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NOTES

Remedying Environmental Racism

Rachel D. Godsil

In 1982, protesters applied the techniques of nonviolent civil disobedience to a newly recognized form of racial discrimination.¹ The protesters, both black and white, attempted to prevent the siting of a polychlorinated biphenyl (PCB)² landfill in predominantly black Warren County, North Carolina.³ In the end, the campaign failed. Nonetheless, it focused national attention on the relationship between pollution and minority communities⁴ and prompted the U.S. General Accounting Office (GAO) to study the racial demographics of hazardous waste sites.⁵

The GAO report found that three out of the four commercial hazardous waste landfills in the Southeast United States were located in

1. Charles Lee, *Toxic Waste and Race in the United States*, in THE PROCEEDINGS OF THE MICHIGAN CONFERENCE ON RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 6, 8 (Paul Mohai & Bunyan Bryant eds., 1990) [hereinafter ENVIRONMENTAL HAZARDS].

2. PCBs cause liver disorders and a serious skin condition called chloracne. Harvey L. White, *Hazardous Waste Incineration and Minority Communities: The Case of Alsen, Louisiana*, in ENVIRONMENTAL HAZARDS, *supra* note 1, at 142, 145.

3. Lee, *supra* note 1, at 8. Reverend Leon White, a veteran of the civil rights struggles of the South, organized the campaign. During the campaign, over 500 protesters were arrested, including several prominent black leaders: Reverend Benjamin Chavis, Jr. of the United Church of Christ Commission for Racial Justice, Dr. Joseph Lowry of the Southern Christian Leadership Conference, and Democratic Congressman Walter Fauntroy. *Id.*

4. The term "minority community" is not defined in the literature addressing environmental hazards and race. The United Church of Christ Commission for Racial Justice study of the relationship between hazardous waste sitings and race did not specifically define "minority community"; rather, the study examined the percentage of minorities in a given area relative to the number of hazardous waste sites. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) [hereinafter TOXIC WASTES AND RACE]. Unless defined otherwise for discussion of a specific case or study, this Note uses "minority community" as a general term to refer to geographic areas with a high concentration of minority residents.

Public awareness and national attention on this issue have escalated recently due to press coverage of a national summit on "environmental racism" in Washington, D.C. *Target of Toxins: Poor communities charge 'environmental racism,'* USA TODAY Oct. 14, 1991, at 1.

5. U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES, 1983. This report examined the four off-site landfills in the EPA's Region IV, which is located in the southeastern part of the United States.

"Hazardous waste" is the term the Environmental Protection Agency (EPA) uses to describe by-products of industrial production which present serious health and environmental problems. TOXIC WASTES AND RACE, *supra* note 4, at xii. Hazardous waste may be toxic, ignitable, corrosive, or dangerously reactive. 40 C.F.R. §§ 261.20-.24 (1990). For a discussion of the dangers of hazardous waste, see White, *supra* note 2, at 142-47.

majority black communities.⁶ Following the GAO report, in 1987, the United Church of Christ Commission for Racial Justice published a comprehensive national study analyzing the relationship between race and the location of hazardous waste sites.⁷ The Commission found that race is the predominant factor related to the presence of hazardous wastes in residential communities throughout the United States — a more significant factor than even socioeconomic status.⁸ Responding to this finding, Reverend Benjamin Chavis, Jr. coined the term “environmental racism,”⁹ referring to both the intentional and unintentional disproportionate imposition of environmental hazards on minorities.¹⁰

While several methods of reducing the amount of hazardous waste society produces exist — most notably source reduction and recycling — none will completely eliminate the need for new hazardous waste

6. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 5, at 3.

7. TOXIC WASTES AND RACE, *supra* note 4; Lee, *supra* note 1, at 6. Other studies have also suggested that minorities are “the most common victims of environmental pollution.” Michel Gelobter, *Toward a Model of “Environmental Discrimination,”* in ENVIRONMENTAL HAZARDS, *supra* note 1, at 87 (citing several studies).

8. TOXIC WASTES AND RACE *supra* note 4, at xiii.

9. Lee, *supra* note 1, at 6. Professors Paul Mohai and Bunyan Bryant compiled studies that provide empirical evidence regarding the burden of environmental hazards borne by racial minorities. Paul Mohai & Bunyan Bryant, *Environmental Inequities and the Inner City*, Delivered at the 6th Annual Technological Literacy Conference of the National Association for Science, Technology & Society (1991) (on file with the *Michigan Law Review*). Mohai and Bryant state that nine of thirteen studies collected found that the distribution of environmental burdens were “racist,” with six of those studies finding race a more significant factor than income. *Id.* (citing TOXIC WASTES AND RACE, *supra* note 4; A. Myrick Freeman, *The Distribution of Environmental Quality*, in ENVIRONMENTAL QUALITY ANALYSIS (Allen V. Kneese & Blair T. Bower eds., 1972); Michel Gelobter, *The Distribution of Air Pollution by Income and Race*, Paper presented at the Second Symposium on Social Science in Resource Management, Urbana, Ill. (June, 1988) (studying urban areas and the nation); Leonard Gianessi et al., *The Distributional Effects of Uniform Air Pollution Policy in the U.S.*, Q. J. ECON. 281-301 (May 1979); Patrick C. West, *Invitation to Poison? Detroit Minorities and Toxic Fish Consumption from the Detroit River*, Paper presented at the University of Michigan Conference on Race and the Incidence of Environmental Hazards, Ann Arbor, Mich. (Jan. 1990)). Moreover, in a 1990 Detroit area study, Bryant and Mohai found that 44% of the residents within one mile of a commercial hazardous waste facility were black while only 15% were black one and a half miles away. Mohai & Bryant, *supra*. This Note does not critically evaluate these findings; it accepts them as true for the purposes of legal analysis. Nor does this Note specifically address the correlation of poverty and environmental hazards which some studies show to be a factor in siting decisions. See *infra* note 19.

10. TOXIC WASTES AND RACE, *supra* note 4, at ix-x. The use of the term “racism” to describe unintentional as well as intentional acts is somewhat controversial. For example, the Supreme Court requires proof of purposeful and invidious discrimination to find a violation of the Fourteenth Amendment; a showing of impact on a minority group is insufficient. *Washington v. Davis*, 426 U.S. 229, 242 (1976); see *infra* Part III. Title VII of the Civil Rights Act of 1964, however, prohibits use of any employment criterion that disparately impacts employees on the basis of race. PAUL COX, EMPLOYMENT DISCRIMINATION § 7.01 (1987). This Note does not distinguish between intentional and unintentional racism in the placement of hazardous waste sites. In both cases the effect on minorities is disproportionate, and as is discussed *infra* Part IV, this Note’s suggested remedy would apply to both.

facilities.¹¹ Opening new facilities means choosing new sites.¹² The media coverage of environmental disasters such as Love Canal¹³ alerted the public to the dangers of hazardous waste. Thus, the process of choosing new sites usually leads to the "Not In My Back Yard" (NIMBY) syndrome.¹⁴ Well-meaning environmentalists and worried citizens of affluent communities oppose hazardous waste facilities in *their* backyards; as a result, developers all too often site facilities in predominantly poor and minority communities.¹⁵

This Note addresses the equity issues that arise in the placement of commercial hazardous waste facilities. Currently, minorities are shouldering an unequal share of the burdens of hazardous waste¹⁶ while the benefits of production that results in hazardous waste are dispersed throughout society.¹⁷ Studies demonstrate that poor whites are overburdened as well.¹⁸ While inequitable distribution of waste

11. Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 266 (1982). In 1982, the United States produced 47.5 million metric tons of hazardous wastes. Moreover, new government regulations will lead to a need for more off-site facilities. *Id.*

Commentators agree that source reduction is a better long-term strategy than developing new disposal methods. See generally TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL (1983); MICHAEL G. ROYSTON, POLLUTION PREVENTION PAYS (1979); Roberta C. Gordon, Note, *Legal Incentives for Reduction, Reuse, and Recycling: A New Approach to Hazardous Waste Management*, 95 YALE L.J. 810 (1986).

12. Many existing facilities, unsafe according to current regulations, have closed, creating a dearth of legal disposal facilities. See Bacow & Milkey, *supra* note 11, at 266.

13. Love Canal was an abandoned waste dump in Niagara Falls, New York. Toxic fumes and leachate caused property damage and severe health defects, including high cancer rates, spontaneous abortions, chromosome damage, and chemical burns. Bacow & Milkey, *supra* note 11, at 265 n.2. While regulation should mitigate some of the health threats of dumps like Love Canal, hazardous waste sites still pose health risks due to the potential for accidents and improper operation. See *id.* at 268. A community containing a hazardous waste facility bears other costs, including the noise and congestion resulting from transporting hazardous waste materials and the stigma of being labeled "the region's dump." *Id.* These combined costs almost always lower property values in the area. See *id.*

14. Public opposition is identified as the major obstacle to siting hazardous waste facilities. Bacow & Milkey, *supra* note 11, at 266-67.

15. Robert Bullard, *Environmental Blackmail in Minority Communities*, in ENVIRONMENTAL HAZARDS, *supra* note 1, at 64.

16. See *infra* notes 21-33 and accompanying text (discussing the United Church of Christ finding that hazardous waste facilities have a disparate impact upon minorities).

17. Bacow & Milkey, *supra* note 11, at 268 ("The social costs associated with hazardous waste facilities fall most heavily on those who live nearby. . . . By contrast, the dispersed benefits of a hazardous waste facility accrue to the entire region served by the facility.").

18. The Commission for Racial Justice found that the poor of *all* races are more likely to bear the burden of proximity to hazardous waste facilities than are members of the middle or upper classes. TOXIC WASTES AND RACE, *supra* note 4, at xiii. Still, the Commission found that "the racial composition of a community was . . . the single variable best able to explain the existence or non-existence of commercial hazardous waste facilities in a given community area." Lee, *supra* note 1, at 11. Because the majority of the poor in the United States are white, BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, SERIES P-60, NO. 171, POVERTY IN THE UNITED STATES: 1988 AND 1989, at 4 (1991) (Whites comprise 66% of poor persons, blacks, 30%. Hispanics, who may be of any race and are therefore included in the preceding figures, comprise 17.2%), the correlation between race and hazardous waste siting supports the conclu-

sites along class lines is troubling and deserving of attention, this Note focuses specifically on the burdens facing racial minorities.¹⁹

This Note contends that all races should share equitably the burdens and risks of hazardous waste facilities. Part I documents the disproportionate burden of hazardous waste sites upon minorities²⁰ and suggests causes of that disproportionality. Part II examines the current federal and state legislation regulating hazardous waste siting. It determines that state hazardous waste management programs fail to address possible "environmental racism." Part III discusses the potential for using section 1983 of the Civil Rights Act of 1866 and the Equal Protection Clause of the Fourteenth Amendment to challenge a state's ability to site facilities that will disparately burden minorities. It argues that in cases where flagrant disparities exist between the environmental burden imposed on minority communities relative to white communities, a constitutional remedy may be successful. Part III, however, concludes that this remedy is insufficient because most plaintiffs will not be able to prove that a state harbored discriminatory purpose, and therefore will not prevail under section 1983 or the Fourteenth Amendment. Part IV proposes a potential Act of Congress, patterned after a provision of the Civil Rights Act of 1990, in conjunction with an amendment to current federal legislation and model state legislation, to ameliorate the disparate burden of hazardous waste siting on minorities.

I. DEFINING "ENVIRONMENTAL RACISM"

A host of studies have concluded that minorities are exposed to a higher level of pollution of all forms than are whites.²¹ Civil rights organizations have raised the issue of "environmental racism" in response to concern over this inequitable distribution of various environmental burdens.²² This Part sets forth the findings of the United Church of Christ Commission for Racial Justice that document the disproportionate distribution of hazardous waste facilities in communities with high percentages of minority residents.

The United Church of Christ Commission for Racial Justice report, the first comprehensive national report to document the specific

sion that race, and not simply economic vulnerability, affects siting decisions. TOXIC WASTES AND RACE, *supra* note 4, at 16.

19. Race and poverty as factors in the placement of hazardous waste sites are difficult to disaggregate. Commentators argue, for instance, that the high poverty rate in minority communities, *see supra* note 18, is one reason for "environmental racism." *See infra* notes 34-38 and accompanying text. This Note discusses both race and poverty as factors leading to the disproportionate burdening of racial minorities.

20. *See infra* notes 23-33 and accompanying text.

21. Michael Gelobter, *Toward a Model of "Environmental Discrimination,"* in ENVIRONMENTAL HAZARDS, *supra* note 1, at 87.

22. Bullard, *supra* note 15, at 60, 70. *See supra* note 9 and accompanying text.

relationship between hazardous waste sitings and racial demographics,²³ comprises two studies. The first analyzed the relationship between demographic patterns and commercial hazardous waste (CHW) facilities²⁴ and the second determined the link between demographic patterns and uncontrolled toxic waste (UTW) sites.²⁵ This Note discusses both relationships, because evaluating equity issues in the siting of CHW facilities requires consideration of the *total* burden of hazardous waste facilities on minorities.

The Commission noted a consistent national pattern: race is the most significant determinant of the location of hazardous waste facilities.²⁶ Though socioeconomic status appeared to play an important role, race proved more significant.²⁷ Communities with the highest composition of minority residents had the greatest number of commercial hazardous waste facilities.²⁸ Moreover, forty percent of the country's CHW capacity is located in landfills in predominantly black or Hispanic communities.²⁹

The presence of UTW sites in American communities is generally pervasive: fifty percent of all Americans live in communities with uncontrolled sites.³⁰ Minority communities, however, are affected to a

23. Lee, *supra* note 1, at 6.

24. A "commercial hazardous waste facility" accepts hazardous wastes from a third party for a fee or other remuneration. TOXIC WASTES AND RACE, *supra* note 4, at xii.

25. "Uncontrolled toxic waste sites" are those closed and abandoned sites on the EPA's list of sites which pose a threat to human health and the environment. *Id.* at xii. For a discussion of the research methodology and statistical tests used, see *id.* at 9-12.

26. TOXIC WASTES AND RACE, *supra* note 4, at 23. The study tested the following variables: "minority percentage of the population," "mean household income," "mean value of owner-occupied homes," "number of uncontrolled toxic waste sites per 1,000 persons," and "pounds of hazardous waste generated per person." *Id.* at 10. The Commission evaluated the number of uncontrolled toxic waste sites in a particular area to assess whether underlying historical or geographical factors — including land use, zoning, and transportation access — affected the location of commercial facilities. The hazardous waste generation variable was used to determine the relationship between the location of facilities and waste generation. *Id.* The report found that communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic minority residents. In communities with two or more facilities, or with one of the nation's five largest landfills, the average minority percentage of the population was more than three times that of communities without facilities: 38% vs. 12%. Minorities comprised 24% of communities with one hazardous waste facility while comprising only 12% of communities without such facilities. *Id.* at xiii.

27. *Id.* at xiii. The study concluded that the mean household income and the mean value of owner-occupied homes did not correlate as well as the mean minority percentage of the population with the presence of commercial hazardous waste sites. *Id.* at 13. The correlation between a minority population and the location of commercial hazardous waste sites was statistically significant in eight of the EPA's ten regions, while mean household income was significant in only three of those regions. *Id.* at 44. Moreover, the correlation between minorities and commercial hazardous waste facilities was statistically significant in 22 states, while household income was statistically significant in only two states and mean home value in eight. *Id.* at Table B-7; see also Mohai & Bryant, *supra* note 9.

28. TOXIC WASTES AND RACE, *supra* note 4, at xiii.

29. *Id.* at xiv. The report supported the 1983 GAO study finding that large commercial landfills are located in predominantly rural black communities. *Id.* at 16.

30. *Id.* at xiv.

greater degree: three of every five blacks and Hispanics live in communities with uncontrolled toxic waste sites.³¹ The average minority population is four times greater in areas with UTW sites than in communities without such facilities.³² These findings demonstrate that blacks in particular are strikingly over-represented in the populations of metropolitan areas with the largest number of uncontrolled toxic waste sites.³³

Commentators have suggested several causes for the disproportionate burden on minorities. Most argue that minority communities are targeted for hazardous waste facilities and other environmental hazards by waste-management firms because their residents are more likely to be poor and politically powerless.³⁴ Waste-management firms, therefore, find it politically expedient to site hazardous waste facilities in minority communities.³⁵ These communities also tend to be more vulnerable to offers of compensation made in exchange for accepting hazardous environmental conditions.³⁶

Segregated housing patterns are another possible reason that minorities, and blacks particularly, are overburdened by environmental risks. According to the 1989 census data, 54.8% of urban blacks and 70.9% of poor urban blacks were concentrated in poverty areas.³⁷ By contrast, only 16.7% of urban whites and 40% of poor urban whites lived in poverty areas.³⁸ Because poor whites are more likely than minorities to live in economically varied areas, they will benefit from the political clout of the middle class.

Furthermore, the mean value of owner-occupied homes is a signifi-

31. *Id.*

32. *Id.* at 16.

33. Lee, *supra* note 1, at 12. The study found that blacks comprise 11.7% of the general population but at least 23% in the six cities that contain the greatest number of UTW sites. *Id.* For example, Memphis, Tennessee, which ranks as the metropolitan area with the greatest number of UTW sites in the nation, 99.8% of the black population lives in areas with UTW sites. TOXIC WASTES AND RACE, *supra* note 4, at 19.

34. Barry Commoner, an environmental scientist, states that "[t]here is a functional link between racism, poverty, and powerlessness, and the chemical industry's assault on the environment." Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, 11 AMICUS J. 22, 25 (1989). Charles Lee, author of the United Church of Christ report, argues that minority communities are targeted for the siting of hazardous wastes because they are "poorer, less informed, less organized, and less politically influential." *Id.* Time reports that waste-management firms look for the cheapest land, least community resistance, and local politicians hoping to attract revenues to their poor, minority districts. Elson, *Dumping on the Poor: America's Dispossessed Have Lived for Decades with Toxic Wastes and Garbage. Now They're Fighting Back*, TIME, Aug. 13, 1990, at 46; see also Taylor, *Panelists Assail Toxic Dumps in Minority Areas*, WASH. TIMES, Sept. 28, 1990, at A4.

35. See Bullard, *supra* note 15, at 60, 64.

36. See *id.* at 62-64; see also *infra* notes 112-19 and accompanying text.

37. U.S. BUREAU OF CENSUS, *supra* note 18, at 4. The U.S. Department of Commerce defines a "poverty area" as a census tract with a poverty rate of 20% or more. *Id.* at 4 n.4.

38. *Id.* at 4-5.

cant variable in the location of hazardous waste facilities.³⁹ According to one commentator, "[a]s a rule, whites are reluctant to move into neighborhoods that are as little as 20% black."⁴⁰ A smaller pool of willing buyers in minority areas lowers housing prices,⁴¹ and thereby lowers land values.⁴² Because developers are more likely to propose sites in areas with lower land values, they will often choose minority areas.⁴³ The dynamics of segregation, by allowing poor whites to benefit from middle-class resistance to hazardous waste facilities, and lowering land values in minority neighborhoods, may cause disproportionate sitings in predominantly minority areas.

The current political climate in middle- and upper-income areas is hostile toward waste facilities generally and hazardous waste facilities particularly.⁴⁴ The power of opposition results in costly delays for waste disposal companies and developers.⁴⁵ Although civil rights organizations have on occasion successfully opposed the siting of hazardous waste facilities in their communities,⁴⁶ minority communities often do not have the political influence or resources to compete with their affluent white counterparts, nor the level of representation in the state legislatures to compete even with poor whites.⁴⁷ Therefore, because hazardous waste sites must go *somewhere*, they are frequently placed in poor, minority communities.⁴⁸

II. LEGISLATION REGULATING THE HAZARDOUS WASTE SITING PROCESS

As early as 1965, Congress recognized that improper waste disposal "create[s] serious hazards to the public health, including pollution of air and water resources, and . . . public nuisances."⁴⁹ Until 1976, however, hazardous waste disposal was barely regulated. The result was careless waste disposal.

This Part discusses current federal and state regulation of hazardous waste facility siting. Section II.A sets forth the provisions of the Resource Conservation and Recovery Act (RCRA) governing hazard-

39. TOXIC WASTES AND RACE, *supra* note 4, at 16.

40. Walter L. Updegrave, *Race and Money*, MONEY, Dec. 1989, at 152, 159.

41. *Id.*

42. TOXIC WASTES AND RACE, *supra* note 4, at 16.

43. *Id.*

44. See Bullard, *supra* note 15, at 64; White, *supra* note 2, at 148.

45. White, *supra* note 42, at 151.

46. Arnolando Garcia, *Environmental Inequities*, CROSSROADS, June 16, 1990, at 18-19 (giving examples of the successful organizing efforts of minority organizations against the placement of hazardous waste facilities in their communities); Russell, *supra* note 34, at 22-24.

47. White, *supra* note 42, at 152.

48. Bullard, *supra* note 15, at 64.

49. Solid Waste Disposal Act, Pub. L. No. 89-272, § 202(a)(4), 79 Stat. 997 (1965).

ous waste.⁵⁰ Although RCRA establishes a “cradle to grave” tracking of hazardous substances,⁵¹ it leaves the siting of hazardous waste facilities to the states.⁵² Section II.B describes paradigmatic state siting procedures and concludes that none will ameliorate the inequities of the present distribution of hazardous waste facilities.

A. *Federal Response to Hazardous Waste: Resource Conservation and Recovery Act*

Prior to federal legislation, mismanagement of hazardous waste by disposal operators transformed hazardous wastes into a “crisis of high order.”⁵³ The “Love Canal”⁵⁴ disaster first brought the hazardous waste crisis to public attention, prompting Congress to pass RCRA.⁵⁵ The Act was adopted to prevent the careless disposal of hazardous wastes.⁵⁶

RCRA creates comprehensive federal guidelines for the management of the production, transport, treatment, and disposal of hazardous waste.⁵⁷ RCRA prohibits the placement of hazardous waste in certain land formations⁵⁸ and the land disposal of specific liquid wastes, and specifies minimum technological requirements for any waste site.⁵⁹ Nonetheless, as one commentator has claimed, it gives only “rudimentary treatment to the siting issue,”⁶⁰ leaving the states to translate RCRA’s limited guidelines and the EPA’s broad regulations⁶¹ into programs that both protect public health and the environment⁶² and create needed waste disposal capacity.⁶³

Each state must comply with EPA regulations under RCRA for its

50. Pub. L. No. 94-580, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991 (1988)).

51. 42 U.S.C. §§ 6921-6930 (1988).

52. 42 U.S.C. § 6924 (1988); see Joseph C. Gergits, Note, *Enhancing the Community’s Role in Landfill Siting in Illinois*, 1987 U. ILL. L. REV. 97, 112.

53. Bram D.E. Canter, *Hazardous Waste Disposal and the New State Siting Programs*, 14 NAT. RESOURCES LAW. 421, 421 (1982). The EPA believes that 90% of wastes have been disposed of improperly. *Id.* at 423.

54. See *supra* note 13.

55. Gergits, *supra* note 52, at 100.

56. *Id.* at 111.

57. 42 U.S.C. §§ 6941-6949a (1988); see Gergits, *supra* note 52, at 111.

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

59. 42 U.S.C. § 6924(m), (o), (p) (1988).

60. Canter, *supra* note 53, at 431. Canter claims that even the EPA’s MODEL STATE HAZARDOUS WASTE MANAGEMENT ACT (Annotated) (SW-635) (1977) failed to offer guidance for finding new sites for hazardous waste facilities. *Id.* at 435.

61. See 40 C.F.R. §§ 271-272 (1990).

62. 42 U.S.C. § 6902(b) (1988).

63. Canter, *supra* note 53, at 432-33 (quoting Letter from Douglas Costle, Former EPA Administrator, to State Governors (July 23, 1980)).

hazardous waste program to obtain federal approval.⁶⁴ Once the EPA authorizes a state program, that state has primary responsibility for enforcing it, although the EPA retains the right to exercise its enforcement authorities under RCRA.⁶⁵ The EPA has articulated three basic procedural requirements to guide the development of siting programs: (1) the state must complete a technical analysis of all proposed sites before any single site is selected; (2) the public must be allowed to fully participate in site selection; and (3) the state must not allow the process of site selection to be hampered by blanket local vetoes.⁶⁶ State programs must include provisions governing "permitting, compliance evaluation, enforcement, public participation, and sharing of information."⁶⁷

The state program must have its basis in "human health or environmental protection."⁶⁸ "Consistency" regulations, however, prohibit states from adopting overly stringent standards that act as a "prohibition on the treatment, storage or disposal of hazardous waste."⁶⁹ States interpreting the general guidelines provided by RCRA and the EPA have developed varied hazardous waste management programs.⁷⁰

B. *State Hazardous Waste Management Programs*

The major obstacle facing states attempting to distribute fairly the burden of hazardous waste facilities is the strength of public opposition.⁷¹ Although the fear and anger felt by communities that have been targeted for hazardous waste facilities are understandable, the NIMBY syndrome is one of the primary reasons minorities are disproportionately burdened by hazardous waste facilities.⁷² As white neighborhoods became vocal proponents of siting facilities "somewhere

64. See 40 C.F.R. § 271 (1990).

65. See 40 C.F.R. § 272 (1990).

66. Canter, *supra* note 53, at 433 (citing U.S. EPA, HAZARDOUS WASTE FACILITY SITING: A CRITICAL PROBLEM 3 (SW-865)(1980)).

67. 40 C.F.R. § 271.1(c) (1990).

68. 40 C.F.R. § 271.4(b) (1990).

69. 40 C.F.R. § 271.4(b) (1990). This regulation is inconsistent with § 3009 of RCRA which permits states to adopt such regulations. 42 U.S.C. § 6928 (1988); see David Schnapf, *State Hazardous Waste Programs Under the Resource Conservation and Recovery Act*, 12 ENVTL. L. 679, 722 (1982).

70. Canter, *supra* note 53, at 438.

71. See U.S. EPA, SITING OF HAZARDOUS WASTE MANAGEMENT FACILITIES AND PUBLIC OPPOSITION 207-19 (executive summary 1979); Sidney M. Wolf, *Public Opposition to Hazardous Waste Sites: The Self-Defeating Approach to National Hazardous Waste Control Under Subtitle C of the Resource Conservation and Recovery Act of 1976*, 8 B.C. ENVTL. AFF. L. REV. 463, 476 (1980). For a discussion of the shift toward siting in poor and minority communities due to the mobilized opposition of affluent communities, see White, *supra* note 2, at 151-52; Bullard, *supra* note 15, at 64; Robert Bullard & Beverly H. Wright, *Environmentalism and the Politics of Equity: Emergent Trends in the Black Community*, MID-AM. REV. SOCIOLOGY, Winter 1987, at 21.

72. White, *supra* note 2, at 151-53; Bullard, *supra* note 15, at 64.

else[, that] Somewhere Else, USA often ended up in poor, powerless, minority communities.”⁷³ Robert Bullard, a sociologist, asserts that politicians and industrialists “respond[] to the NIMBY phenomenon using the ‘PIBBY’ principle, ‘Place in Blacks’ Back Yard.’”⁷⁴

States have set up hazardous waste management programs either to overcome local hostility or bypass local opposition. States tend to take one of three general approaches to this problem: super review,⁷⁵ site designation,⁷⁶ and local control.⁷⁷ Some states have also statutorily mandated the incentives approach, compelling developers to compensate local communities that host hazardous waste facilities.⁷⁸

1. Super Review: The Most Common Approach

Under the super review approach,⁷⁹ a hazardous waste facility developer chooses a prospective site and applies for a permit with the authorizing agency, typically a state EPA or Department of Natural Resources. That agency will review the application and evaluate the environmental impact.⁸⁰ Once the application satisfies the state’s criteria, it is presented to a special administrative body appointed to quell the fears of the affected community.⁸¹

States’ environmental impact criteria differ, as do the complexity of their applications.⁸² Indiana demands that developers apply for a

73. Bullard, *supra* note 15, at 64.

74. *Id.* at 71.

75. Canter, *supra* note 53, at 438 (super review is a process of designating special siting boards to encourage participation, and hopefully lessen opposition from communities targeted for a hazardous waste facility); see *infra* section II.B.1.

76. Canter, *supra* note 53, at 437; see *infra* section II.B.2.

77. Celeste B. Duffy, *State Hazardous Waste Facility Siting: Easing the Process Through Local Cooperation and Preemption*, 11 B.C. ENVTL. AFF. L. REV. 755, 790 (1984).

78. CONN. GEN. STAT. ANN. § 22a-122(d) (West Supp. 1991); GA. CODE ANN. § 12-8-68(a) (Michie 1988); IND. CODE § 6-6-6.6-3(a) (West Supp. 1991); KY. REV. STAT. ANN. § 68.178(1) (Michie Supp. 1990); ME. REV. STAT. ANN. tit. 38, § 1319-R(4) (West. 1964); N.J. STAT. ANN. § 13:1E-80a (West Supp. 1991); N.C. GEN. STAT. §§ 153A-152.1(a), 160A-211.1(a) (Supp. 1990); OHIO REV. CODE ANN. § 3734.18(D) (Baldwin 1989). For a discussion of compensation as a method to overcome local opposition, see Bacow & Milkey, *supra* note 11, at 275-86.

79. Canter, *supra* note 53, at 438. The following state management programs utilize the super-review approach: CONN. GEN. STAT. ANN. § 22a-119 (West 1985 & Supp. 1991); IND. CODE ANN. § 13-7-8.6-3 (West 1988 & Supp. 1991); KAN. STAT. ANN. § 65-3432 (1985); ME. REV. STAT. ANN. tit. 38, § 1319-R(3) (West Supp. 1990); MICH. COMP. LAWS ANN. § 299.517 (West 1984 & Supp. 1991); N.Y. ENVTL. CONSERV. LAW § 27-1105(d) (McKinney Supp. 1991); N.C. GEN. STAT. § 143B-285.12 (1990); and OHIO REV. CODE ANN. § 3734.05(C) (Baldwin Supp. 1990).

80. For a detailed discussion of state hazardous waste management programs which use the super review approach, see Canter, *supra* note 53, at 438-43.

81. Canter, *supra* note 53, at 438.

82. The criteria considered include: seismic activity, 100-year floodplains; mines, oil and gas wells, and mineral areas; general environmental impact; critical habitat for endangered species; air quality; proximity to road; navigable and/or surface waters; wetlands; floodplains or flood hazard areas; geology and hydrology; wells and water supplies; unstable areas; open burning and detonation; zoning and land use requirements; and the proximity to other hazardous waste facilities. Not all states regulate according to each of these criteria, and the standards vary widely.

"certificate of environmental compatibility."⁸³ An Indiana application must delineate the hydrogeological⁸⁴ characteristics of the site, the proposed monitoring program, an environmental assessment, and an engineering plan.⁸⁵ In Wisconsin, the developer waits until the Department of Natural Resources determines the site suitable — based on, among other things, topography, soils, geology and hydrogeology — before specifying details of the construction and monitoring plan.⁸⁶ States also consider "soft criteria" — the effect of the site upon the community, as opposed to the effect on the environment. Michigan's statute requires, for example, an assessment of the impact of a site on the scenic, historic, and recreational aspects of an area.⁸⁷

If the proposed site meets the state's criteria, the application will be passed on to a special siting board.⁸⁸ The special siting boards are usually made up of experts (geologists, chemical engineers, academics and state agency directors) and local representatives. The local representatives are temporary, representing districts proposed for facilities. The methods of choosing local representatives vary from state to state. In Iowa, the local representatives are chosen by the city council and county board of supervisors, while in New York they are chosen by the governor. Ohio and Connecticut do not have local representatives on the board, but instead hold public hearings to encourage local participation.⁸⁹

The super review approach attempts to add legitimacy to the siting process through the creation of special siting boards.⁹⁰ The siting board is supposed to encourage informed debate and to create an opportunity for local community members to voice their concerns to experts rather than engage in reflexive opposition.⁹¹ All states that use this method, however, also have preemption clauses:⁹² if the board fails to eliminate local opposition, it can ignore the opposition. An aim of the super review approach is to minimize the issue of political expediency and emphasize environmental safety.⁹³

Environmental Defense Fund, State Location Standards (1990) (unpublished manuscript, on file with the *Michigan Law Review*).

83. IND. CODE ANN. § 13-7-8.6-5(a) (West 1990).

84. Hydrogeology is "a branch of geology concerned with the occurrence and utilization of surface and ground water and with the functions of water in modifying the earth especially by erosion and deposition." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1109 (1971).

85. IND. CODE ANN. § 13-7-8.6-5 (West 1990).

86. WIS. STAT. ANN. § 144.44(2)(f) (West 1989).

87. MICH. COMP. LAWS ANN. § 299.520(12)(e)(iii) (West Supp. 1991).

88. Canter, *supra* note 53, at 438-42.

89. *Id.* at 438-43.

90. *Id.* at 449.

91. *See id.* at 450-52.

92. *Id.* at 450.

93. *See id.* at 449.

The super review method, however, fails to prevent discriminatory siting. Private developers still choose the sites.⁹⁴ These developers have a cost incentive to choose sites with lower land values, which are typically inhabited by the poor, most often by poor minorities.⁹⁵ Moreover, even if states preempt local land-use statutes, those opposing the site may pursue other methods to block the sites.⁹⁶ Opponents of a facility can litigate, use their informal connections in state government to prevent the operation of a preemption statute, or resort to civil disobedience. Once developers realize that the super review approach will not fully assuage the NIMBY syndrome, they will continue to designate siting areas in poor, minority communities in order to prevent siting delays and save the expense of a protracted fight.

2. *Site Designation*

Under the site designation approach, rather than responding to the developer's selection, the state creates an inventory of possible sites.⁹⁷ In three states, Massachusetts, Maryland, and Minnesota, an agency or board designates sites around the state for future hazardous waste facilities.⁹⁸ Arizona designated one future site by statute, but otherwise follows a permit review process.⁹⁹

The Maryland plan requires the City of Baltimore, each county, and each unincorporated municipality, to submit a list of suitable sites to the Maryland Environmental Service.¹⁰⁰ The Service then evaluates the sites and compiles an inventory list. Maryland uses the super review approach concurrently.¹⁰¹ Developers must obtain a certificate of public necessity from the Hazardous Waste Facilities Siting Board, whose government-appointed members represent diverse public and private interests and hail from different regions of the state.¹⁰²

Minnesota created a Waste Management Board, which designates candidate sites for construction of disposal facilities, no two of which can be in a single county.¹⁰³ The Board solicits proposals from potential developers and operators rather than local governments. After developing a list of potential sites, the Board asks local governments, metropolitan governments, and regional development commissions for

94. See *supra* note 79 and accompanying text.

95. See *supra* notes 37-43 and accompanying text.

96. Bacow & Milkey, *supra* note 11, at 272-74.

97. Canter, *supra* note 53, at 443; cf. Gergits, *supra* note 52, at 117 (In Maryland, the state itself constructs and operates landfills, yet local review boards may accept or reject the state's siting proposals.).

98. Canter, *supra* note 53, at 444-48.

99. ARIZ. REV. STAT. ANN. § 49-902(A) (1988).

100. MD. NAT. RES. CODE ANN. § 3-710 (Supp. 1991).

101. See MD. NAT. RES. CODE ANN. § 3-703 (1989).

102. Canter, *supra* note 53, at 444.

103. MINN. STAT. ANN. § 115A.21(1) (West 1987).

comments. Minnesota's plan then provides for local "project review committees" for each candidate site, to encourage communication between local communities and state regulatory authorities, and to appease local concerns.¹⁰⁴ The Board makes a final selection following an evaluation of the site and with the benefit of local participation.¹⁰⁵

This method offers more promise to ameliorate environmental racism than does the super review approach because the state, unlike developer, is not motivated by profit. It therefore will be less likely to designate potential sites solely on the basis of the lowest land values. By taking a more comprehensive view of the sites, the state could ensure that no single area becomes overburdened.

The site designation approach is hardly infallible, however. For example, the Maryland plan, in which counties are required to designate *suitable* sites, may create an impetus for counties to select *unsuitable* sites, hoping to dissuade the Environmental Service from putting the county's sites on its inventory. Professor White suggests other syndromes which may prevent this method from successfully furthering equity — "Not In My Term Of Office" (NIMTOF) and "Not In My Election Year" (NIMEY).¹⁰⁶ politicians from communities with political clout may lobby the agency to remove their district from the list. In addition, the community may litigate against the facility or otherwise try to delay the siting. The prospect of such delays may lead a harried agency to choose the community *least* able to sustain the NIMBY syndrome — the poor and minority community — rather than battle a more influential community.

3. Local Control

Only two states, California and Florida, continue to adhere to the local control approach. Under this approach, local land use regulations are not preempted by a state hazardous waste management plan.¹⁰⁷ In other words, a locale can create strict land use regulations to block any hazardous waste site.

In California, local ordinances cannot be preempted by the state hazardous waste management plan — the state can never force a city to accept a hazardous waste site. The California statute states that "[n]o provision of this chapter shall limit the authority of any state or local agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce and administer."¹⁰⁸ The Florida statute is not absolute. If the Department

104. Canter, *supra* note 53, at 446.

105. MINN. STAT. ANN. § 115A.194(4) (West Supp. 1991).

106. White, *supra* note 2, at 151-52.

107. See CAL. HEALTH & SAFETY CODE § 25147 (Deering 1988); FLA. STAT. ANN. § 403.723(2) (Harrison 1985).

108. CAL. HEALTH & SAFETY CODE ANN. § 25105 (Deering 1988).

of Environmental Regulation has issued a permit to a developer, but a local government determines a developer's plans to construct a hazardous waste facility conflict with its local rules, the developer may petition the governor and the cabinet for a variance.¹⁰⁹ They will grant a variance only if the developer can establish, by clear and convincing evidence, that the facility will not have a "significant adverse impact" on the regional environment or economy.¹¹⁰

This approach does nothing to allay the NIMBY syndrome. Indeed, the local approach condones it. Any locale can statutorily exclude hazardous waste facilities. When it becomes necessary to site such a facility, the state will have to find methods to coax a community to accept the facility. Minority communities tend to be more susceptible to states' coaxing mechanisms — the most typical being the incentives approach.¹¹¹

4. *The Incentives Approach*

Some states have begun to require compensation to host communities in an effort to eliminate local opposition.¹¹² The general notion is that developers or state taxpayers should compensate the community targeted for a hazardous waste facility because only that community incurs the costs of the facility while the entire state enjoys the benefits.¹¹³ Theoretically, the developer will be required to compensate the community for the social costs of the facility. This compensation, if it actually reflects the costs, may eliminate opposition to the facility and ensure that the facility will be built only if the benefits of building the facility outweigh the costs — finally internalized by the developer.¹¹⁴

In response, one commentator claims that the social costs of hazardous waste facilities have not proved compensable; instead, "offers of compensation have occasionally increased local opposition" when

109. FLA. STAT. ANN. § 403.723(4)-(7) (Harrison 1985).

110. FLA. STAT. ANN. § 403.723(7) (Harrison 1985). For a discussion of the preemption of local land use laws, see Duffy, *supra* note 77, at 789-92.

111. Bacow & Milkey, *supra* note 11, at 275.

112. *Id.*

113. *Id.*; see also Bullard, *supra* note 15, at 62-64. The way states measure and distribute compensation differs from state to state. In Ohio, the state agency makes incentive payments to the host community. OHIO REV. CODE ANN. § 3734.25 (Baldwin 1991). Several states determine compensation as a function of the gross receipts or amount of wastes processed at a facility. CONN. GEN. STAT. ANN. § 22a-132 (West Supp. 1991); IND. CODE § 13-7-8.6-1 (West 1990); N.J. STAT. ANN. § 13:1E-80 (West 1991). Others authorize the local community to require developers to pay a tax or license fee. GA. CODE ANN. § 12-8-39 (Michie Supp. 1991); KY. REV. STAT. ANN. § 68.178 (Michie/Bobbs-Merrill 1980).

114. Bacow & Milkey, *supra* note 11, at 275-76 & n.63. If the developer or the state does not pay the community for the costs of the facility, those costs are externalities. Thus, there is no way to determine if building the facility is efficient since these externalities are not fed into the cost-benefit analysis. For a discussion of the economic analysis of environmental decisionmaking, see Howard A. Latin, *Environmental Deregulation and Consumer Decisionmaking Under Uncertainty*, 6 HARV. ENVTL. L. REV. 187 (1982).

opponents of a proposed facility have perceived compensation as a bribe.¹¹⁵ Moreover, many civil rights activists reject the incentives approach as extortion and compensation as "blood money."¹¹⁶ Civil rights advocates recognize that the compensation may appeal to local politicians representing minority communities in dire need of revenues for basic services,¹¹⁷ but argue that wealthy communities should not be allowed to pay the disadvantaged to accept risks that the affluent can afford to escape.¹¹⁸ According to Bullard, "[c]oncern about equity is at the heart of [blacks'] reaction to industrial facility siting where there is an inherent imbalance between localized costs and dispersed benefits."¹¹⁹

The current state hazardous waste management programs thus do not explicitly address the equity issue nor will the approaches they employ resolve it. Minority communities targeted for a hazardous waste facility might look to judicial remedies for relief.

III. POTENTIAL FOR A JUDICIAL REMEDY

Minorities overburdened by toxic waste facilities will find it difficult to obtain a judicial remedy under either of the principle mechanisms for remedying official racial discrimination: the Equal Protection Clause of the Fourteenth Amendment¹²⁰ or section 1983 of the Civil Rights Act of 1866.¹²¹ Section III.A examines equal protec-

115. Bacow & Milkey, *supra* note 11, at 276-77.

116. Lee, *supra* note 1, at 18; *see also* Bullard, *supra* note 15, at 63.

117. Historically, polluting industries were placed near poor areas and the pollutants were considered trade-offs for economic development. "[A] paper mill spewing its stench in [one of Alabama's poverty-ridden blackbelt counties led Governor George Wallace to declare: 'Yeah, that's the smell of prosperity. Sho' does smell sweet, don't it?'" Bullard, *supra* note 15, at 65.

118. *Id.* at 63. An example of how the incentives approach works occurred recently in California. The Los Angeles Bureau of Sanitation offered Gilbert Lindsay, a black city councilman, a \$10 million "Community Betterment Fund" if his district would host a hazardous waste incinerator. He accepted, ecstatically claiming that the job development and financing would make the neighborhood "more like the Garden of Eden rather than the garbage dump it is now." Russell, *supra* note 34, at 26. However, he did not mention the dangerous level of dioxins and the exacerbation of the smog problem. *Id.* The compensation did not lower the opposition of the community, which organized for three years and successfully defeated the siting of the incinerator. *Id.* at 28-29. For a detailed discussion of this project, *see id.* at 25-29.

119. Bullard, *supra* note 15, at 65.

120. The Fourteenth Amendment states in relevant part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See* *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

121. The text of section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). Section 1983 provides statutory authority for civil rights actions

tion doctrine and the standard of proof for disparate impact cases.¹²² Section III.B discusses the cases in which plaintiffs have used section 1983 to challenge siting decisions that disparately burdened minority communities and analyzes why they failed to meet the prescribed equal protection standard. Section III.C analogizes the overburdening of minority communities with hazardous waste to the disparate provision of municipal services. In lawsuits over the disparate provision of services, the courts have found that local governments violated the equal protection rights of their black citizens by failing to offer them the same municipal services provided to white residents. Finally, section D concludes that while minorities in a few communities may be able to use equal protection doctrine and section 1983 to remedy discriminatory hazardous waste sitings, most will not.

A. Equal Protection Doctrine

To mount a successful Equal Protection Clause challenge to a state's decision to site a hazardous waste facility, minority residents must prove that the decision was motivated by a discriminatory purpose.¹²³ Such a purpose may be proved through circumstantial rather than direct evidence.¹²⁴ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹²⁵ the Supreme Court suggested five relevant factors to use as evidentiary sources: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision, especially if it "reveals a series of official actions taken for invidious purposes;" (3) the sequence of events preceding the decision; (4) any departures, substantive or procedural, from the normal decisionmaking process; and (5) the legislative or administrative history, specifically contemporary statements, minutes of meetings, or reports.¹²⁶ The above-mentioned factors are

brought by individuals to enforce constitutional rights. *Monroe v. Pape*, 365 U.S. 167 (1961). The two essential elements of a § 1983 action are (1) that the conduct complained of was committed by a person acting under the color of state law; and (2) that this conduct deprived a person of rights, privileges, and immunities secured by the Constitution or the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

122. A statute, neutral on its face, that bears more heavily on one race than another is reviewed according to disparate impact doctrine. *Davis*, 426 U.S. at 241. Challenging the siting of a hazardous waste facility would fall into this category since no hazardous waste management statute mandates that developers site facilities in minority communities. See *supra* section II.B for a discussion of state hazardous waste management programs.

123. *Davis*, 426 U.S. at 242 (holding that invidious purpose was necessary to trigger strict scrutiny of a facially neutral government action). Government action that facially discriminates against racial or other minorities must withstand strict scrutiny. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1451 (2d ed. 1988).

124. 426 U.S. at 242.

125. 429 U.S. 252 (1977).

126. 429 U.S. at 266-68.

not exhaustive;¹²⁷ the foreseeability of the adverse consequences, for example, also bears on the existence of discriminatory intent.¹²⁸

If a governmental entity has engaged in a pattern of discrimination that is particularly "invidious," the Court will find discriminatory purpose from the pattern alone.¹²⁹ Patterns sufficiently stark to meet the Court's standard are rare, however.¹³⁰ Courts of appeals have developed variations on the subjects of inquiry identified by the Supreme Court in *Arlington Heights* in order to determine when disproportionate impact was prompted by an "invidious" discriminatory purpose.¹³¹

The establishment of intent as the *sine qua non* of racial discrimination has created a quite onerous burden of proof for plaintiffs.¹³² This burden forces the plaintiff, the party with the least access to evidence of probative motivation, to produce that evidence.¹³³ Plaintiffs cannot rely on the disparate impact of a governmental action on a racial group to result in a judicial remedy; they must show specific racial animus. The following examination of environmental disparate impact cases illustrates that governmental action must be particularly flagrant for plaintiffs to prove discriminatory purpose.

B. Application of Equal Protection Doctrine to Siting Decisions

Two cases have raised equal protection challenges against municipalities for discriminatory solid waste landfill sitings.¹³⁴ In both cases,

127. 429 U.S. at 268.

128. *Personnel Admr. of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979).

129. *Arlington Heights*, 429 U.S. at 266. The Court cites, *inter alia*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), as examples of such stark patterns.

In *Yick Wo*, a city ordinance prohibited laundries from operating in wooden buildings without the consent of the city's board of supervisors. The city applied the ordinance only against Chinese residents — all white residents were granted exemptions upon request. 118 U.S. at 374. The Court inferred from this discriminatory application of the law "an evil eye and an unequal hand" and held the ordinance unconstitutional based on the city's discriminatory application. 118 U.S. at 373-74.

Gomillion involved a geographic redistricting measure passed by the Alabama state legislature which transformed the outline of the city limits of Tuskegee from a square to a "strangely irregular twenty-eight-sided figure." 364 U.S. at 341. The Court held the measure unconstitutional, stating that this measure was "tantamount . . . to a mathematical demonstration[] that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." 364 U.S. at 341.

130. *Arlington Heights*, 429 U.S. at 266.

131. See, e.g., *Ammons v. Dade City, Fla.*, 783 F.2d 982 (11th Cir. 1986). For a discussion of the factors used by the Eleventh Circuit, see *infra* notes 194-96 and accompanying text.

132. See, e.g., John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1274-75, 1279, 1283 (1970); TRIBE, *supra* note 123, at 1509; Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 46-47 (1972).

133. Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Board of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1203 (1982).

134. Although this Note focuses on the siting of hazardous waste facilities and not solid waste landfills, no one yet has challenged hazardous waste sitings using the Equal Protection

the courts held the evidence insufficient to establish that racial discrimination motivated the challenged official decision. The cases, *East Bibb Twiggs Neighborhood Assn. v. Macon-Bibb County Planning & Zoning Commission*¹³⁵ and *Bean v. Southwestern Waste Management Corp.*,¹³⁶ suggest that success in seeking a judicial remedy to siting decisions will be particularly difficult to realize.

The plaintiffs in each case offered data establishing that the siting decisions disproportionately affected minorities. Each court found the data insufficient to support an inference of racial discrimination.¹³⁷ The plaintiffs' attempts to employ the *Arlington Heights* factors to establish intent also failed in each case. The *East Bibb Twiggs* court analyzed the *Arlington Heights* factors in turn and found the plaintiffs' arguments without merit.¹³⁸ Based on nonstatistical proof, the *Bean* court found the decision to site the solid waste site near a black high school and residential neighborhood "insensitive and illogical" but not motivated by purposeful discrimination.¹³⁹

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

In *East Bibb Twiggs*, the plaintiffs, residents of Macon-Bibb County, challenged a Planning and Zoning Commission decision to permit the creation of a private landfill in a census tract in which sixty percent of the residents were black. The court admitted that the landfill would affect to a "somewhat larger degree" the predominantly black census tract.¹⁴⁰ The court noted that the only other Commission-approved landfill was located in a predominantly white census tract and stated that this landfill placement undermined the "development of a 'clear pattern, unexplainable on grounds other than race.'"¹⁴¹ The court was not persuaded by the plaintiffs' contention that both census tracts were located within a County Commission *District* composed of roughly seventy percent blacks.¹⁴²

The plaintiffs argued that the court should view the Commission's landfill decision against the historical background of locating undesir-

Clause. This section examines cases involving nonhazardous landfills, which raise similar legal issues.

135. 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd.*, 896 F.2d 1264 (11th Cir. 1989). The discussion that follows in this Note is based on the district court's opinion because it sets out the facts in a more detailed manner than does the appellate opinion.

136. 482 F. Supp. 673 (S.D. Tex. 1979).

137. *East Bibb Twiggs*, 706 F. Supp. at 885; *Bean*, 482 F. Supp. at 680.

138. 706 F. Supp. at 885-87.

139. 482 F. Supp. at 680-81.

140. 706 F. Supp. at 885. See *infra* text accompanying notes 158-65 (discussing alternative determinations of the relevant population for measuring impact).

141. 706 F. Supp. at 884-85 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

142. 706 F. Supp. at 885.

able land uses in black neighborhoods. The court reasoned that the Commission's earlier decision to place a landfill in a white census tract rebutted this argument. The court also noted that the plaintiff's historical evidence of racially biased decisionmaking focused on decisions made by agencies other than the Commission, "evidence which sheds little if any light upon the alleged discriminatory intent of the Commission."¹⁴³

The plaintiffs identified a statement in a study conducted by the Commission that "racial and low income discrimination still exist[ed] in the community."¹⁴⁴ The court reasoned that the statement indicated a recognition of racial discrimination in the community without implying that racial discrimination affected the Commission's decisionmaking process. Rather, the court suggested, such recognition may have encouraged vigilance against racial discrimination.¹⁴⁵

The plaintiffs also contended that the Commission deviated from its "normal procedures" in several ways: the Commission urged participation from the city and county; it granted a rehearing after the petition for a landfill was denied; and it made certain findings of fact.¹⁴⁶ The court admitted that the Commission deviated somewhat from the norm but did not identify any procedural *flaws*.¹⁴⁷

The final *Arlington Heights* factor cited by the plaintiffs involved the legislative and administrative history of the action. The plaintiffs focused on the Commission's initial denial of the landfill permit. The Commission denied permission for the landfill because, in part, the landfill was adjacent to a residential area and would result in increased traffic and noise. Plaintiffs maintained that the reasons offered for the denial were still valid and thus, invidious racial purposes must have motivated the Commission's authorization.¹⁴⁸ The court did not agree. Several Commission members changed their position after determining that the impact had been exaggerated. The developer addressed the concerns of other members regarding adequate buffers and appropriate access for dumping vehicles. The court found that the Commission "carefully and thoughtfully addressed a serious problem and . . . made a decision based upon the merits and not upon any improper racial animus" and held that the plaintiffs had not been deprived of equal protection of the law.¹⁴⁹ The Eleventh Circuit affirmed the district court's opinion.¹⁵⁰

143. 706 F. Supp. at 885.

144. 706 F. Supp. at 885-86 (footnote omitted).

145. 706 F. Supp. at 886.

146. 706 F. Supp. at 886.

147. 706 F. Supp. at 886.

148. 706 F. Supp. at 886.

149. 706 F. Supp. at 887.

150. 896 F.2d 1264 (11th Cir. 1989).

East Bibb Twiggs illustrates the difficulty of seeking a judicial remedy for siting decisions which have a disparate impact on racial minorities. An initial roadblock is determining whether a particular siting will have a disparate impact: it is not obvious how the court should demarcate the population affected. The court in *East Bibb Twiggs* measured the percentage of minorities in census tracts. The plaintiffs argued that the relevant boundaries should be County Commission Districts. The court in *Bean v. Southwestern Waste Management Corp.*¹⁵¹ used a third approach, target areas.¹⁵² A better alternative would be to determine the population of the area *physically affected* by the siting: the area in which residents suffer the smell, the traffic, the sight, the lowered land values, and the potentially polluted groundwater resulting from the facility.¹⁵³ Focusing the inquiry on the physically affected area would better measure *impact* for purposes of determining disparate impact than arbitrarily chosen political boundaries.

In *Arlington Heights*, the Supreme Court suggested that courts look to the role of historical discrimination to determine discriminatory intent.¹⁵⁴ The court in *East Bibb Twiggs*, however, indicated that it would only consider relevant discrimination perpetrated by the particular government agency challenged by the plaintiffs.¹⁵⁵ In the context of hazardous waste sitings, the agencies are newly created,¹⁵⁶ therefore, they have no history of discrimination. The government of that state or city might have an invidious history of racism and segregation, but a court following *East Bibb Twiggs* would not consider that relevant to the question of the agency's discriminatory intent.

2. *Bean v. Southwestern Waste Management Corp.*

In *Bean*, the plaintiffs moved for preliminary injunction of the Texas Department of Health's (TDH) decision to grant a permit to Southwestern Waste Management to operate a solid waste facility in close proximity to a predominantly black high school and residential neighborhood. The plaintiffs alleged that the decision was motivated by racial discrimination in violation of section 1983.¹⁵⁷ The plaintiffs

151. See *infra* section III.B.2.

152. *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979). "Target area" is a term of art referring to an area designated by the federal government as low income. See *Rodriguez v. Barcelo*, 358 F. Supp. 43, 45 (D.P.R. 1973).

153. See *Bean*, 482 F. Supp. at 680 (judge inquired into the proximity of the waste site to the minority community within the census tract).

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

155. 706 F. Supp. at 885.

156. See *supra* section II.B discussing state hazardous waste management plans (most states have recently created separate decisionmaking bodies for the purpose of siting hazardous waste facilities).

157. 482 F. Supp. 673, 675 (S.D. Tex. 1979).

advanced two theories to establish intent.

The plaintiffs first argued that the present decision was part of the TDH's pattern or practice of discrimination in the placement of solid waste sites.¹⁵⁸ To test this theory, the district court analyzed the percentage of minority population in areas in which TDH had approved sites.¹⁵⁹ Plaintiffs produced data for seventeen sites operating with TDH permits as of 1978. Citywide, 82.4% of the sites were located in areas in which the minority population was 50% or less.¹⁶⁰ Fifty-nine percent of the sites were located in census tracts with minority populations of 25% or less.¹⁶¹ In the target area, with a minority population of 70%, the TDH approved two sites.¹⁶² The first site was in a census tract with less than 10% minority residents and the other was the site challenged in the present case in which minority residents were 60% of the population.¹⁶³ The court held that these data did not indicate a clear pattern or practice of discrimination because 50% of the solid waste sites in the target area were located in census tracts with *less* than 25% minority population.¹⁶⁴ Furthermore, the plaintiffs failed to introduce supplemental evidence to support this theory.¹⁶⁵

The plaintiffs maintained in their second theory that the TDH's approval of the permit in the context of the historical discriminatory placement of solid waste sites and the specific events surrounding the application constituted racial discrimination.¹⁶⁶ The plaintiffs offered three sets of data to support this theory.

The first set showed that the City of Houston planned to use two waste sites, both located in the target area. The plaintiffs argued that this indicated discrimination because the target area had "the dubious distinction of containing 100% of the type I municipal landfills that Houston utilize[d] . . . although it contain[ed] only 6.9% of the entire population of Houston."¹⁶⁷ The court rejected this argument on two grounds. First, a sample of two sites was not a sufficient data base to create a statistically significant result, and second, one of the sites was in a predominantly white census tract.¹⁶⁸ The court held that "[n]o inference of discrimination can be made from this data."¹⁶⁹

The plaintiffs' second set of data focused on the total number of

158. 482 F. Supp. at 677.

159. 482 F. Supp. at 677.

160. 482 F. Supp. at 677.

161. 482 F. Supp. at 677.

162. 482 F. Supp. at 677.

163. 482 F. Supp. at 677.

164. 482 F. Supp. at 677.

165. 482 F. Supp. at 677-78.

166. 482 F. Supp. at 678.

167. 482 F. Supp. at 678 (quoting the plaintiffs' brief).

168. 482 F. Supp. at 678.

169. 482 F. Supp. at 678.

solid waste sites situated in the target area. This data showed that the target area contained 15% of the solid waste sites located in Houston and only 6.9% of its population.¹⁷⁰ Plaintiffs argued the target area's percentage of minority residents proved that the disparity must be attributable to racial discrimination.¹⁷¹ The court stated that "the inference of racial discrimination dissolve[d]" when it compared plaintiffs' data to the location of solid waste sites relative to the white population within the target area.¹⁷² Half of the solid waste sites in the target area were in census tracts with a 70% white population.

The third data set concentrated on the citywide location of solid wastes sites: this data indicated that the eastern half of the city, primarily composed of minority residents, had many more solid waste sites than the western half.¹⁷³ The court stated that this data was compelling on the surface, but that its probative value faded upon closer scrutiny. After a close examination and the inclusion of defendants' evidence, the court held that not only was the plaintiffs' data not accurate but that the minority census tracts had a slightly smaller percentage of solid waste sites than proportionately expected.¹⁷⁴ The court held that the plaintiffs' data did not compel a conclusion that the decision to grant a permit to build a solid waste site was motivated by racial animus so as to support a preliminary injunction.¹⁷⁵

The *Bean* decision did not analyze the *Arlington Heights* factors in turn. Rather, the court looked at the specific events surrounding the approval of the permit. These circumstances caused the court to question the logic of the agency's decision but not its motivation. The site was being placed within 1700 feet of a predominantly black high school and only slightly farther from a residential neighborhood. The court admitted that if it were TDH, "it might very well have denied this permit. It simply does not make sense to put a solid waste site so close to a high school Nor does it make sense to put the land site so near to a residential neighborhood."¹⁷⁶

Although the court found the decision to grant the permit "unfortunate and insensitive,"¹⁷⁷ it held that the plaintiffs failed to establish that the decision was motivated by purposeful racial discrimination, in violation of section 1983, for purposes of a preliminary injunction.¹⁷⁸

170. 482 F. Supp. at 678.

171. 482 F. Supp. at 678.

172. 482 F. Supp. at 678.

173. This data indicated that 67.6% of the solid waste sites are located in the half of the city where 61.6% of the minority population lives; 32.4% of the sites are located in the half of the city where 73.4% of the whites live. 482 F. Supp. at 678.

174. 482 F. Supp. at 679.

175. 482 F. Supp. at 680.

176. 482 F. Supp. at 679-80.

177. 482 F. Supp. at 680.

178. 482 F. Supp. at 680.

The data the plaintiffs presented did not reveal a clear pattern or practice of discrimination, nor did TDH's illogical decision necessarily suggest racial animus. The court did not, however, grant the defendant's motion to dismiss, stating that answers to a number of questions could lead to a decision for either side.¹⁷⁹ The court delineated issues it considered relevant for establishing discriminatory intent when the case went to full trial, which included: the proximity of solid waste sites to minority communities within each census tract; the site selection process and how many alternative sites are adequate; and whether TDH was informed of the racial composition of the community and the racial distribution of waste sites in Houston.¹⁸⁰

In considering the plaintiffs' request for a preliminary injunction, the *Bean* court stated:

The plaintiffs have adequately established that there is a substantial threat of irreparable injury. They complain that they are being deprived of their constitutional rights. That, in itself, may be considered irreparable injury, but more is present here. The opening of the facility will affect the entire nature of the community — its land values, its tax base, its aesthetics, the health and safety of its inhabitants, and the operation of Smiley High School, located only 1700 feet from the site.¹⁸¹

Despite the court's recognition of harm, the plaintiffs did not establish a substantial likelihood that TDH was motivated by discriminatory purpose. Like *East Bibb Twiggs*, *Bean* illustrates the difficulty of challenging siting decisions. Since plaintiffs in neither case prevailed, it is not evident what standard plaintiffs must meet to prove discriminatory purpose when waste facilities overburden minority communities.

C. *Analogy to Disparate Provision of Municipal Services: What It Takes To Prove Discriminatory Purpose*

The Eleventh Circuit has decided a line of cases involving racially disparate provision of municipal services.¹⁸² The issue in these cases is analogous to the issue of overburdening minority communities with hazardous waste facilities: the former involves disparate beneficial treatment while the latter involves disparate burdensome treatment. In the provision of services cases, the Eleventh Circuit has recognized that for a city to bestow benefits on white communities while ignoring black communities is to violate the Equal Protection Clause.¹⁸³ Burdening minority communities while allowing white neighborhoods to

179. 482 F. Supp. at 680-81.

180. 482 F. Supp. at 680.

181. 482 F. Supp. at 677 (citations omitted).

182. *Ammons v. Dade City, Fla.*, 783 F.2d 982 (11th Cir. 1986); *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181 (11th Cir. 1983). For a district court case on the same issue, following the Eleventh Circuit decisions, see *Baker v. City of Kissimmee, Fla.*, 645 F. Supp. 571 (M.D. Fla. 1986).

183. See *Ammons*, 783 F.2d at 988 ("[W]hen it is foreseeable . . . that the allocation of greater resources to the white residential community will lead to the 'foreseeable outcome of a

remain relatively free of toxic wastes suggests a violation of equal protection as well. An examination of these cases illustrates how conspicuous official action must be before courts will infer discriminatory purpose, compelling the conclusion that a judicial remedy will not be available for most communities attempting to oppose the siting of a hazardous waste facility.

In its disparate provision of municipal services cases, the Eleventh Circuit employed a version of the *Arlington Heights* factors: (1) the nature and magnitude of the disparity — the disparate impact; (2) foreseeability of the disparate impact of the official action; (3) the legislative and administrative history of the decisionmaking process; and (4) the knowledge that the action would cause the disparate impact.¹⁸⁴ The following sections of this Part are organized according to these factors. Each section explains the courts' rulings in the provision of services cases and analyzes how a case involving hazardous waste siting would fare using this standard.

1. *Disparate Impact*

In these cases, the disparity in the provision of services was so stark that the nature and magnitude of the disparate impact gave rise to an inference of discriminatory intent.¹⁸⁵ In *Dowdell v. City of Apopka, Florida*, the district court found that the level of street paving, water distribution, and storm-water drainage differed markedly in the white and black communities.¹⁸⁶ The Eleventh Circuit held "the magnitude of the disparity, evidencing a *systematic* pattern of municipal expenditures in all areas of town except the black community, is explainable *only* on racial grounds."¹⁸⁷ The court reached a similar conclusion in *Ammons v. Dade City, Florida*, in which the city spent 90% of its street resurfacing funds in the white community and only 10% in the black community.¹⁸⁸ Finally, the district court in *Baker v. City of Kissimmee, Florida* held that the disparities of services alone were so overwhelming as to give rise to an inference of discriminatory

deprived black residential community,' then a discriminatory purpose . . . is properly shown.") (footnote and citation omitted).

184. *Ammons*, 783 F.2d at 988; *Dowdell*, 698 F.2d at 1186. The factors differ slightly from those in *Arlington Heights*, 429 U.S. 252, 266-68 (1977); they emphasize foreseeability and knowledge, and do not explicitly take into consideration departures from normal decisionmaking processes.

185. *Dowdell*, 698 F.2d at 1186; see also *Ammons*, 783 F.2d at 988; *Baker*, 645 F. Supp. at 586.

186. Forty-two percent of the streets in the black community remained unpaved compared to 9% in the white community; 60% of the streets in the white community had curbs and gutters, whereas the city provided none for the black community. 698 F.2d at 1185 n.3.

187. 698 F.2d at 1186 (emphasis added).

188. 783 F.2d 982, 985 n.8 (11th Cir. 1986).

intent.¹⁸⁹

As is shown in *East Bibb Twiggs* and *Bean*, when challenging a siting permit it is difficult to make a statistical argument as powerful as those in the provision of services cases. Rarely will there be a large enough number of sites in the jurisdiction of the decisionmaking body to create an overwhelmingly stark disparity. The *Bean* court noted that, "there are only two sites involved here. That is not a statistically significant number."¹⁹⁰ The same result will occur in the hazardous waste context. Even if a court considers uncontrolled waste sites, which it probably will not because uncontrolled sites would not have been authorized by the state agency, it is unlikely that more than a few sites are located in a given area.¹⁹¹ In most instances, plaintiffs challenging hazardous waste sitings will find it difficult to prove intent through disparate impact alone.

2. Foreseeability

The courts have held in provision of services cases that the "continued and systematic relative deprivation of the black community was the obviously foreseeable outcome of spending nearly all federal revenue sharing monies received on the white community in preference to the visibly underserved black community."¹⁹² This factor supported the plaintiffs' argument that the respective city governments engaged in purposeful discrimination.¹⁹³

The decision to place a hazardous waste facility in a predominantly minority community may create a foreseeable outcome of burdening that community. For a disparate impact claim, courts should take into account other environmental hazards such as uncontrolled toxic waste sites; the foreseeability of disproportionate impact depends on the total level of impact prior to the siting decision. If the minority community is already burdened by uncontrolled waste sites and other environmental burdens relative to white communities in the area, plaintiffs may have a persuasive argument that it was foreseeable that the hazardous waste site would have a disparate impact on minorities. Although plaintiffs may be successful in this factor, it is not clear that foreseeability alone will lead to an inference of purposeful discrimination.

189. 645 F. Supp. 571, 586 (M.D. Fla. 1986). See 645 F. Supp. at 581 for a table comparing the provision of street paving services to whites and blacks.

190. *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673, 678 (S.D. Tex. 1979).

191. TOXIC WASTES AND RACE, *supra* note 4, at 18 (displaying the number of commercial and uncontrolled hazardous waste sites in counties).

192. *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1186 (11th Cir. 1983); see also *Ammons v. Dade City, Fla.*, 783 F.2d 982, 988 (11th Cir. 1986); *Baker v. City of Kissimmee, Fla.*, 645 F. Supp. 571, 587 (M.D. Fla. 1986).

193. *Dowdell*, 698 F.2d at 1186; *Ammons*, 783 F.2d at 988; *Baker*, 645 F. Supp. at 587.

3. Legislative and Administrative History

In *Dowdell*, the court held that the legislative and administrative pattern of decisionmaking, covering nearly a half century, "indicate[d] a deliberate deprivation of services to the black community."¹⁹⁴ The court took into consideration, for example, the underrepresentation of blacks in government and a municipal ordinance, which remained in force until 1968, segregating the black community to the south side of the railroad tracks.¹⁹⁵ Similarly, Dade City, and Kissimmee, Florida, the cities in question in *Ammons* and *Baker* respectively, had histories of racial discrimination in every aspect of city life from municipally enforced segregation to maldistributed municipal services.¹⁹⁶

Even if the long history of segregation and racism in Apopka, Dade City, and Kissimmee is duplicated in a city sited for a hazardous waste facility, evidence of such history will be of little help to the plaintiff attempting to prove discriminatory purpose. The *East Bibb Twiggs* court ruled that decisions made by government agencies other than the Planning and Zoning Commission "shed[] little if any light upon the alleged discriminatory intent of the Commission."¹⁹⁷ Unlike the provision of services cases in which the city's decisions were being challenged, in siting contexts, plaintiffs will challenge a specific state agency's decision.¹⁹⁸ Courts may refuse to consider the general state or city history of racism and segregation because, the court will argue, it would be irrelevant to the intent of the specific agency.

4. Knowledge

Though perhaps difficult to distinguish from foreseeability, the courts in two of the provision of services cases considered the defendants' knowledge of the potential for racially discriminatory results as a separate factor for determining whether an agency has engaged in intentional discrimination.¹⁹⁹ The courts held that the discriminatory results of defendants' actions were not unknown to them and admonished that "[a] brief visit to the black community makes obvious the need for street paving and storm water drainage control."²⁰⁰

This factor could prove helpful to plaintiffs challenging a hazardous waste facility siting. As in foreseeability analysis, it is possible that

194. 698 F.2d at 1186.

195. 698 F.2d at 1186.

196. *Ammons v. Dade City, Fla.*, 594 F. Supp. 1274, 1279-85 (M.D. Fla. 1984); *Baker*, 645 F. Supp. at 588.

197. *East Bibb Twiggs Neighborhood Assn. v. Macon-Bibb County Planning & Zoning Commn.*, 706 F. Supp. 880, 885 (M.D. Ga. 1989).

198. See *supra* section II.B (discussing state hazardous waste management programs).

199. *Ammons v. Dade City, Florida*, 783 F.2d 982, 987-88 (11th Cir. 1986); *Baker*, 645 F. Supp. at 588.

200. *Ammons*, 783 F.2d at 988 (citing *Dowdell v. City of Apopka, Florida*, 511 F. Supp. 1375, 1383 (M.D.Fla. 1981)); *Baker*, 645 F. Supp. at 588 (same).

a court would find that an agency who authorized a hazardous waste facility in an already-burdened community had knowledge that its decision would create a disparate impact on that community. The provision of services cases suggest, however, that courts require such a high level of corroborating evidence to infer discriminatory intent that the combination of foreseeability and knowledge will likely not be enough in most cases.

D. *Insufficiency of a Judicial Remedy*

A glaring racial bias must be evident for courts to *infer* discriminatory purpose from the inquiry into circumstantial evidence suggested by *Arlington Heights*. As *East Bibb Twiggs* and *Bean* illustrate, this bias might not be discernible even though the governmental action has harmed a minority community. Professor Kenneth Karst observed that

[r]acism [today]. . . is a living system, just as Jim Crow was a system. The main difference between the two systems is that today's racism inflicts a greater proportion of its harms unthinkingly. One who is stumbled over often enough may, understandably, notice that those cumulative impacts bear a certain functional resemblance to kicks.²⁰¹

Many minority communities will not be able to prove discriminatory intent in siting decisions. Often there will be no discriminatory intent to prove. In other cases, the burden of proof will be too difficult to overcome. The community will be "stumbled over" by a governmental decision — not kicked intentionally — and therefore will have no recourse under the Equal Protection Clause or section 1983.

The plaintiffs in these cases are attempting to remedy a harm to their community: they, as racial minorities, are carrying a disproportionate level of environmental burdens. In order to remedy this harm according to current equal protection doctrine, they must find evidence of bigotry among the government officials. These officials may not be bigots or racists. They may make decisions constrained by the proposals of developers²⁰² and the inadequacies of state regulations.²⁰³ Yet in these instances, and in those in which a lack of information prevents proof of intent, the plaintiff-community has no judicial remedy for the harm of disparate impact. Only a small number of plain-

201. Kenneth L. Karst, *The Supreme Court, 1976 Term — Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977) (footnote omitted).

202. Many state hazardous waste management programs allow developers to propose sites which state agencies then approve or deny. See *supra* section II.B (describing state programs). In the past, minority communities have not organized around environmental issues as much as more affluent white communities, thus decreasing the likelihood of siting delays. See *supra* notes 34-36 and accompanying text. Moreover, land is often cheaper in these communities. Therefore, developers are more likely to propose constructing sites in minority communities. See *supra* notes 39-43 and accompanying text.

203. See *supra* text following note 119 (arguing that current state regulation does not adequately address the imbalance of burdens on minority communities).

tiffs will prevail using the Equal Protection Clause and section 1983. Federal and state legislation, therefore, appear to be more promising vehicles to ameliorate maldistribution of hazardous waste facilities along racial lines.

IV. AMELIORATING ENVIRONMENTAL RACISM

This Part proposes an Act of Congress modeled after an amendment to Title VII suggested by the Civil Rights Act of 1990. When constructing the proposed Act, section IV.A analogizes to employment discrimination cases in which the Supreme Court's construction of Title VII allows plaintiffs a remedy if they can prove disparate impact.²⁰⁴ Further, section IV.B suggests an amendment to RCRA and model state legislation to *prevent* states from making discriminatory siting decisions. Finally, section IV.C acknowledges the need for organizing efforts by civil rights groups in response to proposed hazardous waste facilities.

A. Federal Equity Mandate

Plaintiffs have been unsuccessful in challenging siting decisions under the Equal Protection Clause because of the burden of proving discriminatory purpose.²⁰⁵ An Act of Congress modeled on Title VII,²⁰⁶ specifically an amendment suggested by the Civil Rights Act of 1990,²⁰⁷ would solve this dilemma. The Supreme Court stated in a seminal Title VII case, *Griggs v. Duke Power Co.*, that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."²⁰⁸ Thus under Title VII, a "disparate impact" model is available under which plaintiffs need not prove discriminatory purpose for a court to rule that an employment practice that has a disparate impact on minorities is illegal.²⁰⁹ Similarly, this

204. See *infra* notes 206-09 and accompanying text.

205. See *supra* Part III.

206. Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e-1 to 2000e-17 (1988), is one segment of the 1964 Civil Rights Act. Title VII deals with discrimination in the employment relationship, prohibiting employers, unions, and employment agencies from discriminating on the basis of race, color, national origin, sex or religion. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW ch. V (1988).

207. See Civil Rights Act of 1990, S. 2104, 101st Cong., 2nd Sess. (1990). Congress passed the Civil Rights Act of 1990 to "strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence . . ." S. 2104, 101st Cong., 2nd Sess. (1990). President Bush vetoed the Act. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 29, 1990). However, a similar but weaker bill, the Civil Rights Act of 1991, has been passed by Congress and is supported by President Bush. Adam Clymer, *Civil Rights Bill is Passed by House*, N.Y. TIMES, Nov. 8, 1991, at A15.

208. *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971) (emphasis in the original).

209. The Supreme Court in *Griggs*, 401 U.S. at 431, construed Title VII to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 645-46 (1989).

proposed Act would create a "disparate impact" model of discrimination for hazardous waste facility sitings, aimed at the *consequences* of site selection rather than the motivations.²¹⁰

A cause of action would involve two elements: disparate impact and "environmental necessity."²¹¹ Plaintiffs bear the initial burden of proving that the siting decision would result in a disparate burden on a minority community compared to white communities. To end confusion and litigation over what constitutes the relevant population affected,²¹² the Act would define the relevant population to encompass those physically or financially harmed by the sites.²¹³

The goal of this legislation is to provide minority communities with a mechanism to prevent their communities from being *overburdened* by environmental hazards. When any hazardous waste facility is sited, it will result in a disparate burden on that location. Therefore, to prove disparate impact for the purpose of the Act, the plaintiffs will have to show that the site will result in a burden on their community *greater* than the burden on a white community due to the presence of other pollutants: uncontrolled toxic waste sites, solid waste landfills, or polluting industry.

Once the plaintiff established impact, the burden would shift to the defendant-state agency to establish that the decision is an "environmental necessity."²¹⁴ The defendant could establish a *prima facie*

210. See Civil Rights Act of 1990, § 4, amendment to § 703 of the Civil Rights Act of 1964. This amendment states in relevant part:

(1) An unlawful employment practice based on disparate impact is established under this section when —

(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity

S. 2104, 101st Cong., 2d Sess. § 4 (1990).

211. The burden of proving "environmental necessity" parallels Title VII's "business necessity." The Supreme Court most recently formulated the standard under which "business necessity" is assessed in *Wards Cove*: "This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternate practices to achieve the same business ends, with less racial impact." *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 658 (1989). Similarly, "environmental necessity" contains two prongs: proof of the environmental suitability of the chosen site; and the availability of alternative sites which do not disparately impact minorities. See *infra* notes 214-17 and accompanying text.

212. See, e.g., *East Bibb Twiggs Neighborhood Assn. v. Macon-Bibb County Planning & Zoning Commn.*, 706 F. Supp. 880, 884-85 (M.D. Ga. 1989) (plaintiffs and defendants disagree whether census tract or County Commission Districts contain relevant population); see *supra* notes 152-53 and accompanying text.

213. All states carry out environmental impact studies prior to designating suitable sites. See *supra* Part II.B. This study should indicate the area around a site that will be physically and financially affected.

214. In Title VII cases prior to *Wards Cove*, once the plaintiff made a *prima facie* case of disparate impact, the burden shifted to the employer to prove "business necessity." See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The Supreme Court in *Wards Cove* held that the burden of *production* shifted to the defendant but the burden of *persuasion* remained with the plaintiff. *Wards Cove*, 490 U.S. at 659. The most controversial aspect of the Civil Rights Act of 1990, and the grounds on which President Bush vetoed the Act, was the shift in the burden of

demonstration of "environmental necessity" by proving that the chosen site was environmentally suitable.²¹⁵ The plaintiff would then be entitled to present evidence that alternative sites were available.²¹⁶ Evidence of an alternative site would reshift the burden to the defendant to prove that the chosen site was *necessary* to safely dispose of hazardous wastes.²¹⁷ The establishment of an "environmental necessity" standard will permit the defendant to locate the hazardous waste facility in the community despite the proven disparate impact.

This Act would alleviate most of the difficulties of pursuing an equal protection claim set forth in Part III. The burden on the plaintiff would be to prove a disparate impact of hazardous waste facilities on a minority community relative to a white community. Since the

proof to employers to prove business necessity. Martin J. Hamer, *The Case for a New Civil Rights Bill*, N.Y. TIMES, Nov. 11, 1990, § 3, at 13; *Racial Politics — Again*, BOSTON GLOBE, Apr. 23, 1991, at 16. Those who opposed the bill claimed that this shift would lead to hiring quotas. Hamer, *supra*; *Racial Politics — Again*, *supra*. However, one commentator claims that President Bush's alternative bill would also shift the burden of proof to employers once plaintiffs established a *prima facie* case; the difference being what employers would be required to prove. Michael Kinsley, *Hortonism Isn't Racism, But It is a Great Lie*, L.A. TIMES, June 6, 1991, at B7. Under the Civil Rights Act of 1990, employers would have to prove that there is a "significant" relationship between its employment criteria and "successful performance" of the job," while the President's bill would require proof only that the practice "has a manifest relationship to the employment in question" or that "legitimate employment goals are significantly served by, even if they do not require, the challenged practice." *Employment Quotas Again Placed at Issue as Republicans Introduce Civil Rights Bill*, DAILY REP. FOR EXECUTIVES, Mar. 13, 1991, at A-15. The compromise bill, supported by President Bush and passed by Congress in 1991, allows employees to defend their employment practices by showing them to be "job related for the position in question and consistent with business necessity." Clymer, *supra* note 207, at A8. The *New York Times* says that this provision would eliminate the *Wards Cove* standard and order the courts to interpret the law as it existed prior to *Wards Cove*. *Id.* The environmental suitability standard, the defendant's *prima facie* demonstration of environmental necessity, is more objective than the first element of business necessity since it is a measurable standard devised by each particular state. See *supra* notes 82-88 and accompanying text (describing the different environmental criteria considered by states).

215. This prong measures whether the chosen site conforms to the environmental impact criteria set by the state.

216. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) ("If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship.") (citation omitted).

217. A definitive determination of factors that would allow defendants to prove that a chosen site is *necessary*, after plaintiffs have presented evidence of environmentally suitable alternative sites, is impossible without case-by-case analysis. Courts can look to Title VII cases for guidance, but must also recognize the differences between the employment context and hazardous waste sitings. For example, under Title VII, in measuring whether alternative employment practices were available, the Supreme Court considered relevant "factors such as the cost or other burdens of proposed alternative selection devices. . . ." *Wards Cove*, 490 U.S. at 661. In the context of hazardous waste sitings, however, taking the increased cost of an alternative site into account will simply facilitate the inequitable placement of hazardous waste facilities in poor, minority communities. See *supra* notes 21-33 and accompanying text. In some cases, however, the land value of the plaintiffs' suggested alternative site will be significantly greater than the site at issue. If this additional cost to the facility would bar its development at the suggested site, courts may have to balance the state's need for the site against the site's impact on the community.

goal would not be to infer intent, but to prove harm, courts could consider uncontrolled toxic waste facilities and other environmental hazards as part of the total harm to the community. Although the Act would make it easier for plaintiffs to challenge siting decisions successfully, the "environmental necessity" provision would ensure that important environmental considerations were protected. If a state could dispose of waste safely only in this community, safety would supersede the disparate impact claim.²¹⁸

Applying the proposed Act to the facts of *East Bibb Twiggs Neighborhood Assn. v. Macon-Bibb County Planning & Zoning Commission*²¹⁹ illustrates the functional nature of the inquiry. In *East Bibb Twiggs*, the plaintiffs proved that the site would have a greater impact on the black population than on the white population. The plaintiffs attempted to introduce evidence that undesirable land uses have been located historically in black neighborhoods.²²⁰ Assuming that the evidence was persuasive and the court found that this community was overburdened by environmental hazards, the burden of proof would then shift to the Commission to establish "environmental necessity." The court would look at the *impact* of the site, consider the environmental suitability of alternative sites, and base its decision on elements of equity and safety.

While this Act would provide minority communities with a judicial remedy, an amendment to RCRA may actively further distributional equity even before siting decisions are made. When enacting RCRA, Congress declared that it is a national policy to reduce the generation of hazardous wastes.²²¹ It should amend RCRA to include as a national policy the amelioration of the disparate burden of hazardous waste facilities on minority communities. The EPA only authorizes state programs that are designed to protect health and the environment.²²² Similarly, to comply with RCRA's new national policy, the EPA should only authorize hazardous waste disposal programs that are designed to resolve the disproportionate effect of hazardous waste on minority communities.

The United Church of Christ Commission for Racial Justice offered several recommendations which would be useful in promulgating this objective.²²³ First, it suggests that the President issue an executive order mandating that all executive branch agencies which regulate hazardous wastes consider the impact of current policies and regula-

218. See *supra* note 82 (discussing criteria states consider when completing environmental impact statements).

219. 706 F. Supp. 880 (M.D. Ga. 1989) *aff'd.*, 896 F.2d 126 (11th Cir. 1989).

220. 706 F. Supp. at 885.

221. 42 U.S.C. § 6902(b) (1988).

222. See 42 U.S.C. § 6902(b) (1988) (authorizing state programs).

223. TOXIC WASTES AND RACE, *supra* note 4, at 24-25.

tions on minority communities.²²⁴ Second, the Commission proposed that the EPA establish an Office of Hazardous Wastes and Racial and Ethnic Affairs to monitor the state siting of hazardous waste facilities to ensure that the states give adequate consideration to the racial and socioeconomic characteristics of potential host communities.²²⁵ Finally, it advises the EPA to establish a National Advisory Council on Racial and Ethnic Concerns, to be comprised of representatives of minority groups, to facilitate the dissemination of information to minority communities throughout the country.²²⁶

Through the combination of a federal judicial remedy for communities and an amendment to RCRA, the federal government could take steps to facilitate a more equitable distribution of hazardous waste facilities. Plaintiff-communities will be more likely to challenge successfully disparate impact sites in federal court. The federal government could refuse to approve state programs that do not adequately prevent race-based sitings. The states, however, would continue to make actual siting decisions. Therefore, state programs must be developed that do prevent sitings that disproportionately burden minority communities.

B. *Suggestions for States*

State governments should also declare as an objective the eradication of race-based inequalities in the burdens of hazardous waste facilities. As is clear from Part II, states are inadequately addressing distributional equity. States will have to combine the approaches currently in effect and make a direct effort to take into account the racial and socio-economic characteristics of potential hazardous waste sites.²²⁷

The state approach best able to address the question of equity is site designation.²²⁸ This approach allows the relevant state agency to assess the current distribution of hazardous waste facilities and determine whether minority communities are particularly affected. If so, the agency can use racial makeup as a criterion when compiling a short list of potential sites.

Site designation alone will not succeed, however. Chosen communities will oppose the site.²²⁹ Therefore, states should simultaneously use the super review approach.²³⁰ Using the super review approach

224. *Id.* at 24.

225. *Id.*

226. *Id.*

227. *Id.* at 25.

228. *See supra* notes 97-106 and accompanying text.

229. *See supra* section II.B.

230. *See supra* notes 79-96 and accompanying text. Minnesota follows the combined site designation and super review approach. While Minnesota does not explicitly address the distributional equity issue, its plan restricts the state from siting more than one facility in any county.

and at the same time giving responsibility to a state agency rather than a developer to designate sites will eliminate one primary criticism of the super review approach: that cost-conscious developers choose sites. The creation of a special siting board to facilitate communication and information between the state and the locale may minimize opposition.

A state dedicated to ameliorating the disparate impact on minorities could first create a permanent agency or board.²³¹ This board would be responsible for selecting an inventory of candidate sites for commercial hazardous waste facilities. The number of sites placed on the inventory would depend both on the amount of waste generated and the number of environmentally suitable sites. When evaluating sites, the board should assess environmental suitability,²³² economic feasibility, risks and effects for local residents, adverse effects on agriculture and natural resources,²³³ and whether the locale is already burdened by environmental hazards. If the board finds that a number of sites equally satisfy the above criteria, it should take into consideration the racial and socioeconomic makeup of the potential candidate sites. If existing commercial hazardous waste facilities are sited disproportionately in minority communities, the board can remove sites that are predominantly minority from the inventory. This model would ensure that minority communities are not disparately burdened by hazardous waste sites while protecting environmental considerations.

C. *The Need for Grass Roots Involvement*

Two main problems remain with this combination of approaches: the Not In My Term of Office (NIMTOF) and Not In My Election Year (NIMEY) syndromes.²³⁴ The above stated procedure may result in a facility designated in an affluent area. The residents of that area will oppose the facility and politicians will exhibit the NIMTOF and NIMEY syndromes. Though a state may be dedicated to ameliorating the disparate burden of hazardous waste facilities in the abstract, politicians will not want to vote against their most powerful constituents. Thus, to keep politicians from lobbying agencies to prevent equitable siting, a vocal grass roots effort is needed to raise the political capital of minorities.

Minority communities are beginning to demand political accountability on issues of environmental risks. Almost a thousand people, pri-

MINN. STAT. ANN. § 115A.21(1) (West 1987). The Minnesota approach is thus useful for constructing a model statute.

231. See MINN. STAT. ANN. § 115A.055 (West Supp. 1991).

232. Environmental suitability would encompass the "intrinsic suitability" of the site as well as whether it complied with all federal and state pollution control and environmental protection rules. See MINN. STAT. ANN. § 115A.20 (West Supp. 1991).

233. See MINN. STAT. ANN. § 115A.20 (a), (d), (f) (West Supp. 1991).

234. See *supra* text accompanying note 106; White, *supra* note 2, at 151.

marily Hispanics from all over California, marched a mile and a half to the gates of a proposed hazardous waste incinerator chanting "el pueblo parara el incinerador."²³⁵ The organizers of the protest, Mothers of East Los Angeles (MELA), have been active since 1985. In 1987, they helped elect a local woman, Lucille Roybal-Allard, as the district's state assemblywoman. She spoke at the protest claiming that "[t]hey think that if they pick a poor community [in which to site a hazardous waste incinerator], they won't have any resistance. . . . We are here to prove that they are wrong."²³⁶ This is only one example of civil rights organizations which have begun to organize around this issue.²³⁷ The organization and use of civil rights era techniques will have to continue to try and ensure state and federal accountability.

CONCLUSION

The combination of federal, state, and local efforts suggested by this Note could reduce the inequitable distribution of hazardous waste facilities. The proposed Act, modeled on the 1990 amendment to the Civil Rights Act of 1964, would provide plaintiff communities with a more accessible judicial remedy while ensuring that important environmental standards are protected. An amendment to RCRA and model state legislation would facilitate a more equal distribution of the burdens of hazardous facilities.

Judge Richard Posner warns against "fool[ing] ourselves into thinking that profound social problems are actually solvable."²³⁸ He allows, however, that "the understanding and amelioration of such problems" is possible.²³⁹ This Note aspires to both possibilities.

235. "[T]he people will stop the incinerator." Russell, *supra* note 34, at 22.

236. *Id.* at 22-23.

237. See Garcia, *supra* note 46, at 18-19; Russell, *supra* note 34, at 22.

238. Richard A. Posner, *Us v. Them*, THE NEW REPUBLIC, Oct. 15, 1990, at 47, 50 (book review).

239. *Id.*