1994

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Maria Ramirez Fisher

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ON THE ROAD FROM ENVIRONMENTAL RACISM TO ENVIRONMENTAL JUSTICE

We’re not saying to take the incinerators and the toxic-waste dumps out of our communities and put them in white communities—we’re saying they should not be in anybody’s community. . . . You can’t get justice by doing an injustice on somebody else. When you have lived through suffering and hardship, you want to remove them, not only from your own people but from all peoples.¹

I. INTRODUCTION

The environmental movement invariably has focused on traditional areas of environmentalism which include wilderness and wildlife preservation, pollution, conservation, and overpopulation.² Presently, however, the environmental movement is entering a new stage of activism, that of social justice, in response to charges of environmental racism.³ Environmental racism occurs when people of color disproportionately bear the burdens and risks of environ-

¹. A Place at the Table: A Sierra Roundtable on Race, Justice, and the Environment, SIERRA, May-June 1993, at 50 [hereinafter A Place at the Table].
². Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality 1 (1990). The environmental movement has developed in four important stages. Dorceta Taylor, Can the Environmental Movement Attract and Maintain the Support of Minorities?, in Race and the Incidence of Environmental Hazards: A Time for Discourse 28, 30-32 (Bunyan Bryant & Paul Mohai eds., 1992) [hereinafter Environmental Hazards]. In the early 1800s, the movement was primarily concerned with the preservation of natural habitats. Id. By the early 1900s, environmental groups began to specialize in different areas such as mountaineering, forestry, and wildlife preservation. Id. During the 1940s, when economic and industrial expansion caused severe environmental degradation, environmental groups campaigned against pollution, overpopulation, depletion of non-renewable energy sources, and food production. Id. at 31. By the end of the 1970s, the environmental movement slowed, but environmental disasters at Love Canal and Times Beach rejuvenated interest in dangers produced by toxins and hazardous waste disposal. Id. at 31-32.
³. Susan Frey, Environmental Racism: Time for the Green Movement to Recognize Color, SANTA CLARA MAG., Summer 1993, at 18. For instance, the 10 major environmental groups were pressured into joining the civil rights movement to combat environmental inequities by a letter from the Southwest Organizing Project of Albuquerque. Id. at 19. The Gulf Coast Tenant Leadership Development Project sent a similar letter. A Place at the Table, supra note 1, at 50. These letters charged the groups with racist hiring practices and ignoring the serious toxic hazards faced by the poor and communities of color. Frey, supra, at 19.
mental protection policies while the associated benefits are dispersed throughout society.\(^4\) The disproportionate siting of hazardous waste facilities in communities of color is one aspect of environmental racism.\(^5\) Charges of environmental racism are premised on the belief that all Americans have a basic right to live and work in healthy environments.\(^6\) The reality, however, is that people


One commentator suggests that an activity is racist when there is a desire to dominate and subordinate others. Gerald Torres, *Race, Class, and Environmental Regulation*, 63 U. COLO. L. REV. 839, 840 (1992). In terms of the power struggle between the races, an environmental policy or practice is environmentally racist when "the predictable distributional impact of that decision [or policy] contributes to the structure of racial subordination and domination that has similarly marked many of [the] public policies in this country." Id.

\(^5\) Godsil, supra note 4, at 397. This Comment addresses the disproportionate siting of hazardous waste facilities, discrimination in the enforcement of environmental regulations, and the exclusion of people of color from environmental and government agencies. Environmental racism, however, encompasses much more than this. Other issues include "urban industrial pollution, childhood lead poisoning, pesticides and farmworkers, land rights, sustainable development, and the export of toxics and 'risky' technology." Robert D. Bullard, *Introduction to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 7, 9 (Robert D. Bullard ed., 1993) [hereinafter CONFRONTING ENVIRONMENTAL RACISM]. For a discussion of these aspects of environmental racism, see generally CONFRONTING ENVIRONMENTAL RACISM, supra.

\(^6\) Bullard, supra note 2, at 43. See also Bunyan Bryant & Paul Mohai, *Introduction to Environmental Hazards*, supra note 2, at 1-2 (noting resurgence in en-
of color overwhelmingly are disproportionately denied this right and continue to live and work in polluted environments.\(^7\)

Civil rights leaders have long decried environmental inequities,\(^8\) but it is only recently that federal and state policymakers, legal scholars, and mainstream environmental groups have turned their attention towards developing a solution to the problem.\(^9\) Cooperative environmental movement as people of color recognize basic right to live in safe and clean environments.

7. Benjamin F. Chavis, Jr., Foreword to CONFRONTING ENVIRONMENTAL RACISM, supra note 5, at 3 (noting that millions of African Americans, Latinos, Asians, Pacific Islanders, and Native Americans experience exposure to greater health and environmental risks than general population); Robert D. Bullard, Anatomy of Environmental Racism and the Environmental Justice Movement, in CONFRONTING ENVIRONMENTAL RACISM, supra note 5, at 15 (noting that people of color are disproportionately harmed by industrial toxins).

8. Marianne Lavelle & Marcia Coyle, The Federal Government, In Its Cleanup of Hazardous Sites and Its Pursuit of Polluters, Favors White Communities Over Minority Communities Under Environmental Laws Meant to Provide Equal Protection for All Citizens, A National Law Journal Investigation Has Found, NAT'L L.J., Sept. 21, 1992, at S2 (noting activists have been protesting against environmental racism since 1982). A 1982 protest against the hazardous waste facility located in Warren County, South Carolina, an African American community, is often identified as the seminal event of the environmental justice movement. Godsil, supra note 4, at 394. Residents of Warren County organized to protest the designation of their community as a burial site for soil contaminated with highly toxic polychlorinated biphenyls ("PCBs"). BULLARD, supra note 2, at 33-36. The protest, however, did not prevent the dumping of more than 32,000 cubic yards of soil in Warren County. Id. at 36-37. At that time, this was the largest PCB dumping ever documented in the United States. Id. at 36. However, although the protest failed, it brought the issue of environmental inequity to the nation’s attention. Id. at 38.

The events at Warren County spotlighted the inequities in environmental protection, yet many civil rights organizations failed to join the environmental movement because they were more concerned with social, economic, and political issues. Kelly Michelle Colquette & Elizabeth A. Henry Robertson, Environmental Racism: The Causes, Consequences, and Commendations, 5 TUL. ENVL. LJ. 153, 154 (1991). Some civil rights leaders spurned the environmental movement, describing it as "‘irrelevant’ at best and, at worst, ‘a deliberate attempt by a bigoted and selfish white middle-class society to perpetuate its own values and protect its own life style at the expense of the poor and the underprivileged.’” Richard J. Lazarus, Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection, 87 NW. U. L. REV. 787, 788 (1983). Although commentators suggest that exclusionary policies and racial stereotyping worked to limit the involvement of people of color in environmental issues, the more likely explanation is that people of color are less concerned with the environment. Id. at 822. Nonetheless, in the 1980s, people of color began to organize to protest adverse environmental conditions in their communities. Colquette & Robertson, supra, at 154. See also BULLARD, supra note 2, at 17. In fact, the environmental justice movement is utilizing many of the civil rights strategies used to gain equal protection under the laws. Colquette & Robertson, supra, at 154. Moreover, there are at least six federal cases challenging alleged discrimination in environmental protection on civil rights grounds. Luke W. Cole, Empowerment as the Key to Environmental Protection: The Need for Poverty Law, 19 ECOLOGY L.Q. 619, 632 (1992).

9. Lazarus, supra note 8, at 788-89. Environmental groups originally ignored evidence of environmental racism, perhaps because the claims were “unsettling
tion between these groups will aid in the efforts to rid the nation of environmental racism. This Comment, however, argues that the most successful means by which to achieve environmental justice is to combine the strategies and techniques employed by grassroots organizations with the vast political, technical, and financial resources of mainstream environmental groups to create an effective alliance. Part II of this Comment presents background data on environmental racism. Part III discusses strategies which environmental and grassroots organizations should cooperatively employ in order to achieve environmental justice. Part IV concludes that as more communities successfully fight against the construction of hazardous waste facilities in their neighborhoods, available sites for such facilities will diminish. Consequently, safer and more efficient methods of waste management need to be researched and developed.

II. EVIDENCE OF ENVIRONMENTAL RACISM

Environmental inequities exist in three major areas: (1) decisions regarding the location of waste facilities; (2) enforcement of environmental laws and regulations; and (3) the structure of environmental agencies and groups. Of these three, the impact of environmental racism on the siting of hazardous waste facilities has been the most controversial.

A. Siting of Hazardous Waste Facilities

The need for efficient and proper disposal of hazardous waste is an important consideration in locating hazardous waste facili-

and potentially divisive.” Id. at 789. The mainstream environmental community itself has acknowledged its failure to attack environmental racism. See A Place at the Table, supra note 1, at 50. One commentator has suggested that the environmental groups' inattention to environmental racism may be intentional. See Cole, supra note 8, at 620 n.1 (noting that in 1971, 58% of Sierra Club members voted against working on environmental racism issue). Although some commentators and policymakers suggest further study is needed to support the alleged correlation between race and environmental inequities, Congress and regulators have already begun attacking the problem. Jones, supra note 3, at 28. The federal government's quick response to the problem has been motivated, in part, by the growing documentation of environmental inequities by sociologists and other academia. Lazarus, supra note 8, at 790-91.

10. See Bullard, supra note 7, at 39 (outlining some of these strategies).

11. Chavis, supra note 7, at 3. For further discussion of this issue, see infra notes 29-46 and accompanying text.

12. Id. For further discussion of this issue, see infra notes 59-68 and accompanying text.

13. Id. For further discussion of this issue, see infra notes 69-102 and accompanying text.
Improper disposal of hazardous waste increases the risk of harm to both the environment and human welfare. Communities alerted to the risks associated with hazardous waste facilities actively oppose the construction of these facilities in their neighborhoods. Successful opposition, in turn, reduces the number of available sites for construction of hazardous waste disposal facilities.


In Chicago, Illinois, an African-American community of 10,000 residents is located near a landfill, industrial refuse burners, and the city sewage plant. Mariam LaVelle, An Industrial Legacy, Nat'l L.J., Sept. 21, 1992, at S3. Residents suffer from health problems such as asthma, pink eye, cancer and birth defects; these problems are believed to be linked to the waste disposal and industrial plants. Id. One community resident who worked as a court-ordered monitor of the incinerator chose to abort her fetus because it "was developing without a head or bottom." Id. The same resident's father also died of lung cancer at the age of 41. Id. Love Canal is the site of an environmental disaster where a residential community was contaminated by toxic fumes and leachate. Lawrence S. Bacow & James R. Milkey, Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach, 6 Harv. Envtl. L. Rev. 265, 265 n.2 (1982). Residents suffered from health effects which included chemical burns, chromosome damage, a high incidence of spontaneous abortion, and a cancer rate 30 times the national average. Id. Cases such as these explain the intense response and concerns harbored by communities which oppose the location of such facilities in their neighborhoods. Colquette & Robertson, supra note 8, at 155.

16. Id. "Not In My Backyard" ("NIMBY") groups have been successfully campaigning against the construction of facilities in their communities. Godsil, supra note 4, at 396. Consequently, developers seek locations where they are less likely to face organized opposition; i.e., poor communities and communities of color. Id.
ties. The vast amount of waste Americans generate yearly exacerbates the problem. Although technological advancements may develop more efficient means of waste disposal and reduce the amount of waste generated, there will continue to be a need for waste disposal facilities. The issue of environmental racism will become more visible as the number of available waste disposal locations are reduced and waste generation continues.

Recognizing the benefits and dangers of hazardous waste disposal, Congress balanced these conflicting concerns by enacting the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Despite Congress's good intentions, how-

17. Id. at 400.
18. See Walsh, supra note 15, at 110 (noting that Americans generate approximately 575 million tons of toxic waste annually). The precise amount of hazardous waste generated yearly in the United States remains uncertain. Id. The difficulty in determining an exact amount stems from the problems with defining and then identifying hazardous waste. Id. at 108. Nonetheless, it is inevitable that the amount of waste will grow as industries continue to expand. Id. at 111. For example, the United States produced nine million metric tons of hazardous waste in 1970. Id. at 112 n.56. By 1990, that amount grew to approximately 250 million tons. Colquette & Robertson, supra note 8, at 156. This figure may be conservative when compared with the Congressional Budget Office's estimate that the amount of hazardous waste generated was between 223-308 million tons. CHARLES A. WENTZ, HAZARDOUS WASTE MANAGEMENT 2 (1989).

As for the revenue created by waste disposal, waste disposal companies grossed $3.25 billion in 1990. Robert W. Collin, Environmental Equity: A Law and Planning Approach to Environmental Racism, 11 VA. ENVTL. L.J. 495, 516 (1992). This amount is expected to increase by 115% by 1996. Id.
20. Godsil, supra note 4, at 395-96.
21. See Lazarus, supra note 8, at 792. Among the benefits of environmental protection are the creation of a cleaner environment, the reduction of the incidence of health problems associated with pollution, and the availability of amenities associated with the environment. Id. at 793. The burdens associated with environmental protection include the economic costs of implementing environmental policies, reduction of public monies for social welfare programs, and redistribution of risks related to the pollution treatment. Id. at 792-94.
22. Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-91 (1988 & Supp. V 1993). RCRA requires EPA to identify hazardous waste substances. Developments in the Law - Toxic Waste Litigation, 99 HARV. L. REV. 1459, 1471 (1986) [hereinafter Toxic Waste Litigation]. Hazardous wastes identified by EPA may be stored and disposed of by facilities that have obtained permits from EPA. Id. RCRA also requires generators and transporters of the identified hazardous wastes to keep records of the substances which are stored, transported, and disposed of in specifically labelled containers. Id. Generators and transporters of hazardous waste are also required to report to the federal government the kinds and amounts of hazardous wastes handled. Id.
ever, RCRA and CERCLA created a federal management waste system which fails to account for the distribution of environmental burdens throughout society. Consequently, while these environmental statutes bestow benefits on society as a whole, they disproportionately place burdens upon communities of color.

There are existing studies that arguably substantiate the claim that people of color bear an unequal environmental burden. For instance, there is evidence that supports the claim that communities of color are disadvantaged by environmental protection policies. In 1983, the General Accounting Office ("GAO") issued a report on the relationship "between the location of hazardous waste facilities and the racial and economic status of the surrounding communities of color."
communities.\textsuperscript{30} The GAO study reported a strong correlation between race and poverty and the location of hazardous waste facilities.\textsuperscript{31} In the eight states composing EPA's Region IV, the study identified four hazardous waste sites.\textsuperscript{32} In three of these communities, African-Americans made up the majority of the population.\textsuperscript{33} In addition, the GAO reported that at least twenty-six percent of the population in all four communities were both below the poverty level and predominantly African-American.\textsuperscript{34}

Motivated by the results of the GAO report, the United Church of Christ ("UCC") conducted a national study in 1987.\textsuperscript{35} The UCC study was more comprehensive that the GAO report because it focused on the entire United States.\textsuperscript{36} The UCC study reported that communities with a single hazardous waste facility had twice as many people of color as did communities without such a facility.\textsuperscript{37} The study also reported communities with two or more facilities had more than three times the population of people of color than

\textsuperscript{30} U.S. General Accounting Office, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities 2 (1983) [hereinafter Siting of Hazardous Waste Landfills]. The GAO conducted the study at the request of Congressman Walter E. Fauntroy who was arrested at the Warren County protest. Mohai & Bryant, supra note 4, at 921. For a discussion of the events surrounding the Warren County protest, see supra note 8.

\textsuperscript{31} Id. The sites included: (1) Chemical Waste Management in Sumter County, Alabama; (2) SCA Services in Sumter County, South Carolina; (3) Industrial Chemical Company in Chester County, South Carolina; and (4) Warren County PCB landfill in Warren County, North Carolina. Id. at 2.

\textsuperscript{32} Id. at 1. The study also revealed that more than one-fourth of the population in all four counties had income below the poverty level. Id. However, Professor Bullard states that:

\begin{quote}
[This phenomenon] cannot be reduced solely to a class [issue] because there is no shortage of poor white communities in the region. One only has to point to southern Appalachia to see widespread white poverty in America. Nevertheless, poor whites along with their more affluent counterparts have more options and leverage mechanisms \ldots at their disposal than blacks of equal status.
\end{quote}

Bullard, supra note 2, at 40.

\textsuperscript{33} Id. The sites included:

\begin{itemize}
\item Chemical Waste Management in Sumter County, Alabama.
\item SCA Services in Sumter County, South Carolina.
\item Industrial Chemical Company in Chester County, South Carolina.
\item Warren County PCB landfill in Warren County, North Carolina.
\end{itemize}

\textsuperscript{34} Siting of Hazardous Waste Landfills, supra note 30, at 1.

\textsuperscript{35} See generally Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites (1987) [hereinafter Toxic Wastes and Race]. Although it generally approved of the GAO Report, the United Church of Christ noted that the GAO report was limited by its regional scope and, therefore, the UCC initiated a similar study which focused on the entire nation. Charles Lee, Toxic Wastes and Race in the United States, in Environmental Hazards, supra note 2, at 10, 13.

\textsuperscript{36} Toxic Wastes and Race, supra note 35, at 3.

\textsuperscript{37} Id. at 13.
communities without such sites. The UCC study thus concluded that race, rather than socioeconomic status, was the predominant factor related to the presence of hazardous waste facilities in residential communities throughout the United States. Furthermore, the UCC study determined that these patterns did not occur by chance; instead, “some underlying factor or factors, which are related to race, played a role in the location of commercial hazardous waste facilities.”

In 1990, EPA surveyed and evaluated existing data regarding the extent of the environmental burdens shouldered by communities of color. EPA’s report noted that “environmental and health data are not routinely collected and analyzed by income and race.” More importantly, the report indicated that data on the health risks posed by industrial facilities were also not routinely collected. However, the EPA report acknowledged that evidence exists which indicates that racial and ethnic minorities are more likely to live near a commercial waste treatment facility or an uncontrolled hazardous waste site than whites.

38. Id.
39. Id.
40. Id. at xv.
42. ENVIRONMENTAL EQUITY REPORT, supra note 15, at 17.
43. Id.
44. Id. at 3. The Workgroup did not generate any new evidence but relied on the GAO and UCC reports. Id. at 11. EPA’s failure to conduct a new investigation was criticized by Professor Robert Bullard who stated that “[the] Workgroup failed to grasp the interrelationship between race, class and environmental decision-making.” 2 ENVIRONMENTAL EQUITY WORKGROUP, U.S. ENVTL. PROTECTION AGENCY, Environmental Equity: Reducing Risk for all Communities, Supporting Document 78 (June 1992) [hereinafter ENVTL. EQUITY WORKGROUP].

Critics also charge that the Workgroup report was in part an EPA “plan to deflect grassroots political pressure and woo civil rights groups away from the environmental equity issue.” Mary Lee Kerr & Charles Lee, From Conquistadors to Coalitions: After Centuries of Environmental Racism, People of Color are Forging a New Movement for Environmental Justice, S. EXPOSURE, Winter 1993, at 9, 18. See also Robert D. Bullard, Conclusion: Environmentalism with Justice, in CONFRONTING ENVIRONMENTAL RACISM, supra note 5, at 195 (noting that EPA’s Workgroup report was part of plan to “drive a wedge between grassroots environmental activists and mainstream civil rights and environmental groups”). An internal confidential memo, which was leaked to the press, detailed EPA’s public relations campaign. Id. For the text of the internal memo, see Lead Poisoning (Part 2), Hearing Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce, 102d Cong., 2d Sess. (1980) 53-67.
The relationship between race and siting decisions requires more investigation than has been undertaken.\footnote{Jones, supra note 3, at 28.} As discussed above, however, existing evidence indicates that communities of color are more likely than white communities to harbor hazardous wastes facilities.\footnote{Id.} Consequently, these communities experience the financial, economic, and medical risks associated with hazardous waste facilities, while the majority of society enjoys the benefits of environmental protection policies.

There are two characteristic responses to charges of environmental racism. Often, the response to charges of environmental discrimination is that government agencies are complying with race-neutral environmental statutes which benefit all citizens.\footnote{Lavelle & Coyle, supra note 8, at S2. EPA lawyers assert that "they carry out the law, case by case, on the basis of science, the size and legal complications particular to each toxic waste site or illegal pollution case." Id. They argue that discriminatory outcomes from the implementation of environmental protection policies are not a function of discriminatory rules or procedures or racial bias within environmental agencies. Gelobter, supra note 28, at 73. Activists respond that the "hundreds of seemingly race-neutral decisions in the science and politics of environmental enforcement have created a racist imbalance." Lavelle & Coyle, supra note 8, at S2.} The other response portrays the determination of disposal facility locations as an economic and political issue, not a racial issue.\footnote{Cole, supra note 8, at 628. Factors other than financial resources and political influence contribute to environmental inequities. Id. These factors include "racist and economic exclusion from 'nicer' neighborhoods, 'expulsive zoning,' the exploitation of workers' immigration status, government neglect and design, and the 'success' of environmental laws." Id. at 628-29. Poor communities are also more likely to accept "bribes" to permit a facility to be built in their neighborhoods because of their small tax base and difficulty in financing municipal projects. Tsao, supra note 15, at 373-74. Although these communities generally oppose waste facilities, often they find that the economic inducements outweigh the risks of hosting a hazardous waste facility. Robert Bullard, Environmental Blackmail in Minority Communities, in ENVIRONMENTAL HAZARDS, supra note 2, at 82, 84. The economic inducements include the promise of jobs created by the construction and operation of the waste facility as well as the added revenue to the community. Id. Despite arguments that environmental racism is a function of economic, political, and financial variables and not a product of purposeful discrimination, communities of color clearly bear the burden of environmental protection while the white majority reaps the associated benefits. See Boyle, supra note 4, at 969.}

From an economic perspective, business necessity and the economic status of people of color partially explains the existence of environmental injustice. A classical economic analysis of waste-facility siting decisions suggests that these facilities are located where it
is the least costly to build, manage, and maintain them.\textsuperscript{49} Since communities of color often have low property values,\textsuperscript{50} they will be considered as sites for disposal facilities more often than white communities having higher property values.\textsuperscript{51} Additionally, the economic powerlessness of people of color limits their ability to move out of inexpensive residential areas targeted as feasible waste facility locations.\textsuperscript{52} Arguably, therefore, the inequitable distribution of waste sites is the consequence of economic considerations.\textsuperscript{53}

The political weakness of minority groups also contributes to the likelihood that waste facilities will be located in communities of color.\textsuperscript{54} For instance, waste management companies seek to locate their facilities in minority neighborhoods because of these communities' inability to conduct successful campaigns against siting decisions.\textsuperscript{55} On the other hand, these companies avoid areas where a community is more likely to successfully organize to prevent the construction of a hazardous waste facility in the area.\textsuperscript{56} The effect is

\textsuperscript{49} See Collin, \textit{supra} note 18, at 516. \textit{See also} Mohai \& Bryant, \textit{supra} note 4, at 923-24 (noting that classic economic theory suggests that poverty also plays a role in siting decisions).

\textsuperscript{50} Collin, \textit{supra} note 18, at 517. \textit{See also} Boyle, \textit{supra} note 4, at 971 (noting that more African-Americans live in lower-income neighborhoods than poor whites). Racist laws and attitudes limit the economic power of African-Americans and other people of color. Lazarus, \textit{supra} note 8, at 809. People of color with low incomes are limited by financial resources and are, therefore, forced to live in low-income housing. \textit{Id.} Even wealthy people of color have a limited choice of homes because real estate agencies often will not show them houses in affluent white communities. \textit{Id.} \textit{See also} Cole, \textit{supra} note 8, at 628 (finding that racist exclusion from "nicer" neighborhoods is common practice).

\textsuperscript{51} Collin, \textit{supra} note 18, at 516-17. \textit{See also} Godsil, \textit{supra} note 4, at 399 (finding that developers are more likely to propose sites in areas with low property values and, thus, communities of color are chosen).

\textsuperscript{52} Lazarus, \textit{supra} note 8, at 808 (noting that economic plight of people of color confines them to less healthy communities).

\textsuperscript{53} Collin, \textit{supra} note 18, at 516-17. Land use regulation which protects the natural environment is an additional factor in the rising cost of property values. \textit{Id.} at 513. Land use regulations remove land from the available housing supply, causing demand to increase which, in turn, raises property values. \textit{Id.}

\textsuperscript{54} Boyle, \textit{supra} note 4, at 977.

\textsuperscript{55} Godsil, \textit{supra} note 4, at 399. A consulting firm recognized this weakness when it advised the California Waste Management Board that "[a]ll socioeconomic groupings tend to resent the nearby siting of major facilities, but the middle- and upper-socioeconomic strata possess better resources to [e]ffectuate their opposition." Tsao, \textit{supra} note 15, at 367 (quoting CALIFORNIA WASTE MANAGEMENT BD., POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING 42-43 (1984)).

\textsuperscript{56} Colquette \& Robertson, \textit{supra} note 8, at 169. These campaigns are part of the "not in my backyard" ("NIMBY") syndrome. \textit{Id.} at 168. NIMBY organizations have the money, political influence, time, and access to various resources to oppose the construction of waste facilities in their neighborhoods. \textit{Id.}
to transfer environmental problems from white communities to communities of color.\textsuperscript{57}

As discussed above, the evidence indicates that the unequal distribution of hazardous waste facilities in communities of color is a function of both economic and political factors. From this perspective, race may not appear to be the determinative factor in siting decisions. However, asserting that factors other than race contribute to the disproportionate distribution of hazardous waste facilities in communities of color is an insufficient explanation of the disparity.\textsuperscript{58} Furthermore, even if environmental laws and policies relating to siting decisions are not facially discriminatory, they may be discriminatory in their impact on communities of color.

B. Discriminatory Enforcement of Environmental Regulations

The racial composition of areas surrounding hazardous waste facilities may also impact the degree to which environmental laws and regulations are enforced.\textsuperscript{59} By enforcing environmental laws in communities of color significantly less often than in white communities, regulatory agencies tacitly approve the illicit conduct. Accordingly, businesses will flock to communities of color because penalties will be non-existent or low enough to be considered an acceptable cost of conducting business.\textsuperscript{60}

Due to the lack of commentary on this subject, the \textit{National Law Journal} ("NLJ") conducted an investigative report in 1992. The NLJ report was a comprehensive survey of "every U.S. environmental lawsuit concluded in the past seven years."\textsuperscript{61} The key findings include the following: (1) penalties under hazardous waste laws at sites having the greatest white population were approximately 500\% higher than penalties at sites with the greatest minority popu-

\textsuperscript{57} Bullard, \textit{supra} note 2, at 89. This result has been labelled as the "place-in-blacks'-backyard" ("PIBBY") principle. \textit{Id.} at 5. African-American communities are less successful in challenging the siting of hazardous waste landfills, toxic waste dumps, and industrial plants in their neighborhoods because they lack the organization, financial resources, and personnel to propel a long-term protest. \textit{Id.} at 18.

\textsuperscript{58} Bullard, \textit{supra} note 5, at 11 (noting that causes of environmental racism cannot be reduced to class and economic issues). \textit{Id.} Given its focus, it is easy to believe that environmentalism is immune from racial bias. The evidence, however, suggests the contrary; environmentalism, like education, housing, and employment relations, suffers from racial bias. \textit{Id.}

\textsuperscript{59} See Lavelle & Coyle, \textit{supra} note 8, at S2.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.} The NLJ investigation is the first time federal policy punishing polluters has been evaluated to determine whether it contributes to environmental racism. \textit{Id.}
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lation;\(^{62}\) (2) with respect to federal environmental laws governing air, water, and waste pollution, penalties in white areas were forty-six percent higher than in communities of color;\(^{63}\) (3) under the CERCLA cleanup program, abandoned hazardous waste sites in communities of color take twenty percent longer to be placed on the national priority list than those in white areas;\(^{64}\) (4) at sites located in communities of color, EPA chooses containment seven percent more often than the cleanup method preferred under the law;\(^{65}\) and (5) at sites located in white communities, EPA orders permanent treatment twenty-two percent more often than containment.\(^{66}\) The NLJ found that the racial imbalance evidenced by these findings often occurs regardless of whether the community is wealthy or poor.\(^{67}\) Although it was only one study, the NLJ investigative report’s findings are so striking that they cannot be ignored by policymakers and environmentalists.\(^{68}\)

C. The Lack of People of Color in Environmental Decisionmaking Positions

The federal government’s failure to adequately respond to charges of environmental racism is evidence of the political powerlessness of people of color.\(^{69}\) Political powerlessness takes on various forms ranging from the failure of people of color to exer-

62. Id. Fines averaged $335,566 in white areas compared to $55,318 in minority communities. Id.

63. Id.

64. Lavelle & Coyle, supra note 8, at S2.

65. Id.

66. Id.

67. Id.

68. EPA Administrator Reilly responded to the NLJ report. See EPA’s Reilly Replies to ‘Unequal Protection’, NAT’L L.J., Jan. 25, 1993, at 16. Reilly’s response reaffirmed EPA’s commitment to environmental justice. Id. However, he contended that NLJ’s study was flawed and challenged NLJ’s conclusion that EPA treated white communities more favorably. Id. Reilly stated that: “disproportionate impacts, even if established, could reflect a failure to recognize and address different circumstances as opposed to differential treatment.” Id. (emphasis added). Reilly further stated that if EPA’s own examination of its programs revealed inequitable treatment of low-income communities and communities of color, “corrective action” would be taken. Id. at 18.

69. See Collin, supra note 18, at 517 (stating that people of color lack the political power to overcome environmental discrimination); Godsil, supra note 4, at 399 (finding that communities of color are targeted because of political powerlessness); Lazarus, supra note 8, at 808 (noting that people of color possess little power in political fora); Tsao, supra note 15, at 375 (noting that all citizens are not equally able to voice their concerns and effectuate their opposition to siting decisions); Boyle, supra note 4, at 977 (noting that imbalance of political power favors privileged white communities).
cise their elective franchise, to the dismal numbers of people of color in political office and policymaking positions. Consequently, people of color have not enjoyed the benefits of representation at the legislative, regulatory, or enforcement levels as they relate to environmental issues. This section will describe the lack of minority representation in government and at the public interest level.

1. Government Entities

People of color are insufficiently represented at all levels of government. The lack of minority representation at the national level is significant because national environmental policy is determined by Congress, federal agencies, and federal courts. Without representatives to present and champion their interests, people of color cannot enjoy the benefits of environmental protection, but rather must bear the burdens and costs of these policies.

Recent electoral developments may foreshadow an improvement in minority representation at the federal level. For example, the 1992 federal election marked a significant increase in minority representation.

70. Lazarus, supra note 8, at 819. Professor Lazarus aptly summarized the negative impact of slim or no representation of people of color at every level of environmental interest. He wrote:

[Racial minorities] have not been well represented among the interest groups lobbying and litigating before governmental authorities on environmental protection issues. Nor have they been well represented, especially at the national level, within those governmental organizations actively involved in the . . . environmental processes. Their voices have not been heard in the mainstream environmental . . . organizations that participate in the policymaking debates . . . . Traditional civil rights organizations have historically had little interest in, and have infrequently become involved with, environmental issues. At the same time, mainstream environmental organizations have historically included few minorities in policymaking positions.

71. Lavelle & Coyle, supra note 8, at 82. Most gains have been made at state and local levels. Lazarus, supra note 8, at 820. For a discussion of the involvement of people of color in the federal government, see infra notes 72-79 and accompanying text.

72. Lazarus, supra note 8, at 810. Agreements made during political bargaining determine the distribution of burdens and benefits among members of society. Id. Parties having the greatest political leverage will protect and advance the interests of their constituents. Id.

73. Id. at 808. Environmental legislation is the result of involved negotiations between various interest groups. Id. at 813. Parties with strong political influence will be able to protect their concerns. Id. at 813-14. Because people of color wield little political power as a result of their underrepresentation both in the government and within environmental groups, environmental legislation may not adequately address their concerns. Id.
representation in Congress. Although few have actually become involved with environmental issues, several minority representatives have displayed interest in remedying environmental inequities.

Underrepresentation of people of color is also a problem in federal environmental agencies. Currently, EPA employs 746 persons “in positions classified as ‘manager’ or ‘management official, merit pay’.” Of these 746 employees, fifty-seven (7.5%) are people of color. EPA recognized the lack of representation in an internal memo which stated that “[t]he lack of minorities, especially in positions of influence, almost certainly has contributed to the lack of insight into equity issues... found to be characteristic of both EPA and our traditional constituency groups.”

Responses to the charges that the lack of representation of people of color is a contributing factor to the incidence of environmental racism point to reasons other than race. Proffered explanations include views that: (1) people of color are not concerned about environmental issues; (2) African-Americans still feel un-

74. CONG. Q., Jan. 2, 1993. In 1992, 39 African-Americans were elected to the House of Representatives, and one African-American woman, Senator Carol Mosely-Braun, was elected to the Senate. The New Class: More Diverse, Less Lawyerly, Younger, CONG. Q., Nov. 7, 1992, at 7-10. Only 19 Latinos were elected to the House and none were elected to the Senate. Id. Seven Asians were elected to the House and two to the Senate. Id. Also, Senator Ben Nighthorse Campbell became the first Native American to serve in Congress in more than 60 years. Lazarus, supra note 8, at 821 n.140.

75. Lazarus, supra note 8, at 820-21. Representative John Lewis of Georgia introduced the Environmental Justice Act of 1992 and Representative Conyers conducted hearings on environmental racism. Id. at 822 n.143. For a discussion of the voting record of the Congressional Black Caucus, see Henry Vance Davis, The Environmental Voting Record of the Congressional Black Caucus, in ENVIRONMENTAL HAZARDS, supra note 2, at 55-63.

76. Lazarus, supra note 8, at 822. These agencies are EPA, the Department of the Interior, the National Oceanic and Atmospheric Administration, and the Executive Office of the President (which includes the Council on Environmental Quality, the Office of Management and Budget, and the Domestic Policy Office). Id.

77. Letter from Dan J. Rondeau, Director, Office of Civil Rights, U.S. Environmental Protection Agency, to Maria N. Fisher, Staff Member, Villanova Environmental Law Journal (Feb. 2, 1994) (on file with the Villanova Environmental Law Journal). Employees in the “manager” or “management official, merit pay” positions are “policy-making or policy influencing officials who have attained the GM-15 or Senior Executive Service pays levels.” Id.

78. Id. Statistics demonstrate that while 18.7% of the EPA workforce include either supervisory or managerial positions, only 10% of these positions are held by people of color. Collin, supra note 18, at 517 n.162. Moreover, only 4% of EPA Senior Executive Service employees are people of color. Id.

79. Id. at 822 n.145 (emphasis added).

80. Lazarus, supra note 8, at 822. This view holds that people of color were not involved in the environmental movement because they are not concerned or knowledgeable about environmental issues. Dorceta Taylor, The Environmental Justice Movement, 18 EPA J., Mar./Apr. 1992, at 23. Research has shown, however, that
welcome in the environmental arena from which they have historically been excluded; and (3) people of color lack the resources and confidence necessary to induce political change. Nevertheless, the result of underrepresentation in the political sphere is the neglect of concerns of people of color. This neglect increases the burdens and risks of environmental protection policies shouldered by people of color.

2. Environmental Groups

Mainstream environmental groups have been harshly criticized for their lack of interest in environmental issues impacting people of color. At first glance, the role of environmental groups may not appear to have an impact on environmental racism. Viewed in light of their powerful influence over environmental policy, however, environmental groups could be powerful agents for curbing environmental racism.

people of color are interested in the environmental movement, but are unable to convert their interest into action. Taylor, supra note 2, at 49 n.3.

81. Lazarus, supra note 8, at 823.
82. Id. at 824.
83. Id. at 814. Policymakers typically address problems of those people who are able to present their concerns. Id. Therefore, lack of representation of people of color leads to legislative and policy decisions that do not address the environmental concerns of these groups. Id.

84. Lavelle & Coyle, supra note 8, at S2 (noting that mainstream green groups have been criticized for their role in shaping environmental policy). See also BULLARD, supra note 2, at 1-2 (noting that "mainstream environmental organizations ... [slow] to include minorities, poor and working class persons."). Environmental racism was brought to the attention of mainstream environmental groups in 1990. Lavelle & Coyle, supra note 8, at S2. See also supra note 3.

Professor Bullard acknowledges that the “Big Ten” environmental groups have responded to this criticism; however, other commentators still contend these groups are not moving fast enough to address these issues. Id. Although mainstream groups have taken up the battle call, tensions have developed between these groups and grassroots organizations. Id. Funding is the primary reason for these disputes. Id. In addition, the failure of the “Big Ten” to consult with the smaller groups when developing strategies and granting proposals to organize against hazardous waste siting decisions has increased tensions. Id.

85. Boyle, supra note 4, at 978. See also BULLARD, supra note 2, at 14. Large environmental groups have influence over both politicians and minority communities. Boyle, supra note 4, at 977-79. Environmental interest groups have greater access to policymakers because of the promise of votes and campaign contributions. Id.

86. See Bullard, supra note 7, at 38 (noting that mainstream environmental movement should assist environmental justice movement).
As in other areas of society, racial discrimination has impeded the involvement of people of color in environmental groups. For example, a 1988 survey of eleven environmental organizations found only six people of color serving on their boards of directors. The survey also reported that these organizations only employed 222 people of color out of 1,317 employees, and of those 222, only 24 were considered professionals. Despite efforts to diversify their workforce, environmental organizations have been unable to increase the involvement of people of color. The primary explanation for this lack of involvement is that these groups traditionally have been supported by middle and upper-class whites. Another difficulty facing environmental organizations in efforts to attract people of color is the lack of qualified applicants. For the most part, major environmental groups agree with the criticism that the environmental movement has not concerned itself with minority issues. In response, mainstream environmental groups have attempted to attract people of color to their organizat-

87. Cole, supra note 8, at 637-38. For example, some chapters of the Sierra Club in the past have voted to exclude African-Americans and Jews from their membership. Id. at 638 n.59.


89. John H. Adams, The Mainstream Environmental Movement, 18 EPA J., Mar./Apr. 1992, at 25, 26 (noting that predominantly white staffs are indefensible). Although environmental organizations have attempted to attract people of color, they are now being criticized for siphoning off the best talent from local community organizations. Claudia MacLachlan, Tensions Underlie Rapport with Grassroots Groups, Nat’l L.J., Sept. 21, 1992, at S10. Overall, however, efforts to hire people of color have not been successful. BEYOND THE GREEN, supra note 88, at 11.

90. BEYOND THE GREEN, supra note 88, at 11.

91. Id.

92. Cole, supra note 8, at 639; BULLARD, supra note 2, at 1.

93. Id.

94. BEYOND THE GREEN, supra note 88, at 11. The lack of qualified applicants stems from the fact that environmental organizations have a narrow definition of “qualified applicant.” Id. A “qualified applicant” has graduate degrees or years of volunteer experience. Id. Because there are few students of color attending college to begin with, and the environmental movement is relatively new, there are few people of color who qualify. Id.

95. Adams, supra note 89, at 26 (acknowledging criticism of agendas of mainstream environmental organizations). John H. Adams, Executive Director of the National Resources Defense Council (“NRDC”), has stated that environmental groups must ally themselves with the environmental justice movement. Id. at 25. Additionally, Michael Fischer, former Executive of the Sierra Club, has called for the “friendly takeover of the Sierra Club by people of color.” Frey, supra note 3, at 18.
tions as well as having joined forces with local grassroots organizations to address issues of environmental injustice.96

Once environmental groups actually attract people of color, they must attempt to sustain that interest.97 Generally, groups retain support by offering incentives and by relying on personal commitment.98 Communicating the appeal of environmental organizations to people of color thus requires that these organizations modify their agendas and policies to include issues of concern to people of color.99 However, despite recent efforts to diversify environmental organizations, some critics maintain that many organizations have not gone beyond the rhetoric of diversification.100

Although much of the criticism is aimed at environmental groups, traditional civil rights organizations are not exempt from scrutiny. Most civil rights groups work with social justice issues, but fail to incorporate the environmental justice movement into their agendas.101 This lack of participation contributes to the perception that people of color are not interested in environmental issues.102

96. See Frey, supra note 3, at 19 (claiming that Sierra Club is changing its priorities); A PLACE AT THE TABLE, supra note 1, at 50 (environmental groups committed to diversifying staffs and working with environmental justice movement). The NRDC has worked with the Mothers of East Los Angeles and Concerned Citizens of South Central Los Angeles to reverse the decision to build California's first toxic incinerator in a predominantly Latino community. Adams, supra note 89, at 27. In addition, the Sierra Club helped persuade California to build a highway in Oakland around an African-American community, rather than through it. Frey, supra note 3, at 19.

Traditional environmental groups also have attempted to diversify. A PLACE AT THE TABLE, supra note 1, at 50. However, even these attempts have been criticized for "siphoning off" the best talent from grassroots organizations fighting against environmental inequities. MacLachlan, supra note 89, at 510.

97. Taylor, supra note 2, at 36.

98. Id. When incentives are strong enough, members continue to make donations and offer support when necessary. Id. Conversely, when financial support is weak, the organization must rely on moral appeals to attract the personal commitments of interested parties. Id. at 36-37.

99. Id.

100. Id. at 3.

101. BEYOND THE GREEN, supra note 88, at 38. See also Bullard, supra note 2, at 3-6 (noting that major goals of civil rights movement were social justice and elimination of institutionalized injustice); Charles Lee, Beyond Toxic Wastes and Race, in CONFRONTING ENVIRONMENTAL RACISM, supra note 5, at 47-48 (noting that since people of color "face rising unemployment, increasing poverty, worsening housing, and declining education and health status [they] cannot afford the luxury of only being concerned about quality of their environment.") But see Bullard, supra note 5, at 36 (noting that grassroots organizations in communities of color are taking initiative to improve overall quality of life).

102. BEYOND THE GREEN, supra note 88, at 39.
III. THE PATH TO ENVIRONMENTAL JUSTICE

The path to environmental justice requires the commitment of regulators, legislators, and activists. Attempts to achieve environmental justice must begin with cooperation between these various groups. Therefore, the recent discourse between these groups must continue so that all may equally share the benefits and risks of environmental protection policies. This Comment, however, suggests that achieving environmental justice will be the result largely of efforts made by an alliance of grassroots civil rights organizations and environmental groups.  

In the past, grassroots organizations have effectively fought hazardous waste facility siting proposals with techniques borrowed from the civil rights movement of the 1960s. Leaders have borrowed techniques from the civil rights era in organizing protests, demonstrations, petitions, and hearings to educate the public. Bullard, supra note 5, at 33. For example, residents of Kettleman City, California, which is 95% Latino, successfully opposed the siting of the state's first commercial hazardous waste incinerator in their neighborhood. Jane Kay, The Kettleman City Story, 18 EPA J., Mar./Apr. 1992 at 47. For a discussion of this issue, see infra notes 153-57 and accompanying text. In Hawaii, the Pele Defense Fund prevented the proposed capping of a live volcano for the purpose of harnessing steam. Rick Carroll, The Pele Defense Fund, 18 EPA J., Mar./Apr. 1992, at 49. Many Hawaiian residents opposed the capping of the volcano because they worshiped Pele, Hawaii's volcano goddess, and because it would create an industrial slum in their neighborhood. Id. at 49-50. For a discussion of strategies local organizations use to oppose hazardous waste facilities, see generally Tsao, supra note 15.  

Implementing techniques learned from the civil rights era requires time, money, and political influence. Colquette & Robertson, supra note 8, at 168. Some segments of society do not have access to these resources. Id. See also Boyle, supra note 4, at 977-78.  

Although environmental organizations have been involved with environmental issues which have corollary effects on minority populations, they must become more extensively involved in the issue of environmental racism. Id.
benefits and burdens of environmental protection. The potential for success of such a cooperative effort between local grassroots organizations and major environmental groups comes from the knowledge, expertise, and resources each would contribute to the partnership. For instance, local organizations would bring specific information and expertise to the environmental justice movement. National environmental organizations would offer technical, political, legal, and financial resources. This combined effort would create a strong alliance to prevent environmental inequities and ensure a safe environment for all. The following sections discuss litigation strategies which would be effective tools for such an alliance to use to achieve environmental equity.

A. Challenging Siting Decisions Through Litigation

1. Fourteenth Amendment's Equal Protection Clause

Since communities of color disproportionately host hazardous waste facilities, defeating future siting decisions will require litigation under the Fourteenth Amendment's Equal Protection Clause. However, under the United States Supreme Court's decisions in Washington v. Davis and Village of Arlington Heights v. Metropolitan

107. Id. at 27. A partnership between environmental groups and grassroots environmental organizations is necessary to achieve environmental justice. Id. Although the goal of environmental justice prompts environmental organizations to join the movement, those groups also act out of fear of losing their political influence by failing to embrace the environmental justice movement. A PLACE AT THE TABLE, supra note 1, at 50. Michael Fischer, former executive director of the Sierra Club, when commenting on the need for a change in the priorities of the environmental organizations stated: "Embrace diversity or drift into irrelevancy . . . . With city, county, and state governments and judiciaries becoming more diverse, the environmental movement cannot promote the change it wants if it remains an essentially white movement." Frey, supra note 3, at 19.

108. Adams, supra note 89, at 27.

109. Id. Grassroots groups fighting environmental inequity are an extension of established community groups. BULLARD, supra note 2, at 16. Many of these groups have organized infrastructures developed during the civil rights movement of the 1960s. Id. Environmental injustice is now on their agenda and these groups are attacking the problem with protests, neighborhood demonstrations, picketing, political pressure, and litigation. Id. at 17-18.

110. Adams, supra note 89, at 27.

111. Id. The first step toward this union was the 1991 First National People of Color Leadership Summit. Marcia Coyle, Empowerment: Civil Rights Meets Environmental Rights, Nat'l L.J., Sept. 21, 1992, at S10. The conference brought together mainstream environmental groups and local community groups in order to address environmental discrimination. Id.

112. 426 U.S. 229 (1976). In Davis, Washington D.C. police officers challenged a qualifying test required to join the police force. Id. at 232. They argued that the test discriminated against people of color because they tended to receive
Housing Development, a plaintiff must present actual proof of discriminatory intent on the part of government decisionmakers. Litigation based on the Equal Protection Clause therefore has been largely unsuccessful because proof of discriminatory intent is difficult to establish. For this reason, future challenges must persuade courts to change the level of scrutiny applied to cases charging discrimination in the enforcement of environmental policies.

lower scores than whites. Id. at 232-34. The Court held that the evidence was insufficient to prove discriminatory intent. Id.

113. 429 U.S. 252 (1977). In Arlington Heights, the Supreme Court set forth five factors that are indicative of discriminatory intent: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the sequence of events preceding the decision; (4) any departures from the normal decisionmaking process; and (5) the legislative or administrative history, especially where there are contemporaneous statements. Id. at 266-68.

114. Id. at 264-71. To bring a case under the Equal Protection Clause, a plaintiff must prove that the state had an intent to discriminate. Id. Even where a plaintiff has statistical evidence of disparate impact, an intent to discriminate must still be proven. Davis, 426 U.S. at 252.


116. Collin, supra note 18, at 534. Davis and its progeny have been harshly criticized. Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 319 (1987). Critics attack the imposition of the burden of establishing discriminatory intent on the wrong party; discriminatory intent is easy to hide. Id. Furthermore, since state action is based on multiple motives, the government always can identify a non-discriminatory motive for its action. Id. Perhaps more importantly, injury caused by state action exists regardless of the government's intent. Id.

The arguments supporting the reasoning in Davis are: (1) applying strict scrutiny to a decision having a disproportionate impact on a suspect class would be too costly; (2) a disproportionate impact standard would place liability on some persons who are not culpable; (3) a disproportionate impact test would be inconsistent with equal protection values; and (4) it would be inappropriate for the judiciary to remedy the disproportionate impact of a neutral government action. Id. at 320.

117. Collin, supra note 18, at 535. The present requirement of discriminatory intent required by Arlington Heights and Davis is inappropriate for environmental
Commentators have suggested that courts adopt intermediate levels of scrutiny or an "unconscious racism" test in cases challenging siting decisions. The proposed intermediate scrutiny approach would apply to state actions having a disproportionate impact on a suspect class. Under this approach plaintiffs must prove that the alleged act of discrimination had a disproportionate impact on a suspect class. After plaintiffs prove disproportionate impact, defendants would have the opportunity to demonstrate that the suspect class's interests were adequately represented. Plaintiffs would then have the burden of proving that their interests were not adequately represented or that the decisionmaking process was defective in some way. If the court finds that the plaintiff had adequate representation, the state must then articulate a rational basis for its decision. If the court fails to find that the suspect class was adequately represented, the court would next determine whether the defendant satisfactorily accounted for the interests of that class. This level of scrutiny permits courts to protect the in-
terest of a suspect class while only requiring that the government establish that people of color were represented in the decisionmaking process.126

Under the proposed “unconscious racism" test,127 government action would be evaluated to determine whether it was “racially significant."128 The court would examine evidence regarding the “historical and social context" of the government decision to determine whether “a significant proportion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action’s meaning had influenced the decisionmakers."129 Once a plaintiff proves the racial significance of the government's act, there would be no need to prove intent under this test.130 One commentator contends that this test is necessary if "African American, Hispanic and Native American people are to live in a clean, hazardous free environment."131

2. Title VI of the Civil Rights Act of 1964

It is unlikely that federal courts will adopt either the intermediate scrutiny standard or the unconscious racism test in cases challenging environmental decisions on equal protection grounds. However, given the present climate in which all branches of the federal government are concerned with the problem of environmental racism, courts may be more receptive to challenges based on Title VI of the Civil Rights Act of 1964.

Title VI bars discrimination on the basis of race, color, or national origin under federally funded programs.132 Title VI has been

126. Id. at 982-83.
127. Collin, supra note 18, at 535. Under this theory, the distinction which courts have made between discriminatory impact and disproportionate impact are deemed to be a “false dichotomy." Lawrence, supra note 116, at 322. The unconscious racism test rejects the traditional notions of intent. Id. The rejection is based on the view that a shared cultural experience has influenced society's views of the races to the extent of creating racial stereotypes and prejudices. Id. However, society does not recognize how our cultural experience has shaped our views about the races. Id. Consequently, “a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”
128. Lawrence, supra note 116, at 356.
129. Collin, supra note 18, at 536.
130. Id.
131. Id.
132. 42 U.S.C. § 2000d (1988). The basic provision of Title VI provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id. For a discussion of Title VI and the roles of agencies in implementing
underused in litigation, especially in environmental cases. In the past, failure to seek relief through Title VI in environmental cases has been due in part to EPA's expressed view that EPA is not subject to Title VI "since EPA is a 'scientific and technical' agency and is not in a position to assess the effects its decisions have on people protected by the act." In line with the Clinton Administration's steps to address the issue of environmental racism, however, EPA has changed its view of Title VI. EPA has notified Louisiana and Mississippi of its investigations of possible Title VI violations. Both cases are significant because the Sierra Club Legal Defense Fund worked with individuals from the affected neighborhoods to present claims to EPA.

Plaintiffs may benefit from litigation under Title VI because the Supreme Court in *Lau v. Nichols* held that Title VI prohibits conduct producing a discriminatory effect. Although *Lau* has been questioned, the Court reaffirmed the decision in *Guardian's Association v. Civil Service Commission*. In *Guardian's Association*, the Court held that Title VI and its implementing regulations prohibit use of federal monies in a manner which has a discriminatory effect. Thus, plaintiffs may avoid the need to prove discriminatory intent required by *Davis* and *Arlington Heights* by litigating under Title VI and proving that an environmental decision or policy has a discriminatory impact. Title VI is a potentially powerful tool for fighting environmental racism; unfortunately, as remedial

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139. Id. at 568 ("Discrimination is barred which has that effect even though no purposeful design is present.").

140. See Regents of the University of California v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (holding that Title VI proscribes discrimination that would violate Equal Protection Clause or Fifth Amendment).


142. Id. at 593.

143. Lazarus, *supra* note 8, at 835.
legislation requiring a nexus to federal monies, Title VI has had limited impact.  

A case filed in the District Court for the Northern District for California provides a model for Title VI litigation. In *Clean Air Alternative Coalition v. U.S. Department of Transportation*, the plaintiffs, primarily African-Americans, Latinos, and Asians, challenged a decision to rebuild the Cypress Freeway through West Oakland. The construction apparently would expose the communities to higher levels of noise and air pollution, including carbon monoxide and benzene. The communities are already surrounded by other highways, sewage plants and other polluting facilities. Specifically, plaintiffs allege:

The brunt of the proposed project's negative social, human health, and environmental impacts - including those associated with noise and air pollution, the dislocation of persons, the condemnation of homes and businesses, the chilling of economic developments, as well as the disruption of the life of the community - will be borne by minority residents of West Oakland, including plaintiffs.

The suit seeks a court order barring further development of the federally-funded project and asks that the government agency prepare a new environmental impact analysis of the community.

However, although *Clean Air Alternative* provides some hope for judicial assistance, the quest for environmental justice cannot rely on the courts to pave a path leading to environmental equity. Local community groups should continue organized protests against environmental injustices. Even though local community organizations traditionally have relied on volunteer participation and monetary donations, they have been able to wage successful campaigns.

144. *Id.*
146. *Id.* The Cypress Freeway collapsed in the 1989 earthquake. *Id.*
147. *Id.*
148. *Id.*
150. *Id.* at 51.
151. *Id.* at 52.
152. For a discussion of grassroots organizations' campaigns, see *supra* notes 96-97 and accompanying text.
The most recent grassroots movement’s victory occurred in *El Pueblo para el Aire y Agua Limpia v. Chemical Waste Management.* In *El Pueblo,* community members organized to prevent California’s first hazardous waste facility from being located in Kettleman City, a small town that is ninety-five percent Latino. When government and industry failed to provide information regarding the facility in Spanish text, the community organized to bring a lawsuit. The court acknowledged that the residents expressed a “continuous and strong interest” in the review process, but were denied “meaningful involvement” when the environmental impact reports, public meeting notices and public hearing testimony were not translated into Spanish. As a result, the court ordered the government to set aside the decision granting the permit for the facility’s construction.

Since local grassroots organizations operate on minimal budgets, they will benefit greatly by cooperating with large environmental organizations. Once these groups are financially on par with other white middle- and upper-class groups, they will enjoy the same success in challenging the designation of their communities as hazardous waste sites.

**IV. Federal Responses to Environmental Racism**

Public outcry has prompted a response from the federal government on environmental racism. In February 1994, the President signed an executive order addressing environmental racism. The executive order requires federal agencies to develop strategies to combat and prevent environmental inequities. In addition,
Congress has responded to the problem by introducing legislation which in part addresses the issue of environmental inequity.\footnote{Ronald V. Dellums, \textit{A Challenge to Congress: The Need for New Legislation}, 18 EPA J., Mar./Apr. 1992, at 30.}

Versions of the Environmental Justice Act (EJA)\footnote{S. 1161, H.R. 2105, 103rd Cong., 1st Sess. (1993). In 1992, the Environmental Justice Act was originally introduced by then Senator Al Gore and Congressman John Lewis. \textit{STANDING COMMITTEE ON ENVIRONMENTAL LAW, AMERICAN BAR ASSOCIATION, Draft Report to the House of Delegates}, (Mar. 30, 1993). Senator Gore stated that the bill was designed to alleviate the discrimination that minority communities experience from toxic waste and pollution. \textit{Id}.} and the Department of the Environment Act (DEA)\footnote{S. 171, H.R. 3425, 103rd Cong., 1st Sess. (1993).} are pending in both the House of Representatives and the Senate.\footnote{Ronald Begley & Elisabeth Kirschner, \textit{The Demand for Environmental Justice}, CHEM. WEEK, Sept. 15, 1993, at 27.}

The EJA seeks to ensure equality in the implementation and application of environmental, health and safety laws.\footnote{S. 1161; H.R. 2105, \textit{supra} note 162. EJA would establish and maintain information to help assess health risks, identify areas which are highly contaminated, assess the health danger posed by those areas, grant technical assistance to community groups in those areas, and incorporate equity considerations in all federal environmental programs. \textit{Id}.} The primary goal of DEA is to elevate EPA to departmental level status.\footnote{S. 171; H.R. 3425, \textit{supra} note 163.} DEA also would establish the Office of Environmental Justice (OEJ).\footnote{Id.} Under the bill, OEJ would develop a plan to ensure environmental equality, determine whether environmental policies are aiding those who suffer the highest exposure to pollution, and collect data on environmental health to evaluate how various groups are affected.\footnote{Id.}

EPA has made significant efforts to promote environmental justice. The most pivotal step thus far has been the institution of investigations under the Civil Rights Act of 1964.\footnote{For a discussion of Title VI of the Civil Rights Act of 1964, see \textit{supra} notes 132-50 and accompanying text.}

\footnote{For a discussion of the Workgroup, see \textit{supra} notes 41-42 and accompanying text.}
the environmental justice movement. With respect to the risk assessment process, the report suggested that procedures should be revised to ensure better risk-characterization across populations, communities and geographic areas. The Workgroup also recommended that EPA review permits, grants, monitoring and enforcement procedures to address the high risk concentration in communities of color. Finally, EPA established an Office of Environmental Equity to spearhead the fight for environmental justice.

A. Solutions to the Enforcement Problem

The NLJ study revealed a racial imbalance in the federal government's policies regarding the enforcement of environmental laws and regulations. Since the study was issued, EPA has changed its response to enforcement violations by using a multimedia approach. Under the multimedia approach, EPA looks at all the problems associated with a facility or neighborhood. Furthermore, EPA enforcement actions now allege violations of several statutes instead of only one. EPA is developing "strategies to target inspections, enforcement action, and compliance monitoring" in communities facing several environmental threats. Finally, EPA has implemented a "supplemental environmental projects" policy whereby companies failing to comply with environmental laws must complete environmental programs to "promote pollution prevention, pollution reduction, environmental restoration and environmental auditing."

172. ENVIRONMENTAL EQUITY REPORT, supra note 15, at 25. EPA could fulfill this goal by issuing statements regarding its interest in environmental equity, and by having top EPA officials make it clear to the public sector that environmental equity should command greater attention. Id.

173. Id. at 26.

174. Id. at 4.

175. Charles S. McCowan, Jr. & J. Randy Young, "Intent" in Environmental Racism is Hard to Prove But Plaintiffs May Not Have To, CORP. LEGAL TIMES, January 1994.

176. Kathleen Aterno, Statement on Environmental Justice, Before the Subcomm. on Transportation and Hazardous Material of the Comm. on Energy and Commerce, Nov. 18, 1993 (publication forthcoming 1994). Previously, EPA filed cases that charged violators with the "failure to comply with only a single environmental law." Id.

177. Id.

178. Id.

179. Id.

180. Id. at 4. When companies are found to have violated environmental laws, EPA collects monetary payments in the amount of the "economic benefit that any company gained through non-compliance." Id. The supplemental environ-
B. Solutions to the Representation Problem

The lack of minority representation in all the organizations making and influencing environmental policy must be remedied if environmental justice is to be achieved. Without greater representation, environmental groups will continue to ignore the environmental concerns of people of color. Therefore, all types of environmental groups should take steps to either recruit people of color or open communications with minority groups.

The EPA Workgroup recommended that "EPA should expand and improve the level and forms with which it communicates with people of color and low-income communities and should increase efforts to involve them in environmental policy making." The Workgroup's suggestions explored ways to help minority and low-income communities involve themselves in local environmental decisionmaking. The suggestions included targeting these communities with outreach and environmental education literature, establishing outreach representatives in regional offices, and translating published materials into languages other than English.

Mainstream environmental groups also have a responsibility to combat environmental inequities. Once these groups achieve diversity in professional positions, as well as membership, concerns of people of color will enter the agenda of these environmental groups. This will prompt environmental organizations to offer financial, technical and legal advice to local community groups. Although this cooperation is necessary to achieve environmental justice, certain obstacles must first be overcome before adequate minority representation can be achieved.

Environmental groups and local communities must be equals. Environmental groups must learn from the local groups, and in turn must educate the groups the environmental injustices suffered by communities of color. Likewise, local community groups must be willing to work with environmental groups. Toward mental projects policy will reduce cash payments when companies agree to institute useful environmental programs. Id.

181. ENVIRONMENTAL JUSTICE WORKGROUP, supra note 44, at 29.
182. Id. at 30.
183. Lazarus, supra note 8, at 850.
184. Taylor, supra note 80, at 24.
185. Lazarus, supra note 8, at 851.
186. Id. Professor Lazarus also states that mainstream environmental groups should not use the "environmental racism" controversy as a means to increase fundraising efforts. Id.
this end, the minority organizations also must overcome their distrust of environmentalists and the federal government.\textsuperscript{187}

Moreover, efforts must be made to increase an awareness of environmental concerns among communities of color.\textsuperscript{188} An extension of this goal is to increase enrollment of people of color in college curriculums which lead to environmental careers.\textsuperscript{189} Both grassroots organizations and environmental groups can contribute by creating job opportunities and internships for people of color.\textsuperscript{190}

\textbf{IV. CONCLUSION}

Environmental justice will be achieved through cooperation between local and national environmental organizations. The battles will be fought both in the courts and in local communities. These groups must be vigilant in monitoring both federal and state environmental regulations to ensure that the laws are equitably enforced. Lastly, the groups must make efforts to attract people of color into their ranks in order to promote environmental justice. An inevitable consequence of achieving environmental justice is the reduction of available areas to locate waste and industrial facilities.\textsuperscript{191} Therefore, besides concentrating on environmental equity, these groups must seek to develop more safer and more equitable alternatives for hazardous waste management.

Mariá Ramirez Fisher

\textsuperscript{187} Id. at 851.
\textsuperscript{188} ENVT'L CAREERS ORG., supra note 88, at 113.
\textsuperscript{189} Id. at 102-03.
\textsuperscript{190} Id.