1997

Environmental Racism and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies

Daniel Kevin

Follow this and additional works at: http://digitalcommons.law.villanova.edu/elj

Part of the Environmental Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/elj/vol8/iss1/3

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
“ENVIRONMENTAL RACISM” AND LOCALLY UNDESIRABLE LAND USES: A CRITIQUE OF ENVIRONMENTAL JUSTICE THEORIES AND REMEDIES

DANIEL KEVIN†

I. INTRODUCTION

THE subject of “environmental justice” has attracted considerable attention in recent years. Environmental justice advocates allege that due to “environmental racism,” locally undesirable environmental land uses (LULUs) such as hazardous waste facilities, solid waste disposal sites and contaminated industrial sites are disproportionately placed in minority communities. To remedy this perceived disproportionality, advocates have sued to prevent the siting of some environmental LULUs, formulated legal theories that promise more expansive relief to minority communities and suggested changes in the procedures by which LULU sites are chosen.

The increased prominence of environmental justice is evidenced in several ways. Environmental justice is “one of the fastest growing areas of legal scholarship.” The Clinton Administration made environmental justice “a centerpiece of its environmental program” and promulgated an Executive Order requiring each

† Mr. Kevin is an environmental analyst at the Ernest Orlando Lawrence Berkeley National Laboratory in Berkeley, California. J.D., Golden Gate University Law School (1986); Doctoral Candidacy, University of California, Berkeley (1982); M.A., University of California, Berkeley (1975); B.A., University of California, Santa Cruz (1973). Mr. Kevin was an analyst with the U.S. Congressional Office of Technology Assessment from 1979 to 1987, and worked with private sector environmental consulting firms from 1987 to 1996. Any opinions expressed herein are solely those of the author.

1. See Richard J. Lazarus, Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection, 87 Nw. U.L. Rev. 787, 802 n.56 (1993) [hereinafter Lazarus, Pursuing Environmental Justice] (finding that “minorities may receive an unfair share of the environmental risks that are redistributed by environmental protection [laws]”).


(121)
federal agency to formulate an environmental justice strategy.\textsuperscript{5} Legislative proposals at federal and state levels would mandate actions thought by their sponsors to advance environmental justice. Environmental justice advocates have dominated that portion of law review literature addressing environmental justice issues. Typically, when discussing effects on minority populations, supporters of environmental justice focus on three areas. First, environmental justice advocates argue that LULUs are more likely to be sited in minority communities than in non-minority communities and that minority communities accordingly suffer greater impacts from LULUs.\textsuperscript{6} Second, such advocates assert that these disparate impacts either arise from racism on the part of proponents of LULU projects, or are attributable to pervasive racism in society at large.\textsuperscript{7} Third, supporters of environmental justice suggest that legislative and judicial remedies should be implemented to halt the siting or the operation of projects that create disparate impacts.\textsuperscript{8}

This Article will critically examine some of the major assumptions underlying these three environmental justice arguments by addressing the impact, or lack thereof, on minorities. A close examination of the racial component of environmental justice theories is particularly appropriate given the dominant role many environmental justice advocates ascribe to race in decisions to site projects creating LULUs. Part II of this Article discusses environmental justice rationales. Part III examines environmental justice remedies, including administrative and legislative relief. Parts IV and V critique environmental justice rationales and remedies.

Specifically, this Article contends that some of the key arguments supporting environmental justice remedies — that LULUs disproportionately affect minorities, and that these disproportionate effects are the result of racism — are debatable. Disparate impacts may not be widespread, and to the extent that such impacts do exist, the disparities can be attributed to factors other than racism. Absent evidence of intentional discrimination in siting, the legal foundation is weak for environmental justice remedies which are race-conscious and based upon disparate impacts alone. This

\begin{itemize}
  \item \textsuperscript{6} For brevity, disparities in both LULU siting and in impacts from siting are termed "disparate impacts" in this Article. For a further discussion of disproportionate effects on minorities from LULU sitings, see infra notes 9-16 and accompanying text.
  \item \textsuperscript{7} For a further discussion of racism as a source of disparate impacts, see infra notes 17-26 and accompanying text.
  \item \textsuperscript{8} For a further discussion of environmental justice remedies, see infra notes 33-60, and accompanying text.
\end{itemize}
Article further suggests that such remedies would likely expose non-minority populations to unwarranted adverse impacts. For these reasons, policy-makers and the judiciary should be cautious in examining environmental justice issues and in implementing actions to correct siting disparities.

II. ENVIRONMENTAL JUSTICE RATIONALES

Environmental justice advocates argue that LULUs are disproportionately sited in or close to areas populated by disadvantaged minority groups, and that these sitings are a result of the racism of siting proponents and/or of the American society in general.

A. LULUs Are Sited Disproportionately in Communities in Which Most Residents Are Members of Disadvantaged Minority Groups

Many environmental justice advocates claim that studies of LULU sitings show that race is the best predictor of hazardous waste site locations, and that minority groups, specifically Blacks, Latinos and Native Americans, are disproportionately affected by these sitings. The term "disproportionate" is not explicitly defined in much of the environmental justice literature. Frequently, environmental justice advocates conclude that disproportionality exists when there are disparate impacts. In its simplest formulation, advocates claim that disparate impacts exist when minority groups, in particular communities or regions, or across the United States as a whole, bear greater burdens from LULUs than do Whites.

Among the studies cited most frequently by advocates as evidence of disproportionate siting are separate documents issued by the United States General Accounting Office (GAO Report), the United Church of Christ Commission for Racial Justice (UCC

9. Collins & Hall, supra note 3, at 304. Studies "virtually unanimously" conclude that "communities of color bear a disproportionate share of... environmental burdens." Id.

10. See U.S. DEPT. OF ENERGY, OFFICE OF ENVTL. MGMT., VOLUME I, DOE/EIS-0200-D, DRAFT WASTE MANAGEMENT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR MANAGING TREATMENT, STORAGE, AND DISPOSAL OF RADIOACTIVE AND HAZARDOUS WASTE 6-90 (1995). In its environmental justice analysis for the management of low-level mixed waste, the Department of Energy defined "disproportionately high and adverse human health effects" as occurring "when the risk or rate for a minority or low-income population from exposure to an environmental hazard significantly exceeds the risk or rate to the general population, and, where available, to another appropriate comparison group." Id. A disproportionately high and adverse environmental impact "refers to an impact (or risk of an impact) to a low-income or minority community that significantly exceeds the same type of impact in the larger community." Id.
Study), and by Robert Bullard, a sociologist (Bullard Study). The GAO Report described the racial and economic characteristics of census areas located approximately within a four mile range of four hazardous waste landfills in Environmental Protection Agency (EPA) Region IV.\footnote{11} Three of the four landfills were located in areas where the majority of residents were black.\footnote{12} The UCC Study compared 1980 racial and socioeconomic characteristics of postal zip codes containing commercial hazardous waste treatment, storage and disposal facilities (TSDFs) to all other zip codes in the continental United States.\footnote{13} The UCC Study found that zip code areas with at least one operating TSDF had twice the average proportion of minority residents than areas without such facilities.\footnote{14} The study concluded that race is the single best predictor of the location of such facilities, and that a national pattern existed of disproportionate siting of hazardous waste facilities in communities where minorities made up a large percentage of the population.\footnote{15} The Bullard Study found that although Blacks made up twenty-eight percent of the population of Houston in 1980, six of the city’s eight incinerators (eighty percent) and fifteen of the seventeen landfills (eighty-eight percent) were located in predominantly black neighborhoods.\footnote{16}

B. Disproportionate Siting of LULUs in Minority Communities is Primarily a Result of Racism Against Minorities

Environmental justice advocates frequently allege that the disparate impacts described in the GAO, UCC, Bullard and other stud-

\footnote{11} U.S. GEN. ACCT. OFF., SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 3 (1983) [hereinafter GAO REPORT]. The GAO Report did not determine why the landfill sites were selected, the population mix of the areas when the sites were established, the distribution of populations around the sites, how the communities’ racial status compared to other communities in the states concerned or whether the sites posed a risk to surrounding communities. \textit{Id}.  
\footnote{12} At the time of the GAO Report, Blacks made up about a fifth of the population of Region IV. ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 32 (1994) [hereinafter DUMPING IN DIXIE].  
\footnote{13} COMM’N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NAT’L REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 13 (1987) [hereinafter UCC STUDY]. Characteristics included the mean household income and the mean value of owner-occupied housing. \textit{Id}. at 10.  
\footnote{14} \textit{Id}. at 13.  
\footnote{15} \textit{Id}.  
ies are attributable to racism against minorities. Advocates interpret these studies to mean that the minority communities are deliberately targeted for LULU sitings due to active racial bias, and/or that such communities are disfavored as a result of a more diffused and generalized societal or institutional racism. Advocates also contend that the selection of minority communities is encouraged by certain frequently encountered characteristics of such communities, such as meager political and economic power, which result from racism.

1. Defining Environmental Racism

Two definitions or understandings of environmental racism are encountered in the environmental justice literature. The first definition focuses on active racism on the part of proponents of LULU facilities or agency personnel reviewing siting proposals, where, environmental justice literature contains many allegations of racism as a motivation for LULU sitings.17 According to one commentator, "[p]ublic officials and private industry have in many cases responded to the NIMBY [Not In My Backyard] phenomenon using the place-in-[B]lacks'-backyard (PIBBY) principle."18 This commentator further contended that "[these are] not random siting[s]. Minority communities are deliberately targeted as sacrifice zones."19 The Reverend Benjamin Chavis, Jr., then Executive Director of United Church of Christ Commission for Racial Justice and one of the founders of the environmental justice movement, stated that developers and siting officials "deliberate[ly] target [ ]... people of color communities for toxic waste facilities."20

Some environmental justice advocates further contend that factors related to socioeconomic class are inadequate to explain disproportionate siting, and attribute some or most siting decisions to active racial bias by parties seeking to site LULUs.21 One commen-

17. See UCC STUDY, supra note 13.
18. DUMPING IN DIXIE, supra note 12, at 4.
21. See DUMPING IN DIXIE, supra note 12, at 32-33. As stated by Robert Bullard, one of the most frequently cited environmental justice advocates, "[t]he facility siting controversy cannot be reduced solely to a class phenomenon because there is no shortage of poor white communities in the [Southeast] region. . . . [P]oor whites along with their more affluent counterparts have more options and leveraging mechanisms (formal and informal) at their disposal than blacks of equal status." Id.
tator argued that lower class white communities benefit from the political influence of the white middle class by avoiding hazardous waste facilities sitings in their communities because, due to segregated housing patterns, poor whites are more likely than minorities to live in economically varied areas.22

Although many environmental justice advocates assert that racial bias underlies most or all LULU siting decisions, advocates also frequently support a second meaning of the term "environmental racism" and contend that intentional bias is not necessary for such racism to exist. To them, the term refers to a broad array of phenomena which need not be tied directly to purposeful discrimination or racial animus on the part of any particular actor or institution. For example, Robert Bullard characterized environmental racism as "any policy, practice, or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or color. [Environmental racism] . . . also refers to the exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and staffs."23 Bullard further believes that environmental racism provides benefits for non-minorities while shifting costs to minorities.24 Similarly, in the UCC Study, Benjamin Chavis, Jr. used the term "environmental racism" to describe both intentional and unintentional disproportionate imposition of environmental hazards on minorities.25 A third source described the phenomenon more simply: "[e]nvironmental racism is a term used to call attention to the fact that environmental hazards fall disproportionately on communities of color."26

2. Minority Community Attributes

Many environmental justice advocates allege that minority communities become hosts of LULUs due to community attributes that are the products of racism. One common argument is that minority communities possess insufficient political power to avoid being the targets of LULU siting. Advocates argue that minorities are underrepresented in governing bodies that make siting deci-

24. Dumping in Dixie, supra note 12, at 98.
25. UCC Study, supra note 13, at 395.
sions. 27 Frequently, environmental justice advocates trace the lack of minority political power to past and present racism in American society as a whole. 28 Some advocates argue that to the extent that the democratic process in the United States actually reflects the will of the majority, the process itself produces injury to minorities. 29

Similarly, advocates allege that, due to racism, minority communities in general are poorer than non-minority communities. 30 This places minority neighborhoods at a disadvantage in resisting siting decisions, as more affluent communities are better able to marshal economic resources, as well as political and social contacts, to oppose LULU siting. 31 Similarly, minority communities are attractive to persons seeking to site LULUs because of their lower land values as compared with non-minority communities. 32


29. See Naikang Tsao, Ameliorating Environmental Racism: A Citizens' Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps, 67 N.Y.U. L. Rev. 366, 391 (1992). "[L]ocal governments are democratically elected, and therefore, accountable to their constituents. This view, however, obscures the fact that local government is often totally unwilling to address the needs of minority residents. Indeed, the majoritarian process has frequently failed to protect racial minorities and the poor from the dangers posed by hazardous waste sites." Id. (citations omitted). "Public perception ... will reflect the concerns of the majority, particularly those with the resources to be heard, and may discriminate against the disadvantaged minorities. Under the prevailing regime of response to public perceptions, the poor and minorities have suffered disproportionately from environmental and other safety hazards." Frank B. Cross, The Public Role in Risk Control, 24 ENVTL. L. 887, 937 (1994). See also Omar Saleem, Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions, 19 COLUM. J. ENVTL. L. 211 (1994) (urging heightened level of public participation).

30. Godsil, supra note 22, at 399. "Most [commentators] 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." Id. Impoverished communities lack the "financial and technical resources necessary to resist environmentally hazardous facilities." Hope Babcock, Environmental Justice Clinics: Visible Models of Justice, 14 STAN. ENVTL. L.J. 3, 10-12 (1995).

31. Godsil, supra, note 22, at 399. For example, wealthier communities are better able to afford the costs of litigation, and are more likely to have residents who are attorneys and are aware of legal options for opposing LULU siting. Id.

32. Collins & Hall, supra note 3, at 304.
III. ENVIRONMENTAL JUSTICE REMEDIES

Whatever the source of disparate impacts in LULU siting, the existence of such impacts is seen by most environmental justice advocates as conclusive evidence of injustice. To rectify disparate impacts, advocates have suggested administrative, legislative and judicial remedies.

A. Administrative and Legislative Remedies

1. Agency Actions

The Clinton Administration's Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority and Low Income Populations,33 directed each federal agency to make environmental justice part of its mission by identifying and addressing the disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority and low-income populations.34 Specifically, each agency was directed to develop an environmental justice strategy to promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; to ensure greater public participation; to improve research and data collection relating to the health of and environmental hazards in minority populations and low-income populations; and to identify differential patterns of consumption of natural resources among minority populations and low-income populations. Agencies were directed to conduct their programs, policies and activities that substantially affect human health or the environment in a manner that will not exclude populations from participation in, or denying the benefits of, or subjecting persons to discrimination because of race, color or national

34. Id. President Clinton provided a separate memorandum to Executive Order 12,898 describing the Administration's commitment to environmental justice issues.

The purpose of this separate memorandum is to underscore certain provision [sic] of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment. Environmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities. Application of these existing statutory provisions is an important part of this Administration's efforts to prevent those minority communities and low-income communities from being subject to disproportionately high and adverse environmental effects.

Id.
origin. The Order further directed the Administrator of EPA to convene an interagency federal Working Group on Environmental Justice, which will provide guidance to agencies on criteria for identifying such effects. The Order did not, however, define a methodology for agencies to determine whether their activities have disproportionate effects.

Pursuant to Executive Order 12,898, federal agencies established entities within their jurisdictions to address environmental justice issues. For example, EPA established an Office of Environmental Equity to serve as the focal point for equity concerns and to provide oversight for that agency. Further, that Office formed a National Environmental Justice Advisory Council, to “bring the issue of environmental racism to national attention and provide a forum to address the issue.” Similarly, the Department of Energy (DOE) has an Office of Environmental Justice and Research within the Office of Economic Impact and Diversity, as well as an Environmental Justice Steering Committee, a Working Group on Environmental Justice and a Center for Environmental Justice Information.

DOE’s draft environmental justice guidelines directed the Office of Environmental Management to include environmental justice as a factor for the periodic assessment of the compliance of DOE units with regulatory and other statutory

35. Id. Particular race- and income-conscious actions that agencies were directed to undertake included:

[C]ollect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income . . . [and] determine whether their programs, policies, and activities have disproportionately high and adverse health or environmental effects on minority populations and low-income populations; . . .

[C]ollect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites have become the subject of a substantial Federal environmental administrative or judicial action. Such information shall be made available to the public, unless prohibited by law.

Id. § 3-302.

36. Id. § 1-102.

37. Id.

38. Charles S. McCowan, Jr. & J. Randy Young, “Intent” in Environmental Racism is Hard to Prove But Plaintiffs May Not Have To, CORP. LEGAL TIMES, Jan. 1994, at 3B.


requirements and to provide incentives for managers to consider environmental justice issues.\textsuperscript{41}

EPA's Office of Solid Waste and Emergency Response (OSWER) has taken the position that a statutory amendment to the Resource Conservation and Recovery Act\textsuperscript{42} (RCRA) would be required to allow EPA, in response to allegations under Title VI of the Civil Rights Act of 1964,\textsuperscript{43} to base RCRA permitting decisions on socioeconomic discriminatory effects that are unrelated to protection of human health and the environment.\textsuperscript{44} However, where complaints or comments concerning a RCRA facility allege disproportionate effects on human health or the environment, EPA has authority to consider and respond to those concerns by taking action on a permit application, including refusing to issue a new permit pending full consideration of potential health effects.\textsuperscript{45} In response to a request from EPA Region VI on how to respond to environmental justice-based challenges to issuances of RCRA permits, OSWER Headquarters instructed the Region to be prepared to address all environmental justice comments before arriving at any final permitting decisions.\textsuperscript{46}

2. Legislation

To date, no state or national governing body has enacted legislation incorporating environmental justice remedies. A California legislative proposal would have required agencies to collect demographic data, including racial composition, about areas where haz-

\textsuperscript{41} Id. at 33 (discussing examples of departmental strategies to reduce environmentally hazardous risks to minority or low-income populations).


\textsuperscript{43} Title VI of the Civil Rights Act of 1964 (Title VI) §§ 601-06 (1964) (codified as amended at 42 U.S.C. §§ 2000d-2000d-4 (1994)). For a further discussion of Title VI, see infra notes 161-77, and accompanying text.

\textsuperscript{44} U.S.E.P.A., OSWER ENVTl. JUSTICE TASK FORCE DRAFT FINAL REPORT (1994), at 13-14. This document states that under section 3005 of RCRA, EPA "shall issue a permit" to facilities complying with RCRA provisions. Id. (citing RCRA, § 3005, 42 U.S.C. § 6925).

\textsuperscript{45} Id. at 13.

Section 3005(c)(3) [of RCRA] requires EPA to add to a permit such terms or conditions necessary to protect human health and the environment. EPA has interpreted this . . . provision to authorize denial of a permit to a facility in extraordinary circumstances where EPA determines that there are no additional permit terms or conditions that would address unacceptable risk that would be posed by a facility's operation.

\textsuperscript{46} Id. at 13-14.
ardous or solid waste facilities were proposed to be sited.\(^{47}\) On the national level, the Environmental Equal Rights Act of 1993\(^ {48}\) was a noteworthy attempt to incorporate racial criteria into evaluations of siting approvals. Under this bill, citizens of the targeted state could challenge a waste facility siting if the proposed facility was to be placed in an "environmentally disadvantaged community."\(^ {49}\) Challenges could be based on the following grounds: (1) the proposed location of the facility is within two miles of another waste facility, Superfund site or facility that releases toxic contaminants; (2) the proposed location is within a community that has a higher than average percentage of low-income or minority residents; and (3) the proposed facility may adversely affect the human health or environmental quality of the community. Facility proponents could defeat a challenge if they could show that no alternative location within the state poses fewer risks and that the facility either would not release contaminants or would not increase the cumulative impact of contaminants upon residents.\(^ {50}\) Another legislative attempt designed to incorporate racial criteria into the siting process was the Public Health Equity Act.\(^ {51}\) If enacted, this bill would have required federal agencies providing financial assistance to states, local governments or private entities to promulgate regulations, pursuant to Title VI of the Civil Rights Act, barring intentionally discriminatory acts and acts with "discriminatory effects."\(^ {52}\)

One environmental justice advocate has suggested that state governments declare as an objective the eradication of race-based inequalities in the burdens of hazardous waste facilities upon mi-

---

47. CAL. A.B. 2212, Regular Sess. (Cal. 1993-94). The Bill would have prohibited agency approval of a permit for a "potentially high impact development" unless the permit application included a description of specified demographic data of the census tract in which the development is located, and of all contiguous census tracts. Id. at 1. Required data included race, ethnicity, percentage below poverty level and percentages below age 5 and above age 65. Developments so regulated would have included hazardous waste and non-hazardous solid waste facilities. Id. at 3.


49. Id.

50. 139 CONG. REC. E1106-07 (daily ed. April 30, 1993) (remarks of Congresswoman Collins). This bill was supported by the National Council of Churches and the Sierra Club Legal Defense Fund, among other organizations.

51. S. 1841, 103d Cong. (1994). This bill sought to "prohibit discrimination, on the basis of race, color or national origin, in programs and activities relating to occupational and other exposure to hazardous substances." Id.

52. Id. These regulations would explicitly address actions that result in "disproportionate exposure" to hazardous substances on the basis of race, color or national origin. Id. § 2702(b)(1).
minority communities.\textsuperscript{53} State agencies should take into consideration the racial and socioeconomic makeup of candidate sites for waste facility siting and remove sites that are in predominately minority areas from the inventory of candidate sites if existing facilities are disproportionately sited in minority communities.\textsuperscript{54} In addition, Congress should pass legislation creating a disparate impact model of discrimination for hazardous waste facility sitings.\textsuperscript{55} Under this model, plaintiffs challenging a siting decision would have the initial burden of showing that the siting would result in a disparate burden, in terms of the populations that would be physically or financially harmed by the site, on a minority community as compared with white communities.\textsuperscript{56} For siting to proceed, defendants would have to show that the siting decision is an "environmental necessity" by proving that the chosen site is environmentally suitable to safely dispose of the wastes and, if alternate sites are available, that the particular site in question is necessary to do so.\textsuperscript{57} As part of its evaluation, the court could consider uncontrolled toxic waste facilities and other environmental hazards unrelated to the proposed facility as part of the total harm to the community.\textsuperscript{58} Under this model, increased costs at alternate sites would not a priori justify siting the facility in a minority area.\textsuperscript{59} If the additional cost to the facility would bar its development, the court would have

\textsuperscript{53} Godsil, supra note 22, at 425-26.

\textsuperscript{54} Id. See also Robert W. Collin, \textit{Environmental Equity: A Law and Planning Approach to Environmental Racism}, 11 \textit{VA. ENVTL. L.J.} 495 (1992) (stating that "[o]ne of the major obstacles confronting the environmental problem-solving process is that . . . [i]t has failed to include the concerns of minorities and the poor. The benefits and burdens of industrial and economic expansion have been and continue to be spread disproportionately"); Lazarus, \textit{Pursuing Environmental Justice}, supra note 1, at 802 n.56 (exploring policy decisions to address potential distributional inequities in environmental protection).

\textsuperscript{55} Godsil, supra note 22, at 421. This model is based on judicial interpretations of Title VII of the Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994) dealing with discrimination in employment situations. Essentially, this commentator urges a "disparate impact' model of discrimination for hazardous waste facility sitings, aimed at the consequences of site selection rather than the motivations." Godsil, supra note 22, at 422 (citations omitted) (emphasis in original).

\textsuperscript{56} Godsil, supra note 22, at 422.

\textsuperscript{57} Id. at 422-23. The plaintiff could present rebuttable evidence that alternative sites were available. \textit{Id.} at 423. In the event that the plaintiff presented such evidence, the defendant could then show that the chosen site was "necessary to safely dispose of hazardous wastes." \textit{Id.} (emphasis in original).

\textsuperscript{58} Id. at 423-24.

\textsuperscript{59} See \textit{id.} at 423 n.217.
to balance the state’s need for the site against the site’s impact on the community.\textsuperscript{60}

B. Litigation

Environmental justice advocates have brought litigation in specific instances of LULU sitings based upon the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964, and have suggested additional legal bases for halting siting attempts. Examples and underlying rationales of such litigation, and problems encountered by environmental justice advocates in the judicial system, are discussed in Section V.

IV. CRITIQUE OF ENVIRONMENTAL JUSTICE RATIONALES

There are two key flaws in the environmental justice arguments summarized in Part II of this Article. First, disparate impacts in LULU sitings appear to be overstated by environmental justice advocates. Second, to the extent that disparate impacts exist, there is little evidence that racism in the sense understood by most people — actions motivated by bias against a racial group or groups — has been a material factor in the majority of LULU sitings in minority communities. Disparate impacts in LULU sitings are attributable to other factors.

A. LULU Siting May Not Be as Disproportionate as Environmental Justice Advocates Claim

As one commentator concluded, “[n]otwithstanding the growing significance of the environmental justice movement, few rigorous studies have been conducted that satisfactorily establish a statistically significant correlation between a community’s race and socioeconomic status and its exposure to disproportionate environmental risks or impacts.”\textsuperscript{61} There are sufficiently important methodological problems with some of the more prominent studies that many environmental justice advocates rely upon to warrant caution in accepting claims of disproportionality at face value.

A study by Douglas Anderton, et. al (Anderton Study) of hazardous waste treatment, storage and disposal facilities in the United States that opened for business prior to 1990 and were still open in 1992, and about which data could be found on the level of census

\textsuperscript{60. Id.}

tracts (about eighty-five percent of such facilities), came to very different conclusions than the UCC and other studies cited by many environmental justice advocates. 62 The Anderton Study found that there were no statistically significant differences between the percentages of Blacks and Hispanics in census tracts with TSDFs and in tracts without such facilities. 63 In other words, there was no correlation between the presence of these minority groups and the presence of a TSDF. 64 The study also found that there were statistically significant correlations between the presence of a TSDF and the following socioeconomic factors: lower employment rate of males, employment in industrial occupations and lower housing values, as compared with non-TSDF tracts. 65 Of these factors, "the most significant and consistent effect on TSDF location of those [factors] . . . considered is that TSDFs are located in areas with larger proportions of workers employed in industrial activities, a finding that is consistent with a plausibly rational motivation to locate near other industrial facilities or markets." 66

The discrepancies between the results of the Anderton Study and the findings of the UCC Study stem from the differences in geographic units of analysis chosen by the researchers. 67 The zip code areas used in the UCC Study are larger than the census tracts used in the Anderton Study. The use of these larger units increases the percentage of Blacks in particular. The Anderton Study found that when census tracts within a two and a half mile radius of TSDFs were aggregated, the percentage of black residents was greater than the percentage of Blacks in census tracts containing TSDFs. 68


63. Id. at 129-33. The study analyzed eight census tract characteristics. Two variables, percentages of black and hispanic persons, related to race and ethnic compositions. Id. at 129. Three variables encompassed economic conditions of the populated area. Id. Three variables indicated the industrial and housing characteristics of the census tract area. Id.

64. Id.

65. Id.

66. Id. at 136.


68. Anderton Study, supra note 62, at 131, 134-36. Nonabutting tracts, which did not contain TSDFs nor abut TSDF tracts, especially those on the periphery of the two and a half mile radius studied for each TSDF, contained significantly larger proportions of black residents, equalling thirty-three percent of the population, than did TSDF tracts, equalling twelve percent, or adjacent tracts, equaling sixteen percent. Id. at 134.

Probing the Anderton Study's results, Robert Bullard stated that the fifteen percent of sites outside of the census tracts covered by the Anderton Study include many sites, including several landfills with relatively large capacities, that are lo-
There are no firm guidelines on how to define the geographic extent of areas that are potentially affected, in terms of health, property values and other indicators, by the presence of TSDFs. However, it is likely that data derived from census tracts produce more defensible statistical results than do data based on zip code areas. Accordingly, it is likely that the Anderton Study is more reliable than the UCC Study. Census tracts are designed to be homogeneous with respect to population characteristics, economic status and living conditions. In contrast, zip code areas are basically geographic designations, intended to maximize the transportation efficiency of postal deliveries. Thus, any homogeneity within zip codes is fortuitous, rather than being present by design.

Assuming that greater impacts are experienced by individuals closer to a TSDF, census tracts containing a TSDF would logically bear the greatest potential burdens. If there is no correlation between minority populations and TSDFs within census tracts, then the core environmental justice arguments that minorities are targeted for the siting of TSDFs and that minorities disproportionately bear the burdens of such siting are weakened. If a larger percentage of minorities are found within a radius of several miles of TSDFs than is found in the national population, this is arguably due to the larger percentages of minorities in industrial areas in general, which occurs regardless of the presence of TSDFs.

Even some environmental justice advocates have criticized the UCC Study for shortcomings in its statistical methodology. The UCC Study relied on current demographic data rather than the demographic data pertaining to the time when the initial siting decision may have been made. The UCC Study also equated the siting of toxic facilities with exposure to toxic releases. Further, the

69. See Been, Locally Undesirable Land Uses, supra note 16, at 1402-03 (discussing advantages of using census tracts as unit of analysis).
72. See, e.g., Michael B. Gerrard, Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis, 68 TUL. L. REV. 1047, 1130 (1994) (criticizing the UCC Study's inattention to timing concerns); Lazarus, Pursuing Environmental Justice, supra note 1, at 802 n.56 (criticizing the UCC Study's equating toxic sites with exposure to toxic releases).
73. A contrasting industry view was stated by Joan Z. Bernstein, Vice President of Environmental Policy and Ethical Standards at Waste Management, Inc.:
UCC Study's own findings showed little difference between the nationwide percentages of whites and minorities who live near abandoned hazardous waste sites.74

Robert Bullard's study of incinerators and landfills in Houston also contains methodological problems. Bullard did not explain the methodology used to arrive at his findings.75 For example, rather than census tracts, Bullard used "neighborhoods" as his unit of analysis, but did not specify how he defined this term; thus, it is difficult to evaluate the accuracy of his analysis.76 Bullard classified some neighborhoods as predominantly minority based on his own observations, despite census data showing that the census tract concerned was predominantly white.77 Additionally, Bullard may have left some solid waste sites out of his analysis.78 Therefore, depending upon the demographics of the location of the sites, Bullard's conclusions about disproportionate impacts may be inaccurate.79

The bulk of the existing research on site demographics compares current racial and income characteristics of host communities to those of communities that do not host LULUs. Commentator Vicki Been has observed that existing research is insufficient to determine whether the siting process placed LULUs in geographic areas that contained a disproportionate percentage of minorities at the time that the areas were selected to host LULUs, or whether such areas became predominantly minority after the LULU siting decisions were made.80 It is possible that the percentages of minor-

There is . . . a great deal of misunderstanding about the health risk posed by living near a waste facility. Because risk is a function of exposure, rather than proximity, there is very little basis, in fact, for the public's fear. In other words, living near a facility does not mean an individual would be exposed to contamination, even if there were a problem at the facility. For example, a landfill that leaks and contaminates the soil beneath it would not necessarily affect the residents living near the landfill who never come in contact with soils several hundred feet underground. Joan Z. Bernstein, The Siting of Commercial Waste Facilities: An Evolution of Community Land Use Decisions, 1 KAN. J. L. PUB. POL'Y 83, 85 (1991) (emphasis in original).

74. See Satchell, supra note 19, at 35 (citing UCC STUDY, supra note 13). The percentages of each race that resides near an abandoned waste site are: Whites, fifty-four percent; Blacks and Hispanics, fifty-seven percent; Asians, fifty-three percent; and Native Americans, forty-six percent. Id.

75. For a full discussion of Robert Bullard's Houston studies, see Been, Locally Undesirable Land Uses, supra note 16, at 1400-06 and app.

76. Id.

77. Id. at 1401 n.72.

78. Id. at 1400 n.69, 1407.

79. Id. at 1400 n.69. Vicki Been recognized that "if Professor Bullard analyzed fewer than all of the sites in . . . [the neighborhood designations], his conclusions about the disproportionate siting of facilities obviously would be inaccurate." Id.

ities in affected communities increased after siting decisions were made, thus, overstating the amount of disproportionality. The phenomenon of persons "coming to the nuisance" could have taken place: the presence of LULUs could depress property values, making housing cheaper, thus making such areas attractive to lower income households. 81

Been analyzed two frequently-cited reports, the GAO Report and the Bullard study. 82 Addressing the GAO Report, she concluded that a "coming to the nuisance" phenomenon did not take place: the communities involved were predominantly minority at the times she estimated that the siting decisions were made and there were no increases in the percentages of Blacks living in those communities. 83 In addition, Been found no correlation between the presence of landfills and declining land values. 84 Examining the Bullard study, Been found that the census tracts involved were predominantly black at the time of LULU siting. However, after siting, the percentage of black residents increased by a larger amount in these tracts than in Houston as a whole, and land values decreased, providing evidence that market factors contributed to the disproportionate effect of siting upon minorities. 85 Been concluded that additional research should be conducted to identify which came first in the communities impacted by LULUs, the LULUs or the "people of color and poor," and also to trace changes in the demographics of host neighborhoods following sitings. 86

B. Factors Other Than Racism Account for Disparate Impacts

Environmental justice advocates often combine two classes of LULUs in their efforts to attack environmental racism: TSDFs that undergo a formal siting process which incorporates environmental review and contaminated sites resulting from lax environmental standards and industrial and commercial practices. 87 However,

81. Id. at 1388-89. Also, residents with the means to move out would probably do so, intensifying the concentration of low-income people in the area. Id. at 1388. Summarizing available data, Been concluded that most studies show that hazardous waste sites have a statistically significant adverse impact on surrounding property values, while there is a split in opinion regarding the effect of solid waste landfills and incinerators. Id. at n.19.

82. Id. at 1398-1405.

83. Id. at 1398-99.

84. Id. at 1390-1400.


86. Id. at 1046. See also Vicki Been, Siting of Locally Undesirable Land Uses: Directions for Further Research, 5 MD. J. CONTEMP. LEGAL ISSUES 105, 110 (1993-94).

87. See, e.g., 139 CONG. REC. E1106-07 (daily ed. April 30, 1993) (statement of Congresswoman Collins). For example, in her introduction of the Environmental
these two categories present analytically distinct problems. For example, compared to most industrial facilities, a TSDF's formal siting process includes far more regulated criteria for selecting site locations and a more extensive public participation and comment process. Therefore, as a general rule, it is more difficult to establish what considerations led to the siting of individual industrial facilities. Still, certain generalizations can be made about both classes of LULUs.

To the extent that disparate impacts in the location of LULUs exist, environmental justice advocates are not persuasive in tracing the cause of disparities to racism. There has been insufficient analysis of non-racial factors as causes of disparate impacts or unequal results in siting. Persons reviewing environmental justice claims should consider an alternate hypothesis: all things being equal, both public and private sector actors desiring to site LULUs seek out locations which meet certain physical criteria, (e.g., geological stability, soils with low permeability, and absence of shallow groundwater) are inexpensive in relation to similar locations, and are located near other existing industrial facilities. Other favorable locations are those in proximity to existing transportation routes and in areas that have low or non-existent local opposition. For example, the Anderton Study found that the location of TSDFs is best correlated with the employment of workers in industrial activities, a conclusion consistent with decisions to site LULUs near other industrial facilities or markets. Absent more concrete evidence of racial animus, disparate impacts or unequal results should

---

Equal Rights Act of 1993, Congresswoman Collins in the same paragraph referenced both abandoned toxic waste sites nationwide and city-owned solid waste landfills in Houston as examples of unjustifiably severe health hazards faced by minorities and the poor. Id. As Bullard noted, "Black communities became the dumping grounds for various types of unpopular facilities, including toxic wastes, dangerous chemicals, paper mills, and other polluting industries." DUMPING IN DIXIE, supra note 12, at 36.

88. Been, Locally Undesirable Land Uses, supra note 16, at 1392. For example, Been concluded that market dynamics have been largely ignored by the current research on environmental justice. Id.

89. Bernstein, supra note 73, at 83-84. In the past, waste disposal sites were primarily chosen because "they were considered undesirable for other purposes." Id. at 84. Ideal locations for disposal sites included flood plains, swamps and wetlands. Id. With a rise in environmental awareness, these areas became "completely inappropriate . . . for land disposal." Therefore, industrial sites were favored because they are typically "available at low cost or are sparsely populated." Id. Over the past several decades, waste industries have reevaluated their criteria for identifying attractive site areas. Id. Industry methods have shifted "from considerations that were primarily financial to considerations that reflect the priority of protecting human health and the environment." Id.

90. Anderton Study, supra note 62, at 133.
be considered disproportionate only when other, non-racial factors do not explain siting. 91

Even where non-racial factors explain siting decisions, such decisions are still subject to critical examination. Siting proponents may impermissibly focus on cost considerations rather than physical criteria relating to safety, and are likely to prefer to locate LULUs in settings where regulation is relatively less stringent. Siting decisions can and should be challenged when there is evidence that harm to human health or the environment may result.

1. Facilities undergoing formal siting

Nondiscriminatory factors account for disparate results in the great majority of formal siting decisions. Some hazardous waste landfill sites which are often cited as examples of environmental racism, such as Emelle, Alabama and Warren County, North Carolina, may be technically superior to alternate sites. 92 For example, when Chemical Waste Management made its decision to site a hazardous waste landfill, Emelle was the only county east of the Mississippi River evaluated by EPA and listed as one of the ten most desirable counties for a landfill. 93 Factors accounting for its desirability as a landfill included the sparse population surrounding the site, reliable access to the site, and arid temperature in the site's location. 94 Most importantly, Emelle was underlain by dense natural chalk forming a good barrier between waste disposal activities and aquifers. 95

Other factors being equal, and independent of racism, siting proponents seek out areas where the costs of siting are low relative to comparable areas. 96 Minority communities are often in areas

91. An example of the conceptual problems in claiming racial disproportionality is shown by LULU sittings in the Northeast United States. Most proposed sittings in that region have been in mostly white rural areas. Gerrard, supra note 72, at 1130. These areas are “disproportionately” white when compared to national percentages of the white population in those states or in the United States as a whole. Id. at n.542.

92. See GAO REPORT, supra note 11, at 9 (regarding Warren County); Bernstein, supra note 73, at 86 (regarding Emelle).


94. Id.

95. Id.

96. See Bernstein, supra note 73, at 84. Generally, disposal sites are located on unused and unsuitable land. Id. As a result of lower economic demands and diminished land value, these areas are more attainable to residents of lesser means than other geographic areas. Id. Similarly, once waste facilities are sited, adjacent land becomes less desirable to other residents “with the ability to make an economic choice” to live elsewhere. Id.
with lower land values. In addition, although the assertion that “no one likes to live near a waste site” is probably correct, in some instances there has not been strong opposition from minority communities that have been or would be affected by a LULU siting. It is reasonable to conclude that lack of opposition has resulted from the same factors that have been cited in the cases of white communities which have solicited LULUs; as well as potential problems, LULUs can bring potential benefits to communities in jobs, revenues and direct provision of social services.

In some cases, not only has there been a lack of local opposition to LULU sitings, but community leaders have actively sought out or welcomed such sitings. For example, the Campo Band of Mission Indians has supported the construction of a solid waste landfill on reservation land in San Diego County, California. Permitting and environmental standards for the landfill would meet, at a minimum, applicable EPA standards. The landfill

97. See Maria Ramirez Fisher, On the Road From Environmental Racism to Environmental Justice, 5 Vill. Envtl. L.J. 449, 459 (1994) (stating that “[s]ince communities of color often have low property values, they will be considered for disposal sites more often than white communities having higher property values”).
99. Id. at 512. Even some environmental justice advocates concede that there often is low local opposition to LULU sitings from minority communities, or at least less than there would be from non-minority communities. Id.
100. The case of the Emelle site is again instructive, where a hazardous waste landfill has brought in jobs and millions of dollars in revenues to an economically depressed area.

When Chem Waste acquired the [Emelle, Alabama] site in 1977, Sumter County was struggling with illiteracy and infant mortality rates that were among the highest in the state, which in turn made them among the highest in the nation. Over time, the landfill has brought revenue into the county which has improved schools, built the fire station and the town hall, improved health care delivery, provided employment, and reversed the percentages on illiteracy. In fact, in the first ten years of the landfill’s operation, the infant mortality rate in Sumter County was cut in half. Three hundred people are currently employed at the Chem Waste Emelle facility; the annual payroll is $10 million; and a portion of the state tax on hazardous waste is given to Sumter County with a minimum annual guarantee of $4.2 million to the county.

Seigler, supra note 93, at 64. See also Christopher Boerner & Thomas Lambert, Environmental Injustice, The Pub. Interest, Winter 1995, at 74 (regarding support by local chapter of NAACP for construction of incinerator and waste landfill in Brooksville, Mississippi due to economic benefits that would accrue).
102. Id.
would bring great economic benefits to the Campo Band.\textsuperscript{103} Tribal sources estimated that the landfill would directly create at least fifty-five permanent jobs for at least thirty-five members of the Campo Band, almost eliminating tribal unemployment.\textsuperscript{104} Here, the most sustained and politically effective opposition to siting the landfill has come from several white neighbors of the Campo Reservation.\textsuperscript{105}

Unfortunately, LULUs have been sited despite considerable opposition from minority communities. Siting in the face of local opposition, however, is not limited to minority communities. A prominent example of LULU siting in spite of objections from non-minority communities is the decision to place a high-level radioactive waste repository in Nevada.\textsuperscript{106} Conversely, other communities with white majorities have lobbied to have facilities, which most people would consider to be LULUs, sited in their jurisdictions in order to gain jobs and other benefits during difficult economic times.\textsuperscript{107} In both situations, non-racial factors better explain the outcomes than intentional or societal racism.

2. Contaminated sites

Most sites contaminated with hazardous waste are associated with factories, gasoline stations, dry cleaners and other industrial or commercial land uses located in urban areas.\textsuperscript{108} Much of the haz-

\textsuperscript{103.} Id. at 3-88. The reservation unemployment rate in 1990 was approximately sixty percent in a potential resident labor force of seventy people, versus a county wide unemployment rate of approximately four percent. Id. Of tribal members employed, less than half earned over $7,000 per year. Id. at 3-89. These figures were thought to have improved in 1991, although hard data were not available. Id. A rise in tribal revenues was attributable to funds from the corporate sponsor of the solid waste disposal facility, Mid-American Waste System, Inc. Id. at 3-88.

\textsuperscript{104.} Id. at 4-78. The jobs would pay $15,000 - $20,000 for unskilled labor, and more for skilled labor. Projected tribal income from disposal fees charged to users was estimated as being approximately $50 million over a thirty year project lifetime. Id. At maximum use, this amount could double. Fifty percent of these revenues would go to the tribal general fund for such purposes as housing, education, health care, while the other fifty percent would go to economic development projects. Id.

\textsuperscript{105.} Interview with Muriel Waller, co-author of FEIS and attendee at public meetings discussing the proposed project, (Mar. 10, 1995).

\textsuperscript{106.} Foster Church, \textit{Can Nevada Keep America's Sizzling Nuclear Waste Out of Its Backyard?}, GOVERNING, Apr. 1990, at 21-24 (noting political weakness of Nevada's Congressional delegation as key factor in state's designation as sole prospective location for high-level radioactive waste repository over state objections).


\textsuperscript{108.} See Gerrard, \textit{supra} note 72, at 1090-91.
ardous waste produced by these sources was disposed of at the factories where it was generated, in these urban areas. When factories shut down, contaminated sites were often left behind. 109 Blacks in particular are much more likely than Whites to live in these urban areas. 110 It is plausible that Blacks came to urban neighborhoods at least in part because of the availability and proximity of jobs in industry. 111 The minority population of urban neighborhoods may have grown even after the shutdown of factories because of the common tendency of people who move to different communities to migrate to areas already settled by relatives and fellow ethnic group members. Also, it is likely that the price of housing in these areas has been lower than in less impacted suburban neighborhoods, and economically depressed minority group members may have been unable to move to more affluent settings.

Some environmental justice advocates have asserted that minority residential areas have been preferentially designated for industrial and commercial uses. 112 However, in some urban areas, such as Baltimore, heavy industrial uses are located to a greater extent in non-minority communities. 113 Further, lower-income Blacks residing in Baltimore are concentrated in formerly middle-class neighborhoods where industry has never existed. 114

Richmond, California has been described as exemplifying the lack of fair geographic distribution in the siting of facilities. 115 According to one frequently cited study by Citizens for a Better Environment (CBE Report), “[a]ll of the lower income, minority neighborhoods are in the western and southern parts of Richmond

109. One source found that towns with economic bases oriented toward industry are far more likely to have numerous dumpsites. Michael R. Greenberg & Richard F. Anderson, Hazardous Waste Sites: The Credibility Gap 158 (1984); see also Gerrard, supra note 72, at 1128 n.527. Prior to environmental regulation, many industrial and commercial facilities may have disposed of waste on-site or nearby because of the lower cost of doing so. Collin, supra note 54, at 509.


111. Id.

112. See, e.g., Collin, supra note 54, at 509 (stating that “[b]efore environmental regulation, many industrial and commercial facilities located in minority areas . . .”).

113. Duff, supra note 110, at 56.

114. Id.

115. Tsao, supra note 29, at 372. See also Donna Gareis-Smith, Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act, 13 Temp. Envtl. L. & Tech. J. 57, 64 (1994) (comparing current racial composition of Richmond as whole (fifty percent black and ten percent latino) with composition of neighborhoods closest to “the heaviest industrial zone” (seventy-two percent to ninety-four percent black)).
Environmental Racism

where the highest concentration of petrochemical facilities are also located,"116 and "[t]his form of institutional discrimination has been called 'environmental racism' by some community leaders."117 Upon a closer examination, however, it is difficult to assess the relative importance of racially discriminatory practices versus non-racial factors when evaluating the proximity of minorities to contaminated sites in Richmond.

The CBE Report based its analysis on 1980 census data, and did not look at racial demographic trends over time. However, the industrial character of western and southern Richmond was established long before Blacks or other minority groups became a substantial presence in the city. The black population of Richmond numbered 29 out of approximately 6,800 in 1910, 33 out of approximately 16,000 in 1920, and 270 out of approximately 24,000 in 1940.118 In 1940, the highest proportion of total minorities to the total population within any Richmond census tract was 8.5 percent.119 Some of the most important industries in the city were established in western and southern Richmond before World War II, when Richmond was still populated almost entirely by Whites.120 These included Santa Fe Railroad, Standard Oil and Pullman Coach, all of which opened their Richmond operations between 1900 and 1910, and Kaiser Shipyard, which opened in 1941.121

Beginning around 1941, large numbers of black laborers from the South came to the city to work at Kaiser and other industries.122

116. Michael Belliveau et. al., Richmond at Risk: Community Demographics and Toxic Hazards from Industrial Polluters 121 (1989) [hereinafter CBE REPORT].
117. Id. at 2.
120. See Moore, supra note 118, at 3.
121. Id. at 35. Many other large and small industrial operations, including foundries and chemical manufacturing concerns, also were located in southern and western Richmond prior to 1920, and early fire insurance maps show few if any major industrial facilities in other parts of the city. SANBORN MAP CO., RICHMOND, CONTRA-COSTA COUNTY, CAL. (1916). Industrial facilities located in west and south Richmond as of June 1916 included the Union Super Phosphate Company, Stauffer Chemical Company, Santa Fe Foundry, Berkeley Steel Company, Western Pipe and Steel Company, the Richmond Machine and Boiler Works and the Atchison, Topeka & Santa Fe Railroad shops and yards. Id.
122. Moore, supra note 118, at 35-36. Blacks were actively recruited by Kaiser directly and by the Richmond Chamber of Commerce, as well as being drawn to Richmond by personal networks. Id. Moreover, the city hosted fifty-five other war industries besides Kaiser. Id. at 44.
Due at least in part to segregation in housing, Blacks lived mostly in western (and southern) Richmond and North Richmond. Of these areas, most Blacks lived in North Richmond through at least 1945. In comparison with western and southern Richmond, this northern area was not heavily industrialized. Although some manufacturing facilities were located there prior to World War II, North Richmond consisted mostly of open fields and truck gardens into the 1930s. Despite the arrival of many Blacks to the city, western and southern Richmond did not become predominantly black until the post-war years, when many Whites moved out of the city. Whites were still a majority in every Richmond census tract in 1950. Even in the 1960 census, Whites were a majority in eighteen out of twenty-two Richmond listings. In only one North Richmond tract and three western and southern Richmond tracts were Blacks in the majority; Whites constituted substantial minorities in the three western and southern Richmond tracts, of forty-three percent, forty percent, and thirty-nine percent, respectively.

The above data indicate that the presence of industrial sites in areas of Richmond that are predominately black is not due to industries being preferentially located in black areas, but to their being preferentially located in industrial areas. Given that industrial

123. Id. at 22, 60-61. Moore, following common local practice, uses "west Richmond" to encompass the southern portions of the city as well; thus, I have placed the words "and southern" in parentheses in the text. Although technically not within the city limits of Richmond proper, North Richmond was considered to be part of Richmond by black residents of Richmond and North Richmond alike during this period. Id. at 6, 36. North Richmond census tracts were included under the heading "Richmond" in 1960 U.S. Census results, the first census to show North Richmond tract data. U.S. DEP'T OF COMMERCE, POPULATION AND HOUSING STAT. FOR CENSUS TRACTS, SAN FRANCISCO-OAKLAND, CAL. AND ADJACENT AREAS 46-48 (1960).

124. Moore, supra note 118, at 24, 36.

125. Id. at 6-7; SANBORN MAP CO., RICHMOND, CONTRA COSTA COUNTY, CAL. (1916). Companies located in North Richmond before the war included the Certainteed Manufacturing Company, which manufactured roofing and mattress products; Standard Sanitary, a company that made porcelain fixtures and which was the biggest employer of Blacks in Richmond; and the Republic Steel Package Company. Moore, supra note 118, at 9; SANBORN MAP CO., RICHMOND, CONTRA COSTA COUNTY, CAL. (1916).


uses were already concentrated in western and southern Richmond, it is not surprising that this area became the favored location for additional industries during and after the war. Western and southern Richmond also have geographic advantages for some types of industries.\(^{129}\) Sadly, it is also not surprising that these areas also are the location of many contaminated sites, including several state and National Priority List (Superfund) sites.\(^{130}\)

V. CRITIQUE OF ENVIRONMENTAL JUSTICE REMEDIES

The core premises of environmental justice arguments are that disparate impacts to minority communities from LULU siting are widespread, and that racism during the siting process is the primary cause of these disparate impacts. To deal with siting impacts upon minority communities, environmental justice advocates seek to apply race-conscious solutions to change the outcomes of siting decisions. However, as argued above, both of these premises are debatable. Remedies based upon flawed premises should be treated with suspicion by the courts, and, as will be discussed below, the history of environmental justice litigation so far demonstrates that courts have been reluctant to apply the reasoning of environmental justice advocates. A further reason why judicial (and legislative) caution is warranted is that race-conscious remedies would likely place unfair and adverse impacts upon non-minority communities.

A. Disparate Impacts By Themselves Are Insufficient to Create a Requirement that Projects be Halted

Courts have hesitated to overturn LULU sitings on the basis of environmental justice considerations. In the words of an environmental justice advocate, "[t]here is not yet a well-developed legal doctrine that can be used effectively to combat environmental racism."\(^{131}\)

---

\(^{129}\) As shown in maps in the CBE Report, almost all bulk petrochemical and hazardous waste storage facilities in the city are located close to waterways used for transportation: the Richmond Harbor Channel, Santa Fe Channel, San Pablo Bay Channel, Lauritzen Channel, San Francisco Bay, all of which border west or south Richmond. CBE REPORT, supra note, 116, at 58. The Santa Fe and Lauritzen Channels in particular are major industrial locations. These locations are not labeled on the CBE map.

\(^{130}\) It is worth noting that the community of Point Richmond, which is largely white, is closer to some of the major industrial facilities of Richmond (e.g. Standard Oil Refinery) than are many Richmond minority neighborhoods.

\(^{131}\) Collin, supra note 54, at 818.
1. Equal Protection

Litigation has been brought against LULU sitings based on the Equal Protection Clause of the Fourteenth Amendment, which prohibits a state from denying the equal protection of laws to any person within its jurisdiction.\footnote{132. See U.S. CONST. amend. XIV, §1.} Under the body of law interpreting the Equal Protection Clause, the use of race or national origin as a basis for the distribution of benefits or burdens by governmental authorities is subject to strict scrutiny:\footnote{133. See Adarand Constructors v. Pena, 115 S. Ct. 2097, 2117 (1995).} unless the authority concerned can show that the classification is necessary to advance a compelling governmental interest, and that the proposed action is narrowly tailored to further that interest, the practice will be found unconstitutional.\footnote{134. Id.} A crucial problem for environmental justice advocates bringing suits based on the Equal Protection Clause is that in order to prevail, plaintiffs must show discriminatory intent on the part of the challenged agency.\footnote{135. See Washington v. Davis, 426 U.S. 229, 239 & 242 (1976).} Disparate impacts alone are insufficient to trigger strict scrutiny absent a clear pattern of impacts that fall more heavily on one race than another and that cannot be explained on grounds other than race.\footnote{136. Id.} To date, no court has found that plaintiffs challenging a LULU siting have made the requisite showing of discriminatory intent.\footnote{137. See Bean v. Southwestern Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (concluding that the plaintiffs did not establish a deprivation of constitutional rights because they never proved discriminatory purpose). See also Collin, supra note 59, at 518 (stating "[t]here is not yet a well-developed legal doctrine that can be used to effectively combat environmental racism").} In Washington v. Davis\footnote{138. 426 U.S. 229 (1976). In Washington v. Davis, two African-American men filed suit after learning that their job applications were rejected. Id. at 232. Their suit alleged that the application process, particularly a written test given to determine applicants verbal skills was discriminatory. Id. at 233-34. The district court granted the defendant's motion for summary judgment. Id. at 234. The Court of Appeals reversed and directed summary judgment for the plaintiffs. Id. at 237. On appeal to the Supreme Court, the decision of the Court of Appeals was reversed. Id. at 238. The Court held that the test, which had been created by the Civil Service Commission and given to applicants for federal employment, was not racially discriminatory. Id. at 245. The Court noted that many other African-American applicants had successfully completed the test, and concluded that the employment test was not fatally discriminatory. Id. at 252.} the Supreme Court rejected a disparate impact claim, holding that disparate results themselves are not illegal and do not trigger strict scrutiny, whereby "racial classifications are [subject] . . . to the strictest scrutiny and are . . . justifiable
ENVIRONMENTAL RACISM

only by the weightiest of considerations.”139 The Davis Court held that strict scrutiny is triggered by intentional discrimination.140 Similarly, in Village of Arlington Heights v. Metropolitan Housing Development Corp.,141 the Court stated that a disparate impact resulting from governmental policies is not clear proof of discrimination.142 “[A]n official action will not be held unconstitutional solely because it results in a racially disproportionate impact.”143 Disproportionate impacts may be evidence of discrimination, but impact alone does not amount to an intent or purpose to discriminate.144 As described by the Court in Personnel Administrator of Massachusetts v. Feeney,145 if neutral laws have “a disproportionate adverse effect upon a racial minority, it is unconstitutional . . . only if that impact

139. Id. at 242 (citing McLaughlin v. Florida, 379 U.S. 184 (1964)).
140. Id.
141. 429 U.S. 252 (1977). In Arlington Heights, an Illinois non-profit developer brought suit after the city's planning commission refused to rezone his tract of land from single-family to a multi-family classification. Id. The developer's suit alleged that the rezoning request was a violation of the Equal Protection Clause of the Fourteenth Amendment and of the Fair Housing Act. Id. at 252. The district court found that the denial was motivated by a desire to protect the neighboring property values and was not racially motivated. Id. The Court of Appeals for the Seventh Circuit reversed “finding that the ‘ultimate effect’ of the rezoning denial was racially discriminatory and observing that denial would disproportionately affect blacks.” Id. The Supreme Court reversed, stating that the developer failed to prove a “racially discriminatory intent or purpose.” Id. at 265. The Court found that the zoning policies were in effect before the developer's request for zoning and were consistent with established policies and precedent. Id. at 267.
142. Id. at 264.
143. Id. at 264-65.
144. Id. at 265. As stated by the Court, “[i]n many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the ‘heterogeneity’ of the Nation’s population.” Id. at 266 n.15. The Court recognized, however, that judicial deference is unjustifiable when “a discriminatory purpose” serves as a motivating factor in the legislative process. Id. at 265. Factors suggested by the Court that may be taken into account in deciding whether discriminatory intent existed are the historical background of the decision, particularly if official actions were taken for invidious purposes; the specific sequence of events leading up to the decision; procedural or substantive departures from normal procedures; and the legislative and administrative history of the decision. Id. at 267-68.
145. 442 U.S. 256 (1979). In Feeney, a female employee challenged a Massachusetts statute that gave promotional preference to civil servants who were veterans. Id. The plaintiff, who performed better on the civil service exam than many veterans was ranked below those veteran applicants. Id. Her suit alleged that “the absolute-preference formula . . . operate[d] to exclude women . . . and thus discriminate[d] against women in violation of the Equal Protection Clause of the Fourteenth Amendment. Id. The statute was declared unconstitutional by a three judge panel. Id. On remand from the Supreme Court, the district court affirmed their previous decision, finding “that the consequences of the . . . preference formula . . . [was] too inevitable to have been ‘unintended.’” Id. at 257.
can be traced to a discriminatory purpose."146 The fact that a governmental unit adopts a legitimate policy with the awareness that discriminatory impacts will result does not in itself satisfy the requirement of discriminatory intent or purpose.147

Particularly relevant to the issue of environmental justice is that the Supreme Court does not recognize poverty as a suspect classification requiring application of the strict scrutiny test.148 As a result, the disproportionate existence of LULU sites in impoverished areas does not justify the application of strict scrutiny.149 Environmental justice advocates have not been successful in differentiating between disparate siting impacts caused by poverty, and the putative effects of race upon siting.

Applying the preceding principles, several jurisdictions have rejected Equal Protection claims aimed at halting the siting of LULUs.150 In Bean v. Southwestern Waste Management Corp.,151 the District Court for the Southern District of Texas refused to issue an injunction that would halt the siting of a waste disposal facility after Plaintiffs were unable to show that the siting criteria were racially discriminatory.152 The Eleventh Circuit adopted a similar position

146. Id. at 272.
147. Id. at 279. "'Discriminatory purpose' . . . implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. (citations omitted).
148. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). In San Antonio School District, the Supreme Court reviewed the issue of whether the Texas school system discriminated on the basis of wealth in the manner in which education is provided and if wealth is a suspect classification. Id. at 19-21. The Texas public school system relied in part on local tax dollars to fund school districts. Id. at 4. The plaintiff alleged that this system had a disproportionate impact upon poor minority-majority school districts. Id. at 28. The Court, per Justice Powell, stated "this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny." Id. at 29. The Court refused to "intrude into an area in which it has traditionally deferred to state legislatures." Id. at 40.
149. Id. at 41. "[T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." Id.
152. Id. In Bean, the residents of a Houston neighborhood sought an injunction to stop the operation of a waste management facility. Id. at 674-75. The district court denied the request. Id. at 681. The district court looked past the basic statistics offered by the plaintiffs and determined that the criteria established by the waste disposal company were not based on racial discrimination. Id. at 678-79. The site was located near the Houston Ship Channel, where many of Houston's
in *East-Bibb Twiggs Neighborhood Ass’n v. Macon Bibb County Planning & Zoning Commission*,\(^{153}\) holding that absent purposeful racial discrimination, the siting of a waste disposal facility in a minority neighborhood did not establish a violation of the Equal Protection Clause.\(^{154}\) In *R.I.S.E., Inc. v. Kay*,\(^{155}\) the Fourth Circuit stated that insensitivity by a planning commission does not amount to a violation of the Equal Protection Clause.\(^{156}\) In summary, as stated by the Bean court, to succeed in an action alleging a violation of the Equal Protection Clause, "plaintiffs must show not just that the decision to grant a permit is objectionable or even wrong, but that [the siting decision] is attributable to an intent to discriminate on the basis of race."\(^{157}\)

Environmental justice advocates disagree with the preceding interpretations of the Fourteenth Amendment. According to one proponent, the requirement to show discriminatory intent "ignores the history of institutional racism in the United States . . . and exposes the white bias underlying the prevailing theory of ‘colorblindness’ and ‘race-neutral criteria’ in [the] equal protection doctrine."\(^{158}\) Some advocates have proposed that the meaning of discriminatory intent be redefined. For example, one advocate

---

\(^{153}\) *East-Bibb Twiggs Neighborhood Ass’n v. Macon Bibb County Planning & Zoning Commission*, 896 F.2d 1264 (11th Cir. 1989).

\(^{154}\) Id. at 679. The court concluded that the plaintiffs did not prove "that the decision to grant the permit was motivated by purposeful racial discrimination." Id. at 678.


\(^{156}\) Id. The residents of a predominately black census tract in Macon, Georgia brought suit against the Macon-Bibb County Planning and Zoning Commission claiming that the commission had denied them equal protection of the law when the commission decided to locate a landfill in a neighborhood that would affect more blacks than whites. Id. at 1265. The district court determined that the commission did not act with an intent to discriminate. Id. at 1266. On appeal, the Eleventh Circuit affirmed the district court’s findings. Id. at 1267.

\(^{157}\) Bean, 482 F. Supp at 677.

proposed that if an action is "racially significant"—if it "conveys a symbolic message to which the culture attaches racial significance"—a plaintiff challenging a project need not go further to show discriminatory intent.\footnote{159} According to this source, "[b]ecause the government decision-makers are part of our culture, any decision they make is necessarily influenced by racial considerations."\footnote{160} The logical result of this analysis would be that any action with adverse affects upon minorities, especially if the effects are distributed disparately across racial groups, becomes discriminatory and satisfies the intent requirement. To date, no court has adopted this revised understanding of discriminatory intent.

2. Title VI

To overcome the hurdle of proving discriminatory intent in Equal Protection-based claims, many environmental justice advocates have suggested litigation based on Title VI of the Civil Rights Act of 1964.\footnote{161} This law provides that no person shall be excluded on the basis of race, color or national origin, from participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving federal assistance.\footnote{162} Regulations promulgated pursuant to Title VI, regarding programs receiving assistance from EPA, state that recipients shall not use criteria or methods of administering their programs which have the effect of subjecting individuals to discrimination because of their race, color, national origin or sex;\footnote{163} nor shall recipients choose a site or location of a facility that has the purpose or effect of excluding individuals, denying these individuals benefits or subjecting them to discrimination on the grounds of race, color, national origin or sex.\footnote{164} Programs receiving federal financial assistance can in some circumstances be found to be in violation of Title VI where disparate impacts are found, even if discriminatory intent cannot be established.\footnote{165} Under Title VI, proponents have successfully compelled municipalities to provide additional services to minority

\footnote{159. Collin, \textit{supra} note 54, at 536.}
\footnote{160. \textit{Id.}}
\footnote{161. Title VI \S 601, 42 U.S.C. \S 2000d (1994).}
\footnote{162. \textit{Id.} See also Gareis-Smith, \textit{supra} note 115, at 57 (discussing litigation under Title VI).}
\footnote{163. 40 C.F.R. \S 7.35(b) (1995).}
\footnote{164. \textit{Id.} \S 7.35(c).}
\footnote{165. This principle was established regarding private actions under Title VI in Lau v. Nichols, 414 U.S. 563 (1974) and Guardians Ass'n v. Civil Service Comm'n of the City of New York, 463 U.S. 582 (1983).}
neighborhoods, where such services were substantially inferior to those in non-minority communities.166

Title VI has obvious attractions for prospective litigants because state and local environmental programs often receive federal funding. For example, California Rural Legal Assistance (CRLA) filed a Title VI-based complaint with EPA's Civil Rights Division against a broad array of California state agencies and private waste management firms.167 The complaint alleged discrimination against Hispanic communities when siting and expanding hazardous waste sites.168 CRLA sought an immediate moratorium on the expansion of such sites in Latino communities.169

Neither EPA nor the Department of Justice have specified what type of state action regarding hazardous waste programs receiving federal funding would constitute a Title VI violation.170 Despite the lack of overall guidelines, EPA has undertaken several Title VI actions.171 From approximately October 1993 until December 1994, more than twenty administrative complaints alleging environmental racism were filed with EPA under Title VI, nine of which EPA accepted for investigation.172

Despite the features of Title VI that make it attractive to environmental justice advocates, its applicability to LULU siting remains unsettled. While Title VI-based actions have been successful

166. See, e.g., Johnson v. City of Arcadia, Fla., 450 F. Supp. 1363 (M.D. Fla. 1978). Minorities in the municipality of Arcadia, Florida brought suit alleging that the city had violated their rights by depriving them of equal municipal services. The suit did not assert a 14th Amendment claim. Id. In granting relief, the District Court for the Middle District of Florida held that minorities deserve access similar to whites to all municipal facilities. Id. at 1378. A municipality that elects to provide services may not provide inferior sewer, city water, paved streets, fire hydrants and recreational facilities to minorities as compared with whites. Id.


168. Id.

169. Id.

170. States May Develop Guidance for Handling Title VI Complaints, INSIDE EPA ENVIRONMENTAL POLICY ALERT, Feb. 1, 1995, at 32. The EPA Office of Civil Rights is developing guidance for states to handle Title VI complaints. Id.

171. Id. For example, in 1993, the EPA Office of Civil Rights investigated whether state environmental authorities in Louisiana and Mississippi were violating Title VI when they approved permits for hazardous waste facilities in minority neighborhoods. Lavelle, supra note 39 at 41. In the Louisiana case, the site was in a heavy industrial zone. In contrast, the Mississippi site was free of hazardous waste pollution. Id.

in contesting disparate impacts in some instances\textsuperscript{178} they have failed in others, including one case, described below, that concerned a contested land use.

In \textit{Coalition of Concerned Citizens Against I-670 v. Damian},\textsuperscript{174} the District Court for the Southern District of Ohio found that Title VI does not \textit{per se} prohibit actions creating disparate impacts. Rather, it prohibits only those actions causing a disparate impact without adequate justification.\textsuperscript{175} Once a plaintiff has established a \textit{prima facie} case that some definite, measurable disparate impact is present, the defendant can counter with a legitimate nondiscriminatory reason for its action.\textsuperscript{176} If the plaintiff offers an alternative method which accomplishes the same goal and that would not have an objectionable impact (such as siting the offending project in a non-minority neighborhood), the defendants can rebut a \textit{prima facie} case of discrimination by demonstrating that such an alternative method would not accomplish the objective sought.\textsuperscript{177}

In summary, to survive Title VI challenges, LULU proponents should be prepared to document their use of legitimate, non-discriminatory siting criteria, and to document their conformance to a decision-making process that brings forward and analyzes a reasonable range of alternatives. Siting is far more defensible where it includes extensive public involvement and objective consideration of alternatives which have lesser impacts upon minority groups.

3. \textit{Other Civil Rights Statutes}

In \textit{Wards Cove Packing Co. v. Atonio},\textsuperscript{178} the Supreme Court made it more difficult for plaintiffs to succeed in Title VII Civil Rights Act

\begin{itemize}
  \item \textsuperscript{173} \textit{See NAACP v. Med. Ctr., Inc.,} 657 F.2d 1322, 1333-35 (3d Cir. 1981). Plaintiffs filed suit alleging that the result of a hospital merger proposal would have a disparate impact upon minority communities. \textit{Id.} at 1326. The district court found that the defendants had failed to show a feasible less discriminatory alternative. \textit{Id.} at 1328. On appeal, the Third Circuit held that the plaintiff did not have to show intentional discrimination. \textit{Id.} The court stated "proof of disparate impact or effects is sufficient" to show a violation under Title VI. \textit{Id.}
  \item \textsuperscript{174} 608 F. Supp. 110 (S.D. Ohio 1984).
  \item \textsuperscript{175} \textit{Id.} at 127 (stating Title VI only prohibits actions that have "differential impact without adequate justification"). In \textit{Damian}, the city of Columbus, Ohio decided to construct a highway and plaintiffs filed a suit alleging that the highway would have a disproportionate impact upon minorities and was a violation of Title VI. \textit{Id.} at 112-13. The district court determined that the Planning Commission failed to satisfy the public involvement requirement but that the Commission's actions were not discriminatory. \textit{Id.} at 128-29. As a result, the court failed to grant the injunction sought by the plaintiffs.
  \item \textsuperscript{176} \textit{Id.} at 127.
  \item \textsuperscript{177} \textit{Id.} (citations omitted).
  \item \textsuperscript{178} 490 U.S. 642 (1989).
\end{itemize}
cases by holding that disparate impacts alone are not evidence of discrimination. In response, Congress amended Title VII enacting the Civil Rights Act of 1991, which redefines the burden of proof regarding disparate impact. Under this Act, an unlawful employment practice based on disparate impact is established if a complaining party demonstrates that a particular employment practice causes a disparate impact on the basis of race, color, religion, sex or national origin, and the defendant fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity. If a defendant does make this demonstration, the plaintiff can still prevail by presenting evidence that an alternate employment practice without similar disparate impacts would also serve the employer's legitimate interests, and the defendant refuses to implement such a practice.

Title VII case law has frequently been cited in Title VI cases. However, the applicability of Title VII to Title VI-based environmental justice challenges has yet to be determined. Some courts, notably NAACP v. Medical Center, Inc., have applied to Title VI cases a standard used in Title VII cases: if the defendant is able to

---

179. Id. In Wards Cove, the Supreme Court reversed the findings of the Court of Appeals, which had relied on statistical inferences to find that the defendant's hiring practices were discriminatory. Id. at 659-62. The statistics put forth by the plaintiff were not, the Supreme Court decided, evidence of discrimination. Id. at 656. The decision required the judiciary to "proceed with care before mandating that an employer . . . adopt . . . alternative . . . hiring practice[s]." Id. at 661. The Court's rationale for limiting its review was that "[c]ourts are generally less competent than employers to restructure business practices." Id. (citations omitted).


181. Id. After the revisions, the burden of proof in disparate impact actions is established if:

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Id.


183. Id. at § 703, 42 U.S.C. § 2000e-2(k)(1)(A)(ii)(1994). See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (stating employers failure to adopt alternative proposal which eliminated disparate impacts while still meeting employer's business interests was evidence employer used its tests as pretext for discrimination). See also Colopy, supra note 158, at 164 n.177.

184. See Colopy, supra note 158, at 160 n.158.

provide evidence of a legitimate nondiscriminatory reason for the action, the plaintiff can in turn rebut by offering evidence that the proffered legitimate reason is a mere pretext for the discriminatory action. This can be done by showing that other selection devices without a similar undesirable effect would also serve the legitimate interest of the defendant. Other courts, such as Bryan v. Koch, have not used this standard, and the NAACP court did not reach a conclusion as to whether this standard was necessarily applicable in all Title VI claims.

Even under Title VII, plaintiffs must still overcome substantial hurdles to prevail on causes of action based solely on evidence of disparate impacts. Title VII does not demand that an employer give preferential treatment to minorities. Rather, the employer has discretion to choose equally qualified candidates, provided the decision is not based upon unlawful criteria. A defendant is not required to prove that the employee selected is the best qualified, or to select a minority applicant whenever that person’s objective qualifications are equal to those of a white candidate. Analogous to Title VI, the employee’s prima facie case of discrimination is rebut-

186. Id. at 1336.
187. Id.
188. 657 F.2d 612 (2d Cir. 1980). The Bryan court clearly described the problems of applying Title VII reasoning to Title VI cases:

The consideration of alternatives that has occurred in Title VII cases is instructive as to the appropriate standard for challenges under Title VI. Title VII cases typically involve a challenge to a particular selection device, frequently an examination. If the selection device has a disparate racial impact, there is a compelling argument for prohibiting its use, despite its job-relatedness, if another device will also select qualified employees and have a lesser disparate impact. In that context the inquiry is sharply focused upon comparable alternatives, other selection procedures or examinations. With Title VI, however, the inquiry could frequently become too open-ended. If, for example, a court were to assess alternative ways of saving funds throughout administration of a city or even throughout administration of the health care function, it would seriously risk substituting its own judgment for that of the city’s elected officials and appointed specialists. We are skeptical of the capacity and appropriateness of courts to conduct such broad inquiries concerning alternative ways to carry out municipal functions. Once a court is drawn into such a complex inquiry, it will inevitably be assessing the wisdom of competing political and economic alternatives. Moreover, such policy choices would be made without broad public participation and without sufficient assurance that the alternative selected will ultimately provide more of a benefit to the minority population.

189. See NAACP v. Medical Center, 657 F.2d at 1336-37. The court in NAACP stated that this test was a stringent standard that “more than adequately serves Title VI aims”; it also cited Bryan without stating any disagreement with the Bryan court’s approach in not applying the same test. Id.
ted if the employer articulates lawful reasons for the action. To satisfy this intermediate burden, the employer need only produce admissible evidence which would allow a trier of fact to rationally conclude that the employment decision was not motivated by discriminatory animus. 190

Some environmental justice advocates 191 have also proposed applying other civil rights statutes to halt LULU facility siting, such as 42 U.S.C. § 1982, 192 which states that all citizens shall have the same right to inherit, purchase, lease, sell, hold and convey real and personal property; and Title VIII of the Civil Rights Act of 1968, 193 which bars discrimination in sale or rental of housing or in provision of services or facilities in connection therewith. 194 Plaintiffs have to overcome major hurdles in order to use these statutes to overturn LULU facility siting actions. First it is debatable whether disparate impacts in LULU siting interfere with the rights enumerated in the plain wording of these statutes. Regarding Title VIII, for example, this statute does not purport to bar discrimination in the distribution of services generally, and deals only with discrimination in the realm of fair housing opportunities, and services or facilities in connection with the sale or rental of a dwelling. 195

Second, even if courts were to accept challenges to LULU siting under these statutes, the presence of disparate impacts alone would not guarantee success for plaintiffs. To establish a violation of 42 U.S.C. § 1982, a plaintiff must present sufficient evidence for a reasonable fact finder to conclude that the defendant's actions were racially motivated. 196 As is true for plaintiffs bringing Equal

194. Cole, supra note 191, at 529 (recognizing that there have been no reported cases involving Title VIII but that Title VIII offers another basis for environmental justice claims). Title VIII "bars the refusal 'to sell or rent . . . or otherwise make available, or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin,' and bars discrimination 'against any person in the . . . sale or rental of a dwelling, or in the provision of services or facilities in connection there with, because of race, religion, sex, familial status or national origin.' " Id. at 534 (citations omitted).
195. Lazarus, Pursing Environmental Justice, supra note 1, at 840 (discussing possibility of using Title VIII for environmental purposes).
Protection claims, plaintiffs seeking redress under this statute must establish proof of racially discriminatory intent or purpose.\textsuperscript{197} Once a \textit{prima facie} case of discriminatory intent is made out, the burden shifts to the defendant to show that his other actions were not racially motivated, or that there is some legitimate nondiscriminatory reason for those actions.\textsuperscript{198} Regarding Title VIII, disparate impacts alone are sufficient to establish a \textit{prima facie} violation of the statute, and plaintiffs do not need to prove discriminatory intent.\textsuperscript{199} However, defendants can prevail by showing that there was no less discriminatory alternative available, and that the justification was bona fide and legitimate.\textsuperscript{200}

B. Siting of LULUs on the Basis of Avoiding Racially Disparate Impacts Would Lead to Preferential Siting in Non-Minority Communities

Conflicts over LULU siting can be lessened by lowering the number of LULUs that must be sited, for example, through waste reduction and recycling efforts. However, some irreducible number of LULUs must be sited somewhere. Most environmental justice advocates argue that minority populations should not host LULUs to a greater extent than their percentage of the population.\textsuperscript{201} Few advocates have been explicit regarding the proportion of LULUs that should be hosted by white communities. However, while many advocates disclaim an intention to preferentially site LULUs in non-minority communities,\textsuperscript{202} environmental justice rationales and remedies exert strong pressures against locating LULUs in minority areas. As stated by two commentators, "[m]ost of the environmental justice initiatives now being considered attempt to alleviate environmental inequities by forcing polluting and waste facilities to operate in wealthier, non-minority areas."\textsuperscript{203}

\textsuperscript{198} Cho, 782 F. Supp. at 1187.
\textsuperscript{199} Soules v. U.S. Dept. of Housing and Urban Dev., 967 F.2d 817, 822 (2d Cir. 1992).
\textsuperscript{200} Strykers Bay, 695 F. Supp. at 1543.
\textsuperscript{201} See, e.g., Rodolfo Mata, \textit{Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model}, 12 VA. ENVTL. L.J. 375, 411 (1994)(viewing methods employed by states to site LULUs as problematic "because they do not promote the equal distribution of such facilities across race, ethnic and income groups").
\textsuperscript{202} See, e.g., Fisher, supra note 97, at 449; DUMPING IN DIXIE, supra note 12, at 126.
\textsuperscript{203} Thomas Lambert & Christopher Boerner, Letter, 36 ENV'T, October 1994, at 2-3.
Preferential siting in white communities can be justified in several ways. It can be argued, for example, that minorities should bear lesser burdens in order to compensate for past discrimination in LULU siting in particular, or for past and on-going generalized discrimination. In this conception, a fair distribution of LULUs requires "advantaged" neighborhoods to bear a greater share of LULUs than minority neighborhoods to make up for past discrimination against minorities. Since minority communities also suffer disproportionately from ills other than LULUs, such as poorer health and less mobility, to help equalize the overall burdens borne by different communities, and to distribute impacts equally, a relatively larger share of LULUs should be sited in non-minority neighborhoods.\footnote{These arguments are summarized in Vicki Been, \textit{Conceptions of Fairness in Proposals for Facility Siting}, 5 Md. J. Contemp. Legal Issues 13, 18-19 (1993-94). Another rationale for reducing the burdens of LULUs upon minorities can be inferred from a contention by Bullard that "[w]aste generation is directly correlated with per capita income; however, few waste facilities are proposed and actually built in the mostly white suburbs." \textit{DUMPING IN DIXIE}, supra note 12, at 102. As minorities are disproportionately poorer than whites, it is likely that less waste is attributable to minority groups than is represented by their proportion of the overall population. A logical extension of this argument is that minorities should bear fewer burdens in the siting of waste facilities than their share of the population would otherwise dictate.}

Probably more important than theoretical justifications, however, are bureaucratic and political considerations. There are presently no formal federal prohibitions against siting LULUs in minority neighborhoods. However, bureaucracies with environmental justice responsibilities are being created in each agency,\footnote{For a discussion of federal administrative attempts to address environmental justice, see \textit{supra} notes 33-46 and accompanying text.} and due to Executive Order 12,898 and other pressures, federal siting proposals which impact minority communities come under a higher level of scrutiny than do proposals which impact primarily white areas. This creates incentives for project managers to favor siting in non-minority areas.\footnote{Further research in this area is necessary, although it could well prove difficult to convince agency employees to come forward publicly with such observations.}

Depending upon the evolution of laws, regulations and court cases, incentives could also be created for private sector actors to site LULUs in non-minority areas. Persons opposing the siting of LULUs in minority areas could have new grounds for legal challenges, with lawsuits against siting in minority areas encouraged. The concomitant logistical and monetary hurdles that industry
would encounter could significantly affect business decisions,\footnote{207} and make siting in white communities more attractive than would otherwise be the case if solely technical criteria were employed.

VI. CONCLUSION: ENVIRONMENTAL JUSTICE SOLUTIONS SHOULD EMPHASIZE RACE-NEUTRAL CRITERIA

Many advocates see environmental justice as part of the broader struggle to achieve "racial and social justice."\footnote{208} It is debatable, however, whether the definition of justice held by these advocates is a view held by the majority of people in our society. While no opinion polls were found bearing on the specific question of whether it would be desirable to introduce racial criteria into siting decisions, polling results clearly show that in other settings, preferential treatment based upon race is objectionable to the great majority of respondents.\footnote{209} This opposition was recently manifested in the passage of the California Civil Rights Initiative (CCRI),\footnote{210} on November 5, 1996, by the California electorate, as an amendment to the California Constitution. The CCRI prohibits the State and its political subdivisions from using race, sex, color, ethnicity or national origin as a criterion for either discriminating against or granting preferential treatment to any individual or group in the

\footnotesize{207. Stephen C. Jones, Inequities of Industrial Siting Addressed, Nat’l L.J., August 16, 1993, at 20.}
\footnotesize{209. See Gallup Poll: Preferential Job Hiring Opposed, S.F. Chron., May 21, 1981, reprinted in Affirmative Action and Equal Protection, Hearings Before the Subcommittee in the Judiciary, United States Senate, 97th Cong., on S.J. 41 at 1050-51 (1981). Majority opposition to racial preferences is of long standing. Gallup Polls, dated May, 1977, October 1977, and December 1980, that surveyed attitudes on affirmative action found that over eighty percent of the respondents opposed preferential treatment. Gallup concluded that "rarely is public opinion, particularly on such a controversial subject, as united as it is over this question." Id. at 1050. More recent results include a 1994 study by the National Opinion Research Center which found that only sixteen percent of respondents endorsed preferences for Blacks in hiring and promotion. See David K. Shipler, My Equal Opportunity, Your Free Lunch, New York Times, March 5, 1995, at 4-1. Seventy-five percent of those polled in a 1995 Washington Post-ABC News poll (including eighty-one percent of Whites and forty-six percent of Blacks) answered no to the question, "Do you think that blacks and other minorities should receive preferences in hiring, promotions and college admissions to make up for past discrimination." Richard Morin, No Place for Calm and Quiet Opinions, Washington Post National Weekly Edition, April 24-30, 1995, at 34.}
\footnotesize{210. California Ballot Pamphlet for the General Election, California Civil Rights Initiative, Proposition 209 (1996).}
operation of the State's system of public employment, public education or public contracting. 211

Based on these indicators, it is likely that most people would see the use of racial criteria to supersede technical factors in siting decisions as unfair. A fair siting process would be one in which minority communities would be no more and no less likely to be selected than other areas that have equal suitability. People hold widely differing conceptions of what constitutes fairness in siting. 212 Still, most people would likely agree that to be equitable, decision-making should at the minimum be informed by the following principles: (1) strict adherence to defensible technical siting criteria relating to the safety of sites; (2) absence of animus against any population grouping, especially groupings based on race or ethnicity, as a motivation in siting decisions; and (3) avoiding siting decisions that result in concentration of LULUs in too circumscribed a geographic area. 213 The third principle is the most difficult to specify and, depending upon the dispute, the definition of "too circumscribed an area" can be a neighborhood, city, state or even a multi-state region. However, the principle itself is crucial to fairness.

An example of a racially-neutral approach that attempted to address the third principle was the proposed Environmental Justice Act of 1992, which after several attempts failed to pass either the House or the Senate. 214 The 1993 version of this Act would have required EPA to identify the one hundred counties or other geographical units in the United States containing the highest total weight of toxic chemicals. Those areas would be classified as Environmental High Impact Areas (EHIAs). The Act would require a health impact study to evaluate "the nature and extent, if any, of

211. Id. While the CCRI does not specifically address the use of racial criteria in LULU siting, some of the remedies suggested by environmental justice advocates would clearly be contrary to the intent of this initiative in situations where racial animus cannot be demonstrated. In practical effect, the CCRI may bar the use of racial criteria if public contracting was involved in site selection and preferential treatment was inherent in the criteria used in site selection.

212. See Been, Conceptions of Fairness, supra note 204 (discussing various models to address LULU sitings).

213. The following may also be added: A LULU should be sited in the same geographic area(s) experiencing the benefits which generate the need to site the LULU in the first place. This consideration underlies attempts by communities and states to ban out-of-area radioactive, solid or hazardous wastes. This is more problematic than the other principles, as the safest sites may be in remote areas that generate very little waste. Other principles that have been extensively explored in LULU siting literature include compensating communities or individuals for the burdens brought by LULUs, and choosing among equally suitable sites by some form of lottery.

acute and chronic impacts on human health” in EHIAs as compared to other counties. If the study found “significant adverse impacts on environmental pollution on human health” in EHIAs, a moratorium would be declared on the siting or permitting of any new facilities in an EHIA that would release toxic substances in quantities found to cause significant adverse impacts on human health.

Environmental justice advocates identify racism as the cause of disparate impacts. However, the concept of Occam’s razor should be applied: the simplest of competing theories which adequately explain a phenomenon should be preferred. If the same non-racial factors can explain the presence of LULUs in non-minority and minority communities alike, logic dictates that race should neither be taken as the primary explanation for siting outcomes nor form the basis for remedies. If poverty rather than racial bias is a crucial factor in siting decisions, race-neutral remedies focusing on low income communities in general would be appropriate.

The current focus of environmental justice advocates on disparate impacts should be replaced by a race-neutral approach to limit the impacts placed upon any community. To the extent that minorities currently suffer greater burdens from LULUs, such an approach would likely benefit minority more than white communities. Additionally, race-neutral measures will be far more acceptable to the public and the courts alike.