ARTICLES

ENVIRONMENTAL JUSTICE: BRIDGING THE GAP BETWEEN ENVIRONMENTAL LAWS AND "JUSTICE"

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INTRODUCTION

The growing perception that environmental benefits and burdens have been inequitably distributed has sparked the recent emergence of a movement for environmental justice. The environmental justice movement, originating as it did from the civil rights movement, has

inevitably confronted environmental laws, lawyers, and institutions. Civil rights advocates and environmentalists each bring their respective histories and modes of discourse to the environmental justice debate. That intersection of race and environment has not been untroubled.

As a consequence, the literature addressing environmental justice treats environmental laws and lawyers with a measure of skepticism. The literature presents environmental law as, at best, a strategically useful tool to stop unwanted land uses. At worst, it presents environmental law as both a significant cause of disproportionate burdens and as a possible impediment to the achievement of social justice. While certain aspects of the skepticism may be warranted, it is important to avoid letting past tensions obscure the positive role that environmental laws could play in the pursuit of social justice. This Article takes one step toward bridging the gap between environmental laws and justice by exploring some of the conditions under which environmental laws can contribute to social and political debates about fair treatment.

Part I describes the emergence and nature of the environmental justice movement by presenting an analytical framework for identifying and distinguishing the two forms of justice raised by the movement: (1) justice in the existing distribution of environmental benefits and burdens ("distributional justice"), and (2) justice in the decisionmaking processes that determine the distribution of environmental benefits and burdens ("political justice"). Part I considers the strategies environmental justice advocates have suggested for addressing both of these forms of environmental justice.

In order to illuminate the way in which those in the environmental justice movement have perceived the environmental movement and environmental laws, Part II provides a short history of the environmental movement and its somewhat tense relationship with contemporaneous civil rights and social justice movements. It then reviews the perspectives on environmentalists and environmental law exhibited in the environmental justice literature. Numerous authors observe that participants in the environmental justice movement feel alienated from the traditional environmental movement. They also note the ways in which environmental laws have caused, not solved, environmental problems in poor and minority[1] communities. While

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1. While the term "minority" may be considered pejorative under some circumstances, the expression is used because it captures the essence of the environmental justice claim: the persistence of unfair treatment against certain minority groups. It is because of their status as minorities (in the political sense) that minorities (in the ethnic sense) risk unfair treatment in

recognizing the strategic value of environmental laws in particular instances, some of the literature expresses concern that the use of environmental laws could have detrimental effects on the long-term struggle for justice.

Part III then focuses more specifically on the movement's quest for political (as distinguished from distributive) justice. Achieving political justice is about changing the political dynamic so that all groups are treated fairly in decisionmaking processes. A legal victory against an unfair decision—whether on civil rights or other grounds—is only one element in the pursuit of the broader social, political, and cultural change necessary to achieving political processes that fairly consider all citizens' interests. The pursuit of political justice must occur in the decisionmaking culture and its social and political context. Part III focuses on the role of environmental laws in political debates about fair treatment.

Communities claiming political injustice frequently encounter enormous difficulties in demonstrating to the broader body politic that they have been or are being treated unfairly. Part III examines the circumstances in which environmental laws could assist in identifying and communicating political injustice. By requiring decisionmakers to meet certain criteria, conduct certain types of analyses, and explain their decisions, environmental laws illuminate the decisionmaking process. Where they reveal irregularities or irrationalities, the evidence produced through the operation of environmental laws may cast doubt on a decision's legitimacy. Once the legitimacy of a decision is in question, it becomes possible to infer the presence of discrimination.[2]

This pattern of analysis—using irregularities to infer discrimination—is nothing new. It is similar to the reasoning utilized in "disparate treatment" cases under the employment discrimination provisions of Title VII of the Civil Rights Act of 1964.[3] The *legal* arguments presented in a Title VII case correspond to the types of *political* arguments that are likely to arise when siting opponents assert "disparate treatment" in the political forum. Under Title VII, a person claiming disparate treatment must present a prima facie case that an adverse employment decision was made despite that individual's

a political process controlled by ethnic and political majorities.

2. This Article addresses the use of environmental laws in the political dynamic associated with siting decisions. It does not address the separate question of the role of environmental laws in proving discrimination under the Equal Protection Clause or statutes prohibiting discrimination.

3. 42 U.S.C. § 2000e (1994).

qualifications.[4] In a claim of unfair treatment in the environmental justice context, opponents would claim that the decision in question was made despite its failure to meet the qualifications established by the relevant environmental criteria. To use the siting of an undesirable facility in a minority neighborhood as an example, environmental laws may reveal that the site was selected despite its failure to meet the necessary qualifications.

Moreover, just as an employer in a Title VII case is likely to present a nondiscriminatory justification for its employment decision, a decisionmaker in the environmental justice context is likely to present a nondiscriminatory justification. Then, like the employee in a Title VII case, those concerned about the fairness of the decision may be able to present information obtained through environmental laws to demonstrate that the decisionmaker's alleged justification is simply a pretext. In a disparate treatment case under Title VII, such circumstantial evidence can be sufficient to infer discriminatory treatment. In the environmental justice context, evidence amassed through environmental laws could likewise support an inference that the decision was influenced by unfair treatment of the affected poor or minority community.

A community's ability to communicate unfair treatment is an important step in increasing decisionmakers' accountability to all. While not all claims of unfair treatment are legitimate, and while all valid claims will not necessarily be aided by environmental information, under the right circumstances environmental laws may assist a community's ability to communicate to the broader body politic. Environmental laws thus have the capacity to play a more significant role in debates about justice than that currently recognized in the environmental justice literature.

I. THE ENVIRONMENTAL JUSTICE MOVEMENT

A. *The Emergence of the Environmental Justice Movement*

While the phenomenon of environmental injustice is nothing new,[5] the development of the environmental justice movement as a

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4. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

5. *See* Robert D. Bullard, *Introduction,* [hereinafter Bullard, *Introduction*] CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 9 (Bullard ed., 1993) [hereinafter VOICES FROM THE GRASSROOTS] (noting that attacks against environmental injustice "predate the first Earthday in 1970"); Deeohn Ferris & David Hahn-Baker, *Environmentalists and Environmental Justice Policy, in* ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 67 (Bunyan Bryant ed., 1995) (noting that "even before the '70s, people of color recognized linkages between social justice and environmental protection issues"); Rachel D. Godsil & James S.

self-conscious movement is relatively recent. The question of environmental justice was brought to national attention by the 1982 opposition of an African-American community in North Carolina to a hazardous waste landfill.[6] The resulting national exposure prompted numerous studies of the distribution of environmental hazards.[7] In 1990, the federal government weighed in when the Environmental Protection Agency created the Environmental Equity Workgroup ("EPA Workgroup") to examine the distributional issues raised by environmental policies and enforcement.[8] In 1994, the Clinton Administration issued an Executive Order designed to assess and address the demographic issues associated with federal actions and to improve public participation procedures.[9] Many state and local governments have also responded with studies and legislation.[10]

Since most of the participants in the environmental justice movement are community groups engaging in local action within their communities, the movement is often characterized as a "grassroots" movement.[11] Local communities around the country have organized in connection with specific objectives, such as opposition to the siting of a waste facility, cleanup of a contaminated site, or a reduction in

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Freeman, *Jobs, Trees, and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. OF CONTEMP. PROBS. 25, 29 (1994) (noting that disadvantaged communities were concerned about environmental problems before the concept of "environmental justice" emerged).

6. *See, e.g.*, DAVID E. NEWTON, ENVIRONMENTAL JUSTICE: A REFERENCE HANDBOOK 1-3 (1996) (discussing community's well-publicized opposition to the landfill); Benjamin F. Chavis, Jr., *Foreword*, *in* VOICES FROM THE GRASSROOTS, *supra* note 5, at 3 (same); Colin Crawford, *Strategies for Environmental Justice, Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 268-69 (1994) (same); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 9 (1995) (same).

7. The studies include the following: U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES, GAO/RCED-83-168 (1983) [hereinafter GAO REPORT] (analyzing demographics associated with hazardous waste sites located in EPA's Region IV); COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES, A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter UCC REPORT] (reviewing demographics associated with commercial hazardous waste sites and uncontrolled hazardous waste sites throughout nation); U.S. EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992) [hereinafter ENVIRONMENTAL EQUITY] (assessing evidence that poor and minority communities are exposed to greater environmental risks than general population).

8. *See* Gauna, *supra* note 6, at 13 (describing formation of work group by then-EPA Administrator William K. Reilly).

9. *See* Exec. Order No. 12,898, 3 C.F.R. § 859 (1995).

10. *See* Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 79 & n.10 (1996) (noting that many states have legislation pending regarding the siting of noxious facilities); Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 613 n.43 (1996) [hereinafter Torres, *Environmental Justice*] (listing state legislative efforts).

11. *See* KATHLYN GAY, POLLUTION AND THE POWERLESS: THE ENVIRONMENTAL JUSTICE MOVEMENT 20-21 (1994) (describing environmental justice movement since 1980s as consisting of local action groups); NEWTON, *supra* note 6, at 24-25.

lead poisoning.[12] Despite the local impetus, however, many groups move beyond the immediate problem. As Professor Eileen Gauna has characterized it, "[e]nvironmental justice activists . . . [see] environmental problems as only one part of the larger social issues of racism and cultural and economic injustice."[13]

These grassroots campaigns for environmental justice follow in the footsteps of the civil rights movement that preceded them.[14] Author David Newton has observed that "[a]lthough the issues with which environmental justice deals are environmental issues . . . [t]he political philosophy that underlies action is a reflection of the civil rights philosophy."[15] Like the civil rights movement, grassroots groups frequently engage in such "direct action" as demonstrations, picketing, petition drives, and other forms of visible and participatory protest.[16] The emphasis on direct action and community participation is not

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12. *See* Robert Bullard, *Dumping in Black and White* [hereinafter Bullard, *Dumping in Black and White*], *in* WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE, AND ENVIRONMENT 4, 7 (Dana Alston ed., 1990) [hereinafter WE SPEAK FOR OURSELVES] (discussing community groups' opposition to municipal landfills, lead smelters, and hazardous waste); *see also* NEWTON, *supra* note 6, at 24, 173-206 (listing environmental justice organizations); Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* VOICES FROM THE GRASSROOTS, *supra* note 5, at 24-25, 26-29 [hereinafter Bullard, *Anatomy of Environmental Racism*] (noting wide variety and dispersement of environmental justice groups and summarizing several local environmental justice initiatives). *See generally* VOICES FROM THE GRASSROOTS, *supra* note 5 (collection of essays on various grassroots environmental justice initiatives); Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 72 (1991) (discussing grassroots organizations and their goals); Torres, *Environmental Justice*, *supra* note 10, at 99, 601-02; Charles Jordan & Donald Snow, *Diversification, Minorities, and the Mainstream Environmental Movement*, *in* VOICES FROM THE ENVIRONMENTAL MOVEMENT: PERSPECTIVES FOR A NEW ERA 85-86 (Donald Snow ed., 1991) [hereinafter VOICES FROM THE ENVIRONMENTAL MOVEMENT] (discussing growth of grassroots environmental organizations). The 1994 Environmental Justice Resource Center directory of local environmental justice groups includes hundreds of local and regional organizations. *See* ROBERT D. BULLARD, PEOPLE OF COLOR ENVIRONMENTAL GROUPS: 1994-95 DIRECTORY (Environmental Justice Resource Center 1994) [hereinafter BULLARD, PEOPLE OF COLOR].

13. Gauna, *supra* note 6, at 12; *see also* Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 641 (1992) [hereinafter Cole, *Empowerment as the Key*] (describing goal of grassroots environmentalists as "structural societal change" to achieve social justice).

14. *See* Austin & Schill, *supra* note 12, at 74 ("The minority grassroots movement draws a good deal of inspiration from the black civil rights movement."); Bullard, *Anatomy of Environmental Justice*, *supra* note 12, at 22, 24-33; Robert D. Bullard & Beverly H. Wright, *The Quest for Environmental Equity: Mobilizing the African-American Community for Social Changes*, *in* AMERICAN ENVIRONMENTALISM 40 (Riley E. Dunlap & Angela G. Mertig eds., 1992); Gauna, *supra* note 6, at 12 (noting that many environmental justice activists were involved in civil rights movement); William C. Scott, *Environmental Justice: A New Era of Community Empowerment, Political Activism, and Civil Rights Litigation*, 7 ENVTL. CLAIMS J. 5, 11 (1994) (observing that grassroots environmental justice groups have applied techniques of civil rights movement to environment problems); Torres, *Environmental Justice*, *supra* note 10, at 601 (discussing relationship between environmental justice and civil rights movements).

15. NEWTON, *supra* note 6, at 19.

16. *See* Austin & Schill, *supra* note 12, at 75 (describing "hands-on tactics" used in grassroots movements); Scott, *supra* note 14, at 11 (discussing forms of protest used by grassroots movements).

simply a tactical calculation. Instead, it arises from a fundamental commitment to a participatory movement.[17]

The creation of a movement out of these diverse activities has been facilitated by recent regional and national conferences bringing together activists and concerned scholars.[18] Various regional and cultural organizations also provide forums for sharing information, as do several publications.[19] In addition, a number of national organizations have turned their attention to environmental justice issues and provide a forum for a larger perspective on local activities.[20] Nonetheless, the heart of the movement remains in its grassroots activism.

B. *Defining Environmental Justice*

The birth of the environmental justice movement brought together two concepts that had rarely been joined: "environment" and "justice."[21] As indicated by the definitions of "environmental justice" and related expressions by activists and observers,[22] many different

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17. *See* Austin & Schill, *supra* note 12, at 75 (stating that commitment to direct participation is "a matter of belief"); Cole, *Empowerment as the Key*, *supra* note 13, at 639-40, 647-50, 657-59, 661-63 (discussing reasons for community-based movement); Rachel Godsil, *The Streets, the Courts, the Legislature and the Press: Where Environmental Struggles Happen*, 5 POVERTY & RACE 6, 8 (1996) [hereinafter Godsil, *Environmental Struggles*]; Jordan & Snow, *supra* note 12, at 87.

18. These conferences include the "Michigan Conference on Race and the Incidence of Environmental Hazards" (January 1990), sponsored by the University of Michigan School of Natural Resources, the "First National People of Color Leadership Summit on the Environment" (1991), "Opportunities for Exchange: Communities Promoting Environmental Justice Through Educating, Organizing, and the Law" (March 1996), as well as numerous regional gatherings. *See* Crawford, *supra* note 6, at 271 nn.15-16 (describing national and regional conferences); Ferris & Hahn-Baker, *supra* note 5, at 68-69 (same).

19. *See* NEWTON, *supra* note 6, at 24-25 (listing regional organizations and publications linking community groups).

20. Such organizations include the Washington Office of Environmental Justice and the Lawyers' Committee for Civil Rights' Environmental Justice Project.

21. *Cf.* Gauna, *supra* note 6, at 2-3 (referring to "environmental racism"). The terms "environmental racism" and "environmental equity" have also been used to describe the movement and its concerns. *See, e.g.*, Bullard, *Introduction*, *supra* note 5, at 5 (using term "environmental racism"); ENVIRONMENTAL EQUITY, *supra* note 7, at 1 (using term "environmental equity").

This Article uses the term "environmental justice" because it is the broadest of the three. Although the term "environmental racism" captures the sense of discrimination often associated with the movement, it fails to capture the injustice that white communities may also face. Use of the term "environmental justice" does not mean that race issues are irrelevant; instead, it broadens the range of relevant issues. The term "environmental equity" rings too weakly. It implies that the underlying problem is simply one of doling out the pie of environmental harms in equal slices. It fails to capture the concerns about unfair treatment that also characterize the movement. The term "justice" better captures the combination of distributional and political issues that the movement confronts.

22. Attorney William Scott has collected a number of these definitions. He notes that Dr. Benjamin F. Chavis Jr. has defined "environmental racism" as:

> [R]acial discrimination in environmental policy making and the unequal enforcement of the environmental laws and regulations. It is the deliberate targeting of people-of-color communities for toxic waste facilities and the official sanctioning of a life-threatening presence of poisons and pollutants in people-of-color communities. It is

types of issues are encompassed by the term.

1. *Defining "environment"*

The conception of "environment" in the environmental justice context refers to attributes of the physical environment that affect any aspect of a community's well-being.[23] The environment is shaped by the entire panoply of land uses, including the location of residential, commercial, and industrial development and the particular characteristics of those land uses. Undesirable land uses like waste disposal facilities, polluting industries, prisons, and homeless shelters are frequently termed "LULUs": Locally Undesirable Land Uses.[24] Both the physical consequences of undesirable land uses—such as increased health risks or noise pollution—and the socioeconomic consequences of land uses—such as aesthetic impacts, stigma, or decreased property values—are "environmental" impacts.[25] Environ-

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> also manifested in the history of excluding people of color from the leadership of the environmental movement.

Scott, *supra* note 14, at 8-9 (quoting Dr. Chavis' 1993 testimony to United States House of Representatives' Subcommittee on Civil and Constitutional Rights).

Mr. Scott notes that Professor Robert D. Bullard defines "environmental racism" as:

> [A]ny policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color. It also includes exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions and regulatory bodies.

Id. at 9 (quoting Robert D. Bullard, *The Threat of Environmental Racism, in* NATURAL RESOURCES AND ENVIRONMENT, Winter 1993, at 23).

Mr. Scott also quotes the EPA's definition of "environmental justice" as:

> The fair treatment of people of all races, cultures, incomes and educational levels with respect to the development, implementation and enforcement of environmental laws, regulations and policies. Fair treatment implies that no population of people should be forced to shoulder a disproportionate share of the negative environmental impacts of pollution or environmental hazards due to a lack of political or economic strength.

Id. (quoting United States Environmental Protection Agency, ENVIRONMENTAL JUSTICE INITIATIVES 1993, 1994, at 19); *see also* NEWTON, *supra* note 6, at 3-5 (defining "environmental equity," "environmental racism," "environmental discrimination," and "environmental justice").

23. This conception of the environment is purposefully broad. *See* Robert D. Bullard, *Environmental Justice for All, in* UNEQUAL PROTECTION 11 (Robert D. Bullard ed., 1994) [hereinafter Bullard, *Environmental Justice for All*] (defining "environment in very broad terms... as places where people live, work, and play").

24. *See* Vicki Been, *What's Fairness Got to do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001 (1993) [hereinafter Been, *Undesirable Land Uses*] (enumerating examples of LULUs); Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 437-38 (1988) (same).

25. The National Environmental Policy Act ("NEPA"), which mandates environmental impact statements for federal actions having significant environmental effects, similarly considers the social consequences of land uses a type of "environmental effect." *See* 40 C.F.R. § 1508.8 (1996) (defining, pursuant to NEPA, environmental "effects" to include impacts that are "ecological... aesthetic, historic, cultural, economic, social, or health"); *see also* Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 579-88 (1997) (discussing socioeconomic effects as "environmental effects" under federal and state environmental review statutes); Heather E. Ross, Comment, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY J. ENVTL. L. 353, 357-60 (1994) (discussing consideration of so-

mental issues have been in the public eye for some time; what the environmental justice movement adds are the ethical and political justice questions, the "who" and the "why" behind decisions impacting the environment.[26]

2. *Defining "justice"*

The types of justice relevant to environmental justice disputes can be classified into two primary categories. One form of justice is distributive: environmental justice concerns are raised by the disproportionate burden of environmental hazards or undesirable land uses borne by low-income and minority communities.[27] The second form of justice focuses on the political process:[28] environmental justice concerns are raised by the discriminatory manner in which decisions with environmental consequences are made.[29]

The environmental justice literature includes a great many things under the rubric of "justice" with relatively little analysis of the form and nature of the justice being sought.[30] While any given instance of perceived environmental injustice may involve claims of both distributive and political injustice, the two forms of injustice present two different kinds of injuries and may require two different types of solutions.[31]

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cioeconomic effects as environmental effects under NEPA).

26. *See* Bullard, *Environmental Justice for All*, *supra* note 23, at 11, 22.

27. Professor John Rawls' *A Theory of Justice* describes one form of distributive justice. Although Rawls acknowledges that inequality is inevitable (and in some cases desirable), he argues that, where inequality exists, the determination of whether an act is "just" turns on whether it tends to increase the welfare of the least advantaged. *See* JOHN RAWLS, A THEORY OF JUSTICE 7, 60-62, 75-80 (1971). "Justice" is thus a function of the distribution of benefits and burdens. *See* Been, *Undesirable Land Uses*, *supra* note 24, at 1028-55 (discussing distributive justice); Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 746-49 (1993) (discussing distributive justice and Rawls' difference principle).

28. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977) (describing "right to treatment as an equal" in the political sphere); H.L.A. HART, THE CONCEPT OF LAW 167 (1961) ("It is . . . clear that a choice, made without prior consideration of the interests of all sections of the community[,] would be open to criticism as merely partisan and unjust."); Been, *Undesirable Land Uses*, *supra* note 24, at 1063-65; *see also* Foster, *supra* note 27, at 748 (arguing that consideration of decision-making processes is necessary to pursuit of justice).

29. *See* Been, *Undesirable Land Uses*, *supra* note 24, at 1060-68 (discussing theories of justice based on the "process" by which LULUs are distributed); Foster, *supra* note 27, at 746-49 (discussing and distinguishing issues of "distributive justice" and of justice in decisionmaking processes); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 451 (1994) [hereinafter Torres, *Environmental Burdens*] ("If justice is to be achieved, one must consider not only the distributional impacts that environmental remedies will have, but also the decision making process by which such impacts are allocated.").

30. *See* Been, *Undesirable Land Uses*, *supra* note 24, at 1006 (noting need for clarification of term "justice").

31. As discussed further below, the relationship between distributive and political justice presents its own set of complex issues. *See infra* Part I.B.3.

a. Environmental justice as distributive justice

Many communities suffer the ill effects of environmental problems or the stigma of socially undesirable land uses. To some extent, all communities must be expected to bear some such burdens as unavoidable by-products of a complex industrial society. But whether these burdens are "equitably" distributed among communities is a central theme of the environmental justice movement. Analysis of this question is fraught with difficulty. Much depends upon how relevant communities are defined[32] and upon what constitutes a "proportional" distribution of desirable or undesirable land uses.[33] There are no easy or absolute answers to either of these questions. However, that it is difficult to define an abstract measure of "community" or "equity" does not mean that unfair disparities do not exist. Nor does it mean that communities are never justified in feeling "put upon" by a disproportionate burden.

The environmental justice literature includes frequent reference to studies suggesting that minority and low-income communities currently endure undesirable land uses to a greater extent than other communities.[34] Two of these studies, both concerning the current

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32. Defining what constitutes a "community" for purposes of evaluating the distribution of environmental burdens presents a significant challenge. What percentage of minorities is necessary to call a community a "minority" community? What income level is necessary to call a community a "low-income" community? And where are the lines defining communities drawn? Around municipal borders? By zip code? By census tract? By the subjective description of neighborhood as defined by the individuals who perceive themselves to be affected by the action? *See generally* Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is How We Measure*, 21 FORDHAM URB. L.J. 633 (1994) (discussing difficulties in defining population types and communities' geographic boundaries); John J. Fahsbender, Note, *An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context*, 5 N.Y.U. ENVTL. L.J. 120 (1996) (discussing importance of boundary-drawing to assessing claims of distributional injustice and suggesting factors to be considered in the process).

33. Few would say that a "proportionate" distribution means an absolutely equal distribution. If pure equality were required, then the goal of equality would end up trumping many of the other factors that determine an ideal distribution. Zoning, designed to organize land uses to eliminate undesirable land use conflicts, would be undermined. Various land use characteristics used to determine the desirability of siting certain types of land uses in certain areas, such as proximity to railroads for businesses requiring access to transportation or stable soils for heavy structures, would also become irrelevant. A community's desire for a particular land use would become irrelevant. While environmental justice advocates are critical of many zoning ordinances for concentrating noxious uses in poor or minority areas and are critical of many siting decisions for unnecessarily placing LULUs in their neighborhoods, they do not suggest that equality should take precedence over every other concern driving land use decisions.

But once the goal of absolute equality is rejected, one encounters the difficult and value-laden task of determining what distribution is "proportionate." *See* Been, *Undesirable Land Uses*, *supra* note 24, at 1028-55 (discussing and critiquing various conceptions of fairness in distribution of environmental burdens); Blais, *supra* note 10, 100-08 (discussing multiplicity of factors that may explain why seemingly unequal distributions may be considered appropriate or even desirable).

34. The studies have been somewhat controversial. Criticism of the studies falls into two categories. The first category of criticism acknowledges that disproportionate burdens exist,

distribution of hazardous sites, were central to the development of the environmental justice movement. First, in a 1983 study the United States General Accounting Office ("GAO") found a correlation between the racial and economic demographics of communities in eight southeastern states and the communities' proximity to hazardous waste landfills.[35] The second well-publicized study on disproportionate burdens was conducted by the United Church of Christ Commission for Racial Justice, which evaluated the racial and economic composition of communities surrounding contaminated sites.[36] The Commission Report, published in 1987, concluded that race was the most significant factor in predicting the likelihood of living near a hazardous waste site.[37] The Commission's data indicate that income was the next most important factor.[38] A 1994 follow-up study, Toxic Wastes and Race Revisited, found that the average percentage of nonwhites who live near hazardous waste sites had increased since the 1987 study.[39] Regional studies of the demographics of hazardous facilities have documented similar distributional disparities.[40]

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but questions whether they are attributable to discriminatory treatment. *See, e.g.*, Been, *Undesirable Land Uses*, *supra* note 24, at 1014-15; Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994) [hereinafter Been, *Market Dynamics*]; Richard A. Samp, *Fairness for Sale in the Marketplace*, 9 ST. JOHN'S J. LEGAL COMMENT. 503 (1994); *cf.* Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121, 138 (implying possibility that disparate impacts might exist). The second category of criticism questions whether the disproportionate burdens asserted by the environmental justice movement exist at all. *See, e.g.*, Blais, *supra* note 10, at 85-87; Kevin, *supra*, at 133-38; *cf.* Blais, *supra* note 10, at 80 (questioning whether admittedly disproportionate distribution of allegedly undesirable land uses is necessarily unfair from host community's perspective).

The distinction is important. Authors in the first category acknowledge the presence or possibility of distributional injustice, notwithstanding their skepticism about whether the distributional injustice resulted from political injustice. It is only the authors in the second category who contend that the environmental justice movement does not present legitimate claims for either distributive or political justice.

35. The GAO Report found that African-Americans comprised the majority of the population near three of the four landfills identified within the study area. *See* GAO REPORT, *supra* note 7, at 1. In addition, the landfills were all located in areas that were relatively poor. *See id.* app. 1, at 4.

36. *See* UCC REPORT, *supra* note 7. The report found that the average percentage of minorities located in communities near commercial hazardous waste facilities was significantly greater than that of communities without such facilities. *See id.* at xiii, 13, 23. The UCC Report also found that people of color were more likely to live near an "uncontrolled" hazardous waste site, such as an abandoned facility or landfill, than whites. *See id.* at xiv-xv, 13, 17, 23.

37. *See id.* at 13, 15-16, 23.

38. *See id.* at 41-42.

39. *See* DR. BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED 2-5 (Center for Policy Alternatives 1994). The updated study was co-sponsored by the United Church of Christ Commission for Racial Justice, the Center for Policy Alternatives, and the National Association for the Advancement of Colored People.

40. *See, e.g.*, Been, *Undesirable Land Uses*, *supra* note 24, at 1012-13 (discussing studies in New Jersey, Louisiana, Texas, Los Angeles, and Saint Louis).

Studies of non-hazardous LULUs indicate that they are also disproportionately located in minority or low-income communities. While the evidence is somewhat limited, regional studies have documented disparate burdens of non-hazardous waste disposal facilities,[41] and of social service facilities such as homeless shelters, homes for the mentally disabled, and halfway houses.[42]

Environmental justice concerns are not only raised by the distribution of specific facilities or contamination sites;[43] they are also raised in connection with environmentally hazardous living or working environments.[44] Studies have shown a correlation between race and exposure to air pollution, between race and lead poisoning, between race and pesticides, and between race and exposure to occupational hazards.[45]

b. Environmental justice as political justice

Environmental justice implicates not only distributive justice, but also political justice. What I term "political justice" concerns the fairness of the decisionmaking process.[46] Professor Ronald Dworkin captures this conception of justice with his reference to the ideal that all citizens should be treated "with equal concern and respect."[47] For

41. *See, e.g.*, Cole, *Empowerment as the Key*, *supra* note 13, at 624-25 & n.17 (describing studies on distribution of garbage dumps).

42. *See, e.g.*, Been, *Undesirable Land Uses*, *supra* note 24, at nn.61-67 & accompanying text (discussing studies finding disparities in the distribution of social service facilities).

43. *See supra* notes 35-42 and accompanying text (discussing distribution of specific LULUs).

44. *See generally* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 3 (Bunyan Bryant & Paul Mohai eds., 1992) [hereinafter A TIME FOR DISCOURSE] (containing studies correlating race and poor environmental conditions).

45. *See, e.g.*, Cole, *Empowerment as the Key*, *supra* note 13, at 625 n.17 (discussing studies documenting such correlations).

46. Neither the imposition of an undesirable land use nor the denial of an environmental benefit means, per se, that the decision to impose the harm or deny the benefit was politically unjust. As Professor Dworkin notes, if a group's interest "is taken into account it may nonetheless be outweighed by the interests of others who will gain from the policy." DWORKIN, *supra* note 28, at 273. Political justice concerns fair treatment; it does not guarantee particular results.

47. *Id.* at 272-73; *see also* Been, *Undesirable Land Uses*, *supra* note 24, at 1063-64 (quoting Professor Dworkin and stating that decision-making process could be considered unjust if it "failed to treat people with 'equal concern and respect,' instead valuing certain people less than others"). Dworkin identifies two distinct forms of equality within the phrase "equal concern and respect." DWORKIN, *supra* note 28, at 273. One is the "right to equal treatment, that is, to the same distribution of goods or opportunities as anyone else has or is given." *Id.* In this sense, "equal concern and respect" is about distributive justice. The second form of equality within the phrase "equal concern and respect" is "the right to treatment as an equal." *Id.* As Dworkin states: "This is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed." *Id.* The use of the term "equal concern and respect" in this Article refers to this second form of justice.

Professor Dworkin considers the right to "treatment as an equal" to be more "fundamental"

example, if an African-American neighborhood rather than a white neighborhood was selected as the site for a new prison because the decisionmakers valued the interests of the white neighborhood more than the interests of the African-American neighborhood, then the African-American neighborhood was not treated with equal concern and respect. More generally, the familiar term "environmental racism" describes a type of political injustice—namely, the failure to treat minority communities with the same concern and respect as white communities.[48]

Claims for environmental justice often include both distributive and political components. Using the prison-siting example, the African-American community may be concerned about such issues as the impact of the prison on the quality of life, property values, and the like. But the community may be as or more concerned about the decision as symptomatic of the lack of respect the decisionmaking body has for the community. The community may view the decision as indicative of their lack of status in the body politic.[49]

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than the "right to equal treatment." *Id.* In other words, he considers political justice to be more important than distributive justice. While accepting his distinction between the two forms of justice, this Article recognizes both as significant without attempting to prioritize between them.

48. Race-based injustice is only one form of political injustice. Siting decisions may favor neighborhoods of rich potential political contributors rather than neighborhoods of poor unregistered voters; neighborhoods of one political party rather than neighborhoods of another; neighborhoods that have lobbied for their interests rather than neighborhoods which have not; neighborhoods that decisionmakers relate to on a cultural level rather than neighborhoods that are culturally distinct. In all of these instances, the disfavored community is not receiving equal concern and respect. That said, some forms of preference may be considered more harmful than others. This Article presumes that preferences for dominant groups (such as whites and the wealthy) at the expense of less powerful groups (such as minorities and the poor) are objectionable because they are inconsistent with social justice.

49. Some have explained decisions resulting in disproportionate burdens by reference to the burdened groups' lack of political and economic power. *See, e.g.*, Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 346 (1993) (suggesting that minorities' lack of political representation may be one cause of environmental racism); Cole, *Empowerment as the Key*, *supra* note 13, at 628 (same); Gauna, *supra* note 6, at 32-33 (explaining view that poor and minority communities are intentionally targeted because they lack political power); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 806-11 (1992) [hereinafter Lazarus, *Pursuing "Environmental Justice"*] (suggesting that minorities' lack of political power may be one cause of environmental inequities); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 399 (1991) [hereinafter Godsil, *Remedying Environmental Racism*] (same); *see also* Blais, *supra* note 10, at 90, 120 & n.184 (summarizing views of writers on this issue). The problem, under this conception, is that the pluralist model of decisionmaking fails citizens lacking political and economic power. *See* Brion, *supra* note 24, at 439-54 (describing how pluralist decision-making model fails to take into consideration lack of influence citizens, especially poorer citizens, have on siting decisions); *cf.* William A. Shutkin, *The Origins of Environmental Justice: The Concept of Environmental Justice and a Reconception of Democracy*, 14 VA. ENVTL. L.J. 579, 579-80 (1995) (suggesting that environmental justice movement provides opportunity to improve democratic participation in decision-making processes).

The implication of this assessment is that greater power would result in decisions that better

There is some debate regarding the role that claims for political justice—and more particularly claims of racial discrimination—should play in the environmental justice movement. As Professor Gerald Torres has observed, the environmental justice movement arose out of the civil rights movement and is therefore inclined to apply civil rights theories and approaches.[50] Environmental harms suffered by minorities are often presumed to be a result of "environmental racism."[51] Professor Torres wisely cautions against a premature allegation of environmental racism, particularly where the movement presumes (without more) that existing disparities are the result of discriminatory decisions.[52] He observes that the reasons for an existing distributional inequity may often be more complex than is suggested by the allegation of racist intent.[53] Professor Torres advises the environmental justice movement to use the charge of racism carefully lest its importance and power be diluted by its application to circumstances where its use may be unwarranted.[54]

Professor Torres, however, goes one step farther. He argues that the movement's emphasis on racism "seems designed to begin a relatively fruitless search for a wrong-doer, or in other words, the bad person with evil intent.... [T]his is probably the wrong road to follow if real changes for the communities at risk are to be achieved."[55] Professor Torres acknowledges the existence of a "subcategory" of activities that could be characterized as racist, or, in his terms, considered "part of a system of racial subordination."[56] This subcategory, however, is simply a "subset of a more general category of inquiry that has as its object a close examination of the distributional effects

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represent the affected community's interests. But the pursuit of justice as described in this Article—justice as equal respect and concern for all—would require that such respect be given regardless of the political or economic power of any particular group. As a practical matter, however, increasing the political and economic strength of certain groups would allow them to fare better in a less than ideal political context. To the extent that a community is able to demonstrate that it has been treated unjustly, its capacity to embarrass the decisionmaking body with that proof could serve to increase the community's political power. Power may be the only practical route to receiving equal concern and respect.

50. *See* Torres, *Environmental Justice*, *supra* note 10, at 602, 604.

51. *See id.* at 602-03. *See generally* ROBERT BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY (1990) [hereinafter BULLARD, DUMPING IN DIXIE] (arguing that the disproportionate presence of undesirable sites in minority neighborhoods is the result of racial bias). Cases raising intentional racial discrimination in siting disputes have, however, failed to meet the high evidentiary burden for proving discrimination under the Equal Protection Clause. *See infra* note 151 and accompanying text (citing cases and commentary).

52. *See* Torres, *Environmental Justice*, *supra* note 10, at 603.

53. *See id.*

54. *See id.* at 602-05.

55. *Id.* at 602.

56. *Id.* at 604.

of environmental policy."[57] Thus, under Professor Torres' characterization, the pursuit of political justice is generally "the wrong road to follow" and, even where merited, it is a sideline to the more important issue of distributive justice.[58]

Professor Torres' concerns regarding the danger of "knee-jerk" and unsubstantiated accusations of racism are well taken. That charges of racism should be used cautiously does not, however, mean that the pursuit of political justice should be minimized in comparison with the pursuit of distributive justice. In many local settings, the political justice element of the environmental justice movement is as central as the achievement of improved environmental quality. When a legitimate question of fair process arises, the environmental issue becomes "a single dimension of an overall social condition."[59] As such, local grassroots debates about individual decisions with environmental consequences become steps in a much larger effort to increase the political status of the burdened community.

Questions of political justice arise in a number of different settings, from the typical siting dispute to government policy, enforcement, or remediation decisions. In the siting context, a question of political justice would arise if a community believed that it had been selected for an undesirable use due to the decisionmakers' failure to treat that community with the same concern and respect given to other communities.[60] The environmental literature frequently illuminates this form of injustice by reference to a California study on siting waste incinerators.[61] In 1984, a private company, Cerrell Associates, com-

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57. *Id.*

58. *See id.* at 602, 604.

59. Walter Willard, *Environmental Racism: The Merging of Civil Rights and Environmental Activism*, 19 S.U. L. REV. 77, 80 (1992); *see also* Bullard, *Anatomy of Environmental Racism*, *supra* note 12, at 30 (stating that "[t]he quest for environmental justice . . . extends the quest for basic civil rights"); Foster, *supra* note 27, at 748 (observing that "decisionmaking power and procedures" and "social structures and institutional contexts," rather than distributive outcomes, are central to environmental racism (quoting IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 18, 20 (1990))); Jordan & Snow, *supra* note 12, at 90 (stating that, in environmental justice disputes, the fundamental issues are "[w]ho shall choose, and how shall the choices be made?").

Professor Torres' reference to "environmental policy" suggests that his focus may be directed toward the environmental justice movement's critique of environmental law and environmental institutions. In that limited domain, the search for a "wrong-doer" may indeed by misguided and, potentially, counter-productive. Perceived more broadly, however, the environmental justice movement's grassroots, localized thrust for greater fairness in local decisionmaking has as much to do with political as distributive justice. As Professor Bullard has stated: "What do grassroot leaders want? These leaders are demanding a shared role in the decision-making processes that affect their communities. They want participatory democracy to work for them." Bullard, *Environmental Justice for All*, *supra* note 23, at xvii.

60. *See, e.g.*, GAY, *supra* note 11, at 21-25 (describing tendency to target minority communities for undesirable land uses).

61. *See* Bullard, *Anatomy of Environmental Racism*, *supra* note 12, at 18.

pleted a much-publicized report on behalf of the California Waste Management Board entitled Political Difficulties Facing Waste-to-Energy Conversion Plant Siting.[62] The report concluded that "all socioeconomic groupings tend to resent the nearby siting of major facilities, but middle and upper socioeconomic strata possess better resources to effectuate their opposition. Middle and higher socioeconomic strata neighborhoods should not fall within the one-mile and five-mile radius of the proposed site."[63]

The implication of the Cerrell Associates' report is that decisionmakers should site facilities in poor rather than wealthy neighborhoods to avoid the political opposition that wealthy communities could more effectively mount. A siting decision supported by this rationale would fail to treat all communities with the "equal respect and concern" essential to a fair decisionmaking process.

Most siting decisions are not, however, accompanied by the kind of "smoking gun" presented by the Cerrell Associates report. Since government and industry are unlikely to announce intentional discrimination against low-income or minority communities, instances of unfair treatment may be difficult to identify.[64] A decision motivated by discriminatory factors may be justified publicly with reference to allegedly neutral factors.[65] In many cases, the discrimination may be entirely unconscious.[66] Thus, instances of unfair treatment may be more pervasive than is suggested by observing only explicit acts of discrimination.[67]

Questions concerning the fairness of decisionmaking processes also arise when federal, state, or local governments make environmental policy decisions.[68] Environmental policy choices may favor certain groups by providing them with more benefits or burdens

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62. *See id.* (citing Cerrell Associates' report).

63. *Id.* (quoting Cerrell Associates' report).

64. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (suggesting that overt discrimination of post-slavery era has been sublimated and is therefore rarely made explicit).

65. *See id.* at 319 (describing assertion that racism hides behind race-neutral justifications).

66. *See id.* at 328-44 (discussing psychological theories and evidence on unconscious racism).

67. Professor Blais' contention that "political and private officials who make siting decisions are rarely accused of engaging in intentional, consistent race discrimination," Blais, *supra* note 10, at 81, seems somewhat at odds with the depiction of the movement presented by its advocates. Concerns about discrimination are often at the center of environmental justice disputes.

68. *See generally* Lazarus, *Pursuing "Environmental Justice," supra* note 49 (discussing the significance of governmental environmental policy decisions on distributional outcomes); Torres, *Environmental Burdens, supra* note 29 (discussing importance of injecting environmental justice concerns into governmental decisions affecting the environment).

than others.[69] For example, if saving open space were to become a governmental priority over slowing pollution in urban areas, that policy choice would be to the benefit of those already living in more remote areas, such as the suburbs. Poorer urban communities would be less likely to receive a benefit from such a policy choice. Thus, to the extent that decisions are made that appear less likely to consider the needs of minority or low-income communities, such communities may not be receiving equal concern and respect in the decisionmaking process.

Environmental enforcement decisions may also favor some at the expense of others. Agencies lack sufficient funds to enforce every violation, and enforcement agencies have considerable discretion in choosing enforcement priorities.[70] Enforcement issues arise in connection with many different types of environmental laws, including national, state, and local pollution control laws, laws establishing agricultural pesticide practices, laws to alleviate lead poisoning, and the like. To the extent governmental decision-makers place less priority on enforcement in communities of color and low-income communities, these communities may not receive "equal concern and respect."[71]

Where environmental contamination has already occurred, federal, state, and local governments likewise have considerable discretion in determining how and when to remediate contaminated sites.[72] If the government's remediation decisions are influenced by the demographics of the communities adjoining contaminated areas, the decisionmaking process could be considered unjust. According to a 1992 study conducted by the *National Law Journal*, uncontrolled hazardous waste sites located near minority or low-income communities

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69. *See* Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 792-806 (discussing distributional implications of environmental policy decisions).

70. *See id.* at 816-17; *see also* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (Brennan, J., concurring) (holding that agency's enforcement decisions are "generally committed to an agency's absolute discretion").

71. *See* Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN'S J. LEGAL COMMENT. 625, 640, 648-51 (1994) (describing enforcement provisions of numerous environmental statutes and suggesting that enforcement behavior may be skewed by political pressures and racism); *see also* GAY, *supra* note 11, at 25-26. There is, however, relatively little data on differential enforcement practices. *See* Gauna, *supra* note 6, at 34-36 (discussing enforcement of environmental laws and lack of data on differential enforcement practices); Kuehn, *supra*, at 627-34 (discussing and criticizing exsisting studies on potentially discriminatory enforcement patterns); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 818-19 (same).

72. *See, e.g.*, Wells v. United States, 851 F.2d 1471, 1478 (D.C. Cir. 1988) (holding that "[the Administrator's] decision to order further study" and not clean up site immediately "was based on economic, social and political policy decisions" and was within the bounds of his discretionary power).

are being cleaned up at a slower rate than hazardous waste sites in other areas.[73] The study also indicated that the remedies chosen for these sites were not as protective of human health as those selected at other sites.[74] Other studies, however, have been less conclusive.[75]

3. The relationship between distributive and political justice

The correlation—or lack thereof—between distributive and political justice has been a subject of much dispute. Does an unjust process necessarily lead to an unjust distribution? Does a just process necessarily lead to a just distribution? Or, phrased conversely, is an unjust distribution necessarily the result of an unjust process, and a just distribution necessarily the result of a just process? What is clear is that no absolutes can be stated; the extent of the correlation will depend upon the particular facts associated with particular claims and how those facts are interpreted.

The first question to be addressed is whether political injustice necessarily results in distributive injustice. If a community consistently fails to be treated with equal concern and respect, then an unequal distribution of burdens can be expected, particularly over time. If a county government consistently sites undesirable facilities, such as landfills, jails, bus depots and the like in certain neighborhoods because it values those neighborhoods less than others, then the burdened neighborhoods are likely to have a disproportionate share of undesirable facilities in comparison with more favored neighborhoods. Thus, under some circumstances unjust processes could lead to unjust distributions. Conversely, unjust distributions could, under such circumstances, be indicative of an unjust process.

In a given decision, however, the failure to treat a neighborhood with equal concern and respect does not necessarily result in an unjust distribution. For example, a regional government concerned about upsetting its wealthy supporters in a suburban community may instead site a facility in a rural poor community. The decisionmaking process could thus be considered "unjust" because it failed to consider all communities with equal concern and respect. If the rural

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73. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-S12; *see also* Kuehn, *supra* note 71, at 634-38 (discussing studies of demographics associated with cleanup of hazardous waste sites, and noting that presence and extent of correlation varied by study).

74. *See* Kuehn, *supra* note 71, at 634-35 (presenting *National Law Journal* findings); *see also* GAY, *supra* note 11, at 26-27 (same).

75. *See* Blais, *supra* note 10, at 87-89 (reviewing studies critical of contention of disparate enforcement and cleanup efforts); Kuehn, *supra* note 71, at 635-38 (discussing studies of cleanups finding no disparity in cleanup rates or explaining disparity through reference to factors unrelated to race or poverty).

poor community contained few undesirable land uses, however, siting the waste facility in the poor community would not result in a disproportionate distribution, notwithstanding the unfairness of that decisionmaking process. Conversely, the fact that a decision does not impose a disproportionate impact on a community does not mean that the community does not have a claim of political injustice.

This begs the second question: does political justice necessarily result in distributive justice? If all communities are consistently treated with equal concern and respect, one would expect that no group of citizens would be forced to absorb a disproportionate share of undesirable land uses. While any one community would have to cope with the burden created by any particular decision, one would expect that, over time, the distribution of burdens would even out.[76] Conversely, where undesirable land uses appear to be distributed in a manner that does not require any one neighborhood to absorb a disproportionate amount, the distributive equity may be indicative of political justice.

Nonetheless, under some circumstances, political justice may not lead to distributive justice. For example, a decisionmaker may give all communities equal concern and respect, but may nonetheless select a site that increases the distributional disparity between the selected community and other communities. Decisions regarding the siting of undesirable land uses turn on a wide range of factors.[77] Thus, the suitability of the site based on nondemographic factors may be important enough to override the unfair distribution that its placement causes.[78]

In addition, what some may consider an "unfair" distribution may be a desirable distribution to others. For example, low-income neighborhoods may encourage industrial uses in the hope of increasing jobs.[79] In such instances, the siting decision might serve rather

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76. As discussed *supra* note 33, defining what constitutes a "disproportionate" burden is itself a daunting challenge subject to varying interpretations. Because absolute equality in distribution is unlikely to be a desirable end, the task is to define what distribution is "proportionate." To the extent that zoning laws concentrate land uses to ensure that no one endures certain types of burdens, the concentration of land uses is not necessarily unjust. Where the concentration impacts on certain residential users more than others, however, the issue of proportionality arises.

77. *See, e.g.*, Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 677 (S.D. Tex. 1979) (observing the multiple factors relevant to siting decisions such as land values, tax base, and health and safety issues), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986).

78. *See* DWORKIN, *supra* note 28, at 273 (noting that even if a group's interest receives equal concern and respect, it may nonetheless be outweighed by other factors).

79. *See* Robert D. Bullard, *Environmental Blackmail in Minority Communities* [hereinafter Bullard, *Environmental Blackmail*], *in* A TIME FOR DISCOURSE, *supra* note 44, at 82-95; Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 808, 822-23.

than disserve the poor or minority community.[80] Political justice—treating all neighborhoods with equal concern and respect—may mean creating distributional disparities where desired. Conversely, the fact that a decision led to disproportionate results does not necessarily mean that the decision was unjust.

The converse question of whether unjust distributions necessarily result from unjust processes becomes even more important when looking at distributional results over time. As previously noted, the disproportionate result of a particular decision does not necessarily mean that the process was unjust. More generally, what does the existence of current disparities say about prior patterns of decisionmaking? There is some evidence that currently unjust distributions do not necessarily result from past political injustice. Market dynamics may cause demographic disparities to arise after a facility is sited.[81] At the time of a siting decision, an area may not be a low-income or minority area. The siting decision may, however, lower property values and offer jobs, both of which may in turn attract lower income residents.[82] In addition, the siting of undesirable land uses may prompt the departure of a community's wealthier or white residents.[83] Due to economic constraints and housing discrimination, the community's lower-income and minority residents may find it more difficult to move, resulting in a higher concentration of minority and low-income residents near the undesirable use than was present at the time of the siting decision.[84] Thus, a disproportionate burden could arise even if earlier land use decisions were not politically unjust.

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80. Professor Blais asserts that communities choose to take on environmental burdens in exchange for non-environmental benefits, such as jobs and tax proceeds. If the pursuit of environmental equity kept an already-burdened community from obtaining additional industry, then the quest for environmental equity might deprive such a community of the opportunity to obtain the non-environmental benefits. Thus, the quest for equity might work against the interests of the communities it is designed to serve. *See* Blais, *supra* note 10, at 82-83, 105-08.

81. *See* Been, *Market Dynamics*, *supra* note 34, at 1398; Samp, *supra* note 34, at 504-505. *But see* Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 460-66 (1994) [hereinafter Bullard, *Legacy of American Apartheid*] (challenging methodology of Been's analysis of post-siting market dynamics and countering assertion that disparities arose after siting); Charles P. Lord, *Environmental Justice Law and the Challenges Facing Urban Communities*, 14 VA. ENVTL. L.J. 721, 727-729 (1995) (countering assertions that disparities arise after siting).

82. *See* Been, *Market Dynamics*, *supra* note 34, at 1388-90; *see also* Blais, *supra* note 10, at 114-15 (describing increase in number of minority residents in Richmond, California as response to jobs created by siting of environmentally sensitive land uses).

83. *See* Been, *Market Dynamics*, *supra* note 34, at 1388-90; Bullard, *Anatomy of Environmental Racism*, *supra* note 12, at 21.

84. *See* Bullard, *Anatomy of Environmental Racism*, *supra* note 12, at 21; *see also* Blais, *supra* note 10, at 118-20 (recognizing lack of housing mobility for minorities, but asserting that that problem should be addressed directly rather than through efforts to achieve distributional equity of environmentally sensitive land uses).

A conclusion that a particular decisionmaking process under scrutiny is just, however, does not mean that the question of political justice is irrelevant.[85] While a siting decision may have been based on an allegedly neutral factor, such as cost, that factor itself may be a consequence of discrimination.[86] For example, where cost appears to have been the driving force behind a siting decision, it must be asked why land values are cheaper in minority areas. Where a low-income or minority community advocates for an environmentally undesirable facility to increase employment opportunities, it must be asked why the poor and minorities must encourage industrial uses detrimental to their health when wealthier communities are not faced with such dilemmas.[87] And with respect to disparities in distribution that arise after a siting decision due to the higher mobility of white and more affluent residents, it must be asked why it is easier for white or wealthy residents to move away from an undesirable use than minority or low-income residents, even if the initial siting decision was not discriminatory.[88]

Thus, even if disproportionate burdens are not caused directly by unfair siting decisions, they may nonetheless reflect deeper problems of political injustice. For that reason, many in the environmental justice movement focus not only on particular local battles regarding facilities or environmental conditions, but on broader questions of social and economic justice as well.[89]

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85. *See* GAY, *supra* note 11, at 28 (arguing that a recognition that minorities experience disproportionate levels of environmental risk because of "housing patterns, land ownership and use, and lack of political power" does not answer the underlying question of why these conditions continue to be exploited).

86. *See* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 496 (1992) ("Because racial inequalities snowball, it is difficult to disentangle cause and effect . . . ."); Lord, *supra* note 81, at 728 (describing a variety of social and economic factors that contribute to disparate siting in Boston area); *see also* Orlando E. Delogu, *"NIMBY" Is A National Environmental Problem*, 35 S.D. L. REV. 198, 206 (1990) (observing that poor municipalities are increasingly reluctant "to see themselves as LULU dumping grounds capable of being bought by market forces").

87. *See* GAY, *supra* note 11, at 21 (describing "job blackmail" which forces workers of color to accept environmentally hazardous facilities in order to obtain jobs which are otherwise scarce due to racial discrimination); Bullard, *Anatomy of Environmental Racism*, *supra* note 12, at 22-23 (same); Bullard, *Environmental Blackmail*, *supra* note 79, at 82-95 (same); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 808 (same).

88. *See* Lord, *supra* note 81, at 728 (describing limited housing options for people of color in Boston); *see also* Blais, *supra* note 10, at 118-20, 126-27 (acknowledging that minorities and poor have less mobility than others, but indicating that some may nonetheless prefer living close to environmentally sensitive land uses).

89. *See* Dana Alston, *Introduction*, *in* WE SPEAK FOR OURSELVES, *supra* note 12, at 3 (noting that communities of color have integrated environmental concerns into broader agenda emphasizing social, racial, and economic justice); Ferris & Hahn-Baker, *supra* note 5, at 67 (noting that "this struggle for environmental parity for all races is inextricably linked to an aggressive overall social justice agenda"); Foster, *supra* note 27, at 731-38 (discussing need to move beyond focus on disproportionate outcomes and beyond focus on individual acts of discrimination to

C. *Achieving Environmental Justice*

Many in the environmental justice movement are exploring mechanisms to prevent environmental injustices from occurring or to provide remedies where they have already occurred. Some of the remedies directly address questions of distributive or political justice. Other proposals, however, are more instrumental: they use legal mechanisms unrelated to questions of "justice" to accomplish particular ends.

Most of the attention on the use of environmental laws in the pursuit of environmental justice has focused on their ability to provide an instrumental means to the goal of stopping a project.[90] A siting agency's violation of substantive standards imposed by environmental laws would provide one basis for a legal challenge. For example, if a local government allowed a wetland to be filled without a permit, an adjoining community could bring suit under applicable federal regulations.[91] Similarly, if a proposed development violated a local zoning code, the violation could provide the basis for a legal challenge.

Violations of procedural rules, many of which are established by environmental laws, present another potential basis for instrumental lawsuits.[92] For example, if a decisionmaking body neglects to provide the required notice of a hearing, that omission could provide a basis for a legal challenge—even if the lack of appropriate notice did not

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consider social and economic context that leads to such disparities); Gauna, *supra* note 6, at 12 (stating that environmental justice activists "see environmental problems as only one part of the larger social issues of racism and cultural and economic injustice"), 27-31 (arguing for "social justice" perspective on environmentalism); Michael Gelobter, *Toward a Model of Environmental Discrimination, in* A TIME FOR DISCOURSE, *supra* note 44, at 74 (arguing that environmental discrimination should "be seen as the interaction of internal processes, external structures, and wider ideological and historical contexts and understandings"); Michael Guerrero & Louis Head, *The Environment—Redefining the Issue, in* WE SPEAK FOR OURSELVES, *supra* note 12, at 11 (noting the importance of "defining how environmental issues fit within a social, racial and economic justice framework); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 825-26 (noting that "distributional inequities that appear to exist in environmental protection are undoubtedly the product of broader social forces" and that environmental justice problems will not ultimately be solved without attention to broader issues of discrimination and poverty); Torres, *Environmental Justice, supra* note 10, at 617-21 (suggesting need to place environmental justice concerns within broader objective of achieving sustainable development).

90. *See generally* Luke J. Cole, *Environmental Justice Litigation: Another Stone in David's Sling,* 21 FORDHAM URB. L.J. 523, 526-28 (1994) [hereinafter Cole, *Environmental Justice Litigation*] (describing use of environmental laws on behalf of poor and minority communities); Michael B. Gerrard, *The Role of Existing Environmental Legislation in the Environmental Justice Movement,* 9 ST. JOHN'S J. LEGAL COMMENT. 555 (1994) [hereinafter Gerrard, *Role of Existing Legislation*] (discussing environmental laws that could be useful to communities opposing siting decisions or seeking to improve environmental conditions).

91. *See* 40 C.F.R. § 230.10 (regulations for obtaining permit to fill wetlands pursuant to the Clean Water Act).

92. *See* Cole, *Environmental Justice Litigation, supra* note 90, at 527-28.

materially affect the decisionmaking process and its fairness.[93] While all of these legal challenges may accomplish the desired end (e.g., they may defeat a proposal to site a LULU in a poor minority neighborhood), they do not directly address the perceived unfairness of the decisionmaking process or its distributional outcome. Suits about wetland permits, zoning code violations, or hearing notifications will not, generally speaking, raise the issues of justice that may have motivated the suits. As stated by attorney Michael Gerrard, "[w]here the communities are able to participate in the legal process to fight facilities, often they are required to focus on objections that are peripheral to their substantive concerns."[94]

The remainder of this Section explores mechanisms explicitly designed to raise issues of distributive and political justice. As Professor Vicki Been has suggested, such proposed remedies are best understood with reference to the particular form of injustice they are intended to cure.[95] The types of remedies can be grouped into the two basic categories discussed above: remedies designed to achieve distributional justice, and remedies designed to achieve political justice.[96]

1. *Achieving distributional justice*

Remedies for distributional injustice include both preventive and remedial approaches. The preventive approach involves the consideration of demographic impacts in the decisionmaking process. The remedial approach involves identifying and developing legal remedies where a perceived distributional injustice has already occurred.

a. *Improving distributional outcomes*

The most well-known effort to improve the distributional outcomes of environmental decisionmaking is President Clinton's February

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93. To the extent that the procedural challenge goes to the fairness of the decisionmaking process, then the environmental law claim would be more than instrumental; it would present an issue of political justice. Such claims are discussed *infra* notes 145-49 and accompanying text.

94. Gerrard, *Role of Existing Legislation*, *supra* note 90, at 559.

95. *See* Vicki Been, *Conceptions of Fairness in Proposals for Facility Siting*, 5 MD. J. OF CONTEMP. LEGAL ISSUES 13, 13 (1994) [hereinafter Been, *Conceptions of Fairness*].

96. Professor Been further differentiates the forms of justice in question. Under distributive justice, she considers conceptions of fairness requiring the equal division of the burdens of LULUs, schemes that would equally disperse them, schemes that would equalize the benefits and burdens of siting by providing compensation to burdened communities, and remedies that would require more LULUs to be sited in areas currently free from them in order to address the past history of undesirable land uses in minority areas. *See* Been, *Undesirable Land Uses*, *supra* note 24, at 1028-52. Under "fairness as process," Professor Been considers remedies addressing intentional race discrimination and remedies to encourage "treatment as equals" in the decisionmaking process. *See id.* at 1060-68.

1994 Executive Order 12,898, entitled "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations."[97] The Order addresses distributive justice as well as justice in the decisionmaking process.[98] The Executive Order states that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . . ."[99]

The Order further requires all federal agencies to develop an environmental justice strategy that identifies the distributional implications of existing programs and requires the agencies to propose revisions to improve distributional fairness.[100] It mandates that federal agencies gather information regarding demographic consequences,[101] and requires government agencies to consider the demographic implications of their decisions.[102] By explicitly requiring that demographic information be gathered and incorporated into decisionmaking processes, environmental justice advocates hope that the Executive Order will lead to a fairer distribution of the consequences of federal agency actions.[103]

The Executive Order makes clear that existing laws, such as the National Environmental Policy Act ("NEPA"), already require agencies to consider demographic effects. NEPA requires the preparation

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97. *See* Exec. Order No. 12,898, 3 C.F.R. § 859 (1995).

98. The distributional aspects of the Executive Order are discussed here. The provisions applicable to improving the decisionmaking process are discussed *infra* notes 141-44 and accompanying text, which address mechanisms for achieving political justice.

99. Exec. Order No. 12,898, 3 C.F.R. § 1-101.

100. *See id.*

101. *See generally id.* § 1-102(b) (requiring interagency working group to collect data and public input regarding environmental justice); *id.* § 1-103(a) (requiring agencies to assess program impacts on minority and low-income communities); *id.* § 1-103(a)(3) (requiring improved research and data collection on effects on both minority and low-income populations); *id.* § 3-301(a) (requiring that epidemiological and clinical studies include members of high risk groups, such as minority and low-income populations). The absence of demographic data and data linking environmental conditions to health risks has been considered a major obstacle to proving or addressing environmental justice problems. *See* Chase, *supra* note 49, at 347-53 (noting difficulties involved in relating environmental hazards to race and income); Crawford, *supra* note 6, at 280 (observing the importance of more data "evidencing actual physical harm to communities burdened by the siting of undesirable facilities" to bringing discrimination claims under the equal protection clause). Because the Order requires the government to gather needed demographic information, it has been considered a key step in overcoming this obstacle. *See* Sebastian C. Pugliese III, Comment, *Environmental Justice: Lowering Barriers to Participation*, 1995 WIS. L. REV. 1177, 1205-06.

102. *See* Exec. Order 12,898, 3 C.F.R. § 859, § 2.2.

103. *See* Gerald Torres, *Changing the Way Government Views Environmental Justice*, 9 ST. JOHN'S J. LEGAL COMMENT. 543, 547-51 (1994) [hereinafter Torres, *Changing the Way*] (examining benefits to be gained from the Executive Order).

of an environmental impact statement ("EIS") in connection with all major federal actions having a significant environmental impact.[104] The White House memorandum on the Executive Order explicitly states that "[e]ach Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA]."[105] The Council on Environmental Quality, the agency responsible for NEPA regulations, has issued an Interim Final Guidance to explain implementation of the Executive Order in the NEPA context.[106]

Similarly, the Executive Order makes clear that, under Title VI of the Civil Rights Act of 1964,[107] federally funded programs and agencies are prohibited from discriminating on the basis of race, color, or national origin.[108] The regulations implementing Title VI indicate that Title VI applies to activities having disparate impacts as well as those motivated by discriminatory intent.[109] To conform with Title VI, federally funded programs and agencies must therefore consider and avoid imposing disproportionate burdens.

Legislative efforts to prevent distributive inequalities in siting decisions have met with mixed results. At the federal level, such efforts included the Environmental Justice Act of 1993[110] and the Environmental Equal Rights Act of 1993.[111] Had they been successful, these

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104. *See* 42 U.S.C. § 4332(2)(C).

105. President's Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994) [hereinafter President's Memorandum on Environmental Justice]; *see also* Johnson, *supra* note 25, at 579-80 & n.74 (discussing Memorandum's reference to NEPA requirements). According to some commentators, NEPA itself can be read to require consideration of demographic impacts. *See id.* at 580-88; Ross, *supra* note 25, at 356-60, 366-69.

Moreover, NEPA regulations also address the problem of distributional justice—the problem of unfair concentrations of undesirable uses—by requiring consideration of cumulative impacts. *See* Ross, *supra*, at 367-68. A cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably forseeable future actions regardless of what agency . . . or person undertakes such other actions." 40 C.F.R. § 1508.7 (1996). Under this reading, the Executive Order simply renders agencies' existing authority explicit.

106. *See* Johnson, *supra* note 25, at 575 (referring to CEQ's draft guidance).

107. 42 U.S.C. § 2000(d) (1994).

108. President's Memorandum on Environmental Justice, *supra* note 105, at 280.

109. *See* Cole, *Environmental Justice Litigation*, *supra* note 90, at 531-32 (discussing applicability of Title VI to actions causing disparate impacts).

110. The Environmental Justice Act of 1993, had it been enacted into law, would have required the federal government to designate as "Environmental High Impact Areas" the 100 areas having the greatest quantities of toxins. If health impact studies had shown adverse impacts on human health, then the legislation would have prohibited siting any additional facilities that could release significant quantities of toxins in that area. *See* Been, *Undesirable Land Uses*, *supra* note 24, at 1069-72 (describing proposed legislation); Been, *Conceptions of Fairness*, *supra* note 95, at 14, 20-22 (same); Bullard, *Legacy of American Apartheid*, *supra* note 81, at 471 (same).

111. The Environmental Equal Rights Act of 1993, had it been enacted into law, would have

bills would have protected areas that were already heavily burdened from the siting of certain additional undesirable facilities.[112] Legislation to require consideration of environmental justice issues has had some success in a few states.[113] For example, New York City has adopted a "fair share" approach to achieve distributional equity.[114] Under the New York City Charter, the City must consider an area's existing burden of undesirable land uses as a factor in deciding where to place new facilities.[115]

b. Challenging distributional injustice

Once a siting decision resulting in distributional inequity has occurred, the question becomes the availability of redress. A remedy would be available only where the burdened community could articulate a right to a particular distributional outcome. Where the burdens of undesirable land uses have not been proportionately distributed, authors in the environmental justice movement have suggested legal remedies based on "disparate impacts." In general, they argue that if a minority area is already subject to a heavier burden of undesirable land uses than a white area and the proposed siting would intensify that impact, then the proposal could be said to have a "disparate impact."[116] On its face, the disparate impact test thus for-

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required the government to identify the minority or low-income areas in the country that were the most "environmentally disadvantaged," and would then have prohibited the siting of solid or hazardous waste facilities in those communities. *See* Been, *Undesirable Land Uses, supra* note 24, at 1083-84 (discussing proposed legislation); Been, *Conceptions of Fairness, supra* note 95, at 17 (same); Bullard, *Legacy of American Apartheid, supra* note 81, at 471 (same).

112. Professor Orlando Delogu has suggested further legislation to guide land use decisions throughout the nation. *See* Delogu, *supra* note 86, at 209-18. The legislation would, among other things, require that "NIMBY burdens" be fairly distributed. *See id.* at 216. He stresses that "rural, semi-depressed, or high unemployment regions in a state" should not be targeted. *See id.* at 217.

113. *See* Blais, *supra* note 10, at 92-93 (referring to state and local efforts to improve distributional burdens); Torres, *Environmental Justice, supra* note 10, at 613 n.43 (summarizing state legislative efforts).

114. *See* N.Y. CITY CHARTER, §§ 203-204 (1989); Been, *Undesirable Land Uses, supra* note 24, at 15-16; Ross, *supra* note 25, at 372. The "fair share" approach is a version of the "fair share" principles adopted by the New Jersey Supreme Court in its *Mt. Laurel* decisions. In these decisions, the New Jersey court struck down zoning regulations that had the effect of excluding the development of affordable housing. *See* South Burlington County NAACP v. Mt. Laurel, 92 N.J. 158 (1983) [hereinafter *Mt. Laurel II*]; South Burlington County NAACP v. Mt. Laurel, 67 N.J. 151 (1975) [hereinafter *Mt. Laurel I*]. The court held that all communities had an affirmative duty to provide housing opportunities for all income levels. *See Mt. Laurel II*, 92 N.J. at 214-15; *Mt. Laurel I*, 67 N.J. at 174. To effectuate the principles enunciated by the court in these cases, the New Jersey legislature passed the Fair Housing Act of 1985, which created a Council on Affordable Housing designed to determine the "fair share" of housing each community in New Jersey would be expected to permit. *See* N.J. STAT. ANN. § 52:27D-301-29 (West 1994).

115. *See* Been, *Undesirable Land Uses, supra* note 24, at 15-16 (discussing New York City Charter).

116. *See* Godsil, *Remedying Environmental Racism, supra* note 49, at 422 (1991) (stating that, under disparate impact test, "plaintiffs will have to show that the site will result in a burden on

goes an inquiry into the decisionmaking process and the attitudes motivating the siting decision.[117] It is designed to prevent a further intensification of disparate burdens.

Disparate impact tests have been suggested in a variety of contexts. Attorney Rachel Godsil has suggested new legislation creating a disparate impact test in connection with the siting of hazardous waste facilities.[118] The legislation could be modeled after civil rights laws such as Title VII of the Civil Rights Act of 1964,[119] which prohibits employment discrimination.[120] To prove a violation of Title VII, a plaintiff need not prove discriminatory intent; disparate impact is sufficient.[121]

Other authors have explored whether existing civil rights laws employing disparate impact tests could be useful in challenging siting decisions that create or exacerbate distributional inequities. Recent attention has focused on Title VI of the Civil Rights Act, which prohibits discrimination in any federally funded program, including federally funded state, local, and private entities.[122] Since Title VI's implementing regulations apply to disparate impacts as well as motives, Title VI may provide a potential remedy for distributional injustice.[123]

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the community *greater* than the burden on a white community due to the presence of other pollutants: uncontrolled toxic waste sites, solid waste landfills, or polluting industry").

117. *See id.* (explaining that disparate impact tests focus on "the *consequences* of site selection rather than the motivations"). Although disparate impact tests ostensibly address only distributional issues, disparate impact tests could also be seen as a "proxy" for discriminatory intent. In that sense, a disparate impact test could be seen as indirectly addressing political as well as distributive justice.

118. *See id.* at 421-24; *see also* Been, *Undesirable Land Uses*, *supra* note 24, at 1082-83 (discussing Godsil's proposal).

119. *See* 42 U.S.C. § 2000e-1 to -17 (1994).

120. *See* Godsil, *Remedying Environmental Racism*, *supra* note 49, at 421.

121. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971); Godsil, *Remedying Environmental Racism*, *supra* note 49, at 421 (discussing disparate impact test articulated in *Griggs*). Like some Title VII case law which has required an employer to show "business necessity" to rebut an employee's claim of discriminatory impact, Godsil's proposal would shift the burden to the defendant to demonstrate that the location chosen for a hazardous waste facility is an "environmental necessity." *Id.* at 422-23 & nn.211, 214.

122. *See* 42 U.S.C. § 2000d; Cole, *Environmental Justice Litigation*, *supra* note 90, at 531-34; Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285 (1995); Kuehn, *supra* note 71, at 644; Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 834-39; James H. Colopy, Note, *The Road Less Travelled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994). In his Memorandum on Environmental Justice, published in connection with Executive Order 12,898, President Clinton reminded federal agencies of their existing duty under Title VI to "ensure that all programs or activities receiving Federal financial assistance . . . do not . . . discriminate on the basis of race, color, or national origin." President's Memorandum on Environmental Justice, *supra* note 105, at 280.

123. Thus, if a federally-funded state or local agency were to site a facility, that siting process could be subject to the regulations' restrictions on disparate impacts. *See* Cole, *Environmental Justice Litigation*, *supra* note 90, at 531-32 (discussing regulations prohibiting various federal agencies from causing discriminatory effects); Fisher, *supra* note 122, at 319-20 (same); Kuehn, *supra* note 71, at 645 (discussing case law concerning disparate impacts under Title VI);

Environmental justice advocates have also considered the potential applicability of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968.[124] The Fair Housing Act prohibits discrimination "against any person in the . . . sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin."[125] As with Title VI, Title VIII does not require a showing of intentional discrimination; discriminatory effect is sufficient.[126] To meet the Act's goal of providing "fair housing throughout the United States,"[127] the Act has been interpreted as prohibiting actions that would have a segregative effect.[128] To the extent that a siting decision prompts white residents to move but leaves minority residents in place due to their lesser housing mobility, a siting decision could be seen as having a segregative effect actionable under Title VIII.[129]

In addition, unlike the United States Constitution's Equal Protection Clause, the equal protection clauses in some state constitutions have been interpreted to apply to disparate impacts.[130] Communities concerned about disparate environmental impacts in these states are urged to consider bringing state-based equal protection challenges.[131]

Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 834-35 (same). In addition, some authors have suggested that Title VI requires that the federal government avoid discriminatory effects in the administration of its pollution-control programs. *See, e.g.*, Kuehn, *supra*, at 646-47 (suggesting use of Title VI to address disparate enforcement practices).

124. 42 U.S.C. §§ 3601-3631 (1994); *see also* Alice L. Brown & Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act)*, 14 VA. ENVTL. L.J. 741 (1995); Cole, *Environmental Justice Litigation, supra* note 90, at 534-37; Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 839-41.

125. 42 U.S.C. § 3604(b).

126. *See* Brown & Lyskowski, *supra* note 124, at 744-45 (discussing Title VIII's discriminatory impact test); Cole, *Environmental Justice Litigation, supra* note 90, at 534-35 (same); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 839-40 (same).

127. 42 U.S.C. § 3601 (providing declaration of policies).

128. *See* Cole, *Environmental Justice Litigation, supra* note 90, at 535 (discussing Title VIII's applicability to actions that could cause or exacerbate segregation).

129. *See id.* at 535-37 (describing how siting decisions could be linked to demographic shifts having a segregative effect prohibited by Title VIII); *supra* notes 83-84, 88 and accompanying text (describing how the siting of undesirable land uses can cause demographic shifts). *See generally* Brown & Lyskowski, *supra* note 124 (discussing applicability of Title VIII in the environmental justice context).

130. *See* Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 302-05 (1992) (identifying state equal protection clauses applying a disparate impact test). The federal equal protection clause does not provide a remedy based upon disparate impacts alone; discriminatory intent must be shown. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). Discriminatory intent implicates political rather than distributive justice. *See infra* Part B.2.b. Some authors have urged that federal equal protection doctrine abandon the discriminatory intent requirement and adopt a discriminatory impact test. *See* 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, 225-31 (1994); Leslie Ann Coleman, Comment, *It's the Thought That Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L.J. 447, 481-84 (1993).

131. *See* Reich, *supra* note 130, at 300-05 (discussing potential for state equal protection

If an agency fails to consider demographic impacts as required under federal or state environmental review statutes,[132] that failure could provide the basis for asserting a claim of distributional injustice.[133] The remedy is somewhat limited, however, because NEPA has been interpreted to impose only procedural, not substantive, requirements.[134] Thus, decisionmakers need not show that they have elimi-

challenges); *see also* Kary L. Moss, *Race and Poverty Data as a Tool in the Struggle for Environmental Justice*, 5 POVERTY & RACE 1, 3-4 (1996) (describing challenge against proposed incinerator based on Michigan equal protection doctrine on grounds that Michigan's equal protection clause recognizes disparate impact as basis for claim).

132. *See supra* notes 104-06 and accompanying text (discussing environmental review statute requirements for considering demographic impacts).

133. To date, the Executive Order's requirement that demographic impacts be considered in conection with federal actions has had an impact in several proceedings. In 1997, the Atomic Safety and Licensing Board ("Licensing Board") denied a license to build a uranium enrichment facility in a poor minority community in Louisiana, in part because the project applicant had, contrary to the Executive Order, failed to consider the racial impact of the facility. *See* Peter Shinkle, *Race Fact in Denial of Uranium Plant*, THE BATON ROUGE ADVOCATE, May 13, 1997, at A1.

In Newark, New Jersey, the State Department of Environmental Protection rejected a permit for a sewage-sludge treatment facility because, pursuant to Executive Order 12,898, the agency needed more time to consider the environmental justice implications of the proposed project. *See* MaryAnn Spoto, *Activists' Cry: Don't Dump on Newark Bay; Environmental Coalition Claims that the Region is Already Overburdened*, STAR-LEDGER, Apr. 24, 1997, at 33. *See generally* Thomas J. Henderson et al., *Analysis of Racially Disparate Impacts in the Siting of Environmental Hazards*, 5 POVERTY & RACE 5, 6 (1996). Similarly, in September 1997, the Environmental Protection Agency ordered Louisiana to rescind air permits issued to Shintech, Inc. for a proposed plastics manufacturing facility pending further analyses, including further analysis of environmental justice issues. *See* Bill Dawson, *EPA Blocks Permits Given to Plant by La.*, HOUS. CHRON., Sept. 11, 1997, at A25; Mike Dunne, *Foes Cite Pollution, Injustice: Shintech Supporters Urge Jobs for Parish*, BATON ROUGE SUN. ADVOCATE, Jan. 25, 1998, at B1. Further hearings on the environmental justice aspects of the siting process were held in January 1998. *See* Chris Gray, *Experts Say Shintech May Not Deliver Jobs But Some Defend Plant*, NEW ORLEANS TIMES-PICAYUNE, Jan. 24, 1998, at B1. The Environmental Protection Agency is expected to rule on a complaint alleging discrimination in the siting process in April 1998. *See id.*

Even before Executive Order 12,898's explicit requirement to consider demographic impacts in the NEPA review process, one community was able to use NEPA to require the consideration of an African-American community's interests. In *Houston v. City of Cocoa*, No. 89-82-CIV-ORL-19 (M.D. Fla. Dec. 22, 1989), an African-American community successfully challenged a redevelopment plan that would have converted an historically black neighborhood into a neighborhood of office buildings and luxury residences. *See* Torres, *Environmental Burdens*, *supra* note 29, at 446-47. In denying the defendants' motion to dismiss, the court made clear that the National Environmental Policy Act requires the consideration of a project's impacts on urban as well as natural environments. *See City of Cocoa*, No. 89-82-CIV-ORL-19, slip op. at 14. The court's ruling paved the way for a negotiated settlement under which the City and neighborhood residents agreed to cooperate in the planning process. The parties agreed to find ways to preserve the neighborhood's historic buildings and ensure the continued availability of affordable housing. *See* Torres, *Environmental Burdens*, *supra*, at 447.

134. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980). If an agency subject to the review requirements fails to consider demographic impacts, that failure could be seen as an actionable procedural defect. If the agency does consider demographic impacts but chooses to go forward notwithstanding a disparate burden, the courts are likely to defer to the agency's substantive decision. *See id.* at 227-28 ("Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to . . . the action to be taken.").

nated disparate demographic impacts; it is sufficient for them to show that they have considered them.[135] More generally, while Executive Order 12,898 and its accompanying memo encourage the consideration of demographic impacts, they make clear that the Order does not create legally enforceable rights to equitable distribution.[136]

2. *Achieving political justice*

Environmental justice advocates concerned about political injustice have recommended strategies both to improve decisionmaking processes and to obtain recourse when such processes are believed to have been discriminatory. Strategies to improve decisionmaking processes are generally designed to encourage widespread public participation. Where decisions have already been made, strategies include litigation and political organizing.

a. *Improving decisionmaking processes*

Professor Sheila Foster has noted that focusing solely on distributional outcomes would fail to address political inequalities skewing decisionmaking processes.[137] She therefore advocates activism "geared toward ensuring public participation in compiling, and access to, information critical to environmental decisionmaking processes."[138] This model "equates fair process with justice."[139] Professor Foster notes that environmental laws requiring the consideration of a proposed project's impacts and encouraging public participation in the analysis of those impacts provide an existing model for achieving fair decisionmaking.[140] The expectation is that participation will increase the possibility that decisionmakers will consider all interests equally.

President Clinton's February 1994 Executive Order 12,898 not only includes mechanisms to improve distributional outcomes; it is also designed to improve the decisionmaking process. The Order is

135. *See* Johnson, *supra* note 25, at 596-97; *see also supra* note 134 and accompanying text.

136. *See* Exec. Order 12,898, 3 C.F.R. § 6-609 (1995); President's Memorandum on Environmental Justice, *supra* note 105, at 280.

137. *See* Foster, *supra* note 27, at 746-49.

138. *Id.* at 749.

139. *Id.* at 750.

140. *See id.* at 751-52; *see also* Johnson, *supra* note 25, at 572-76 (discussing public participation aspects of NEPA); *cf.* Been, *Undesirable Land Uses*, *supra* note 24, at 1071-74 (discussing and critiquing environmental "impact statement" approach as means of achieving fair decisionmaking process). Professor Foster suggests giving environmental impact statements greater weight in the decisionmaking process, and, ideally, allowing a potential host community to decide for itself whether it is willing to bear the risks of a proposed facility. *See* Foster, *supra* note 27, at 752.

intended "to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment."[141] The Executive Order requires that agencies provide the mechanisms necessary for minority or low-income groups to participate effectively in government decisions.[142] The Council on Environmental Quality's draft guidance on Executive Order 12,898's application to the NEPA process encourages agencies to develop innovative methods for reaching out to community organizations and others who are less likely to keep track of formal notice in government documents.[143] Environmental justice advocates expect that Executive Order 12,898's two-pronged approach—requiring (1) the compilation and consideration of demographic information, and (2) the improvement of public participation mechanisms—will result in fairer decisionmaking.[144]

b. Challenging political injustice

Once a community believes that a decisionmaking process was unjust, the issue becomes the mechanism for challenging the perceived injustice. Communities have two forums in which to respond to political injustice. One forum is legal: an aggrieved community can claim that procedures intended to foster politically just decisions were not followed or that decisionmakers discriminated against them. The other is political: a community can work to unmask the unfairness and hold decisionmakers accountable for their unfair treatment.

One legal option entails bringing suit for decisionmaking processes that did not follow procedures designed to achieve politically just decisionmaking.[145] Luke Cole, an attorney with the California

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141. President's Memorandum on Environmental Justice, *supra* note 105, at 280.

142. *See* Exec. Order 12,898, 3 C.F.R. § 1-103(a) (1995) (requiring agency strategies to list "planning and public participation processes . . . that should be revised to . . . ensure greater public participation"); *id.* § 5-5 (suggesting ways in which federal agencies should promote meaningful public participation); *see also* President's Memorandum on Environmental Justice, *supra* note 105, at 280 (stating that Executive Order is intended "to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment").

143. *See* Johnson, *supra* note 25, at 575 (discussing CEQ Guidance's recommendations on providing notice to communities).

144. *See* Scott, *supra* note 14, at 10-11 (describing benefits associated with Executive Order's public participation provisions); Torres, *Changing the Way*, *supra* note 103, at 547-51 (describing role that Executive Order could play in changing federal agencies' decision-making patterns); Torres, *Environmental Justice*, *supra* note 10, at 614-17 (same); Pugliese, *supra* note 101, at 1205-06 (discussing how Executive Order could improve public's ability to participate in certain decision-making processes).

145. *See* Cole, *Environmental Justice Litigation*, *supra* note 90, at 529. Cole observes that a

Rural Legal Assistance Foundation ("CRLAF"), presents one example.[146] In a dispute over the siting of a hazardous waste incinerator in a Latino neighborhood in Kettleman City, California, CRLAF brought a successful suit challenging a state agency's failure to comply with a state environmental review statute's public participation provisions.[147] Although the agency had provided the community with the required documents, it had not translated them into Spanish, the only language for at least forty percent of the community.[148] The court found that the failure to translate had effectively excluded many citizens from exercising their statutory right to participate.[149] Thus, to the extent that procedural violations interfere with a decisionmaker's capacity to decide with equal concern and respect for all, a lawsuit based on procedural violations may assist in the pursuit of political justice.

The legal context for a substantive political justice claim—the claim that a decision fails to treat a community with equal concern and respect—is generally a claim of intentional discrimination. Under certain circumstances, communities may be able to bring claims of intentional discrimination under Titles VI and VIII.[150] More generally, a community can challenge a government decision as discriminatory and hence violative of the Equal Protection Clause.

To date, communities who have challenged local government siting decisions under the Equal Protection Clause have not met with success.[151] To demonstrate a violation of the Equal Protection Clause,

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public participation requirement in an environmental review statute "is not an end in itself. Rather, it is the means to the larger ends of self-government and the accountability of public servants to those they serve, the citizenry." *Id.*

146. *See id.* at 528-30.

147. *See id.* at 528.

148. *See id.* at 529.

149. *See id.* at 530.

150. *See supra* notes 122-29 and accompanying text (describing strategies for using Titles VI and VIII to challenge decisions having disparate impacts). Titles VI and VIII address not only discriminatory impacts but also discriminatory intent. Furthermore, to the extent that disparate impact is seen as a proxy for disparate intent, a case based on disparate impact may implicitly raise issues of political as well as distributional justice.

151. *See* R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) (noting failure to establish intentional racial discrimination), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989) (finding insufficient evidence of racial discrimination), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (holding that plaintiffs did not establish substantial likelihood of proving that decision to grant permit had been motivated by purposeful discrimination), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986). The environmental justice literature is replete with analyses of these cases. *See, e.g.*, Chase, *supra* note 49, at 353-58 (discussing *Bean*, *East Bibb Twiggs*, and *R.I.S.E.*); Cole, *Environmental Justice Litigation*, *supra* note 90, at 539-40 (same); Collin, *supra* note 86, at 518-33 (same); Crawford, *supra* note 6, at 279-90 (same); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 829-33 (discussing *Bean* and *East Bibb Twiggs*); Reich, *supra* note 130, at 290-95

plaintiffs must prove that the defendants' siting decision intentionally discriminated against them.[152] Although discriminatory intent can be proven through circumstantial evidence if no direct evidence is available,[153] the evidentiary burden is quite high.[154] Because the Equal Protection Clause provides a legal remedy for only the more obvious and persistent instances of discriminatory treatment, it fails to provide a remedy for circumstances in which unfair treatment is more insidious.[155]

In many instances, the difficulty of bringing a legal action based on intentional discrimination will mean that the issue of political justice is addressed politically rather than legally. The claim will be that the affected community was not treated with equal concern and respect. The political objective will be to increase the accountability of decisionmakers to all members of the community.

In the short-term, a community may hope to prevent a decision that appears inevitable or to embarrass decisionmakers into reversing their decision. Such efforts have been successful in a number of cases.[156] Where a complete reversal does not occur, a community may

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(discussing *Bean, East Bibb Twiggs,* and *R.I.S.E.*); Saleem, *supra* note 130, at 224-25 (discussing *Bean* and *East Bibb Twiggs*); Coleman, *supra* note 130, at 463-71 (discussing *Bean, East Bibb Twiggs,* and *R.I.S.E.*); Godsil, *Remedying Environmental Racism, supra* note 49, at 411-16 (discussing *Bean* and *East Bibb Twiggs*); Pugliese, *supra* note 101, at 1182-90 (discussing *Bean, East Bibb Twiggs,* and *R.I.S.E.*).

152. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976).

153. *See Davis,* 426 U.S. at 242. In *Arlington Heights,* the Court noted that although disparate impact is a factor to be considered in determining whether a government decision was motivated by an invidious discriminatory purpose, discriminatory impact alone is not dispositive. *See Arlington Heights,* 426 U.S. at 266. Absent a clear expression of discriminatory intent, the Court identified five types of circumstantial evidence that might bear on the question of invidious discrimination. These include: (1) discriminatory impact; (2) the general historical background to the decision; (3) the specific "sequence of events leading to the challenged decision"; (4) "[d]epartures from the normal procedural sequence" or from the normal substantive criteria; and (5) the "legislative or administrative history" of the decision. *See id.* at 266-68.

154. The environmental justice literature includes numerous articles discussing the environmental justice lawsuits raising equal protection claims and the high evidentiary burden established by *Davis* and *Arlington Heights. See supra* note 151 (listing articles).

155. The discriminatory purpose requirement and its high evidentiary standard have been roundly criticized for providing a remedy for only the most blatant acts of intentional discrimination. *See, e.g.,* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049 (1978); Saleem, *supra* note 130, at 225-31; Coleman, *supra* note 130, at 481-84.

Moreover, even if the equal protection doctrine were a viable method for responding to perceived unfairness in the decisionmaking process, it still fails to provide a remedy for discrimination against poor communities because "income" does not create a suspect class. *See* San Antonio v. Rodriguez, 411 U.S. 1 (1973) (refusing to recognize "wealth" as suspect class deserving special scrutiny under Equal Protection Clause). The Equal Protection Clause will thus fail to provide a remedy where the discrimination is based on income rather than race.

156. *See, e.g.,* Bullard, *Anatomy of Environmental Racism, supra* note 12, at 26-38 (describing case studies in which grassroots environmental justice groups challenged environmentally undesirable facilities). For example, local residents in an African-American and Latino neigh-

be able to obtain certain compromises regarding the nature of the use and its effects on the community.

It is in the long-term that a community's efforts to achieve political accountability are most important. While the public exposure of unfair treatment may not be sufficient to generate the reversal of an individual decision, it may, in the long-run, increase the accountability of decisionmakers to groups they had earlier ignored.[157] The more decisionmakers feel themselves accountable to everyone in the community, the more they are likely to treat all with equal concern and respect.

Assuming, then, the importance of pursuing political justice in the political realm, how should such claims be raised? The difficulty of raising such claims should not be underestimated. While unfairness may be obvious to the affected community, it is unlikely to be obvious to the broader body politic. For one, the discrimination is unlikely to be blatant because most decisionmakers would not risk the associated embarrassment. In general, then, one confronts more subtle instances of unfair treatment. Second, as discussed further in Part III, the broader body politic is likely to assume that the affected community is simply asserting a self-interested cry of "Not in My Backyard" under the guise of a claim for fairness. While many communities will indeed be raising a NIMBY claim, demonstrating that their claim is also a claim for fair treatment will require considerable effort. Third, in some instances the claim of discriminatory treatment can be a double-edged sword. As a community raises the charge of racism, the decisionmakers may paint themselves as the victims of the community's unfair accusation.[158] In today's racial politics, many perceive the "victims" as those accused of racism, not the other way around.

Since a claim of unfairness, standing alone, is rarely enough to communicate to the skeptic, communities who believe they have

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borhood in Los Angeles organized the Concerned Citizens of South Central Los Angeles in opposition to the proposed siting of a municipal solid waste incinerator. The political pressure galvanized by the group prompted the mayor to rescind his initial support for the incinerator and request that the city council "kill the project." The city council voted to stop the incinerator project. *See id.* at 37. Similarly, the Mothers of East Los Angeles, a community group in a Latino neighborhood, opposed the siting of a hazardous waste incinerator. As a result of the group's political and legal actions, the siting proposal was withdrawn. *See id.*

157. A case in point is the siting of a solid waste landfill at issue in *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979). Although the community was unable to reverse the siting at issue in the case, they were able to prompt changes in the siting process designed to increase the fairness of future siting decisions. *See* BULLARD, DUMPING IN DIXIE, *supra* note 51, at 44-45.

158. Of course, in some instances the decisionmakers may be right—the claim of racism may be erroneous. The more the charge of racism is abused, the less credible it becomes. *See* Torres, *Environmental Justice*, *supra* note 10, at 604. A cautious use of the term, as suggested by Professor Torres, would serve to strengthen the claim.

been treated unfairly will usually require some evidence to demonstrate unfair treatment.[159] That evidence can come from a variety of sources. Where disparate impacts are present (and are not explicable by post-siting demographic shifts or other factors), a community may be able to show a link between the pattern of impacts and discriminatory treatment. In addition, if there is evidence that calls into question the rationality or legitimacy of a decision, it could be inferred that the decision was based on improper motives—motives such as race or income discrimination. Environmental laws may provide one important mechanism for obtaining such evidence.

While the environmental justice literature has recognized the strategic role environmental laws could play in obtaining a desired outcome,[160] the literature has not addressed the broader role that environmental laws could play in providing information that challenges the legitimacy of decisions and, ultimately, their fairness. The remainder of this Article looks at two questions: First, why is environmental law viewed so skeptically within the environmental justice literature? Part II addresses this question by examining the history of the relationship between the environmental and civil rights movements and how that history is manifested in the depictions of environmental law presented in the environmental justice literature. Second, in an effort to transcend the skepticism, what can environmental laws do to address one of the most important yet most insoluble problems for the environmental justice movement: achieving political justice by increasing the political accountability of decisionmakers to those who have been unfairly treated? Part III addresses this question.

II. PERCEPTIONS OF ENVIRONMENTAL LAW

A. *Historical Background*

The environmental justice movement did not arise in a vacuum. Its rhetoric, perceptions, and preferred modes of action were shaped by the civil rights movement which spawned it. As such, its characteristics differ from the rhetoric, perceptions, and preferred modes of action of the environmental movement and its institutional embodi-

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159. Such evidence might also be important in bringing a claim of discrimination under the Equal Protection Clause. The debate in the political forum, however, can be much broader than the more limited Equal Protection debate governed by *Arlington Heights'* five factors. *See supra* note 153.

160. *See supra* notes 90-94 and accompanying text; *see also infra* notes 264-79.

ments.[161] The differing experiences of the two movements shape their differing approaches to the problem of environmental justice.[162] Further, the tense history of the relationships of each to the other may explain, at least in part, the current skepticism of the environmental movement and its laws revealed by the environmental justice literature.[163]

At the beginning of this century, the environmental movement was primarily concerned with the conservation and preservation of pristine areas.[164] The movement's emphasis on preserving scenic and undeveloped land was complemented by a negative view of cities and a disinterest in urban problems.[165] Issues such as water quality, air quality, noise, and other urban problems that are now considered "environmental" were not within the purview of the environmental movement as it understood itself during the first half of the cen-

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161. *See generally* Marc R. Poirier, *Environmental Justice/Racism/Equity: Can We Talk?*, 96 W. VA. L. REV. 1083 (1994) [hereinafter Poirier, *Can We Talk?*] (discussing different traditions represented by environmental and civil rights movements and consequences of those traditions for relationship between environmentalists and environmental justice advocates); Marc R. Poirier, *Environmental Justice and the Beach Access Movement of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719 (1996) [hereinafter Poirier, *Beach Access*] (describing how these different traditions shaped debates about access to beaches during 1960s and 1970s); *see also* Barbara Dentsch Lynch, *The Garden and the Sea: U.S. Latino Environmental Discourses and Mainstream Environmentalism*, 40 SOC. PROBS. 108 (1993) (arguing that perceptions of environment and environmental issues are culturally based, and explaining divergence between Latino environmental discourse and mainstream environmental discourse on differing cultural backgrounds).

162. *See* Poirier, *Can We Talk?*, *supra* note 161, at 1084-1100 (discussing histories of civil rights and environmental movements and differences in discourse associated with each movement); *see also* Torres, *Environmental Justice*, *supra* note 10, at 601-03 (observing tendency of environmental justice advocates to understand and respond to environmental problems by placing them within a familiar civil rights framework).

163. Professor Richard Lazarus has observed that "[m]uch suspicion and resentment currently exists between the two social movements." Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 853; *see also* Bullard, *Introduction*, *supra* note 5, at 7 (observing traditional environmental movement's failure to respond to placement of undesirable facilities in minority communities); Jordan & Snow, *supra* note 12, at 103 (discussing minorities' skepticism of environmentalists' commitment to environmental justice in light of environmentalists' historic lack of concern); Poirier, *Can We Talk?*, *supra* note 161, at 1083-96 (explaining civil rights movements' historical skepticism of environmental movement and its consequences for the environmental justice movement); A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 FORDHAM URB. L.J. 461, 467 (1994) (stating that gap between environmental justice movement and mainstream environmental movement can be explained by history of environmental movement).

164. *See* ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 19-35 (1993); Cole, *Empowerment as the Key*, *supra* note 13, at 634; NEWTON, *supra* note 6, at 15-16. The goals of "conserving" and "preserving" were not always compatible. Conservationists advocated conserving land in order to save it for a variety of human uses, including resource development and recreational uses. Preservationists, in contrast, advocated preserving land based on its wilderness value, independent of possible human uses. *See* GOTTLIEB, *supra*, at 26-29; Bullard, *Introduction*, *supra* note 5, at 9-11; Cole, *Empowerment as the Key*, *supra* note 13, at 634.

165. *See* GOTTLIEB, *supra* note 164, at 29-30; Tarlock, *supra* note 163, at 470-71.

tury.[166]

While there is little evidence that early environmentalists' interest in conservation was generally borne of hostility to minorities or the poor, in certain instances these environmentalists did discriminate. Minorities were excluded from some of the parks and public beaches created at the behest of environmentalists,[167] and some environmental groups excluded minorities from membership.[168] Professor Gottlieb illustrates environmentalists' elitist tilt by reference to their position on hunting: conservationists criticized hunting for food due to its impact on wildlife while extolling the virtues of sport hunting for recreational pleasure.[169] During the 1940s and 1950s, the environmental movement continued to struggle with resource development issues, adding concerns about population growth and its associated need for resources as a new dimension to its traditional focus on the preservation of natural and scenic areas.[170]

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166. That self-described environmentalists were uninterested in the urban environment does not mean that the urban environment was ignored. *See* Tarlock, *supra* note 163, at 472-77 (noting that during first part of this century, urban planners attempted to improve physical and social environment in emerging modern city). Many reformers in the nation's cities addressed the public health issues that resulted from increasing urbanization and industrialization. *See* GAY, *supra* note 11, at 17 (noting presence of programs to improve urban environment dating from the early 1900s); GOTTLIEB, *supra* note 164, at 47-80 (detailing reformers efforts to improve public health in cities from late 1900s to 1950s).

While we would now call these activities "environmental," they have not been considered a part of the history of the current mainstream "environmental movement," whose roots were based in preservation rather than public health or planning. *See* GAY, *supra* note 11, at 17-18; GOTTLIEB, *supra* note 164, at 6-8. Even today, grassroots environmental justice groups are perceived of as having developed "outside" of the mainstream environmental movement. *See* Bullard, *Introduction*, *supra* note 5, at 11-12. Thus, the realm of environmental action has long been much larger than the actions of the environmental groups as traditionally conceived. *See id.* at 9 (noting that people of color have long framed their struggles on environmental problems as "social problems"); Guerrero & Head, *supra* note 89, at 11 (stating that people of color historically have dealt with environmental issues as community, labor, or civil rights issues); Poirier, *Beach Access*, *supra* note 161, at 723-24 (observing that what is labelled as an "environmental" issue is contingent upon "customs" that derive from historical circumstances); Lynch, *supra* note 161 (observing that Latino environmentalism is not a part of mainstream environmental discourse).

167. *See* Jordan & Snow, *supra* note 12, at 76 (describing nature preserves' racist prohibitions"); Poirier, *Beach Access*, *supra* note 161, at 741 (describing long history of segregated beaches).

168. *See* GAY, *supra* note 11, at 18 (stating that "[m]ost environmental organizations deliberately excluded nonwhites and non-Christians"); Jordan & Snow, *supra* note 12, at 76 (describing discriminatory Sierra Club chapter membership policies); Poirier, *Can We Talk?*, *supra* note 161, at 1087 (discussing minority membership in environmental organizations); *see also* Jordan & Snow, *supra*, at 107 (stating that "[t]he roots of exclusion in the American conservation-environmental movement reach back to the overt racism prevalent at the turn of the century").

169. *See* GAY, *supra* note 11, at 18 (analyzing environmentalists' fears that immigrant hunters would hurt wildlife); *see also* GOTTLIEB, *supra* note 164, at 30-31; Jordan & Snow, *supra* note 12, at 77 (observing early conservationalists' belief that immigrant hunting customs depleted wildlife populations).

170. *See* GOTTLIEB, *supra* note 164, at 35-41.

The 1962 publication of *Silent Spring*, Rachel Carson's book on the risks associated with pesticides, prompted the environmental movement to move beyond the protection of scenic and natural resources and consider the increasingly pervasive problem of pollution.[171] Meanwhile, the civil rights and anti-nuclear struggles of the 1950s and the 1960s created models for the widespread environmental activism of the 1960s.[172] Although the conservation groups which had comprised the environmental movement continued to pursue their preservationist agenda, others discovered environmental issues as a subset of the broader anti-establishment rhetoric of the 1960s.[173] By the late 1960s, the developing environmental movement appeared poised to reach out to others, such as civil rights and social justice groups, who similarly espoused an anti-establishment agenda.[174] The connection never occurred.

Many civil rights leaders remained skeptical of the new environmental activists.[175] Although these activists did not ignore civil rights and social justice issues,[176] civil rights leaders were concerned that the burst of attention to the environment would distract the nation from the pressing problems of poverty that had just begun to receive attention through the War on Poverty.[177] They feared that the impetus to address environmental problems might shift the nation's priorities—and resources—away from social justice.[178]

Environmentalists did little to allay the civil rights leaders' con-

171. *See id.* at 81-86 (discussing Carson's SILENT SPRING and its effects on environmental movement); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 3 (2d ed. 1996) (noting that publication of SILENT SPRING was one factor in stimulating environmental movement of the 1970s).

172. *See* GOTTLIEB, *supra* note 164, at 93; Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 789.

173. *See* GOTTLIEB, *supra* note 164, at 4. While this rhetoric did integrate environmental issues with structural social issues, its primary focus was on the role of industrial America in ruining the environment. *See id.* at 96-97 (describing activists' critique of industrial corporate society). Environmental activists shared the anti-establishment tenor of those in social justice movements, but did not focus on issues of poverty or civil rights.

174. *See* Poirier, *Beach Access, supra* note 161, at 724-25 (noting that late 1960s and early 1970s were period of "great flux" accompanied by uncertainty as to the relationship between the mainstream environmental movement and other social change movements).

175. *See* Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 788-89 (detailing negative reaction of minority community leaders to environmentalism in 1970s).

176. *See* Jordan & Snow, *supra* note 12, at 78 (noting that first Earth Day in 1970 included many speakers from the civil rights movement).

177. *See* GAY, *supra* note 11, at 19 (observing that members of the civil rights movement suspected that "environmentalists wanted to divert public attention and funding away from equal justice issues"); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 788-89 (discussing minority community leaders' fear that environmentalism would take public attention away from social justice issues).

178. *See* GOTTLIEB, *supra* note 164, at 254 (describing civil rights leaders view that environmental issues should not take priority over poverty issues).

cerns. Some environmentalists contributed to the skepticism by arguing that the environment was the most pressing public cause, thereby suggesting that other public issues, such as poverty, had a lower priority.[179] Moreover, the "establishment" embraced environmental concerns, thus muting the "anti-establishment" approach that might have provided more common ground between the civil rights and environmental movements. By 1970, Congress and the Republican Administration were suggesting federal legislative action to address environmental problems and members of the business community were sponsoring Earth Day events.[180]

The momentum continued. In the 1970s almost all existing federal environmental laws were promulgated.[181] A key feature of these laws was that they focused primarily on reducing aggregate pollution levels, rather than on the distribution of pollution.[182] To the extent that distributional consequences were considered, it was assumed that reducing aggregate pollution levels would make everyone better off.[183] When distributional issues were raised, federal institutions declined to consider the connection between environmental protection and race or other socioeconomic issues.[184]

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179. *See* Jordan & Snow, *supra* note 12, at 77-78 (observing, for example, that some environmentalists had asserted that one could not both protect environment and provide housing for minorities); *see also* Ferris & Hahn-Baker, *supra* note 5, at 70 (criticizing environmentalists for advocating preservation of species while opposing investment in human development); Poirier, *Beach Access*, *supra* note 161, at 747 (noting that environmental legislation was seen as hindering availability of affordable housing).

180. By the end of 1969, Congress had passed the first major federal environmental legislation, the National Environmental Policy Act (NEPA). On New Year's Day 1970, four months before Earth Day, President Nixon signed NEPA into law. *See* PERCIVAL, *supra* note 171, at 4. Just three weeks before Earth Day, President Nixon gave a strongly pro-environment State of the Union address. *See* GOTTLIEB, *supra* note 164, at 108-09.

181. PERCIVAL, *supra* note 171, at 5 (noting that Congress enacted "nearly all of the basic environmental legislation" between 1970 and 1976).

182. *See* Tarlock, *supra* note 163, at 461-62 (describing "national" focus of federal environmental laws); *cf.* Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 814 (describing Clean Air Act's focus on "general embient air quality concerns" rather than particular "toxic hot spots").

183. *See* Tarlock, *supra* note 163, at 462 (observing that it was "easy to assume that the benefits . . . [of environmental protection would be] equally distributed across the population"). To the extent that there was any recognition that minority or low-income communities might suffer from a disproportionate burden of pollution, advocates for reducing aggregate pollution levels might have assumed that such reductions would benefit such communities in proportion to the greater harm they suffered. According to empirical studies, however, minority communities do not appear to have benefitted from environmental laws in proportion to the greater environmental burdens they have been shown to experience. *See* Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 792-806 (describing evidence of inequalities in distribution of environmental laws' benefits and burdens).

184. *See* Poirier, *Beach Access*, *supra* note 161, at 753-54 (describing several incidents in which federal agency officials refused to link environmental and poverty issues). As Professor Torres has explained, "[i]n 1975, the United States Commission on Civil Rights chided the United States Environmental Protection Agency . . . for its failure to recognize its responsibility" for the impact of its sewage treatment program on minorities. *See* Torres, *Environmental Burdens*, *supra*

Participating in these legislative efforts was the "second wave" of the environmental movement.[185] The second wave organizations were highly professional, staffed primarily by lawyers and scientists.[186] After participating in the development of many of the federal environmental laws during the 1970s, they then turned to litigation to interpret and enforce them.[187]

Thus, in the 1970s the paths of the civil rights and environmental movements had once again diverged. The mainstream environmental movement had shed much of the anti-establishment rhetoric that briefly characterized it in the 1960s.[188] The environmental movement had become much more centralized and professionalized than the contemporaneous civil rights and social justice movements.

Professor Gottlieb has illuminated the contrast between the mainstream environmental and social justice groups—and the consequences of their differences—by exploring their respective campaigns to minimize exposure to lead.[189] In the 1960s, numerous urban community groups organized around the issue of lead poisoning from exposure to lead paint, a problem that was particularly severe in poor communities due to the presence of flaking lead paint in deteriorated housing.[190] Issues of "social justice" were prominent in the debate.[191] At that time, the lead paint problem was not per-

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note 29, at 431-32. EPA responded that "it was not responsible" for making sure that sewer services were developed equally in minority and other communities. *See id.* at 432.

185. Cole, *Empowerment as the Key*, *supra* note 13, at 633 (coining term "second wave" to describe new type of environmentalists). The second wave was composed of environmental groups who formed in the late 1960s and early 1970s, such as the Natural Resources Defense Council, the Environmental Defense Fund, and the Sierra Club Legal Defense Fund. *See id.* at 634; *see also* GOTTLIEB, *supra* note 164, at 117-61 (describing development of mainstream environmental groups in the 1970s). Traditional environmental organizations, such as the Audubon Society and the Sierra Club, also began to include advocacy against pollution on their environmental agenda. *See* GOTTLIEB, *supra*, at 129-30 (describing Audubon's and Sierra Club's partial shift in focus toward pollution).

186. *See* Cole, *Empowerment as the Key*, *supra* note 13, at 635 (discussing professional make-up of second wave); Jordan & Snow, *supra* note 12, at 86 (stating that second wave organizations became more "professionalized").

187. *See* Cole, *Empowerment as the Key*, *supra* note 13, at 636; Jordan & Snow, *supra* note 12, at 91.

188. *See* Ferris & Hahn-Baker, *supra* note 5, at 69-70 (describing environmentalists shift "from more radical protest and activism to acceptance as a mainstream public-interest group").

189. Professor Gottlieb provides a similar example by exploring the movement's respective approaches to the problem of pesticides. When the risks of pesticides first came to public attention through Rachel Carson's *Silent Spring*, environmentalists focused on the impact of pesticides on wildlife. *See* GOTTLIEB, *supra* note 164, at 240. Meanwhile, farmworkers were organizing to limit farmworker exposure to pesticides in the field. *See id.* at 240-44. Although the Environmental Defense Fund ("EDF"), a mainstream environmental group, did join farmworkers in bringing suit to ban DDT, EDF joined in order to advance its concerns about wildlife. *See id.* at 242-44. Farmworker and "environmental" interests were not opposed, but the cooperation reflected a marriage of convenience rather than a deeper mutuality of purpose.

190. *See id.* at 244-48 (describing movement against lead in environment).

191. *See id.* at 247 (noting that groups were interested in lead paint as both an environ-

ceived of as an "environmental" problem, and the mainstream "second wave" environmental groups were not active on the issue.[192]

In the 1970s, however, as studies showed high levels of lead in the ambient air (due largely to leaded gasoline), the mainstream environmental movement became concerned about lead.[193] In contrast to the community groups' focus on lead paint in poor areas, the environmental groups focused on concentrations of lead in the ambient air.[194] As a result, regulatory attention and resources were diverted from reducing exposure to lead paint and towards reducing ambient air concentrations.[195] The environmental groups did not work overtly against the interests of minorities or the poor;[196] instead, their success as an interest group may have resulted in the diversion of regulatory resources toward their environmental goals at the expense of the issues raised by other, less powerful, constituencies.

At a more general level, the few efforts made by the environmental movement in the early 1970s to establish ties with civil rights or social justice causes were unsuccessful. In 1971, for example, the Sierra Club surveyed its members on their interest in having the Club address social justice issues. When asked, forty-one percent of the members "strongly disagreed" with the statement that the Club should "'actively involve itself in the conservation problems of such special groups as the urban poor and the ethnic minorities.'"[197] In 1972, the Conservation Foundation convened a conference to explore the relationship between the environment, race, and social justice.[198] The Foundation invited representatives of the environmental movement as well as community activists, many of whom were people of color.[199] Many environmental groups were unresponsive, however, and the Foundation's efforts were halted in 1973 with the termination of the head of the organization and his replacement by a leader with a narrower "environmental" focus.[200] While there is little evi-

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mental issue and a social justice issue).

192. *See id.* at 248.

193. *See id.* at 248-49.

194. *See id.*

195. *See id.*

196. *Cf.* Jordan & Snow, *supra* note 12, at 73 (observing that the elitist, professional, and white nature of the environmental movement exists "through no conspiracy, no conscious decisions to create policies of exclusion, no malice").

197. *See* GOTTLIEB, *supra* note 164, at 253-54 (quoting Sierra Club survey); *see also* NEWTON, *supra* note 6, at 17 (discussing Sierra Club poll); Jordan & Snow, *supra* note 12, at 78 (referring to 1973 poll with similar results).

198. *See* GOTTLIEB, *supra* note 164, at 253 (discussing 1972 Conference).

199. *See id.* (suggesting that purpose of diversity of invitees was to encourage environmental organizations to incorporate social justice themes).

200. *See id.* In 1979, the National Urban League and the Sierra Club sponsored a "City Care" conference to bring together environmentalists and civil rights activists. The dialogue

dence that the mainstream environmentalists were actively opposed to social justice, they do not appear to have perceived of poverty and civil rights as "their" issues.[201]

According to Professor Gottlieb, the divide between the movements was exacerbated by the stands taken by some environmentalists on the issues of population and of immigration. By the 1960s, population control had become a central issue for many conservation organizations.[202] Just as Rachel Carson's *Silent Spring* had exposed the dangers of pesticides and focused national attention on pollution, Paul Ehrlich's 1968 book, *The Population Bomb*, focused attention on exponential population growth and its consequences for natural resources.[203] Although population control advocates denied any racial overtones to their efforts, civil rights leaders nonetheless viewed the campaign as implicitly racist.[204]

Civil rights groups, particularly those comprised of Latin Americans, were also alienated by some environmental groups' anti-immigration efforts in the 1970s.[205] Although environmentalists' attention to population and immigration issues faded by the 1980s,[206] the experience during the 1960s and 1970s created what Professor Gottlieb has called a "legacy of conflict" between the civil rights and environmental movements.[207]

As issues of environmental justice gained prominence in the 1980s, grassroots activists directly confronted the mainstream professional environmental organizations and institutions about their role, or lack thereof, in environmental justice issues. In 1990, an environmental

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they achieved, however, was "short-lived." Ferris & Hahn-Baker, *supra* note 5, at 67-68.

201. Professor Marc Poirier observes that the environmental and civil rights movements have developed very different paradigms of discourse and action that limit their ability to recognize and act upon shared concerns. He identifies two paradigms in modern environmental law: concern with natural ecosystems and concern about maximizing overall welfare. Neither of these paradigms easily incorporates distributional concerns. *See* Poirier, *Can We Talk?*, *supra* note 161, at 1088-89. Nor do the environmental paradigms easily incorporate the deeper challenges to the political process that are inherent in the environmental justice movement's concern about fair treatment in the political process. *See id.* at 1093.

202. *See* GOTTLIEB, *supra* note 164, at 256. Earlier conservationists had also expressed concerns about population growth, often in explicitly racist terms. *See id.* at 254-55. These views receded during the Depression but began to reappear in the late 1940s. *See id.* at 255.

203. *See id.* at 256-58 (discussing THE POPULATION BOMB and its effects on environmental movement).

204. *See id.* (describing ways in which population control proposals raised the spectre of racism and population control advocates' discomfort with these charges); Lazarus, *Pursuing "Environmental Justice*,*"* *supra* note 49, at 852 (noting perception by some minorities that environmentalist population control proposals "are principally intended to limit the growing populations of people of color").

205. *See* GOTTLIEB, *supra* note 164, at 258-59 (describing environmentalist anti-immigration sentiments and initiatives and minority perceptions of their racist implications).

206. *See id.* at 259.

207. *See id.* at 259-60.

justice organization known as the Southwest Organizing Project sent a letter to the ten most prominent environmental organizations expressing their concern about the organizations' failure to consider the participation and interests of communities of color affected by the environmental groups' positions.[208] In 1991, the Southwest Network for Environmental and Economic Justice wrote to EPA Administrator William Reilly contending that the EPA had failed to be accountable to communities of color and suggesting improvements in EPA's approach.[209]

These pointed criticisms, along with an increase in public awareness of environmental justice problems, had important consequences in government and the environmental movement. Many mainstream environmental groups are now actively considering the environmental justice implications of their environmental advocacy and assisting communities of color in their challenges to adverse environmental conditions.[210]

Government environmental efforts are also more attuned to distributional issues. The EPA's Environmental Equity Workgroup published its report, "Environmental Equity: Reducing Risk for All Communities," in 1992.[211] President Clinton's February 1994 Executive Order 12,898 requires all federal agencies to consider environmental justice issues.[212] Furthermore the EPA has established an Interagency Work Group involving participants from a range of federal agencies, a national Office of Environmental Justice to coordinate the agency's environmental justice efforts, and a grants program for communities that is designed to foster their ability to address environmental justice issues.[213]

The growing cooperation is evident from the more recent history

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208. *See* Gauna, *supra* note 6, at 11, nn.39 & 42 (summarizing "Group of Ten" letter); Guerrero & Head, *supra* note 89, at 11 (detailing letter); Jordan & Snow, *supra* note 12, at 72 (discussing letter and its call for efforts to diversify environmental organizations' staff).

209. *See* Gauna, *supra* note 6, at 11, n.38.

210. *See* GAY, *supra* note 11, at 20 (noting that major environmental groups are now developing environmental justice programs and building ties to grassroots groups); Bullard, *Anatomy of Environmental Racism*, *supra* note 12, at 24-26, 31, 39 (discussing increasing role of mainstream environmental organizations); Gauna, *supra* note 6, at 21-22 (detailing actions of certain environmental organizations with respect to communities of color). In general, leaders of mainstream environmental groups have expressed concern about their lack of diversity. *See* Ferris & Hahn-Baker, *supra* note 5, at 70; Jordan & Snow, *supra* note 12, at 71-73.

211. EPA's report has, however, been criticized by some in the environmental justice community. *See* Bullard, *Anatomy of Environmental Racism*, *supra* note 12, at 195-203; Foster, *supra* note 27, at 735-38; Gauna, *supra* note 6, at 13-17.

212. *See supra* notes 97-109, 141-44 and accompanying text (discussing Executive Order 12,898).

213. *See* Olga L. Moya, *Adopting and Environmental Justice Ethic*, 5 DICK. J. ENVTL. L. & POL'Y 215, 246-54 (1996) (describing these federal initiatives).

of the lead paint issue. In the 1980s, community groups concerned with lead paint poisoning in the inner city once again placed that issue on the public agenda. This time, as attention to environmental justice issues was beginning to surface, the mainstream environmental movement joined in their effort.[214]

The recent efforts made by environmental groups and agencies represent a sea change from the virtual absence of interaction fifteen years earlier. That said, however, the distance between the mainstream environmental establishment and the grassroots civil rights community has not yet been bridged.[215] As one observer of the environmental movement has observed: "With change comes turmoil. . . . For the Movement, this is not only an age of transition; it is an age of conflict, contradiction, and ambiguity."[216] The remainder of this Section is devoted to exploring the nature of the criticisms of environmental law and environmental organizations expressed in the environmental justice literature.

B. *The Environmental Justice Movement's Perception of the Environmental Movement*

The environmental justice movement's perspective on the mainstream environmental movement reflects the historical development of both movements. The environmental justice literature frequently contrasts the participants in the mainstream environmental movement with the participants in the environmental justice movement.[217]

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214. *See* GOTTLIEB, *supra* note 164, at 249-50. For example, the Environmental Defense Fund has played a significant role in national debates about lead paint poisoning. *See id.* Additionally, the NAACP Legal Defense and Education Fund, the American Civil Liberties Union, and the Natural Resources Defense Council have successfully sued the state of California to obtain lead tests for poor children under the Medicaid program. *See* Bullard, *Anatomy of Environmental Justice*, *supra* note 12, at 24-25.

215. *See* NEWTON, *supra* note 6, at 18 (describing doubt as to ability of mainstream environmentalists to respond to concerns of people of color); Bullard, *Anatomy of Environmental Justice*, *supra* note 12, at 38 (discussing limitations to and possibilities for relationship between grassroots minority organizations and mainstream environmental movement); Jordan & Snow, *supra* note 12, at 93, 106 (noting common struggle faced by mainstream environmentalists and minorities, but cautioning that divisions between them cannot be overcome "overnight"); Lazarus, *Pursuing "Environmental Justice*," *supra* note 49, at 850-52 (noting steps that environmental movement must take to meaningfully address social justice issues).

216. Bullard, *Introduction*, *supra* note 5, at 5; *see also id.* at 16-18 (describing current state of flux marking environmental movement).

217. The term "environmental movement" references the mainstream "second wave" of the environmental movement. Not included are the grassroots environmental groups which arose in the 1970s and 1980s, largely in response to toxic contamination issues. *See* GAY, *supra* note 11, at 47-50 (detailing beginnings of grassroots environmental movement in 1970s and 1980s); Cole, *Empowerment as the Key*, *supra* note 13, at 636-39 (describing grassroots environmental groups and characterizing them as the "third wave" of environmental activism); Poirier, *Can We Talk?*, *supra* note 161, at 1095 (describing grassroots environmentalists). For most of their history, these third wave groups have not been considered a part of the mainstream environ-

The typical member of the environmental movement is described as white, well-educated, and middle- to upper-class.[218] The same is true of the leadership of most mainstream environmental groups.[219] The environmental justice literature observes that the mainstream environmental movement's agenda reflects the interests of its members: preservation of nature, outdoor recreational opportunities, and, in recent years, a concern with ambient environmental conditions.[220] Environmental justice writers note that the absence of poor and minority members and leaders has meant that the mainstream environmental groups generally do not focus on environmental problems specific to poor and minority groups, or on the distributional implications of environmental policies.[221]

More fundamentally, some writers observe that the distance between the movements is based on deep differences in the cultural and moral perspectives held by mainstream environmentalists and minority groups.[222] Writing about the Latino community's perspective on environmentalism, Professor Barbara Deutsch Lynch has observed that the environmental movement's newfound concern with distributional outcomes will not suffice to address environmental justice without a deeper opening to Latino conceptions of the environ-

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mental movement. *See* Cole, *Empowerment as the Key*, *supra* note 13, at 637-39.

218. *See* BULLARD, DUMPING IN DIXIE, *supra* note 51, at 1, 11, 12, 90-91 (1990); GAY, *supra* note 11, at 18; NEWTON, *supra* note 6, at 17; Jordan & Snow, *supra* note 12, at 71-72, 92; Poirier, *Can We Talk?*, *supra* note 161, at 1086; Linda R. Prout, *Toxic Avengers—Teenage Mutant Crusaders Against Pollution*, *in* WE SPEAK FOR OURSELVES, *supra* note 12, at 36; Gauna, *supra* note 6, at 7.

219. *See* GAY, *supra* note 11, at 18 (observing that most leaders of environmental groups are "primarily affluent white people"); Collin, *supra* note 86, at 517 (noting that mainstream environmental groups have few minorities on staff or on their boards of directors); Jordan & Snow, *supra* note 12, at 72-73 (discussing environmental groups' lack of minority hiring).

220. *See, e.g.*, Alston, *supra* note 89, at 3 (observing that "[e]nvironmental justice groups have considered the major national environmental organizations to be predominantly interested in leisure and recreation, wildlife and wilderness preservation, and similar issues"); Lazarus, *Pursuing "Environmental Justice,"* *supra* note 49, at 814-15 (describing ways in which the environmental groups' objectives were an expression of the priorities of its participants).

221. *See generally* NEWTON, *supra* note 6, at 17 (indicating that "mainstream environmentalist groups traditionally have had little interest in issues faced by poor minority, urban people"); Alston, *supra* note 89, at 3 (observing that people of color perceive of the environmental movement as "insensitive to the needs and agendas of minorities"); Austin & Schill, *supra* note 12, at 71-72 (contrasting interests of mainstream environmental groups with interests of minority communities); Bullard, *Introduction*, *supra* note 5, at 13 (observing that lack of minority representation among environmental decisionmakers "has biased environmental decisionmaking in favor of white, middle-class communities"); Jordan & Snow, *supra* note 12, at 71-72, 77 (remarking that conservation leaders realize that their organizations have little to offer most people of color); Lazarus, *Pursuing "Environmental Justice,"* *supra* note 49, at 788 (describing minority leaders' perception of environmentalism as selfish middle-class imposition); *id.* at 811-22 (discussing lack of minority involvement in environmental movement and among environmental policymakers); *id.* at 824-25 (noting that minority communities' conception of environmental priorities often differs from that of mainstream environmentalists).

222. *See* Lynch, *supra* note 161, at 116-18.

ment.[223] Similarly, Professor Robert Williams has observed that the mainstream environmentalists' conception of the environment disassociates environmental and human needs while Indian conceptions of the environment integrate environmental and human needs.[224]

The differences between the participants of each movement lead not only to differing agendas, but to differing methods for addressing concerns. The environmental justice literature notes that the mainstream environmental movement has become highly professionalized. Most of the work of the movement is accomplished by specialists, be they lawyers or scientists.[225] Environmentalists frequently interact with government agencies,[226] or handle technically complicated litigation.[227] The primary purpose of the membership is to raise funds and generate broad political support for the environmental groups' initiatives.[228] From the viewpoint of the environmental justice community, those environmental organizations which actively engage their members tend to organize "expressive" activities, such as recreational events, rather than "instrumental" activities, such as protests, rallies, boycotts, and the like.[229] When it comes to a particular environmental dispute, the environmental justice movement's response to environmental concerns frequently includes an explicitly political component often absent from the more scientific and technical nature of mainstream environmental discourse.[230] Environmental justice advocates observe that the mainstream environmental move-

223. *See id.* at 118.

224. Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994).

225. *See* Cole, *Empowerment as the Key*, *supra* note 13, at 635-36; Gauna, *supra* note 6, at 12, n.40; Jordan & Snow, *supra* note 12, at 73-74, 88-92.

226. *See* Gauna, *supra* note 6, at 12, note 40 (observing that mainstream environmental groups deal with administrative bureaucracies); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 812-14 (noting centralized nature of environmental policymaking in Washington D.C. and its "inside the Beltway" culture).

227. *See, e.g.*, Cole, *Empowerment as the Key*, *supra* note 13, at 636.

228. *See* Jordan & Snow, *supra* note 12, at 73.

229. *See* BULLARD, DUMPING IN DIXIE, *supra* note 51, at 4; *see also* NEWTON, *supra* note 6, at 16 (noting that hiking and other outdoor activities "were the preferred activities of those who called themselves 'environmentalists' until the mid-twentieth century").

230. *See* Austin & Schill, *supra* note 12, at 71-74 (observing that environmental justice groups link environmental problems to broader issues of race and class); *cf.* Poirier, *Beach Access*, *supra* note 161, at 729-36 (contrasting "property" against "civil rights" approaches used in addressing beach access disputes). According to some commentators, grassroots groups focus on political solutions while the mainstream environmental organizations focus on technical solutions. *See* Jordan & Snow, *supra* note 12, at 88-89. The mainstream emphasis on technical solutions renders it difficult for the mainstream to incorporate social justice concerns. *See id.* at 89. *But see id.* at 82-83 (noting that some minority groups have engaged in grassroots political action rather than professional activities due to lack of resources rather than cultural or political preference).

ment's orientation and mode of action are quite alien to the more participatory and overtly political thrust of the grassroots environmental justice movement.[231]

There are signs of change, however. As discussed above, at least some in the environmental movement are beginning to embrace distributional issues and to assess their own membership and leadership strategies.[232] Nonetheless, much of the environmental justice literature reflects the historical division between the goals and methodologies of the mainstream environmental and the environmental justice movements.[233]

C. Environmental Laws as the Cause of Environmental Injustice

The environmental justice literature suggests that environmental and land use laws have provided more environmental benefits to the white and the affluent while providing fewer benefits to or worsening the environmental conditions of the poor and communities of color.[234] In that sense, environmental laws are seen as a "cause" of environmental injustice. The skewing of benefits and burdens occurs in a variety of ways, ranging from the policy-making process to the differing abilities of differing groups to take advantage of the protections environmental laws are intended to offer.

1. Environmental laws' failure to consider distributional consequences results in disproportionate effects

According to some authors, environmentalists' failure to consider distributional consequences has led to environmental strategies that serve and harm communities disproportionately.[235] In general, the focus on reducing ambient levels of pollution has failed to address the concentrations of pollution to which many minorities are exposed.[236] Moreover, some environmental laws reduce general pollu-

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231. *See* Austin & Schill, *supra* note 12, at 75-76; Collin, *supra* note 86, at 539-40; Gauna, *supra* note 6, at 12 n.40.

232. *See supra* notes 210-14 and accompanying text.

233. Professor Poirier observes that differences in history and rhetoric will appear wherever disparate groups come together. He states that: "To work together means to come up against the very limits that make strategies of resistance possible in the first place, and the challenge posed by the diverse traditions and rhetorics that undergird specific struggles needs to be acknowledged and addressed." Poirier, *Can We Talk?*, *supra* note 161, at 1099.

234. *See, e.g.*, Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 792-93 (explaining that environmental justice concerns are raised by disparities in the distribution of environmental benefits and burdens by race and class).

235. *See, e.g.*, Bullard, *Environmental Justice for All*, *supra* note 23, at xv-xvi ("The current system provides greater benefits and protection for middle- and upper-class whites while shifting costs to the poor and people of color.").

236. *See* Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 814-15; A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV.

tion levels by concentrating the pollution—a solution that may provide overall benefits to most but which creates a greater burden where the concentration occurs.[237] Professor Richard Lazarus uses the clean up of hazardous waste as a case-in-point.[238] As toxic wastes are removed from hundreds of sites around the country, they are transported to the nation's few hazardous waste disposal facilities. According to several studies, these facilities are disproportionately located in minority or poor communities.[239] Although most communities benefit from the cleanup, the poor and minority communities with waste disposal sites may be harmed. The benefits and burdens are not equally distributed; an issue of distributive justice is raised.

Market-based pollution credit trading systems present another type of environmental strategy that may distribute the benefits and burdens of environmental controls poorly. Under market-based systems, a company may exceed applicable standards if it makes up for its extra pollution by buying the equivalent "right to pollute" from another facility that has reduced its emissions by more than the amount required to meet its applicable standard.[240] Although the net pollution

871, 874 (1992) (noting that environmental laws focus on aggregate welfare rather than on welfare of particular groups).

237. This discussion focuses on the relative distribution of environmental benefits and environmental burdens. The analysis could also be extended to the distribution of the non-environmental benefits and burdens associated with environmental policies. *See* Blais, *supra* note 10, at 100-04, 102 n.113 (considering both environmental and non-environmental benefits and burdens associated with the siting of undesirable land uses); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 792-806 (describing both environmental and nonenvironmental benefits and burdens of environmental policy).

238. *See* Richard J. Lazarus, *The Meaning and Promotion of Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1, 4 (1994) [hereinafter Lazarus, *The Meaning and Promotion of Environmental Justice*]. Another example involves air pollution controls. In order to reduce sulphur dioxide emissions, many facilities have been required to install an air-cleaning technology aptly named "scrubbers." While effective at reducing emissions into the ambient air, new environmental problems may arise in connection with the disposal of sludge generated by the process. Thus, the general problem of air pollution is converted into a potential hazardous waste problem at sludge disposal facilities. While the benefits of improved air quality may be broadly distributed, the environmental burdens may be concentrated in a few areas. *See* Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 794-95.

239. *See* Lazarus, *The Meaning and Promotion of Environmental Justice, supra* note 238, at 3-4; *see also supra* notes 35-40 and accompanying text (describing studies indicating the disproportionate concentration of hazardous waste sites in poor or minority neighborhoods).

240. *See* Robert W. Hahn & Gordon L. Hester, *Marketable Permits: Lessons for Theory and Practice*, 16 ECOLOGY L.Q. 361, 369 (1989) [hereinafter Hahn & Hester, *Marketable Permits*] (describing emission trading systems). The market is driven by the disparities in the cost of compliance. Some facilities may be able to adopt pollution-control measures more easily and cheaply than others. If they can go beyond the control level required by law, then market-based systems will allow them to obtain sellable credits for the amount by which they exceed regulatory levels. Facilities which find it much more expensive or difficult to comply with regulatory requirements can then buy these credits. The credits will permit these facilities to emit more than would otherwise be allowed. *See* Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109, 110-13 (1989) [hereinafter Hahn & Hester, *Where Did All the Markets Go?*] (describing how efficiency

reduction achieved is the same, the distribution of the pollution may shift. If facilities which find it expensive to adopt pollution control equipment are located in the same geographic area and tend to buy pollution credits that permit them to increase their emissions above otherwise applicable levels, then these areas could see a significant increase in pollution emissions. To the extent that older facilities might find it more economical to purchase the "rights to pollute" than adopt new pollution control techniques, these areas are less likely to benefit from the restrictions imposed by environmental laws and may, in some instances, be harmed by them. As a corollary, those communities with facilities which choose to reduce emissions by more than the amount required by applicable standards and sell the resulting "rights to pollute" will receive disproportionately greater benefits from the trading system. To the extent that the older facilities choosing to buy pollution credits rather than adopt pollution control techniques are disproportionately located in poor or minority areas, these communities will receive less of the benefits and more of the harms of environmental regulations than other communities.[241]

2. *Environmental laws exacerbate existing disparities: the case of grandfather clauses*

The failure to consider the distributional consequences of environmental laws is particularly evident in the "grandfather" clauses included in many environmental laws.[242] Grandfather clauses either exempt or create more lenient standards for existing facilities. The stricter standards imposed by the legislation apply only to new facilities, while grandfathered facilities may be permitted to continue pol-

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gains of trading policies generate a "market" in rights to pollute). *See generally* Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. OF ENVTL. L. 153 (1988) (describing and analyzing market-based environmental control strategies).

241. *See* Gauna, *supra* note 6, at 72 (noting possibility that emissions trading programs could "open the possibility of increasing concentrations of emissions in one part of an air basin through trading pollution credits from another part of the basin, thereby potentially creating 'hot spots' in poor and minority communities"); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 848-49 (arguing that reliance on market incentives to control pollution would likely lead to "pollution 'hot spots' in racial minority communities and low income neighborhoods"); *see also* Stewart, *supra* note 240, at 165 (recognizing that market-based systems "may be inappropriate in dealing with situations where localized concentrations of pollution must be strictly controlled").

242. The term "grandfather clause" arose from provisions in southern voting laws that restricted the vote to those who could prove that their grandfathers had voted. The clauses essentially disenfranchised newly freed slaves. *See* Gerrard, *Role of Existing Legislation, supra* note 90, at 561; Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute So Can You: Environmental 'Grandfather Clauses' and Their Role in Environmental Inequity*, 45 CATH. U. L. REV. 131, 131-32 (1995). While not explicitly discriminating against minorities, the grandfather clauses of today are once again implicated in questions of social justice.

luting at prior levels.[243] The new environmental standards may therefore do little to improve environmental quality for those living near grandfathered facilities.

To the extent that grandfathered facilities are concentrated in low-income or minority communities, these communities will receive little benefit from the more protective standards imposed on new facilities.[244] In addition, the presence of grandfather clauses may skew the private decision-making process. An enterprise deciding whether to continue production at an existing polluting facility or to build a newer, cleaner facility may be more likely to continue using the existing facility due to the more lenient pollution control requirements imposed on it.[245] As a result, grandfather clauses in environmental legislation may intensify the differences in environmental conditions between areas containing grandfathered facilities and areas in which new facilities choose to locate. Assuming that existing facilities are located in low-income or minority areas, the two-tier structure imposed by grandfather clauses in environmental laws has implications for distributive justice.[246]

3. *Consequences of "Not In My Backyard"*

Writers in the environmental justice movement have observed that white and affluent communities often organize to oppose efforts to site undesirable facilities in their communities. Their opposition, dubbed the "Not In My Backyard" ("NIMBY") syndrome,[247] has been quite successful in protecting such communities from undesirable siting decisions.[248] Environmental laws are frequently used to accomplish this end.[249] Even if the environmental statutes do not require

243. *See* Robertson, *supra* note 242, at 141-52 (discussing grandfather clauses in hazardous waste facility regulation and siting statutes); *see also id.* at 152-58 (discussing disparity in standards for existing and new facilities under Clean Air Act).

244. *See generally id.* (arguing that grandfather clauses make it difficult to reduce risk presented by polluting facilities that exist in low-income minority communities).

245. *See id.* at 134, 169-70 (suggesting that grandfather clauses may encourage continued operation of older polluting facilities and retard development of new, cleaner facilities).

246. *See generally id.* The impact of grandfather clauses on environmental justice is generally considered an unintended consequence of their structure rather than an intentional affront to those living near existing facilities. Grandfather clauses are largely motivated by such concerns as fairness to business entities, overall economic considerations, and the political realties of passing cost-imposing legislation. *See id.* at 167-69.

247. *See* Brion, *supra* note 24, at 438 (defining and describing NIMBY phenomeon). The distinction between NIMBY claims and claims for justice is addressed *infra* notes 297-301 and accompanying text.

248. *See* Collin, *supra* note 86, at 509-10 (observing successful use of "NIMBY" strategies); Delogu, *supra* note 86, at 199 (noting frequent success of NIMBY efforts); Gauna, *supra* note 6, at 31-33 (finding that wealthier and politically more powerful communities are often successful as keeping noxious facilities out of their communities).

249. For example, the National Environmental Policy Act ("NEPA") requires that a com-

that a project be halted outright, they give those groups having sufficient resources the opportunity to increase the cost and delay of the siting process, factors which are sometimes enough to block the proposed facility.[250]

The result, environmental justice writers contend, is that the environmentally undesirable facilities that white and affluent residents have successfully resisted are instead sited in poor or minority neighborhoods.[251] These neighborhoods have fewer financial or professional resources to oppose the facilities in question and may not be accustomed to organizing around environmental principles. Siting in such communities presents the "path of least resistance."[252] According to Professor Robert Bullard, NIMBY leads to "PIBBY"—"Place in Blacks' Backyard."[253]

The process feeds upon itself. Zoning laws frequently permit new development that is consistent with current land uses. When noxious uses are already located in a poor or minority area, then additional

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prehensive environmental impact statement be completed for all major actions that are performed or funded by the Federal Government, and which are likely to have important environmental consequences. *See* 42 U.S.C. § 4332(c) (1994). Many states have equivalent statutes that govern state actions, *see, e.g.*, ALASKA STAT. § 38.50.130 (Michie 1996); CAL. PUB. RES. CODE § 21,000 (West 1997), and, in some instances, private actions as well. *See* HAW. REV. STAT. ch. 343; MASS. REGS. CODE tit. 301; MICH. COMP. LAWS § 691.1204 (imposing environmental review requirements on private actions affecting the environment). If the opposed facility is proposed for wetlands, regulations may also be marshalled to prevent the siting. Filling wetlands is prohibited unless the project proponent obtains a permit. *See* 40 C.F.R. § 230.10 (1996) (establishing rules for permits to fill wetlands).

250. NEPA imposes procedural rather than substantive obligations. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (holding that NEPA does not impose substantive constraints on agency's decision-making). Federal wetland regulations create a presumption against siting many uses in wetlands, but establish a difficult and time-consuming permit process that would in some cases allow wetlands to be filled. See 40 C.F.R. § 230.10(a).

251. *See* GAY, *supra* note 11, at 23 (describing shift in site for medical incinerator from suburban community to poor urban neighborhood); Bullard, *Introduction*, *supra* note 5, at 10 (finding that "NIMBY... actions have... intensified the pressure on poor communities and communities of color... [to be] the dumping grounds for polluting industries and other locally unwanted land uses"); Foster, *supra* note 27, at 728 (pointing out success of white affluent communities in shifting undesirable sitings to other areas, namely low-income, minority communities).

252. *See* Collin, *supra* note 86, at 511-13 (noting that because poor minority communities have fewer resources and connections, they are less likely to be able to participate in siting processes and avoid selection); Foster, *supra* note 27, at 728 (recognizing that poor, minority communities lack resources necessary to resist undesirable sitings); Gauna, *supra* note 6, at 31-32 (asserting that unwanted land uses are shifted to communities that lack resources to resist them).

253. BULLARD, DUMPING IN DIXIE, *supra* note 51, at 4-5; *see also* Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 495-96 & nn.2-3 (1994) [hereinafter Gerrard, *Victims of NIMBY*] (describing PIBBY argument and its adherents). Others have disputed this conclusion. *See* Blais, *supra* note 10, at 86 (quoting study which concludes that "PIBBY" oversimplifies the complex set of factors that drive siting decisions); Gerrard, *supra*, at 514-16 (arguing that, in context of recent sitings of waste disposal facilities, there is little evidence of "PIBBY").

undesirable uses will be considered consistent with the existing uses, thus leading to greater and greater concentrations of undesirable land uses.[254] According to the environmental justice literature, the successful NIMBY efforts of certain communities, combined with the tendency of zoning laws to intensify existing uses, presents another way in which environmentalists and environmental laws have created distributional injustice.

4. *Environmental laws serve the wealthy better than the poor*

As described in the environmental justice literature, environmental laws may exacerbate unequal environmental conditions because communities with ample resources are able to use environmental and zoning laws in ways that those with fewer resources cannot. As suggested above, when it comes to the siting of undesirable land uses, affluent communities are more likely to have the resources to participate effectively in environmental review and other environmental proceedings than poorer communities.[255] Wealthy communities can afford to hire experts to analyze government documents, appear in public hearings, and bring suit against the decision makers on both procedural and substantive issues.

The importance of resources is no less relevant when it comes to the enforcement of environmental laws. At a general level, communities with resources find it easier to become involved in and are better equipped to lobby for governmental enforcement of environmental regulations in their communities.[256] More specifically, when the government is unable or unwilling to pursue enforcement actions to a community's satisfaction, a wealthy community has the ability to use its resources to pursue enforcement directly through the "citizen suit" provisions contained in many environmental laws.[257] One of the

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254. *See* Lord, *supra* note 81, at 729 (describing how Boston zoning ordinance, which appears neutral on its face, perpetuates and exacerbates existing concentrations of undesirable land uses). Even if a poor or minority community is able to change local zoning laws to stop undesirable uses in the future, they are unlikely to be able to affect existing uses through zoning. *See* Robertson, *supra* note 242, at 158-60 (discussing how zoning doctrines permit "prior non-conforming uses" to continue and allow for "natural expansion" of existing uses that perpetuate presence of undesirable facilities).

255. *See supra* notes 250-53 and accompanying text (discussing role of resources in successful NIMBY campaigns).

256. *See* Gauna, *supra* note 6, at 35-36 (observing that wealthy communities' ability to engage with agency and enforcement process may improve enforcement efforts relative to enforcement where such participation is lacking); Lazarus, *The Meaning and Promotion of Environmental Justice*, *supra* note 238, at 5 (observing that agencies' enforcement discretion is often affected by attention "to individuals who have the access, clout or basic know-how of agency operations"); *cf.* Kuehn, *supra* note 71, at 666-67 (discussing difficulty faced by those lacking financial or professional resources in participating in or affecting enforcement actions).

257. *See generally* Gauna, *supra* note 6 (discussing citizen suit provisions in environmental

purposes for the citizen suit provisions is to make up for shortfalls in the government's ability or commitment to ensure compliance by all regulated facilities with environmental regulations.[258] These citizen suit provisions permit citizens to pursue enforcement actions against facilities or agencies violating environmental laws.[259]

Bringing a citizen enforcement action, like bringing any litigation, requires significant resources—both to detect and analyze suspected violations and to pursue successful litigation.[260] Wealthy communities are thus more likely to bring private citizen suits than poor neighborhoods.[261] Assuming that government enforcement is evenly distributed,[262] the presence of additional private enforcement efforts in wealthy areas could result in an overall enforcement pattern that varies according to the communities' private resources.[263] Thus, although the citizen suit provisions in environmental laws do provide citizens with recourse if they are concerned about environmental compliance in their neighborhood, the unequal use of these provisions by communities could exacerbate the disparity in environmental conditions among neighborhoods. In this sense, the use of

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laws and use of such provisions by those with sufficient resources).

258. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 3.4, at 171-74 (2d ed. 1994) (stating that citizen suit provisions exist to enforce environmental regulations when government fails to do so); Lazarus, *The Meaning and Promotion of Environmental Justice*, *supra* note 238, at 4-6 (observing shortfall in enforcement resources and role of citizen suits in maximizing enforcement).

259. For example, section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 (1994), allows citizens to sue to enforce violations of the CWA; section 304 of the Clean Air Act ("CAA"), 42 U.S.C. § 7604 (1994), allows citizens to sue to enforce violations of the CAA; and section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, which regulates hazardous and solid waste, permits citizens to sue to enforce violations of RCRA and to stop activities that present "an imminent and substantial endangerment to health or the environment."

260. *See* Gauna, *supra* note 6, at 46 (discussing initial difficulty of detecting hazards and ascertaining violations), 46-49 (discussing Clean Water Act citizen enforcement suits); *id.* at 49-60 (discussing Clean Air Act citizen enforcement suits); *id.* at 60-62 (discussing citizen suits under Superfund Law); *id.* at 62-69 (discussing citizen suits under Resource Conservation and Recovery Act).

261. *See id.* at 43-44 & n.152 (noting that complexity and expense of environmental cases often preclude low income communities from successfully using environmental laws to their advantage); Lazarus, *The Meaning and Promotion of Environmental Justice*, *supra* note 238, at 6. Although successful plaintiffs are generally eligible for attorneys' fees, the amount attorneys can receive is limited. *See* Gauna, *supra* note 6, at 76-77 (stating that attorneys' fees in successful suits are calculated as a product of reasonable hours by the reasonable rate for attorneys in the area where the suit took place, and that the rate cannot be adjusted for contingency nature of many lawsuits). Communities that cannot pay a lawyer in advance may, therefore, have difficulty finding attorneys willing to represent them on a contingency basis. *See id.* at 78-79.

262. As discussed above, the evenness of government enforcement has been questioned, with some alleging that government enforcement efforts are less rigorous in poor and minority areas. *See supra* note 71 and accompanying text.

263. *See* Gauna, *supra* note 6, at 4-6 (arguing that private enforcement efforts by wealthy communities could lead to their having better environmental compliance than communities which cannot affort to initiate private citizen suits).

environmental laws could constitute one cause of the uneven distribution of environmental problems.

D. *Environmental Laws as a Limited Mechanism for Addressing Environmental Justice Concerns*

1. *The benefits of environmental laws*

Notwithstanding the role of environmental laws in causing environmental injustice, the environmental justice literature does acknowledge that environmental litigation may be an effective tool in challenging an undesirable facility. Since many facilities are undesirable due to their environmental consequences, environmental laws regulating the siting process or facility operations provide a natural basis for challenge.[264] Moreover, environmental laws may be the most promising method for achieving legal redress due to the limited coverage of civil rights laws and the high evidentiary burdens associated with the Equal Protection Clause.[265] The literature refers to the relatively frequent success of environmental lawsuits brought to resolve environmental justice conflicts.[266]

The environmental justice literature acknowledges the potential role for both the substantive and the procedural elements of environmental laws in remedying environmental injustices.[267] Substantive environmental laws and their implementing regulations impose cer-

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264. *See generally* Gerrard, *Role of Existing Legislation, supra* note 90 (describing environmental laws and ways in which they could be used to address undesirable environmental consequences). Some authors have stressed particular strategies under environmental laws. *See, e.g.*, Crawford, *supra* note 6 (discussing medical monitoring suits under CERCLA); Gauna, *supra* note 6, at 40-76 (discussing ways to increase use of private citizen suits to achieve environmental justice); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 827-28 (arguing that lawsuits based on non-compliance with environmental statutes could be effective way for minority communities to prevent undesirable sitings in their communities).

265. *See* Cole, *Environmental Justice Litigation, supra* note 90, at 526 (arguing that environmental laws provide a more promising basis for blocking facilities than civil rights laws); Torres, *Environmental Burdens, supra* note 29, at 437 (maintaining that environmental laws have been more effective than civil rights laws in providing redress for perceived environmental injustice). As attorney Michael Gerrard has stated: "If the only tool that you have is a hammer, then the only things you can deal with are nails. If the only laws that you have are laws that say you cannot site facilities in endangered species' habitats or in wetlands, then that is what you look for." Gerrard, *Role of Existing Legislation, supra* note 90, at 559.

266. *See* Cole, *Environmental Justice Litigation, supra* note 90, at 526-30 (describing successful use of environmental law suits); Gerrard, *Role of Existing Legislation, supra* note 90, at 558 (recognizing relatively high success rate of lawsuits based on environmental laws); Robertson, *supra* note 242, at 137-38 (finding that suits based on environmental law have succeeded in delaying and preventing construction of new polluting facilities).

267. *See* Cole, *Environmental Justice Litigation, supra* note 90, at 526-30 (discussing potential for both substantive and procedural elements of environmental law as means to blocking undesirable sitings); *see also* Foster, *supra* note 27, at 749-52 (discussing importance of environmental laws' procedural public participation provisions to environmental justice efforts).

tain requirements on polluting facilities. For example, the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act established permitting processes for air emissions,[268] water discharges,[269] and hazardous waste, respectively.[270] New facilities must go through a permitting process and, once sited, must conform to the terms of their permits. Communities concerned about the facilities can participate in the initial permitting process, monitor compliance once permits have been issued, and bring lawsuits if they believe that the permitting process failed to conform to the mandated requirements or that the facility does not comply with the permit.[271]

The environmental justice literature also acknowledges that the complex procedural requirements imposed by many environmental laws can assist communities concerned about environmental problems. Environmental review statutes, such as NEPA[272] and its state law analogues,[273] require proponents of major federal or state actions to complete environmental impact statements.[274] The statements generate a great deal of information about a project's environmental and socioeconomic consequences and about possible alternatives to a proposed project.[275] NEPA and its state equivalents also provide extensive opportunities for public hearings and participation.[276] If these procedural requirements are violated, they then present a basis for legal claims.[277]

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268. 42 U.S.C. § 7475 (1994) (describing permit requirements for facilities in areas that have attained national air quality standards); *id.* § 7503 (describing permit requirements for facilities in areas that have not yet attained national air quality standards).

269. 33 U.S.C. § 1342 (establishing permitting process for water discharges).

270. 42 U.S.C § 6925 (establishing permitting system for facilities that treat, store, or dispose of hazardous waste).

271. *See generally* Gerrard, *Role of Existing Legislation*, *supra* note 90 (discussing how environmental laws can be used to further goals of environmental justice movement). Many states have assumed responsibility for implementing these programs. In such instances, communities would participate in a state-run permitting program that conforms to the federal requirements.

272. 42 U.S.C. §§ 4321-4370.

273. *See* Johnson, *supra* note 25, at 566-67 (referring to state environmental review statutes); Reich, *supra* note 130, at 305-15 (identifying and discussing state environmental review statutes).

274. 42 U.S.C. § 4332(2)(C).

275. *See* Gerrard, *Role of Existing Legislation*, *supra* note 90, at 556, 561-62 (describing information-gathering value of environmental laws establishing environmental review procedures); *see also* Johnson, *supra* note 25, at 576-78 (describing how that environmental impact statements provide communities with extensive information about a proposed project).

276. *See* Foster, *supra* note 27, at 749-52 & n.145 (describing importance of environmental provisions requiring public participation and need to improve upon participatory provisions already included in existing environmental laws); Johnson, *supra* note 25, at 572-76 (maintaining that public participation provisions, like those in NEPA, provide communities with a vehicle for participating in the decisionmaking process).

277. *See* Cole, *Environmental Justice Litigation*, *supra* note 90, at 528-30 (describing lawsuit which successfully alleged procedural deficiencies); *see also* Godsil, *Environmental Struggles*, *supra* note 17, at 7-8 (discussing successful campaign to force agency to complete required environ-

Some environmental justice authors note that environmental lawsuits not only help to ensure that those siting or operating facilities comply with the substantive and procedural requirements of all applicable laws, but also provide a mechanism for increasing the delay and expense associated with a proposed project.[278] The delay and expense may discourage the project proponent from pursuing the planned action in that particular geographic area or at all.[279]

2. *Environmental law as a necessary evil*

While the environmental justice literature generally acknowledges the strategic value of environmental litigation, some of the literature argues that this remedy fails to address the deeper roots of the problem: discrimination.[280] The underlying issue is the political and economic status of the affected community and the extent to which that community is treated fairly. Strategies like bringing an environmental lawsuit or participating in environmental proceedings are unlikely to address these basic concerns.[281]

Furthermore, the environmental justice literature portrays the technical nature of environmental laws as alienating to the communities enlisting their aid.[282] Because of the complexity of environmental

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mental reviews).

278. *See, e.g.*, Gerrard, *Role of Existing Legislation*, *supra* note 90, at 557 (noting that environmental statutes can stop, "or at least... delay severely" the siting of waste disposal or industrial projects); Godsil, *Environmental Struggles*, *supra* note 17, at 7 (describing delay that can be achieved through invocation of environmental review requirements); Johnson, *supra* note 25, at 578-79 (describing benefits of delays caused by compliance with environmental review statutes).

279. This "cost and delay" strategy mimics the strategy successfully used by traditional environmentalists. *See supra* notes 247-50 and accompanying text (discussing environmentalists' "NIMBY" tactics); *cf.* Delogu, *supra* note 86, at 199 (noting and criticizing NIMBY activists for engaging in delay strategies). It should also be noted, however, that many of those writing in the environmental justice literature espouse the goal of reducing the overall number of undesirable uses, rather than simply shifting them from one area to another. *See, e.g.*, GAY, *supra* note 11, at 50 (noting that environmental justice groups increasingly argue that toxic facilities should be "Not in Anyone's Backyard"); Chavis, *supra* note 6, at 5 (emphasizing that environmental justice movement seeks to remove environmental hazards from not just minority communities but rather from all communities).

280. *See* Cole, *Empowerment as the Key*, *supra* note 13, at 647-49; Torres, *Environmental Burdens*, *supra* note 29, at 450-51.

281. *See* Cole, *Empowerment as the Key*, *supra* note 13, at 647-49 (discussing failure of legal remedies to address political problems at root of environmental injustice); Torres, *Environmental Burdens*, *supra* note 29, at 450-51 (arguing that the pursuit of legal remedies fails to address deeper political and economic problems faced by communities); *cf.* Williams, *supra* note 224 (noting that environmental laws such as Endangered Species Act force attention onto one narrow issue—survival of particular species—rather than on broader issue—the importance of land to particular communities).

282. In some cases, communication between relevant agencies and minority communities may be stymied by the agencies' confusion as to who represents a particular group. The procedure for soliciting and responding to the public's concerns may fail to correspond with the authority and communication structures of a minority community. *See* Williams, *supra* note

laws and the likelihood that community residents will not have the experience or training to use them, the expert lawyer might dictate litigation strategy or engage in the administrative process without the participation of the non-expert community.[283] When the locus of the dispute is moved to the courtroom or an administrative agency, the community group is on unfamiliar turf. Use of environmental laws could thus disengage and disempower the affected community.

E. *Conclusion*

In many low-income and minority communities, environmental laws are looked on with suspicion. First, environmental laws (and environmental lawyers) often cause or exacerbate environmental injustice. Second, despite the potential for some environmental laws to provide a legal basis for challenging an environmental problem, the use of environmental laws does not address the deeper issues of justice that are at stake. In some cases, using environmental laws might harm rather than help the affected community's quest for justice.

The goal of this Article with respect to the first claim—that environmental laws cause environmental injustice—is simply to identify the negative perception, its roots, and its role in the environmental justice movement's attitude toward environmental laws. As to the second claim, this Article intends to move past the concerns about the relationship between environmental laws and the pursuit of justice to explore more fully the ways in which environmental laws can contribute to social justice.[284]

224, at 1157-63 (describing agency's failure to determine who "speaks for" Apaches in Arizona land dispute).

283. *See* Cole, *Empowerment as the Key*, *supra* note 13, at 649-51 (suggesting that bringing environmental lawsuits deprives communities of control over their dispute and shifts debate to forum—courts—where communities are likely to be at a disadvantage); Gauna, *supra* note 6, at 22 n.73, 60 n.218 (noting that technical nature of citizen suits creates battle of experts in which communities tend to give control to lawyers); Poirier, *Can We Talk?*, *supra* note 161, at 1101 (acknowledging possibility that "[p]rofessional analysis and control can deform and even derail a grassroots fight"); Torres, *Environmental Burdens*, *supra* note 29, at 451 (arguing that lawsuits shift debate to fora where minority groups lose control and where they have insufficient resources relative to their opponents). Despite their criticisms of the nature and process of environmental litigation, many environmental justice advocates acknowledge that environmental litigation, if handled with the requisite sensitivity to the broader issues at stake and the participatory needs of the community, will not necessarily distract or disempower the communities being served. *See* Cole, *Empowerment as the Key*, *supra*, at 661-73; Gauna, *supra*, at 39-40; Poirier, *Can We Talk*, *supra*, at 1101-04.

284. *See* Crawford, *supra* note 6, at 302-03 (discussing need to move past historic barriers between environmental and civil rights movements to consider various opportunities that environmental laws can provide); *see also* Foster, *supra* note 27, at 721-25 (discussing relationship between civil rights and environmental groups and suggesting that civil rights groups consider framework provided by environmental laws); Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 853-55 (discussing how environmental and civil rights movements need to move beyond their past tensions to affirm and address "common ground" they share).

III. ENVIRONMENTAL LAWS AND POLITICAL JUSTICE

Environmental laws play three different roles in the pursuit of environmental justice. The first is instrumental: environmental laws may provide a legal "hook" for suits against a project, even if that "hook" does not explicitly relate to the question of justice.[285] Second, environmental laws could serve, rather than hinder, the pursuit of distributive justice. New requirements that demographic impacts be considered in connection with government decisions affecting the environment provide one mechanism for addressing distributional justice.[286] Passing legislation requiring greater distributional equity would be another.[287] Third, environmental laws may assist in the pursuit of political justice. While the first and second roles have received some attention in the environmental justice literature,[288] the role of environmental laws in the pursuit of political justice has not received sufficient attention. The remainder of this Article addresses this issue.

The role of environmental justice in pursuing political justice is explored in connection with environmental justice disputes involving the siting of undesirable land uses. Although siting disputes involve only one aspect of the many environmental problems faced by poor and minority communities, they are of crucial importance.[289] The environmental consequences of a siting decision are, of course, a

285. *See supra* notes 90-94, 264-79 and accompanying text.

286. *See supra* notes 97-109 and accompanying text (discussing Executive Order 12,898 and its requirement that federal agencies consider distributional implications of their decisions).

287. *See supra* notes 110-15 and accompanying text (discussing federal and state legislation).

288. *See supra* note 264 (listing articles discussing instrumental use of environmental laws), and note 133 (discussing role of environmental laws in pursuing distributive justice).

289. Professor Torres has suggested that the environmental justice movement may spend more time than it should on siting disputes. *See* Torres, *Environmental Justice*, *supra* note 10, at 618 (arguing that "there are many other threats of environmental quality that will continue to place many communities at risk regardless of the reform of the siting process"). As recent studies have suggested, siting processes may not be the cause of all disproportionate burdens and, even if they are a cause, they are only one factor in explaining current disproportionate impacts. *See infra* notes 81-84 and accompanying text. Improving distributional results will therefore require more than fixing the siting process. *See* Torres, *Environmental Justice*, *supra*, at 618. In other words, creating fairer siting processes would not necessarily improve long-term distributional justice because a distributional injustice may arise after, and as a consequence of, an initially fair siting decision. Thus, if one's primary goal is the reduction of environmental disparities, attention to siting processes may not solve the problem.

If one perceives political justice as a central concern and goal of the environmental justice movement, however, a heightened focus on siting disputes is neither surprising nor inappropriate. Even thought local siting disputes may not be the most important determinant of the distribution of environmental harms, they often present a manifestation of perceived political injustice. The siting decision becomes a vehicle for responding to a deeper sense of systemic "racial subordination." At the grassroots level, the environmental justice issue in a siting dispute can be as much about continuing the debate on race discrimination as it is about improving environmental quality.

central concern to many communities. But when the fairness of a siting decision is challenged, much more is at stake than the placement of a facility. To many communities, a siting decision may be symbolic of a deep lack of respect given to the affected community and may reflect the community's low social and political status. As described by Professor George Wright in the context of siting hazardous waste facilities, the injuries of concern to a community are not just the public health risks associated with such facilities.[290] They also include the "stigmatic injury" of being selected as the site for undesirable facilities.[291] The argument about the fairness of siting a facility in a poor or minority neighborhood therefore raises not only the practical consequences of the facility, but also the enduring question of the social, political, and economic status of poor and minority communities.

A. *Asserting Claims of Political Justice: The Challenge*

The legal approach for claiming political injustice is generally a suit under the Equal Protection Clause or, where applicable, a suit for discriminatory intent under Titles VI or VIII of the Civil Rights Act.[292] As discussed earlier, however, the evidentiary burden for a claim based on the Equal Protection Clause is high.[293] Where the evidence of unequal treatment is relatively insidious, the Constitution may fail to provide a legal remedy.[294] Titles VI and VIII are relatively limited in their applicability as well.[295]

What remedy, then, exists for communities who believe they have been discriminated against and who are unlikely to find legal recourse? The primary remedy will be the long, slow process of political and cultural change. Communities who believe they have been treated unfairly must find ways to communicate their cause in a manner that stimulates the broader community to greater accountability. To the extent they are successful in unmasking discriminatory treatment, affected communities may gain a new recognition

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290. *See generally* R. George Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 ARIZ. ST. L.J. 777 (1991).

291. *See id.* at 784-87. Professor Wright notes that stigmatic injuries "may reflect a lack of respect and may tend to undermine the bases of the self-respect of the adversely affected community." *Id.* at 787.

292. *See supra* note 150 and accompanying text.

293. *See supra* note 154 and accompanying text.

294. *See supra* note 155 and accompanying text. Professor Blais' conclusory statement that intentional race-based discrimination would be "unconstitutional," Blais, *supra* note 10, at 81, fails to acknowledge the possibility that the constitutional test may be underinclusive.

295. *See supra* note 122 (Title VI applies only to federally funded programs and agencies), and note 125 (Title VIII applies only to siting decisions affecting housing).

and standing in the political and social structures within which they exist.

The struggle for political justice in the political forum is not an easy one.[296] Where injustice has occurred, the unjustly treated community is not viewed with equal concern and respect. With a lack of respect as a backdrop, a claim of unfair treatment is unlikely to be received with responsive sympathy. The difficulty is compounded by the likelihood that the discrimination will be subtle rather than overt. The days of explicit and unapologetic discrimination are now largely over. Furthermore, an accusation of unfair treatment is a serious charge. To the extent it is not believed, the decisionmakers accused of discriminating may be seen as victims of the unfair accusations of the burdened group.

Ultimately, when a burdened group's assertions are not believed, their objection to the siting decision may be seen as just another instance of the widespread "Not In My Backyard" phenomenon.[297] NIMBY is seen as a selfish position: don't bother us; bother someone else. NIMBY claims do not, on their own terms, raise questions of political justice.[298] Consequently, the community will inevitably confront the following questions: Is the claim for environmental justice simply a way to mask self-interested NIMBY attitudes in politically-correct clothing? Is a claim in opposition to a facility a claim for justice simply because it is expressed by a minority or low-income community? Without an answer to these questions, a community will not be able to demonstrate political injustice.

Some environmental justice advocates argue that their NIMBY claims are not selfish because they are not trying to impose the bur-

296. Professor Poirier observes that a race or class-based analysis of land use decisions is a "counternarrative" to the dominant environmental and property-based rhetoric used to evaluate most land use decisions. Basing litigation and negotiation on race or class-based claims is likely to be "problematic . . . because of political and economic resistance to change, bolstered by the conflict of the counternarrative with the categories of the dominant narrative." Poirier, *Beach Access*, *supra* note 161, at 799. Some groups, therefore, make a tactical decision to suppress such potentially divisive issues and focus on more traditional and generally acceptable positions, such as those based on environmental or property theories. *See id.* at 803 (referring to New Jersey Public Advocate's strategy for obtaining beach access for minorities). Obscuring race- or class-based elements of a claim, however, "undermines the effectiveness of the counternarrative as an organizing tool and as an eventual long-term strategy for shifting the dominant discourse." *Id.* at 802. This Article acknowledges the difficulty of making claims of discrimination and suggests a method for using the dominant discourse (of environmental law) to demonstrate the veracity of the counternarrative (of unfair treatment).

297. The "NIMBY" responses of wealthy and powerful communities are considered one of the causes of the disproportionate distribution of undesirable facilities in poor and minority areas. *See supra* notes 251-53 and accompanying text.

298. *See* Torres, *Environmental Justice*, *supra* note 10, at 612-13 (suggesting possibility that claim of "environmental justice" could be abused to achieve "what is essentially a NIMBY result").

den on anyone else. Instead, their position is "NIABY": Not in Anybody's Backyard.[299] For example, in fighting the siting of a hazardous waste facility, a community might urge reductions in the use of hazardous chemicals rather than placement of the facility near another community. There is evidence that such opposition has prompted reductions in the generation of municipal and hazardous waste.[300] But while NIABY may be a plausible position in connection with opposition to certain types of facilities, in connection with other types of facilities the argument becomes strained. Many undesirable uses, like hospitals, jails, and waste disposal facilities serve important and necessary functions. NIABY will not be a plausible or desirable response to these types of necessary land uses. Thus, where a community opposes a particular land use, and where NIABY is not a plausible response, the community cannot avoid the "NIMBY" label.[301]

Nonetheless, the fact that a community does not want a particular land use in its backyard does not mean that its claim of unfairness is illegitimate. No community wants an undesirable use located in its backyard. The issue, then, is not whether the claim is motivated by NIMBY. The question is whether the burdened community is raising a claim for political justice in addition to NIMBY. The NIMBY part of the claim is the community's dismay over the proposed siting. The political justice part of the claim asks the question of fairness: whether it is just to put that particular use in that particular backyard. Therefore, the central issue in the environmental justice context is whether, in addition to its natural opposition, a community is raising an issue of fairness.

The answer to the question of political injustice will be strongly contested. Unlike the legal forum, an absolute answer to the question of fairness is unlikely; winning or losing the political debate will be a matter of degree. The degree to which an affected community can convince the broader community that it has been treated unfairly will depend on how well it can support its claim in terms comprehensible to the broader community. If a community provides a convincing argument that a siting decision has been made unfairly in a par-

299. *See supra* note 279 (discussing NIABY).

300. *See* Gerrard, *Victims of NIMBY*, *supra* note 253, at 516-20. Attorney Gerrard observes that society may sometimes benefit from local communities' NIMBY. In particular, he notes that local opposition to municipal and hazardous waste facilities has prompted greater efforts to reduce waste, thus providing a benefit to all, not just to the community resisting the noxious use. *See id.* at 517-20.

301. *See* Delogu, *supra* note 86, at 198-201 (describing adverse consequences to society that result from self-interest associated with NIMBY syndrome); Gerrard, *Victims of NIMBY*, *supra* note 253, at 522 (concluding that NIMBY attitudes toward low-income housing and social services have negative social consequences).

ticular instance, then that success could improve the community's political status and its long-term prospects for fair treatment.[302]

B. *How Environmental Laws Help Identify Injustice*

How, then, does a community demonstrate that it has been treated unfairly? In the face of allegations of discriminatory treatment, most decisionmakers will attempt to articulate a nondiscriminatory basis for their siting decision. To demonstrate unfair treatment, the aggrieved community will have to show that the proffered basis for the unfair treatment is merely a "pretext" for a discriminatory motive.

The arguments a community could raise in the political forum are similar to the legal arguments a plaintiff would raise in a "disparate treatment" claim under Title VII of the Civil Rights Act of 1964.[303] Under Title VII, a complainant must first make a prima facie case demonstrating unfair treatment.[304] To make a prima facie case, the complainant must present evidence of disparate treatment.[305] In the absence of direct evidence, the complainant may present circumstantial evidence showing that he or she was not selected for the employment in question despite having the requisite qualifications.[306]

By analogy, affected communities may have direct or circumstantial evidence of unfair treatment. Where communities have direct evidence of discrimination, the process of communicating to the broader community will be easier than if the evidence is only circumstantial.[307] A more prevalent and more difficult situation arises when

302. In fact, a community may make political progress through a debate about environmental justice even if it fails to achieve tangible results—in other words, even if it fails to change a siting decision. While the community may remain burdened from a distributional standpoint, if the debates about the siting have raised doubts about the credibility of the decisionmakers and increased the broader community's awareness of and concern for the affected community, the affected community may have progressed in the incremental process of political and cultural change that is necessary to achieve fair treatment. *See* Michael Guerrero & Louis Head, *Informed Collective Action—A Powerful Weapon*, *in* WE SPEAK FOR OURSELVES, *supra* note 12, at 34 (noting that, despite ultimate failure in particular matter, community's active opposition to undesirable facility meant that "none of those involved would every try to shine off the community again").

303. 42 U.S.C. § 2000e (1994). Once again, this Article uses Title VII case law only by way of analogy, not as a formal model for a legal action.

304. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (describing requirements for presenting prima facie case).

305. *See, e.g.*, Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1166 (6th Cir. 1996).

306. The complainant generally must show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp., 411 U.S. at 802. The specific requirements for a *prima facie* case may vary depending upon the particular factual circumstances presented. *See id.* at 802 n.13.

307. In addition, with direct evidence of discrimination, the community may be able to

a community lacks direct evidence, but nonetheless believes that it has been treated unfairly. To present a prima facie case based on circumstantial evidence, the aggrieved community would have to make the opposite showing of that required under Title VII: instead of showing that a site should have been selected based on the site's qualifications, the aggrieved community would need to show that it should not have been selected because it did not have the requisite qualifications for the facility in question.

Under Title VII, once a prima facie case has been made, the defendant has the opportunity to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[308] Similarly, a decisionmaker responsible for selecting a site would be expected to articulate a neutral justification for the siting decision in response to a community's contention that the siting was motivated by unfair treatment.[309]

In the case of Title VII, the employer's articulation of a nondiscriminatory basis does not end the litigation. The complainant has the opportunity to respond and demonstrate that the employer's alleged basis for rejecting the employee was simply a "pretext."[310] Under Title VII, a "'[p]retext . . . means a lie, specifically a phony reason for some action.'"[311] Numerous means can be used to demonstrate that the employer's alleged rationale is pretextual. The complainant can prove that the rationale is not based in fact,[312] or, even if it is based in fact, that it is not the "real" motivation,[313] or that the reason provided is not sufficient to explain the action taken.[314]

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mount a successful legal challenge under the Equal Protection Clause or, if applicable, under Title VI or Title VIII.

308. *McDonnell Douglas*, 411 U.S. at 802.

309. *See supra* note 65 and accompanying text.

310. *McDonnell Douglas*, 411 U.S. at 804.

311. Johnson v. City of Fort Wayne, 91 F.3d 922, 931 (7th Cir. 1996) (quoting Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995)).

312. In *Suggs v. Servicemaster Education Food Management*, 72 F.3d 1228 (6th Cir. 1996), the appellate court upheld the trial court's findings that the facts failed to support the employer's rationales for terminating the plaintiff. *See id.* at 1232-33.

313. *See* Emmel v. Coca-Cola Bottling Co., 95 F.3d 627, 634 (7th Cir. 1996) (explaining that finding of pretext "does not require that the facts presented by the defendant as the reason for its employment action not be true, only that they not be the reason").

314. *See Johnson*, 91 F.3d at 931 (citing Lenoir v. Roll Coater, Inc., 13 F.3d 1130, 1133 (7th Cir. 1994)). A number of courts, using these factors, have found that an employer's stated rationale is pretextual. For example, in *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160 (6th Cir. 1996), the appellate court upheld the trial court's findings that the employer's proffered justification was a pretext. The justification lacked credibility in light of evidence that the employer had shifted its factual assertions as the litigation progressed. *See id.* at 1167. In *Emmel*, the court noted that the defendant's purported explanation of its decision not to promote the plaintiff had shifted over time, suggesting that the explanation was a post-hoc rationalization for the decision designed to mask a discriminatory motive. *See Emmel*, 95 F.3d at 634-35. In *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424 (7th Cir. 1992), applying the analogous Age Discrimi-

By analogy, in a community's debate about the fairness of a siting decision, the community would need to show that the articulated basis for the decision was merely a "pretext" masking discriminatory treatment. The community would need to demonstrate that the decisionmakers responsible for the siting had misstated the relevant facts associated with the siting process, or that the facts, though true, did not provide the "real" justification for the siting decision, or that the purported justification simply fails to provide a credible explanation for the siting decision.

In a Title VII case, if a plaintiff proves that an employer's rationale is a pretext, the jury may infer from the evidence that the real motivation for the employment decision was discriminatory. Similarly, in an environmental justice dispute, a burdened community which can show that the decisionmakers' rationale was a pretext allows for the inference that the real explanation for the decision was discrimination. When the purported rationale for a decision does not add up, the natural question becomes: "Why here?" The evidence may then illustrate that the decisionmakers did not site the facility near the burdened community because it was a good place for the facility. Instead, the evidence may suggest that the decisionmakers avoided siting the facility near communities of political concern to them. If so, the siting decision would fail to treat the burdened community with equal concern and respect.[315]

In a Title VII suit, a jury decides the credibility of the complainant's and the employer's assertions. By contrast, there is no final arbiter in a siting dispute carried out in public debate, and there will be no final answers on the question of whether the decisionmakers' alleged bases for their decision were pretextual or sincere, or on whether the true explanation lies in unfair treatment. However, there are likely to be better and worse answers, answers that have more credibility and less credibility, answers that have more evidence to support them and answers that have less.[316] The political forum

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nation in Employment Act, 29 U.S.C. §§ 621-634, the trial court found, and the appellate court agreed, that the employer's proffered justifications were pretextual. The trial court found that the facts did not support the employer's assertions, and those facts that were true (that the employee was "rude and uncommunicative") did not appear to offer the "real" motivation for the termination decision or explain the decision (since these characteristics had been present and accepted during the preceding 14 years). *See Giacoletto*, 954 F.2d at 426-27.

315. It is possible that a jury could conclude that the employer's rationale was a pretext but that the motive, though illicit, was not discrimination. The same could be true in the environmental justice context. *See infra* notes 378-79 and accompanying text.

316. It is quite possible that the political debate will reveal that the decisionmakers had mixed motives. They may have selected a site for a number of reasons, with a lack of concern and respect for the burdened community as one explanation. Whatever the impact of a "mixed motive" in a civil rights' case, recognition of the illicit motive would still present an ad-

presents a sliding scale of justice. The degree to which a community can communicate its perception that it has been treated unfairly will vary with the strength of the evidence it can muster.

Environmental laws can assist in debates about justice by facilitating the collection of circumstantial evidence to demonstrate the siting equivalent of "disparate treatment."[317] Information gleaned through environmental laws and environmental review procedures can assist in generating a "prima facie case" that the site is not "qualified" and can assist a community's challenge of the justifications offered by decisionmakers. The identification of irrationalities or inconsistencies in the siting process may strengthen the inference that the decision was motivated by a disregard for a community, and increase the evidence supporting the claim that a community's opposition goes beyond NIMBY to include a demand for fairness.[318]

C. *Specific Mechanisms by Which Environmental Laws May Support Claims of Injustice*

Different environmental laws, and different sections within a given environmental law, provide a range of tools that can assist in debates about justice. First, some environmental laws establish substantive criteria whose violation may signal an irrational and possibly discriminatory siting decision. Second, some environmental laws provide extensive information regarding the expected consequences of the siting. Even if these laws do not establish substantive criteria, they may reveal enough about the decision-making process to implicate the legitimacy of the decision. Third, some environmental laws require a consideration of alternative siting options. The additional information regarding alternative sites, and a comparison of the decision-making processes used to reject the alternative sites, may provide evidence of the irrationality of selecting the site located in the

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vance for a community in a political debate about fair treatment. Even if the decisionmakers were motivated only in part by discrimination, the burdened community would be making the political point that they were unfairly treated. They would be closer to the goal of holding decisionmakers accountable to all than they would be if they were unable to show any invidious motive at all.

317. Environmental laws are not the only way to develop circumstantial evidence of discrimination. Evidence of past disparate impacts may be one source of circumstantial evidence pointing toward a pattern of discriminatory treatment. Other irregularities in the siting process—independent of irregularities discovered in connection with environmental or land use laws—might also provide circumstantial evidence casting doubt on the legitimacy of the siting decision.

318. Again, numerous inferences can be drawn from the discovery that the decisionmakers' rationale is pretextual. Discrimination is just one possibility. The likelihood that the true purpose was discriminatory will depend on the entirety of the circumstances. *See infra* notes 378-79 and accompanying text.

poor or minority neighborhood. The more a siting in a poor or minority neighborhood does not make sense, the more likely that another factor, such as discrimination, motivated the decision.

1. Violation of substantive criteria

Many laws governing the siting of undesirable facilities establish certain substantive criteria. For example, the federal regulations governing the siting of hazardous waste treatment, storage, or disposal facilities prohibit the siting of any such facility within 200 feet of a geologic fault line that has been active within a certain period of time.[319] The violation of such an easily verifiable, objective standard would give an aggrieved community a strong legal basis for challenging the siting of a facility within 200 feet of an active fault.[320] The violation of an objective standard, however, might also provide indirect evidence of discrimination. An aggrieved community would ask: Why did the developer choose, as its place for development, a site that was environmentally unsuitable? Was the developer drawn by the hope that the poor and minority neighborhoods in which it proposed its development would be less likely to oppose the facility?[321] Evidence that a developer or decisionmaker has ignored important substantive criteria would support the inference that the decision was motivated by an improper motive.

In light of the federal government's general reluctance to engage in regulating the land use decisions that must be made in the siting context,[322] the examples of substantive criteria governing the siting process burgeon when one considers state laws and regulations.[323]

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319. *See* 40 C.F.R. § 264.18(a)(1) (1996) ("Portions of new facilities where treatment, storage, or disposal of hazardous waste will be conducted must not be located within 61 meters (200 feet) of a fault which has had displacement in Holocene time.").

320. *See supra* notes 264-71 and accompanying text (discussing environmental litigation in environmental justice context).

321. *See supra* notes 61-63 and accompanying text (discussing Cerrell Associates report).

322. *See* Delogu, *supra* note 86, at 202 n.15 (observing that most land use decisions are made at local level).

323. For regulations establishing substantive criteria in connection with siting hazardous waste treatment, storage, and disposal facilities of various forms, see, e.g., 30 TEX. ADMIN. CODE § 335.204 (West 1996) (providing location standards for hazardous waste, storage, processing or disposal); *id.* § 334.493 (providing location standards for facilities storing or processing petroleum-contaminated substances); UTAH ADMIN. CODE § R315-8-2.9 (1996) (establishing location standards for hazardous waste management facilities); Arkansas Environmental, Health and Safety Regulations, ERM AR 264-18 (1996) (providing standards for location of hazardous waste facilities); Connecticut Environmental, Health and Safety Regulations, ERM CT 22a-122-1 (1989) (providing requirement that hazardous waste facilities be located at minimum distance from other land uses); Mississippi Environmental, Health and Safety Regulations, ERM MS 264.S2.3 to 264.S2.7 (1994) (providing requirements for siting hazardous waste management facilities, including hydrological, geological, natural resource, historical, zoning, proximity to other land uses, and aesthetic factors); South Carolina Environmental, Health and Safety Regulations, ERM SC R.61-1-4-IV (1991) (providing locations criteria, including geologic, hydro-

Under Texas' health and safety regulations, for example, municipal and solid waste facilities cannot be located in wetlands,[324] must be "located at least 500 feet from all public water wells and at least 150 feet from private water wells,"[325] and must be a certain distance from all forms of surface water.[326] If a local city council in Texas decided to site a waste disposal facility in a wetland within 100 feet of private and public wells and in the vicinity of the city's minority community, that community could argue that the site was chosen despite it's failure to meet the requisite qualifications for a landfill. The city's violation of the health and safety standards would provide a strong legal basis for challenging the siting decision. Additionally, the city's transgression of such clear and important criteria would be relevant to the debate about the fairness of the siting decision. The site's failure to meet necessary qualifications could suggest that the city council was motivated by improper motives.

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logic, proximity to water sources and other land uses); West Virginia Environmental Health and Safety Regulations, ERM WV-57-1-A-3a (1994) (providing location standards for obtaining approval for siting commercial hazardous waste management facilities, including proximity to water sources, wetlands, and geologic characteristics); Wisconsin Environmental, Health and Safety Regulations, ERM WI 630.18 (1991) (providing standards for location of hazardous waste storage, treatment and disposal facilities); *id.* at 718.01 to 718.14 (providing location standards for placing solid wastes excavated in connection with environmental remediation); Wyoming Environmental Health and Safety Regulations, ERM WY-2 (chapter 10) and ERM WY-3 (chapter 6) (providing standards for location of hazardous waste treatment, storage, and disposal facilities).

For regulations establishing substantive criteria in connection with siting municipal or solid waste disposal facilities of various forms, see, e.g., Minnesota Environmental, Health and Safety Regulations, ERM MN 7035-28.25 (1996) (providing similar standards for demolition debris land disposal facilities); Oklahoma Environmental, Health and Safety Regulations, ERM OK 252:510-7-2 (1995) (providing similar standards for solid waste disposal facilities) and *id.* at 252:520-7-2 (same); Utah Environmental, Health and Safety Regulations, ERM UT R315-302-1 (1995) (providing location standards for solid waste facilities, including restrictions on proximity to other land uses, geologic characteristics, and proximity to water sources); West Virginia Environmental, Health, and Safety Regulations, ERM WV-47-38-3 (1996) (permitting requirements for solid waste facilities, including restrictions on proximity to water sources, proximity to other land uses, and geologic characteristics); Wisconsin Environmental, Health, and Safety Regulations, ERM WI 504.04 (1988) (providing regulations regarding proximity to water sources and other land uses); Wyoming Environmental, Health and Safety Regulations, ERM WY-3 (chapters 2-4) (providing standards for locating sanitary industrial, and construction/demolition landfills, including restrictions on proximity to water sources, other land uses, and geologic characteristics).

For regulations establishing substantive criteria in connection with siting other types of undesirable land uses, see, e.g., Illinois Environmental, Health and Safety Regulations, ERM IL 830.203 (providing locations standards for landscape compost facilities); Texas Environmental, Health and Safety Regulations, ERM TX 309.13 (providing location standards for wastewater treatment plants, including proximity to water sources and buffer zones); West Virginia Environmental, Health and Safety Regulations, ERM WV 47-38D-3 (1996) (providing geologic and other standards for use and disposal of sewage sludge); *id.* at 47-38E-3.2 (providing location standards for yard waste composting facilities).

324. *See* 30 TEX. ADMIN. CODE § 332.36(3) (West 1996).

325. *See id.*

326. *See id.* § 332.36(5).

Some regulations include both environmental and social factors in their substantive criteria. For example, Texas regulations governing hazardous waste storage, processing or disposal facilities prohibit the issuance of permits "if the boundary of the unit is to be located within one-half of a mile (2,640 feet) of an established residence, church, school, day care center, surface water body used for a public drinking water supply, or dedicated public park."[327] Not only would the violation of these standards call into question the rationality of the siting process, the standards themselves directly address the quality of life issues central to an aggrieved community's opposition.

2. Generation of information about the selected site

Another significant type of environmental law, exemplified by NEPA,[328] establishes an environmental review process that can provide useful information to a community questioning the wisdom and fairness of a siting decision.[329] NEPA requires that all federal agencies proposing actions[330] that could have significant environmental consequences prepare an environmental impact statement ("EIS").[331] Unlike the types of environmental provisions described in the preceding section, NEPA does not impose substantive criteria on the decisionmaker.[332] NEPA imposes only a procedural requirement: that the agency analyze and consider environmental impacts.[333] Thus, an aggrieved community cannot sue an agency for its failure to base its de-

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327. *Id.* § 335.205; *see also id.* (prohibiting storage or treatment facilities for petroleum-contaminated substantances within a certain distance from "residence, church, hospital, school, licensed day-care center, or dedicated public park").

328. 42 U.S.C. § 4321-4370d (1994). Many states have NEPA-equivalents governing state actions and, in some cases, private actions as well. *See* Blais, *supra* note 10, at 125 (observing that there are at least 13 states with NEPA-equivalents); *id.* at 126 n.215 (quoting casebook observing that 20 states have NEPA-equivalents); Johnson, *supra* note 25, at 566 (observing that 16 states have enacted NEPA-equivalents and that several more have implemented executive orders mandating NEPA-like environmental review processes); Ross, *supra* note 25, at 369-71 (observing that 28 states have enacted NEPA-like legislation).

329. *See* Johnson, *supra* note 25, at 576-78 (describing NEPA's usefulness as information-gathering tool and use of information in political action).

330. Federal actions include not only projects initiated by the federal government, but also actions funded by the federal government and actions requiring federal permits. *See* 40 C.F.R. § 1508.18(b) (1996). Its reach is therefore somewhat broader than its phrasing implies.

331. *See* 42 U.S.C. § 4332(2)(C).

332. *See* Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 68 & n.110 (1996) (explaining that NEPA "establishes no substantive environmental standards").

333. *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (holding that NEPA imposes only procedural, not substantive, requirements on an agency's decisionmaking processes); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (declaring that NEPA imposes procedural requirement on agency); Vermont Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (stating that NEPA's directive to agencies is "essentially procedural").

cision on a particular environmental consequence.[334] However, the opportunities for increased information and participation that NEPA provides could facilitate a community's ability to understand and critique an agency's decisionmaking process.

Under NEPA, a project proponent must provide notice that it intends to complete an EIS and must allow the public to provide input into the scope of issues that should be covered by the EIS.[335] The EIS must discuss the purpose and need for the proposed action,[336] the alternatives to the proposed action,[337] the environment to be affected by the proposed action,[338] and the environmental consequences of the proposed action.[339] The analysis of the environmental consequences includes both direct[340] and indirect effects,[341] and makes clear that the EIS must consider impacts to "urban quality, historic and cultural resources."[342] The draft EIS must be made available to the public for comment.[343] In addition, federal, state, and local agencies with expertise in or jurisdiction over the environmental impacts of the project must be provided an opportunity to comment.[344] The agency's final EIS must respond to any resulting comments.[345] Finally, the agency must issue a "record of decision" ("ROD") explain-

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334. Even though NEPA and its state equivalents do not provide a means to challenge the substantive basis for a governmental action, aggrieved communities can challenge an agency's failure to comply with NEPA's procedural mandate. *See* Cole, *Empowerment as the Key*, *supra* note 13, at 673-79 (describing successful litigation that challenged the siting agency's failure to conform to requirements of California's environmental review process); Henderson et al., *supra* note 133, at 4-6 (describing challenge to uranium enrichment plant based on failure to follow environmental review procedures). A suit of this nature would not necessarily address the fairness of a siting decision.

335. 40 C.F.R. § 1501.7(a)(1); *see also* Johnson, *supra* note 25, at 573 (detailing procedures for determining "scope" of EIS).

336. *See* 40 C.F.R. § 1502.13.

337. *See* 42 U.S.C. § 4332(2)(C)(iii) (1994); 40 C.F.R. § 1502.14; *see also infra* notes 360-63 and accompanying text (discussing alternatives analysis).

338. *See* 40 C.F.R. § 1502.15.

339. *See* 42 U.S.C. § 4332(2)(C)(i)-(ii) (1994); 40 C.F.R. § 1502.16.

340. *See* 40 C.F.R. § 1502.16(a).

341. *See id.* § 1502.16(b).

342. *See id.* § 1502.16(g).

343. *See id.* § 1502.19. The draft guidance on implementing NEPA in light of Executive Order 12,898 encourages agencies to engage in innovative approaches to reach out to concerned communities. *See* Johnson, *supra* note 25, at 575 (explaining that draft suggests public outreach through religious organizations, minority businesses, and neighborhood watch groups, among others). In addition to the standard Federal Register notice, agencies are encouraged to contact neighborhood organizations and other local groups who might have an interest in the proposed action but would not be likely to become aware via traditional notice mechanisms.

344. *See* 40 C.F.R. § 1503.1. The Council on Environmental Quality regulations do not specify a set time period for comments. Instead, they encourage agencies "to set time limits appropriate to individual actions" subject to the minimums established by 40 C.F.R. § 1506.10. *See id.* § 1501.8.

345. *See id.* § 1502.9(b).

ing the basis for its decision.[346]

NEPA requires that a wide range of possible impacts be considered in an EIS. These include consequences that are "ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."[347] The agency completing the EIS must also consider the extent to which these consequences fall on minority or low-income communities.[348] The reference to cumulative effects means that the existing burden already experienced by the community must be taken into consideration in evaluating the impact of the proposed project.[349]

An EIS may reveal that a proposed project has highly detrimental ecological, social, or cultural consequences. It may also reveal that these impacts will be suffered to a disproportionate extent by minority or low-income neighborhoods. That information alone may be sufficient for a burdened community to demonstrate the site's unsuitability and the unfairness of imposing a project with such significant environmental effects on that—or any other—residential community.

The EIS and ROD also provide information for assessing the veracity of the decisionmakers' purported rationale for a siting decision.[350] If the final EIS or ROD contain conclusions about the impacts that are inconsistent with the information provided in the draft EIS or submitted as comments in connection with the EIS, the community may be able to show that the agency's decision is based on a pretext because the purported rationale is not based in fact. A stark example would be an outright falsehood. The final EIS or ROD might state that the agency has selected a particular site for a particular project because the project's expected air emissions will not have any impact on residential neighborhoods. The draft EIS may, however, document emissions that will affect the neighborhood. Moreover, other agencies reviewing the draft EIS, such as a state agency responsible for air quality, might have submitted comments into the public rec-

346. *See id.* § 1505.2(a)-(c).

347. *See id.* § 1508.8 (indicating broad range of effects to consider when preparing EIS).

348. *See supra* notes 104-05 and accompanying text (discussing assessment of demographic impacts as part of environmental review process).

349. *See supra* note 105 and accompanying text (discussing cumulative impact analysis).

350. *But see* Poisner, *supra* note 332, at 85 (stating that a "'black box' . . . surrounds the actual decision as far as the public is concerned" and that final EISs rarely reveal the true reasons for decision). Mr. Poisner may be correct that the final EIS and the ROD rarely provide the true reason for the decision. However, the information gathered during the decisionmaking process may nonetheless give a community a greater ability to challenge the veracity of a decisionmakers' purported rationale than would be the case absent the environmental review process.

ord indicating that air emissions could affect residential neighborhoods. In this instance, the agency's contention that it selected the site because it would not result in residential exposure to air pollution could be seen as contrary to fact and therefore a pretext.[351]

Even absent an outright falsehood, the EIS process may generate information that challenges the veracity of the agency's explanation for its decision. For example, an agency may be contemplating a project that generates significant amounts of traffic. The agency may conclude in a final EIS or ROD that an important reason for its selection of the site in question is that the expected impact of the proposed action on traffic in residential areas is minimal. The data in the draft EIS may reveal that the existing traffic problems in a residential area are so severe that the marginal increase relative to the existing traffic flow is relatively small. While the relative increase is small, the proposed action will only exacerbate an already serious problem. The agency's conclusion of minimal traffic effects would therefore be misleading. The conclusion of minimal traffic impacts could be considered contrary to fact or, even if plausibly accurate, could indicate that the absence of traffic impacts was not the real motivation for the selection of the site. Low traffic impacts would thus appear to be a pretext for the agency's siting decision.

Any information gathering authority—whether provided through an environmental review statute like NEPA or through another source—is likely to assist a community in its ability to question the real motivations for a siting decision. In Louisiana, a community group called Citizens Against Nuclear Trash ("CANT") challenged a private company's license application for a uranium enrichment plant on numerous grounds.[352] In discovery, CANT obtained information about the site selection process. The information "revealed not the meticulous process touted by [the company], but largely unorganized and incomplete documentation, missing and inaccurate calculations and site scores .... The evidence demonstrated that the 'process' was anything but objective and methodical and, instead, was easily subject to manipulation."[353] A badly prepared EIS can provide similarly useful information about the bona fides of a decision-

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351. If the analysis contained in the conclusion contradicts the information contained in the EIS, then the community may also have a basis for a legal challenge to the decision. *Cf.* Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d 1011 (2d Cir. 1983) (where the EIS contained evidence that the information underlying the decision was inadequate, the court held that "a decision made in reliance on false information, developed without an effort in objective good faith to obtain accurate information, cannot be accepted as a 'reasoned' decision").

352. *See* Henderson et al., *supra* note 133, at 4.

353. *Id.* at 4-5.

maker's purported basis for a decision.[354] In sum, a community may be able to use an EIS to show that the selection of the proposed site does not make sense, whatever the purported rationale of the decisionmaker. Using the Title VII analogy, the responses in the final EIS and in the ROD are similar to the employer's attempt to provide a nondiscriminatory rationale. The information developed throughout the environmental review process may show that the purported rationale is simply a pretext masking a discriminatory decision.

NEPA and its state equivalents not only provide information for communities to use to assess the rationality of the decisionmaker's decision and its purported rationale, but they also provide an opportunity for the public to participate openly in the decisionmaking process.[355] In many instances, the decisionmaking agency will hold a public hearing in connection with the review of the draft EIS.[356] While the public hearings are designed to provide the agency with additional information, they also bring the debate about the project into the public sphere. As one commentator has noted, "[c]itizen participants . . . routinely use hearings as the setting for a broader political maneuver. They use it as an opportunity to make their case not to the EIS agency, nor to the opposing side, but to the broader public through the lens of the media."[357] NEPA and its state equivalents thus provide a forum for a community to link the information in the environmental review process to the political considerations associated with the siting decision.

3. Generation of information about alternative sites

The third type of environmental provision that can illuminate the fairness of the siting process is a requirement that the decisionmaker consider alternatives to the proposed project. The environmental impact statement required under NEPA, mentioned above, must describe not only the project's environmental impacts, but also potential alternatives to the project.[358] In evaluating each alternative, the

354. CANT's legal challenge included claims based on NEPA. The NEPA claims turned largely on the EIS' failure to consider the demographic impacts of the project as required by NEPA and Executive Order 12,898. *See id.* For the current status of the case, see *supra* note 133.

355. *See* Johnson, *supra* note 25, at 572-76 (describing public's role in decision-making process under NEPA).

356. *See* 40 C.F.R. § 1506.6 (1996) (indicating conditions under which agency should hold public hearing).

357. *See* Poisner, *supra* note 332, at 87 (citations omitted). It should be noted that Mr. Poisner is critical of the use of the public hearing as a forum for political maneuvering rather than as an opportunity for more constructive engagement in the decisionmaking process.

358. *See* 42 U.S.C. § 4332(2)(C)(iii) (1994) (requiring agency to consider "alternatives to the proposed action"). Many "mini-NEPAs" at the state level also require alternatives analyses.

agency must facilitate comparison by considering all of the factors evaluated for the proposed action, including a description of the affected environment and an assessment of environmental consequences.[359] Upon making a final decision, the agency's ROD must explain why the agency chose the alternative in question and why it rejected the other alternatives.[360] If a siting decision was fueled by ulterior motives, a comparison of the information provided about the alternative sites with the information provided on the selected site may reveal that the selected site is less qualified for the use than alternative sites or options.[361] For example, a local government might reject an alternative site for a landfill in a white suburban neighborhood due to its impact on endangered species and concerns about open space for community recreation. If construction of the landfill on the selected site, located in a poor minority section of town, would have a greater impact on endangered species and would sacrifice the neighborhood's last available open space, then that information may suggest that the decisionmakers' articulated basis for their siting decision was a pretext.

The contrast may not always be as obvious as in the example presented. The pros and cons of various sites may not be directly comparable. Development of one site may affect open space while development of the selected site does not. But even under this scenario, the comparison between a selected site and alternatives may still be revealing. If the EIS shows that an alternative was rejected due to its impact on open space, while the selected site was chosen notwithstanding significant environmental effects such as odor, potential ground or surface water contamination, and potential impacts on endangered species, then the community may be able to show that the environmental consequences of the selected site outweigh the

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State-equivalent statutes and regulations requiring an alternatives analysis include: California Environmental Quality Act, CAL. PUB. RES. CODE § 21100, 14 CAL. CODE REG. § 15132, 15130; Connecticut Environmental Policy Act, CONN. GEN. STAT. § 22a-1(b); District of Columbia Environmental Policy Act, D.C. CODE ANN. § 6-983; Hawaii, HAW. ADMIN. RULES § 11-200-17; Maryland Environmental Policy Act, MD. NAT. RES. CODE ANN. § 1-301 et seq.; Massachusetts Environmental Policy Act, MASS. REGS. CODE tit. 301, § 11.26; Minnesota Environmental Policy Act, MINN. R. pt. 4410 et seq.; Montana Environmental Policy Act, MONT. ADMIN. R. 16.2.626(2); New York State Environmental Quality Review Act, 14 N.Y.E.L.C. § 8-0109(5); North Carolina Environmental Policy Act, N.C. ADMIN. CODE tit. 1, r. 25.0502; Puerto Rico Environmental Act, EIS Regulations § 5.3.2; Virginia Department of Environmental Quality Act, VA. CODE ANN. § 10.1-1188; Washington Environmental Policy Act, WASH. REV. CODE ch. 43.21C.030(2)(c); Wisconsin Environmental Policy Act, WIS. STAT. § 1.11(2)(c)1-6.

359. *See* 40 C.F.R. § 1502.14.

360. *See id.* § 1505.2.

361. If an agency selects one site rather than alternatives to that site, the EIS is likely to portray the alternatives as inadequate. Nonetheless, a close reading of an EIS may be able to detect bias if such bias exists.

various environmental consequences of alternative sites. While there is no way to quantify the relative importance of various types of impacts, the rationality of the decision may be compromised by a close look at the analysis. In the political debate about the fairness of the decisionmaking process, the information about the decisionmakers' other options may cast doubt on their true motives for the siting decision.

NEPA and its state-equivalents are not the only environmental laws requiring an analysis of alternatives. If a site with wetlands is selected, regulations governing the permit process for filling wetlands require that applicants conduct a rigorous alternatives analysis.[362] The regulations make clear that an application for a permit to fill wetlands will be denied "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[363] The regulations state further that "[a]n alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[364] Where the permit is for a land use that is not dependent upon access to water, then the regulations presume that a practicable alternative to the selected site exists.[365] A decisionmaker selecting a site located in wetlands thus has the burden of proof in demonstrating that it cannot find another practicable site with less impact on wetlands. To overcome the burden of proof, the permit applicant will have to provide quite extensive information about all plausible alternative sites—information that may be helpful to a community trying to assess whether it has been treated unfairly.

If, for example, a careful analysis of the alternatives reveals that other sites without wetlands were as or more practicable as the site selected, then the decisionmakers' motive for selecting the site may be suspect.[366] As with a NEPA or NEPA-like alternatives analysis, the comparison may not be direct. One site might be more practicable

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362. *See* 33 C.F.R. § 230.10. Section 404 of the Clean Water Act requires a permit in order to fill wetlands. *See* 33 U.S.C. § 1344 (1994).

363. 33 C.F.R. § 230.10(a).

364. *Id.* § 230.10(a)(2). Moreover, the regulations indicate that a site is considered "practicable" even if it is not currently owned by the applicant, so long as it "could reasonably be obtained, utilized, expanded or managed... [so as] to fulfill the basic purpose of the proposed activity." *Id.*

365. *See id.* § 230.10(a)(3).

366. If a permit is issued notwithstanding the availability of practicable alternatives, the community may have a legal claim against the permitting agency as well as a political claim about the fairness of the decisionmaking process.

based on location while another might be more practicable based on cost. Nonetheless, if the problems associated with the selected site appear to be greater than those associated with alternative sites, then the decisionmakers' conclusion that the alternative sites were "impracticable" may be suspect. Furthermore, if practicable alternative sites were ostensibly rejected because of the development's impact on wetlands, but the impact in connection with the other sites was smaller than the impact predicted in connection with the selected site, then the community may have reason to question the selection of the site in their neighborhood.

Thus, whether required by NEPA or in connection with a permit application to fill protected wetlands, alternatives analyses provide information not only about the site selected, but about other possible sites or alternatives. Where that information suggests that the site selected by the decisionmakers makes little sense in light of alternative possibilities, then the community may have evidence that the decision is being driven by ulterior motives.

Under the types of circumstances presented environmental laws may have a more positive role to play in addressing environmental injustice than that currently recognized. Environmental laws can do more than provide a somewhat-distasteful legal hook. The insights gained from environmental laws and environmental review procedures can enrich political debates about political justice.

D. *Environmental Laws and Community Engagement*

Identifying the positive contributions of environmental laws to debates about political justice does not erase the concerns about using environmental laws expressed in the environmental justice literature.[367] The literature observes that engaging in environmental proceedings requires considerable expertise—both scientific and legal.[368] One concern is that burdened communities will not have sufficient resources to pay for the scientific expertise necessary to realizing the potential presented by environmental laws.[369] A second concern is

367. *See supra* Part II.D.2 (discussing environmental law as necessary evil).

368. *See, e.g.*, Been, *Undesirable Land Uses*, *supra* note 24, at 1065-68; Cole, *Empowerment as the Key*, *supra* note 13, at 650; Johnson, *supra* note 25, at 600-02.

369. *See, e.g.*, Austin & Schill, *supra* note 12, at 71. Professors Austin and Schill observe that "poor minority communities face some fairly high barriers to effective mobilization against toxic threats, such as limited time and money; lack of access to technical, medical, or legal expertise; relatively weak influence in political and media circles; and cultural and ideological indifference or hostility to environmental issues." *Id.*; *see also* Gauna, *supra* note 6, at 46 (observing, in context of citizen suits, that communities with few resources may find it difficult to discover environmental violations, a necessary first step to bringing citizen suits); James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions Into Envi-*

that communities will not have sufficient legal resources necessary to realizing the potential presented by environmental laws.[370] A third concern is that, even if resources can be obtained, "experts" will take over the process, leaving community residents as disengaged bystanders.[371]

With respect to the necessity of scientific expertise, the effective use of environmental laws does not always require highly specialized knowledge. The conclusions of an environmental analysis are often comprehensible even to those who do not understand the scientific methodology used to achieve them. A statement of increased air or water pollution, data regarding increased traffic congestion, information on the close proximity of the facility to important historic, cultural, or social features—all of these present examples of information that an interested lay person could readily understand and employ to question the true motives for a siting decision. While a technical analysis will usually be helpful, it is not always necessary. Moreover, in the case of NEPA, the statutes implementing regulations require that the environmental impact statement be written in "plain language" readily comprehensible to the public.[372]

That said, there are undoubtedly circumstances in which technical assistance could be of crucial importance. For instance, the conclusions of an EIS may not accurately reflect the gathered data. The EIS might state that "air quality impacts are expected to be minimal" when a deeper analysis of the data might reveal that air impacts would, in fact, be significant. Under this scenario, the lack of expertise could interfere with a citizen's ability to use the EIS process to reveal accurate information.

With respect to the necessity of legal expertise, it should be stressed that the ability of environmental laws to demonstrate political injustice does not require the expensive enterprise of undertaking a lawsuit. Using environmental laws to pursue political justice involves taking advantage of participation opportunities and

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ronmental Risk Assessments, 21 FORDHAM URB. L.J. 547, 554-58 (discussing, in NEPA context, extent to which inequalities in financial and professional resources leave communities unable to compete with well-financed and technically proficient private and governmental project proponents); Johnson, *supra* note 25, at 600-01 (noting that "highly technical nature of environmental review documents" will necessitate having scientific and legal experts to explain documents to community).

370. *See, e.g.*, Austin & Schill, *supra* note 12, at 21 (referring to poor minority communities "lack of access to . . . legal expertise").

371. *See, e.g.*, Cole, *Empowerment as the Key*, *supra* note 13, at 649-52 (explaining that environmental lawyering puts the experts in charge, effectively disempowering the community the lawyering is designed to serve).

372. *See* 40 C.F.R. § 1502.8 (1996); *see also* Johnson, *supra* note 25, at 600-01 (discussing NEPA's plain language requirement).

information that are provided as a matter of course. While pursuing an environmental lawsuit may be desirable as a mechanism for affecting a particular action, it is not necessary for a political debate about fair treatment.

Nonetheless, if a lawsuit bringing environmental claims is desired, or if the technical nature of the project exceeds the capacities of those not trained in the subject matter, professional and financial resources are crucial. Developing mechanisms to improve the ability of burdened groups to take advantage of environmental laws needs to be an important goal of the environmental justice movement. Technical assistance grants for communities are one such mechanism.[373] Environmental groups could also use their legal and scientific knowledge to assist burdened communities.[374] Recognizing the need for legal assistance to groups seeking environmental justice, one author has urged the environmental bar to adopt a "Bill of Rights and Lawyer's Creed" to stimulate pro bono assistance.[375]

To the extent that lawyers and scientists do contribute to grassroots' efforts to seek environmental justice, the next question will be whether that participation inevitably marginalizes the communities from the process. That marginalization is a risk, but it is not inevitable. A conscious effort to involve the "client" community and to provide information and service rather than dictate strategy will be required. With such consideration, the technical or legal intricacies of environmental justice disputes need not deprive a community of its central role.[376]

E. Limitations to the Argument

Environmental law is merely a tool that may, in some cases, provide information that sheds light on the relative "justness" of a siting decision. It cannot provide a one-step litmus test of a siting decision's rationality or fairness.

1. Environmental irrationality is not always indicative of injustice

The fact that a siting decision does not appear to be justified in

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373. *See* Moya, *supra* note 213, at 251 (describing federal community grants program for environmental justice activities); Johnson, *supra* note 25, at 601 (proposing that NEPA be amended to provide technical assistance grants to communities evaluating EIS's).

374. *See, e.g.*, Lazarus, *Pursuing "Environmental Justice," supra* note 49, at 850 (indicating need for mainstream environmental groups to "lend expertise to local communities in need of financial, legal, and technical assistance").

375. *See* Moya, *supra* note 213, at 218, 255-63.

376. *See supra* note 283 (discussing authors' acknowledment that expert assistance in connection with environmental issues and litigation can be helpful to communities if handled with appropriate sensitivity).

light of environmental consequences does not mean that the siting decision necessarily discriminates against low-income or minority communities. Compliance with environmental standards or other relatively "objective" factors may not and probably should not be the only determinant of a siting decision. For instance, a site selected for a city landfill may not be environmentally ideal. However, it may be the only land in close proximity to the areas served and to the highways used. Thus, it is possible that a decisionmaker could convincingly justify a siting decision for reasons unrelated to and considered more important than the environmental factors that would otherwise point toward a suspect decision.[377] In other words, to continue the Title VII analogy, a community may be able to show that the given site is not qualified for selection based on standard environmental criteria, but may not be able to show that the nondiscriminatory justification given to explain the decision is a pretext. The nondiscriminatory justification may provide a valid explanation for the siting decision.

Moreover, while environmental laws may indicate that a site is not qualified to be selected, and a community may be able to demonstrate that the stated justifications are pretextual, the basis for the decision may nonetheless be unrelated to discriminatory influences.[378] Another illicit motive, unrelated to discrimination, may explain the apparently unreasonable decision.[379] For example, the owner of the land in question may desire the development and may have significant influence over the decisionmaking body based on factors other than the suitability of the site. The developer may be an important

377. One might argue that the environmental values are not receiving sufficient weight in the decisionmaking process. That, however, is a very different question from whether the siting decision is based on a lack of "equal respect and concern" for the community surrounding the site selected.

378. The same is true in the Title VII context. A plaintiff could demonstrate a prima facie case of discrimination, the employer could provide a nondiscriminatory motive, and the trier of fact could determine that the employer's explanation was a pretext for illicit motives. However, the fact that the employer's rationale for the decision was a pretext does not necessarily demonstrate that the true motive was discriminatory. A trier of fact could find, based on the totality of the evidence, that the employee had failed to prove that discrimination was the illicit motive prompting the employer's action. *See* Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (holding that court's rejection of employer's rationale for its actions does not permit *per se* judgment for plaintiff).

379. In *St. Mary's*, the district court found that, "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." *Hicks*, 509 U.S. at 508. The Supreme Court accepted the District Court's analysis. In so doing, the Court rejected the appellate court's contention that once the employer's rationale is determined to be a pretext, the court must, "as a matter of law," find for the plaintiff. *See id.* at 508-09. As in the Title VII context, a determination that the rationale used for siting an undesirable facility is a pretext does not necessarily mean that it is a pretext for discrimination.

campaign donor, or may control resources of importance to the constituency served by the decisionmaking body. Thus, the fact that a decision appears irrational and the reasons given to justify the decision appear pretextual does not necessarily prove that the true motivation was discriminatory. Different inferences could be drawn from the same set of facts. The information gleaned from environmental laws can enlighten the debate about justice, but it cannot, in any final sense, resolve it.

2. *Environmental rationality is not always indicative of justice*

The role of environmental law in ferreting out instances of injustice may be more powerful than its role in identifying a just decision. The fact that a siting decision met all relevant environmental criteria would not necessarily demonstrate that the siting was "just." For example, decisionmakers may be presented with numerous environmentally suitable options for the facility in question. Motivated by a lack of equal concern and respect for a particular community, they might site the facility in that neighborhood. Under these circumstances, the fact that the site was environmentally suitable provides no evidence as to whether the siting process was politically just.

CONCLUSION

This Article is intended as a beginning. The environmental justice movement raises infinite questions about the nature and role of the environmental and civil rights movements, and of environmental and civil rights laws, in identifying and addressing not only legal questions, but also the important social and political questions implicit in the distribution of societal burdens. By exploring the potential of environmental laws to contribute to debates about political justice, this Article is intended to provide one bridge across the boundaries that have historically divided the environmental and civil rights communities.