appeal Nos. 95-2 & 95-3, 6 E.A.D. 66 (June 29, 1995), *quoted in* Foster, *supra* note 58, at 279.

[76] Foster, *supra* note 58, at 280.

[77] *Id.* at 279.

[78] *Id.* at 280.

[79] *See* Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL L. 285, 307 (1995)

[80] *See id.*

[81] See Julia B. Latham Worsham, *Disparate Lawsuits under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?* 27 B.C. ENVTL AFF. L. REV. 631, 706 (2000).

[82] See *infra* at 11.

[83] See *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938).

[84] See *Goshen Road Environmental Action Team v U.S. Dept. of Agric.*, 891 F. Supp. 1126 (E.D. N.C. 1995). See also Natalie M. Hammer, Comment, *Title VI as a Means of Achieving Environmental Justice*, 16 N. ILL. U. L. REV. 693, 714 (1996).

[85] See Worsham, *supra* note 81, at 701.

[86] See Popovic, *supra* note 9, at 339.

[87] See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[88] See Popovic, *supra* note 9, at 366.

[89] See *id.* at 349. The third Principle of the Draft Declaration recites environmental justice as a human rights principle: "All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment."

[90] Alaska, Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, Rhode Island and Texas. See *id.* at 355-56.

[91] See *id.* at 356.

[92] See *id.* at 357.

[93] See *id.* at 359.

[94] See *id.* at 366.

[95] See *id.* at 351.

[96] 738 F. Supp. 134 (D. Del.), *aff'd*, 922 F. 2d 832 (3rd Cir. 1990).

[97] See *MacNamara*, 738 F.Supp. at 141.

[98] See *id.* at 142.

[99] Been, *supra* note 14, at 1008-09.

[100] 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 (1993).

[101] See *id.* at 744-755. These techniques include the zoning of segregated neighborhoods. After the judicial dismantling of these exclusionary zoning schemes, other alternative segregative land use controls were used: racially restrictive covenants which survived based on the freedom to contract; the federal government implemented racially segregated federally insured housing and made no move to integrate subsidized housing until the 70s. See also Robert W. Collins and Robin A. Morris, *Racial Inequality in American Cities: An Interdisciplinary Critique*, 11 NAT'L BLACK L.J. 177, 182-83 (1989); Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies In Federal Homeownership Programs*, 74 NW. U. L. Rev. 491, 510-21 (1979). Other federal programs used the power of eminent domain to eliminate urban blight and

build freeways and interchanges by clearing traditionally black neighborhoods and moving those displaced black households to inferior, relocation housing.

At the local level, governments used exclusionary zoning techniques (minimum lot size, single-family dwellings, and bans on apartments and manufactured homes) creating financial barriers for minority homeowners. These financial barriers work just as effectively as segregative zoning practices.

[102] See for example *Swann v. Charlotte-Mecklenburg Bd of Educ.*, 402 U.S. 1 (1971).

[103] See Dubin, *supra* note 100, at 761.

[104] See *West Bros. Brick Co. v. City of Alexandria*, 193 S. E. 881, 883-84 (1937); see also *O'Rourke v. Teeters*, 146 P.2d 983 (Cal. Ct. App. 1944) in which the court recognized the importance of zoning equity within low-income minority communities: "It needs no argument to support the thesis that all classes of our citizens, rich and poor, of whatever race or creed, are entitled to the equal protection of our laws and the privilege of living in areas which have been properly zoned for residential purposes pursuant to the recommendation of a duly created planning commission."

[105] See Dubin, *supra* note 100, at 762-63.

[106] See *id.* at 795.

[107] *Louisiana v. United States*, 380 U.S.145, 154 (1965).

[108] See Dubin, *supra* note 100, at 796.

[109] NORMAN WILLIAMS, JR. AND JOHN M. TAYLOR, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER §82.01 at 1.

[110] 272 U.S. 365 (1926).

[111] See Dubin, *supra* note 100, at 740 (1993).

[112] See *Larkin v. Grendel's Den*, 459 U.S. 116, 121 (1982).

[113] *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

[114] See *Bailey v. Proctor*, 160 F.2d 78 (1st Cir. 1947) where district court ignored legislative intent and dismantled a mutual fund because of the potential for future abuse.

[115] See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 270-72 (2nd ed. 1994).

[116] See Robert D. Bullard, *Mobilizing for the 21st Century: Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 454 (1999) (Bullard calls for a public health model of prevention which does not wait until causative proof has been established before taking action.)

[117] See *New York Urban League v. New York*, 71 F.3d 1031 (2nd Cir. 1995) for what happens when the court declines to consider the broader sociological factors at the heart of the issue.

[118] *Supra* note 23.

[119] U.S.P.L. 106-274 (S.2809) (2000).

[120] *Euclid*, 272 U.S. at 390.

[121] See Duffy, *infra* note 136, at 775 in which she proposes using state siting boards to prevent local opposition from turning the tide of official favor against the siting of hazardous waste facilities.

[122] *See infra* at 30.

[123] The Dept. of Commerce promulgated the Standard Zoning and Enabling Act in 1926 providing a model for states to use in enabling municipalities to use the police power to zone their communities. See Standard State Zoning Enabling Act, U.S. Dept. of Commerce, 1926. The Enabling Statute gave the municipality power to regulate by district according to a comprehensive plan. It created administrative bodies to deal with the zoning (zoning commission) and the complaints as a result of the zoning (board of adjustments).

[124] *See* Dubin, *supra* note 100, at 744.

[125] *See* DANIEL R. MANDELKER, LAND USE PLANNING AND LAW, §1.09 at 8-9 (2nd ed. 1988).

[126] RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW AND PUBLIC POLICY 296 (1996).

[127] R.F. Babcock, *The Chaos of Zoning Administration*, 12 ZONING DIGEST 1, 154 (1960), *quoted in* PLATT, *supra* note 126, at 296.

[128] Richard Briffault, *Our Localism: Part I-The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1-2 (1990).

[129] S.992, H.R. 4332, 92nd Cong. (1974). *See* Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, in ZONING AND THE AMERICAN DREAM 73, 90 (Charles M. Haar & Jerold S. Kayden, American Planning Institute eds. 1989).

[130] *See id.*

[131] *See id.*

[132] *See id.*

[133] *See id.* at 90-91.

[134] *See* NATURAL RESOURCES DEFENSE COUNSEL, LAND USE CONTROLS IN THE UNITED STATES 252 (1977).

[135] *See* PLATT, *supra* note 126, at 297.

[136] *See* Celeste Duffy, Article and Comment, *State Hazardous Waste Facility Siting: Easing the Process through Local Cooperation and Preemption*, 11 B.C. ENVTL. AFF. L. REV. 755, 775-76 n.139 (1984).

[137] COLO. REV. STAT. 24.65.1-101-24.65.1-502 (1974).

[138] H.R. 2929 (Engrossed Substitute), Spec. Sess. (1990). *See also*, SECTION OF URBAN, STATE, AND LOCAL GOVERNMENT LAW. AMERICAN BAR ASSOCIATION, LAND USE, PLANNING AND ZONING LAW: THE 1991 SURVEY 846-48 (1992).

[139] Previously, Washington had allowed local government to make a decision whether to adopt a comprehensive plan. Some counties and cities did not engage in any formal planning or land-use regulations.

[140] *See* SECTION OF URBAN, STATE, AND LOCAL GOVERNMENT LAW. AMERICAN BAR ASSOCIATION, LAND USE, PLANNING AND ZONING LAW: THE 1991 SURVEY 847 (1992).

[141] *Id.*

[142] *See id.*

[143] *See id.*

[144] *See id.* at 848 n.16. *See also* *Barrie v. Kitsap County*, 613 P.2d 1148, 1159 (Wash. 1980) in which the Washington Supreme Court articulated that if the Washington Legislature intended for a certain standard to be met, then the reviewing court will apply stricter scrutiny to ensure that compliance with that standard.

[145] *See* HOW TO LITIGATE A LAND USE CASE: STRATEGIES AND TRIAL TACTICS 28 (Larry J. Smith, ed. 2000). *See* California Environmental Quality Act, CAL. PUB. RES. CODE §§21000-21176 (Deering 1986); Washington State Environmental Policy Act of 1971, WASH. REV. CODE §§43.21C.010-910 (1983).

[146] *See* Smith, *supra* note 145, at 28.

[147] *See id.*

[148] *See id.* at 28-29.

[149] *See Barrie v. Kitsap County*, 613 P.2d 1148 (1980).

[150] *See* HAW. REV. STAT. §343-2 (significant effects include those that adversely affect the economic and social welfare); MD. NAT. RES. CODE ANN. §1-301 (b) (environmental effects include natural, socioeconomic and historical impacts).

[151] *Barrie v. Kitsap County*, 613 P.2d 1148 (1980), *cited in* Foster, *supra* note 58, at 287.

[152] *See Township of Williston v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1975) and *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

[153] *In Township of Williston v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1975) the Pennsylvania Supreme Court adopted a fair share requirement: all communities in the path of population growth had to zone so as to provide housing suitable to the needs of all people who might want to live in that community.

[154] West's Ann.Cal. Govt. Code §65584(a). It is notable that noncompliance is reportedly widespread in California. *See* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 486 (2nd ed. 1999).

[155] *Udell v. Haas*, 235 N.E.2d 897 (Ct. App. N.Y. 1968).

[156] *See id.*

[157] *See* COLE, *supra* note 6, at 39.

[158] *See id.*

[159] *Supra* note 2.

[160] *See* Duffy, *supra* note 136, at 769.

[161] *See* Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 405 (1991).

[162] *See id.*

[163] *See id.*

[164] *See id.* at 406.

[165] *See id.* at 426. Godsil proposes that when a state board evaluates hazardous waste site, they take into account the environmental suitability, economic feasibility, risks and effects of local residents, adverse effects on agriculture and natural resources, and whether the locale is already burdened by environmental hazards. If the board finds that a number of sites exist that satisfy the criteria equally, they should take into consideration the racial and socioeconomic makeup of the potential candidate sites.

[166] *See Goffinet v. County of Christian*, 357 N.E. 2d 442 (Ill. 1976).

[167] *See American Nat'l Bank & Trust Co. v. Arlington Heights*, 450 N. E. 2d 898 (Ill. App. 1983).

[168] *See* Godsil, *supra* note 161, at 407.

[169] *See* Robert S. Bullard, *Environmental Blackmail in Minority Communities*, in THE PROCEEDINGS OF THE MICHIGAN CONFERENCE ON RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 63 (Paul Mohai & Bunyan Bryant eds., 1990).

[170] *See id.* at 63.

[171] *See* Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, 11 AMICUS J. 22, 36 (1989) (describing the offer of a \$10 million Community Betterment Fund by the Los Angeles Bureau of Sanitation to a black city councilman if he would approve a hazardous waste incinerator in his neighborhood.)

[172] *See* COLE, *supra* note 6, at 81.

[173] Lawrence E. Susskind & Stephen R. Cassella, *The Dangers of Preemptive Legislation: The Case of LNG Facility Siting in California*, in RESOLVING LOCATIONAL CONFLICT 408 (Robert W. Lake ed., 1987).

[174] 1977 Cal. Stat. 855.

[175] *See* Susskind & Cassella, *supra* note 173, at 409.

[176] *See id.* at 419.

[177] *See id.* at 420.

[178] *See id.* at 409, 424.

[179] *See id.* at 409.

[180] A. Dan Tarlock, *State Versus Local Control of Hazardous Waste Siting: Who Decides in Whose Backyard?* in RESOLVING LOCATIONAL CONFLICT 145 (Robert W. Lake ed. 1987).

[181] *Id.*

[182] *See* Susskind & Casella, *supra* note 173, at 425.

[183] *See* CALLIES, *supra* note 154, at 412. In an initiative vote, citizens who realize a developer desires to develop land that is presently zoned for intensive use, move to place an initiative on the ballot that would downzone the land before the developer's right vests.

[184] *See id.* at 412-13. In a referendum citizens who disagree with an upzoning petition to place the issue on the ballot. A majority vote at the polls would rescind the rezoning. Some communities actually mandate a referendum on all rezoning issues.

[185] *See* Freilich and Guemner, *Removing Artificial Barriers to Public Participation in Land Use Policy: Effective Zoning and Planning by Initiative and Referendum*, 21 URB. LAW. 511 (1989).

[186] *Supra* note 1.

[187] *See* Godsil, *supra* note 161. Godsil claims that political pressure could lead local agencies to designate unsuitable land hoping to prevent the state board from putting local sites on the inventory. Citizen suits, political pressure from politicians with clout necessary to influence the state board could all lead to undue delay in siting. This might cause a "harried agency" to choose the site occupied by a community of people least likely to mount a legal challenge i.e., the poor and the minority.

[188] FLA.STAT. ANN. §70.001.

[189] *See* CALLIES, *supra* note 154, at 348.

[190] 512 U.S. 374 (1994).

[191] *See id.*

[192] *See id.*

[193] *See id.*

[194] Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1039 (1979).

[195] Robert Bullard, in *Building Just, Safe and Healthy Communities*, 12 TUL. ENVTL. L.J. 373, 386 (1999) suggests that the environmental justice framework requires parties applying for environmental permits to "'prove' that their operations are not harmful to human health, will not disproportionately impact racial and ethnic minorities and other protected groups, and are nondiscriminatory."

[196] *See Fasano v. Bd. of County Comm'r of Washington County*, 507 P.2d 23 (Or. 1973) (finding that in an appeal for a zoning change, the burden of proof is on the person requesting the zone change. They must show that 1) there is a public need for the change, and 2) the need will be best served by rezoning the particular piece of property as compared with other available property. The more drastic the change, the greater the burden of proof on the applicant.)

[197] *Euclid*, 272 U.S. at 395.

[198] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

[199] *Id.* at 68.

[200] *See, for example, Warren v. Municipal Officers of Town of Gorham*, 431 A.2d 624 (Me. 1981).

[201] *See, for example, City of Aurora v. Burns*, 149 N.E. 784 (Ill. 1925).

[202] *See, for example, Kroner v. City of Portland*, 240 P 536 (Or. 1925).

[203] *See, for example, Wolf Pen Preservation Ass'n v. Louisville & Jefferson Cty. Plan. Comm'n*, 942 S.W. 2d 310 (Ky. App. 1997).

[204] *See, for example, Miller v. City of Port Angeles*, 691 P.2d 229 (Wash. App. 1984).

[205] See *Bartram v. Zoning Comm'n of City of Bridgeport*, 68 A.2d 308 (Conn. 1949) (holding that property owners have "no right to a continuation of an existing situation.")

[206] See generally DANIEL R. MANDELKER, *LAND USE LAW* §§6.11-6.22 (2nd ed. 1988). Also CALLIES, *supra* note 153, at 136.

[207] 75 F. 3d 318, 325 (7th Cir. 1996).

[208] See *Robertson v. City of Plano*, 1999 U.S. Dist. LEXIS 8921, 23 (N.D. Ill. 1999).

[209] See *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (Or. 1973).

[210] *Id.*

[211] See SECTION OF URBAN, STATE, AND LOCAL GOVERNMENT LAW, AMERICAN BAR ASSOCIATION, *LAND USE, PLANNING AND ZONING LAW: THE 1991 SURVEY* 848 (1992).

[212] See for example *Bartram v. Zoning Comm'n of Bridgeport*, 68 A.2d 308 (Conn. 1949) (Dickenson, J., dissenting)(stating that "so radical a departure from the general purpose of zoning to separate business from residential districts should not be left to the whims of the zoning board. It should come within 'a comprehensive plan for zoning the town.'")

[213] *Topanga Ass'n For A Scenic Community v. County of Los Angeles*, 522 P.2d 12 (Cal. 1974).

[214] *Id.*

[215] See CALLIES, *supra* note 154, at 89.

[216] See for example Portland Zoning Ord. §33.815.010 that considers conditional uses' "potential individual or cumulative impact they may have on the surrounding area or neighborhood. The conditional use review provides an opportunity to allow the use when there are minimal impacts, to allow the use but impose mitigation measures to address the identified concerns, or to deny the use if the concerns cannot be resolved."

[217] See WILLIAMS & TAYLOR, *supra* note 109, at 333-39.

[218] See for example, *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1993).

[219] See CALLIES, *supra* note 154, at 691-92.

[220] See *Godsil*, *supra* note 160, at 426.