DISTRIBUTIVE JUSTICE AND THE ENVIRONMENT

ALICE KASWAN*

One of the most important developments in environmental law over the last three decades has been the emergence of the environmental justice movement, a movement that has challenged the unequal distribution of undesirable land uses in poor and minority communities. The movement's claims for injustice are varied and interconnected—encompassing unfair treatment, unfair distribution, and the systemic history and patterns of inequality that have led to current disparities. While some have suggested that government action should address only those disparities caused by unfair treatment, Professor Kaswan argues that distributive inequalities deserve regulatory attention regardless of demonstrated discriminatory treatment.

Most existing studies suggest that undesirable land uses are unequally distributed based upon race and class and, consequently, that we have distributive injustice. Some authors, however, have suggested that these disparities may not be unjust: the differences in distribution may be explained by communities' differing preferences for the land uses in question. Professor Kaswan argues that this argument embodies a competing vision of distributive justice, one she calls the "community preferences model." Under this model, the critical issue is not the physically equal division of allegedly undesirable land uses, but the extent to which communities are equally satisfied with surrounding land uses. Some advocates of this model have suggested that the market in land use distribution works, that communities are equally satisfied, and that government intervention to improve distributional outcomes is therefore unnecessary and possibly counterproductive.

Professor Kaswan argues that, even if one were to adopt the community preferences model of distributive justice, we nonetheless have a distributive justice problem. She reviews relevant aspects of the siting process—objective factors, political decisions, and the special role of public participation provisions—and concludes that the land use siting process does not serve to

meet community preferences equally. While advocates of the community preferences model have argued that post-siting housing market dynamics could rectify disparities in preference satisfaction, since those who did not like new land uses could move away from them and those who do like land uses could move toward them, Professor Kaswan argues that the housing market is neither fluid nor equitable enough to overcome the disparities created in the land use siting process. Thus, she argues that the "market" does not achieve equity, and that government efforts to address distributive injustice are appropriate regardless of one's model of distributive justice.

INTRODUCTION

Waterfront South, a neighborhood in Camden, New Jersey, is not lined with marinas, yachting clubs, or fancy estates. As one court has described:

> The population of Waterfront South is 2,132, forty-one percent of whom are children. Ninety-one percent of the residents ... are persons of color .... The residents of Waterfront South suffer from a disproportionately high rate of asthma and other respiratory ailments.[1]

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* Professor of Law, University of San Francisco School of Law. B.S., University of California, Berkeley, 1984; J.D., Harvard Law School, 1991. I would like to thank Barbara Kautz for her invaluable assistance, as well as Shanee Michaelson for her earlier assistance. I thank John Applegate, Craig Anthony Arnold, Henry Brown, Josh Davis, Rick Diamond, Sheila Foster, Susan Freiwald, Gerald Torres, and Tim Iglesias for their insightful comments. I also thank my colleagues at the University of San Francisco for their helpful direction during a Faculty Scholarship Lunch devoted to this Article.

> In 1990, the median household income of residents of Waterfront South was $15,082, and the per capita income was $4,709. Over 50% of the residents of Waterfront South live at or below the federal poverty level.[2]
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> The Waterfront South neighborhood is already a popular location for the siting of industrial facilities. It contains the Camden County Municipal Utilities Authority, a sewage treatment plant, the Camden County Resource Recovery facility, a trash-to-steam plant, the Camden Cogen Power Plant, a co-generation plant, and two United States Environmental Protection Agency ("EPA") designated Superfund sites. Four sites within one-half mile of [a] proposed facility are currently being investigated by the EPA for the possible release of hazardous substances. The [New Jersey Department of Environmental Protection] has identified fifteen known contaminated sites in the Waterfront South neighborhood.[3]

In 1999, the St. Lawrence Cement Company selected Waterfront South as the venue for a new cement manufacturing facility.[4] According to a court reviewing the siting decision, the facility will emit "particulate matter (dust), mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulphur oxides and volatile organic compounds."[5] Each year, 35,000 trucks will cross the neighborhood to make deliveries to the facility and 42,000 trucks will depart from the neighborhood.[6] Since deliveries will come from a barge, the deliveries will be concentrated, with 500 truck deliveries per day on the eighty days a year scheduled for deliveries.[7]

The story in Waterfront South is not unique. This pattern of disproportionately siting locally undesirable land uses, or "LULUs," in poor and minority[8] neighborhoods is common throughout industrial America.[9] Similar patterns emerge when one considers

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1. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 451 (D.N.J.), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002).
2. *Id.* at 459.
3. *Id.* at 451.
4. *Id.* at 453.
5. *Id.* at 454.
6. *Id.*
7. *Id.*
8. The use of the term "minority" is not intended to be pejorative. It captures the sense that, within our heterogeneous society, whites are the dominant majority while other groups, particularly communities of color, experience the challenge of being in the minority.
9. *See infra* notes 159–209 and accompanying text (discussing data on distribution of industrial facilities).

other types of "undesirable" land uses, such as halfway houses for former prison inmates, homeless shelters, and the like.[10]

Beginning in the early 1980s, these conditions prompted the emergence of the "environmental justice" movement. In particular, minority communities and organizations began to question whether they were being exposed to more than their fair share's worth of environmental harms and whether decisions distributing environmental harms were being made fairly.[11] Local grassroots organizations around the country began to explore the connection between race and exposure to undesirable environmental problems.[12] Over the last decade, these grassroots efforts have coalesced into a broadly-based movement for environmental justice[13] that has challenged environmental organizations and government agencies to address the fairness and implications of their actions.[14]

Some commentators have suggested that "distributive injustice"—that is, evidence of disproportionate land use patterns—is not of regulatory concern unless it can be shown that the unequal patterns were caused by identifiably discriminatory or biased processes.[15] Under this view, distributional disparities not caused by

10. *See infra* notes 157–58 and accompanying text (discussing distribution of social service facilities).

11. The environmental justice literature frequently refers to an African-American community's opposition to a toxic landfill in Warren County, North Carolina, in 1982 as the event sparking the emergence of today's environmental justice movement. *See, e.g.*, Benjamin F. Chavis, Jr., *Foreword* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3, 3 (Robert D. Bullard ed., 1993) [hereinafter VOICES FROM THE GRASSROOTS] (discussing importance of North Carolina event); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 9 (1995) [hereinafter Gauna, *Obstacles and Incentives*] (same).

12. *See generally* VOICES FROM THE GRASSROOTS, *supra* note 11 (describing several communities of color who organized in response to local environmental problems); UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994) [hereinafter UNEQUAL PROTECTION] (same).

13. By bringing grassroots activists together, numerous conferences facilitated the creation of a characterizable movement out of these localized actions. *See* Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Suits*, 74 B.U. L. REV. 267, 271–72 nn.15–16 (describing national and regional conferences) (1994); Deeohn Ferris & David Hahn-Baker, *Environmentalists and Environmental Justice Policy*, *in* ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 66, 67–69 (Bunyan Bryant ed., 1995) (same).

14. *See* Gauna, *Obstacles and Incentives*, *supra* note 11, at 11–13, nn.38–39 & 42 (discussing the movement's challenges to the environmental establishment). *See generally* Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 263–64 [hereinafter Kaswan, *Bridging the Gap*] (describing challenges to environmental groups and agencies).

15. *See infra* notes 87–93 and accompanying text.

tainted processes might be regrettable, but are not the appropriate focus of regulatory action. For example, a disparity would be worth redressing if it were caused by an intentionally discriminatory siting decision. The disparity would not be worthy of regulatory concern, however, if it was not caused by a tainted decision-making process, but was instead traceable to the operation of "market forces," such as differences in land costs or the relative efficiency of one location over another. Under this view, the Waterfront South siting decision described above would be worth redressing only if caused by intentional discrimination.

I first argue that distributive justice is a critical issue even in contexts devoid of intentional discrimination or other process failures.[16] Without demeaning the significance of the environmental justice movement's attention to decision-making processes and the structural causes of disadvantage, I argue that distributive justice is an important goal in its own right because it responds to the conditions that people actually experience[17] and because it may be more amenable to remedy than many forms of discriminatory treatment.[18]

The issue is not simply abstract: the importance one attaches to distributive justice has a significant impact on the willingness to develop public policies to address it. Consider, for example, a government policy prohibiting government agencies from siting facilities where there is already a high concentration of polluting facilities. If an agency nonetheless located a facility in such an area, it could be held in violation based solely on the outcome of its decision, even if the basis for its decision was not discriminatory and there was no bias in the decision-making process. Such a policy might prohibit siting an industrial facility in Waterfront South, the community described above. Proposals of this nature have been highly controversial, with the controversy turning to a considerable extent on attitudes about the relative importance of purely distributive justice.[19]

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16. *See infra* Part II.

17. *See infra* notes 94–95 and accompanying text.

18. *See infra* notes 100–07 and accompanying text.

19. For example, in 1992, two bills were introduced into Congress to protect heavily-burdened areas from greater concentrations of undesirable facilities. The Environmental Justice Act of 1992 would have placed limits on the siting of toxic facilities in the one hundred areas in the country experiencing the greatest health impact from toxins. Environmental Justice Act of 1992, H.R. 2105, 103d Cong. (1993); *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, 1069–71 (1993) [hereinafter Been, *What's Fairness Got to Do with It?*]; Robert D. Bullard, *The Legacy of American Apartheid and*

Assuming the importance of distributive justice, the second issue I address is whether the current distribution of undesirable land uses is distributively just. The answer to this question is contested, and turns upon how we define, and therefore measure, distributive justice. This Article identifies and clarifies the two most important theories at issue, and argues that we have failed to achieve distributive justice regardless of which theory of justice we adopt.

The most prevalent theory of distributive justice, what I call the "equal division" model, measures justice by the degree to which undesirable land use distributions are physically equal.[20] Because studies indicate that many poor and minority communities experience a greater concentration of LULUs than other communities,[21] we have a distributive justice problem under this model.

Professor Lynn Blais, in her article *Environmental Racism Reconsidered*, has, however, challenged the assertion that there is a distributive justice problem through proposing what is, implicitly,

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Environmental Racism, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 471 (1994). Similarly, the Environmental Equal Rights Act of 1993 would have prohibited the siting of solid or hazardous waste facilities in minority and low-income areas that were "environmentally disadvantaged." Environmental Equal Rights Act of 1993, H.R. 1924, 103d Cong. (1993). Both of these bills failed to gain congressional approval. *See* Been, *supra*, at 1083–84; Bullard, *supra*, at 471.

As another example, in the late 1990s the EPA interpreted regulations implementing Title VI of the Civil Rights Act to limit state and local environmental agencies' ability to grant permits—and hence condone the siting of—polluting facilities in minority areas already experiencing a disproportionate concentration of such facilities. *See* U.S. ENVTL. PROT. AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998) [hereinafter INTERIM GUIDANCE], *available at* http://www.epa.gov/civilrights/docs/interim.pdf (on file with the North Carolina Law Review). The interpretation proved highly controversial. *See, e.g.*, *Chamber Seeks Minority Business Support in Feud on EPA Environmental Justice Policy*, 67 U.S. L.W. 2041 (July 21, 1998) (discussing business groups' opposition to EPA interpretation); *EPA Defends Release of Interim Policy on Processing of Civil Rights Complaints*, 66 U.S. L.W. 2737 (June 2, 1998) (discussing EPA's defense of its policy in response to opposition). The revised policy, issued in 2000, did little to lessen the controversy. *See* ENVIRONMENTAL PROTECTION AGENCY, DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS AND DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS, 65 Fed. Reg. 39,650 (June 27, 2000) [hereinafter DRAFT RECIPIENT GUIDANCE and DRAFT REVISED INVESTIGATION GUIDANCE, respectively]; Branford C. Mank, *The Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?*, 30 ENVTL. L. REP. 11,144 (2000).

20. *See infra* Section IV.A (describing distributive justice as an equal division of undesirable land uses).

21. *See infra* notes 157–209 and accompanying text (reviewing studies on the distribution of LULUs).

another way of conceptualizing distributive justice.[22] Under her approach, which I characterize as the "community preferences" model, disparities in the siting of LULUs are not necessarily unjust.[23] This model defines distributive justice according to the degree to which the location of LULUs meets community preferences. Because what might be undesirable to one community might be desirable to another, a physically unequal distribution could be "just" if the distribution satisfied host communities equally. Professor Blais argues that the market in preferences works well enough to conclude that, overall, disparities are generally justified by differing preferences.[24]

I argue that the market in community preferences does not work, and that the community preferences model therefore fails to provide an "out" from the problem of distributive justice. Economic and political markets do not function to meet community preferences equally. In fact, the land use siting process and the dynamics of the housing market likely skew undesirable land uses toward poor and minority communities regardless of those communities' preferences.[25] The distributive justice problem does not evaporate through applying a community preferences model; whether we measure justice by it or by the equal division model, we encounter significant inequities deserving serious attention.

The choice of model—equal division versus community preferences—and the assessment of whether justice is achieved under each model, have real-world implications for public policy. Under the equal division model, evidence of disparities provides a strong basis for seriously considering government policies to address unfair concentrations of LULUs. But if one instead adopts the community preferences model and assumes that it provides a satisfactory explanation for existing disparities, then government efforts to equalize the siting of LULUs become unnecessary: there is no distributive justice problem to remedy. Moreover, under this theory, government efforts imposing across-the-board distributional edicts could be counterproductive. If one assumes that the market in

22. Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 80–83 (1996).

23. *See id.* at 80.

24. *See id.* at 82–83.

25. *See infra* Sections VI.C–VI.E (analyzing how the land use siting process leads to distributions that satisfy the preferences of poor and minority communities less than those of other communities) and Section VII.B (analyzing how post-siting housing market dynamics are unlikely to rectify skewed distributions resulting from the land use siting process and may exacerbate disparities in preference satisfaction).

preferences works, government efforts to equalize distributions would interfere with the market's ability to match differing community preferences, leaving communities equally burdened, but unequally satisfied. Under this model, public policies to equalize siting would be an unnecessary and counterproductive intrusion into neutral agency actions.

Since the community preferences model threatens to erase the distributive justice problem, it is important to determine whether its underlying assumptions are accurate. Otherwise, it risks lulling us into complacency about distributive injustice and thwarting efforts to address it.

In sum, the analysis in this Article has four primary goals: (1) to argue for the importance of addressing distributive justice in its own right; (2) to illuminate the relevant theories of distributive justice applicable in the land use context; (3) to demonstrate that we have failed to achieve distributive justice, whether one adopts the equal division or the community preferences model; and (4) to demonstrate more broadly the fallacy of assuming that "the market" has the capacity to resolve significant public policy issues, such as the inequitable siting of locally undesirable land uses. This Article does not attempt to propose specific public policy initiatives. Instead, the Article addresses the fundamental questions about the importance and nature of distributive justice that must undergird future policy development.

Part I provides a brief introduction to the environmental justice movement and then identifies its primary claims: "distributive," "political," and "social" justice. Part I then explores the various causes of distributive injustice, ranging from the invidious to the innocent. It concludes by observing why the issue of distributive justice necessarily implicates racial and economic justice. Part II addresses the importance of distributive justice as a focal point for policy attention, even in the absence of intentional discrimination or identified process failures. Part III explores general theories of distributive justice and analyzes how they lead to the particular models that are relevant in the land use context.

Part IV introduces the first model of distributive justice, the equal division model, and then concludes that, notwithstanding certain methodological controversies, we have a distributive justice problem under this model.

Part V introduces the community preferences model of distributive justice. This model has been used to challenge the assumption that an unequal division of LULUs is unjust, and posits

that unequal distributions may be justified by differences in community preferences. The model itself is controversial. However, this Article accepts the model on its own terms. Part V then explains the methodology for determining whether preferences are equally met. Since it is impossible to determine the extent to which community preferences are met through direct empirical analysis, it is necessary to analyze the *likelihood* that they are met by exploring the factors most likely to determine existing land use distributions: land use siting processes and post-siting housing market dynamics. Hence the apparent irony: an article on *distribution* that thoroughly explores land use *processes*. The irony is resolved, however, by observing that I generally evaluate processes not for their own sake,[26] but to determine the likelihood that the resulting land use *distributions* are likely to satisfy preferences equally.

Part VI evaluates land use siting processes to determine whether they are likely to have led to distributions of land uses that satisfy community preferences equally. It analyzes objective factors (such as market forces and regulatory requirements), political processes expressed through general zoning and individualized siting decisions, and the special role of public participation provisions. It concludes that siting decisions often fail to reflect equally the preferences of facilities' neighbors, and instead are often skewed against the preferences of minority and low-income residents.

Part VII addresses the contention that, even if land use siting processes do not meet community preferences equally, post-siting dynamics in the housing market could rectify such failures. Residents who did not like the LULUs could move away; residents who wanted to live near them could move closer. Part VII concludes that post-siting housing market dynamics are not likely to result in distributions that match neighborhood preferences equally. Differences in income and housing discrimination mean that some will be better able to move toward or away from their preferred land uses than others, thereby deepening distributional disparities. The "market" does not lead to equity.

The Article concludes that advocates of the community preferences model have incorrectly assumed a functioning private preferences market in land use siting and in the post-siting housing

26. Because issues of political and social justice beg for attention in any discussion of land use processes and housing markets, I briefly highlight these dimensions as well. *See* Section VI.F ("The Land Use Siting Process and Political Justice") and Section VII.C ("The Housing Market and Political Justice").

market. The community preferences model's misplaced faith in the market should not lead us to dismiss important governmental efforts to address distributive justice.

This Article is a starting point. Important questions remain, such as the appropriate model for distributive justice, the weight to be given distributive justice when it competes with other social policies, what government efforts would be likely to succeed given the complex causes of distributive inequities, and the specific goals and structure of government initiatives to achieve distributive justice. These issues are, however, subjects for future scholarship.

I. THE ENVIRONMENTAL JUSTICE MOVEMENT AND ITS CLAIMS FOR JUSTICE

A. The Environmental Justice Movement's Impact

Since the 1980s, the rise of the environmental justice movement has begun to impact environmental and land use policy. As the movement challenged the fairness of environmental impacts and decision-making, academics, government agencies, and others undertook systematic studies that suggested that LULU distributions were correlated with race and income.[27] These studies and the movement's gathering strength resulted in various environmental justice initiatives in the 1990s. The Environmental Protection Agency ("EPA") established the Environmental Equity Workgroup, which analyzed existing evidence on the distribution of environmental risks and in 1992 published a study called "Environmental Equity: Reducing Risk for All Communities."[28] In February 1994, President Clinton issued Executive Order 12,898, which requires federal agencies to consider the implications of federal decisions on the poor and on minorities and which urges federal agencies to develop mechanisms for ensuring the participation of all groups in decision-making processes affecting them.[29] The EPA, in conformance with the Executive Order, has issued several guidance documents indicating how it will take environmental justice issues into consideration.[30] Pursuant to the Executive Order, other federal

27. *See infra* notes 157–209 (discussing studies on the distribution of LULUs).

28. U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992) [hereinafter ENVIRONMENTAL EQUITY REPORT].

29. Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (2000).

30. *See supra* note 19 (discussing guidance interpreting Title VI to apply to environmental permitting decisions). In addition, in 1998, the EPA issued a guidance

agencies have, to varying degrees, integrated environmental justice concerns into their programs.[31]

The federal government has not acted alone. Various states have enacted or are considering legislative proposals to control the siting of undesirable environmental land uses.[32] In addition to government actions, a number of mainstream environmental groups have responded to the movement with greater attention to environmental justice issues.[33] Although opinions differ as to the sincerity and depth

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document on incorporating environmental justice concerns into the environmental review processes associated with the National Environmental Policy Act ("NEPA"), which requires Environmental Impact Statements for all major federal actions significantly affecting the environment. *See* 42 U.S.C. § 4332(2)(C) (2000) (establishing environmental impact statement requirement); U.S. ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS (1998), *available at* http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf (on file with the North Carolina Law Review). The guidance document explains in detail how agencies should go about considering the impacts of federal projects on poor and minority communities. *See id.*

31. *See generally* Denis Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12,898 on Environmental Justice*, 31 ENVTL. L. REP. 11,133 (2001) (reviewing numerous agencies' implementation of Executive Order No. 12,898). For example, to the extent federal agencies are subject to Environmental Impact Statement requirements under the National Environmental Policy Act, they have included environmental justice concerns in their analyses. *See id.* at 11,137–38. Their ability to do so has been facilitated by a guidance document on the subject issued by the Council on Environmental Quality for use by all federal agencies. *See* Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act*, (1997), *available at* http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf (on file with the North Carolina Law Review). Many agencies have taken steps to improve outreach to and public participation by low-income and minority communities. *See* Binder et al., *supra*, at 11,138–39. Otherwise, the ways in which federal agencies have integrated environmental justice have varied considerably, depending upon each agency's unique responsibilities. For example, the EPA has distributed grant money to help communities monitor and reduce pollution, *id.* at 11,142, the Department of Agriculture has focused on natural resource issues in poor and minority urban settings and developed programs to train migrant workers about pesticide dangers, *see id.* at 11,143, and the Department of Housing and Urban Development has been involved in urban revitalization and lead poisoning, *id.* at 11,144–45.

32. *See* Chuck D. Barlow, *State Environmental Justice Programs and Related Authorities*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 140, 156 (Michael B. Gerrard ed., 1999) [hereinafter THE LAW OF ENVIRONMENTAL JUSTICE] (providing an overview and analysis of state environmental justice programs). As of 1999, five states had their own environmental justice policies, four states had environmental justice policies incorporated into agreements with the U.S. EPA, and five states had policies under development. *See id.* at 141–42.

33. *See* Kaswan, *Bridging the Gap*, *supra* note 14, at 264 (discussing environmental groups' responses to the environmental justice challenge).

of these efforts,[34] environmental justice issues play a much greater role in debates about environmental policy than was evident just a decade ago. Critical issues remain, however, as to the appropriate nature and scope of environmental justice initiatives.

B. The Environmental Justice Movement's Claims for "Justice"

At its core, the environmental justice movement raises two distinct types of claims for justice: distributive justice and political justice.[35] To provide context for this Article's subsequent focus on distributive justice, this Section sketches the basic parameters of each form and introduces one broader category: "social justice."[36] It also analyzes the degree to which distributive injustices are, and are not, likely to be caused by political or social injustices. The primary focus is on claims for justice raised in the context of land use siting decisions.

1. Distributive Justice

Claims for "distributive" justice focus on whether communities bear more than their fair share of LULUs.[37] While all communities

34. *See id.* at 265 & n.215 (noting that some in the civil rights movement doubt the ability of mainstream environmental groups to respond fully to the needs and concerns of communities of color).

35. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1028–55 (discussing distributive conceptions of environmental justice), 1060–68 (discussing process-oriented conceptions of environmental justice); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 788–98 (1998) [hereinafter Foster, *Justice From the Ground Up*] (discussing and distinguishing distributive and process theories of justice); Kaswan, *Bridging the Gap*, *supra* note 14, at 230–39 (defining and discussing distributive and political justice).

36. One other type of claim made in the environmental justice context is "corrective justice," a claim that has focused on whether the legal system provides adequate remedies for environmental harms once they have occurred. *See* Robert Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681, 10,693–94 (2000) (discussing "environmental justice as corrective justice"). Rather than focusing on siting processes or outcomes, corrective justice focuses on responses to existing circumstances, and addresses such issues as the equity of environmental enforcement actions and common law remedies for environmental harms. *Id.* at 10,693–98.

Theoretically, the idea of corrective justice could be used more broadly than it has been so far. One could argue that, to the extent studies show more LULUs in some neighborhoods than others, then corrective justice requires reparations or other compensation. This Article primarily focuses on justifying efforts to increase the fairness of *future* siting decisions, but I acknowledge that the principles raised could be relevant to a broader conception of corrective justice.

37. *See* H.L.A. HART, THE CONCEPT OF LAW 154 (1961) (observing that claims for justice are essentially claims for fairness, and that where the issue is the distribution of burdens or benefits to classes of individuals, "what is typically fair or unfair is a 'share' ").

must bear some of the burdens of industrial society, the critical question is whether these burdens are distributed equitably. The environmental justice movement raises both narrow and broad claims of distributive justice. When individual local communities argue that they are subject to more than their respective fair shares of LULUs, they are raising "narrow" claims regarding their particular circumstances.[38] For example, if one community is subject to all of the waste disposal facilities for an entire metropolitan area, then that community has a claim of distributive injustice in the narrow sense. But many in the environmental justice movement make the broader claim that, overall, more LULUs are located in poor and minority neighborhoods than in other neighborhoods.[39] Although both narrow and broad claims are critical parts of the environmental justice movement, the broader claim is the primary focus of this Article.

It is important to note that distributive justice is concerned with outcomes, not with the *causes* of those outcomes.[40] Thus, if the distribution of waste disposal facilities in an area is highly skewed, the community has a claim of distributive injustice regardless of whether the disparity was caused by intentional discrimination or, instead, by "objective" siting criteria bearing no relation to the community's demographics. Similarly, looking at the distribution of LULUs more broadly, unequal distributions are of concern regardless of whether they were determined by discriminatory processes or ostensibly neutral market factors.

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38. *See, e.g.*, Robert W. Collin & William Harris, Sr., *Race and Waste in Two Virginia Communities*, *in* VOICES FROM THE GRASSROOTS, *supra* note 11, at 93, 95–98 (describing African-American opposition to concentration of waste facilities in King and Queen County, Virginia); Foster, *Justice From the Ground Up*, *supra* note 35, 779–88 (describing an African-American community's opposition to a waste facility in light of existing concentration); Vernice D. Miller, *Planning, Power, and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 FORDHAM URB. L.J. 707, 710–11 (1994) (describing the siting of a sewage plant in Harlem).

39. *See, e.g.*, LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 54 (2001) (observing pattern of distributive inequities); Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* VOICES FROM THE GRASSROOTS, *supra* note 11, at 15, 15 (arguing that, overall, communities of color are subject to worse environmental conditions than other communities).

40. *See* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 962–63 (1973) [hereinafter Michelman, *Constitutional Welfare Rights*] (stating that distributive justice is "an outcome-oriented appraisal of the pattern and makeup of distributive 'shares' . . . , as distinguished from concern for the correctness of the processes themselves or the purity of their application"); *see also* Kuehn, *supra* note 36, at 10,684 (stating that the focus of distributive justice "is on fairly distributed outcomes, rather than on the process for arriving at such outcomes").

2. Political Justice

The other central claim the environmental justice movement makes is one I have characterized as a claim for "political justice."[41] A claim for political justice looks at the fairness of decision-making processes rather than the discrete distributional outcome of those processes.[42] As H.L.A. Hart has stated, "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."[43] If the interests of some are given more weight than the interests of others, then we have an instance of political injustice.[44] For example, if a community were selected as a site for a waste disposal facility because its interests were not treated with the same respect as those of others, then that community has a claim of political injustice. More pointedly, if the community were selected as a site because of intentional racial discrimination, that claim would implicate political injustice.

Although the distributional outcome of a decision-making process may be relevant to assessing its fairness,[45] the central inquiry under political justice concerns the process rather than the outcome. When evaluating discrete decisions, the standard for political justice is fair *treatment*, without any guarantee of a fair outcome.[46] Here, too,

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41. *See* Kaswan, *Bridging the Gap*, *supra* note 14, at 233–34.

42. It should be noted that, throughout this Article, unless indicated otherwise, I use the term "discrimination" to refer to any decision-making process that violates political justice as described, whether or not it relates to racial discrimination. This is not to minimize the particular importance of racial discrimination, but to recognize that the arguments about political justice include but go beyond issues of racial prejudice. Furthermore, I reserve the use of the term "discrimination" to situations of political injustice. In other words, if a decision were made fairly but nonetheless resulted in a distributive disparity, I would use the term "distributive injustice" but not "discrimination." This is not to minimize the importance and significance of distributional disparities, but simply to ensure that the reader knows when I am referring to political versus distributive justice.

43. HART, *supra* note 37, at 163.

44. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272–73 (1977) (stating that government must treat its citizens with equal concern and respect); *see also* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1063–64 (quoting DWORKIN, *supra*, at 273).

45. For example, under an Equal Protection Clause analysis, the Supreme Court has made clear that the disparate impact of a decision is an important type of circumstantial evidence for proving intentional discrimination. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

46. A community could be treated fairly, but could, for a variety of reasons, nonetheless be subjected to a burden that is greater than that of others. In such an instance the community would have a claim rooted in distributive justice but not in political justice. Fair treatment does not guarantee a particular distributional outcome. *See* DWORKIN, *supra* note 44, at 273 (observing that a group could be treated fairly but nonetheless receive a distributional burden); Kaswan, *Bridging the Gap*, *supra* note 14, at

the environmental justice movement makes narrow and broad claims. In a particular context, it might claim that a particular siting decision was motivated by invidious factors.[47] More broadly, those in the movement argue that there is systemic discrimination in decision-making institutions and structures.[48]

Many have used the term "procedural justice" to describe what I term "political justice."[49] This Article uses the term "political justice" rather than "procedural justice" because the issue goes beyond the question of procedure to the substance of the deliberative process.[50] If the issue is framed as one of "procedural justice," then decision-makers might argue that they have solved the "fair treatment" problem through the creation of procedures that ensure participation of all groups in decision-making processes. It is not clear, however, that procedural requirements enhancing public participation will necessarily lead to substantive decisions that are more responsive to public opinion.[51] While enhancing participation procedures to equalize opportunities is an important step in creating the preconditions for political justice, it provides no guarantee that the

240; *see also infra* note 121 and accompanying text (describing lottery as fair process that could lead to unfair outcome).

47. *See, e.g.*, Collin & Harris, *supra* note 38, at 95–98 (describing racial bias in siting a landfill in a black community in King and Queen County, Virginia).

48. *See, e.g.*, Chavis, *supra* note 11, at 3 (describing myriad forms of "environmental racism").

49. *See, e.g.*, KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS AND COMMENTARY ON ENVIRONMENTAL LAW AND PRACTICE 35–37 (2d ed. 2000) (using the term "procedural justice" to describe theories based upon how people are treated); Kuehn, *supra* note 36, at 10,688–89 (categorizing theory of justice based on a right to equal concern and respect in "political decision[s]" as "procedural justice").

50. In other areas of the law, the term "procedure" does not have an explicitly substantive component. For example, procedural due process doctrine focuses on the government's procedures for making decisions that affect protected interests. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976) (observing that the government must use fair procedures whenever it deprives individuals of "liberty" or "property" within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment). The doctrine does not impose any requirements on the substance of a governmental decision. Similarly, under NEPA, a governmental agency must adopt procedures for assessing and considering the environmental effects of its decisions, but the statute does not impose any substantive requirement that the agency give weight to those effects. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam) (stating that NEPA "imposes upon agencies duties that are 'essentially procedural[,]' " that NEPA does not require that environmental consequences be given substantive weight in the agency's final decision, and that the Department of Housing and Urban Development had met NEPA's requirements by demonstrating that it had procedurally "considered" environmental consequences).

51. *See infra* Section VI.E and accompanying text (discussing role of public participation provisions).

substantive decision will embody political justice. One must, of course, be mindful of the risk of creating a false dichotomy between "substance" and "procedure." Clearly, the procedures agencies use may affect the substance of their ultimate decisions, and this hope is one of the motivating forces behind the creation of improved procedural requirements.[52] Nonetheless, a focus on procedure is one step removed from establishing explicit expectations for the substantive respect that various groups' interests should be accorded in decision-making processes.

3. Social Justice

Distributive and political justice mark the basic categories of justice at issue in the environmental justice movement. Under the rubric of "social justice," environmental justice claims look beyond immediate siting processes and outcomes to consider the wide web of political, economic, and social forces that influence the distribution of LULUs.[53] This inquiry focuses on such issues as inequities in wealth, historic and present zoning practices, implicitly or explicitly discriminatory decision-making structures that indirectly affect siting decisions, housing discrimination, and employment discrimination. The "social justice" rubric is useful because it indicates a broadly-focused inquiry. At base, however, it combines elements of distributive and political justice and does not present a fundamentally different category of justice.

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None of these claims for justice—distributive, political, or social—are raised in a vacuum. Many communities raise all of them.[54] Speaking narrowly, siting decisions are challenged because they add to the disproportionate burden a community must bear *and* because the bases for the siting decisions are believed to be discriminatory.[55]

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52. *See* Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 452–55 (1994) (suggesting that improved community participation procedures would make administrative agencies more responsive to poor and minority communities).

53. *See, e.g.*, Foster, *Justice from the Ground Up*, *supra* note 35, at 791–92 (observing that, to understand environmental justice, one must look beyond the "atomistic conception of agency" and consider the full web of "economic and social forces" that contribute to environmental injustice); Kuehn, *supra* note 36, at 10,698–99 (describing one form of environmental justice as social justice).

54. *See* MANASTER, *supra* note 49, at 159 (noting the multiple and overlapping claims of distributive and procedural justice made by communities opposing siting decisions).

55. *See, e.g.*, Miller, *supra* note 38, at 714–15 (describing West Harlem community's disparate environmental burden and the discriminatory processes that led to it).

Speaking broadly, those in the movement decry inequalities in national distributions and the widespread racism, power disparities, and institutional biases that are believed to cause them.[56]

C. *The Causes of Distributive Injustice*

The extent to which distributional disparities are caused by political and social injustice is highly contested.[57] Although I argue that the presence of distributional disparities is sufficient to trigger regulatory concern regardless of cause, the causes are not irrelevant. Where distributive injustice is linked to political or more general social injustice, it presents multiple bases for concern. It is thus worthwhile to at least sketch the possible relationships.[58]

In some circumstances, distributive injustice could be caused by political injustice in discrete siting decisions. Historic and current discrimination in siting LULUs would likely lead to a concentration of LULUs in disfavored communities.[59] Theoretically, these distributional disparities could be erased by post-siting housing dynamics: those who did not like certain land uses could move away; those who liked them could move closer.[60] Even if this were true, however, there would be some period of time during which disparities would exist. As elaborated below, moreover, such post-siting housing market dynamics are not, in fact, likely to equalize the demographics surrounding LULUs.[61] Thus, past and present discrimination in siting processes are likely to lead to distributional disparities.

In other circumstances, siting disparities might not be caused by political injustice in discrete decisions, but might nonetheless be a product of the broader form of social injustice discussed above. Historic or present zoning laws might concentrate undesirable land

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56. Robert D. Bullard, *Introduction* to VOICES FROM THE GRASSROOTS, *supra* note 11, at 7, 7–13 (describing inequitable distributions and their pervasive historical, political, and institutional causes).

57. *See* Foster, *Justice from the Ground Up*, *supra* note 35, at 790–92 (observing that evidence of distributional injustice prompts a difficult and contested inquiry into causation).

58. *See* Kaswan, *Bridging the Gap*, *supra* note 14, at 239–42 (discussing interrelationships between distributive and political justice). Some understanding of causation may be necessary to design remedies that will be effective in the long term, although that is not the focus of this Article.

59. *See id.* at 239 (arguing that political injustice is likely to lead to distributional injustice).

60. *See infra* notes 477–89 and accompanying text (discussing post-siting housing market dynamics).

61. *See infra* notes 498–510 and accompanying text (discussing post-siting housing mobility).

uses in certain neighborhoods.[62] Alternatively, social injustice may have led to disparities after an initially neutral siting decision. If at the time of an initial decision, an area had been unpopulated, or was white and affluent, then the siting decision itself was probably not politically unjust.[63] But broader social injustices, like poverty and housing discrimination, could have led to a subsequent concentration of poor and minority residents, since they would be less able to flee undesired LULUs, or might be attracted to lower-valued housing in areas with LULUs.[64]

Social injustice is also a factor in disparities that arise from certain market forces, like land values. Proponents of undesirable land uses are drawn to cheaper land, land that is often located in poor and minority neighborhoods.[65] In such cases, there is no political injustice in the discrete siting decision. But the problem of social injustice is evident. Land values in minority neighborhoods are often cheaper than in comparable non-minority neighborhoods, suggesting that the difference in valuation is a product of lingering discrimination.[66] Thus, even if certain distributional disparities are not attributable to political injustice in discrete siting decisions, they may nonetheless be attributable to broader forms of social injustice.[67]

Finally, it is possible for distributive disparities to arise without implicating either political injustice in a siting decision or broader issues of social justice. A community could be treated with the same concern and respect as all other communities, but nonetheless be selected for a disproportionate share of LULUs due to some

62. *See infra* notes 336–401 and accompanying text (discussing role of zoning provisions in creating unequal LULU distributions).

63. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1014 (remarking that "market forces" operating after the initial siting decision may have caused a currently disproportionate outcome); Richard A. Samp, *Fairness for Sale in the Marketplace*, 9 ST. JOHN'S J. LEGAL COMMENT. 503, 505 (1994) (pointing out the fallacy of studies that "draw conclusions regarding the reasons for a siting decision from the composition of the *current* population" (emphasis added)).

64. *See* Bullard, *supra* note 39, at 21–22 (stating that "racial barriers" make it difficult for minorities to relocate); Foster, *Justice from the Ground Up*, *supra* note 35, at 793–96 (describing housing market theory and observing that market forces can themselves be racist); Kaswan, *Bridging the Gap*, *supra* note 14, at 241–42 (same); Charles P. Lord, *Environmental Justice Law and the Challenges Facing Urban Communities*, 14 VA. ENVTL. L.J. 721, 728 (1995) (discussing role of discrimination in reducing minority housing mobility).

65. *See infra* notes 322–24 and accompanying text.

66. *See infra* notes 471–73 and accompanying text.

67. *See* Foster, *Justice from the Ground Up*, *supra* note 35, at 791–98 (discussing causation, role of market forces in creating unjust distributions, and potential racism inherent in the housing market).

objective factor that does not implicate political or social justice.[68] For example, geological features might explain a concentration of waste disposal facilities. In such an instance, a distributional disparity in disposal facilities would have been caused by the objective factor of stable geological formations, not by the siting agency's failure to treat the waste-site beleaguered community with less fairness and respect than others. In this situation, we could identify a distributional injustice, but it would not be linked to a political or social injustice. (Arguably, however, if decision-makers know their decision will result in an unintended disparate impact, but fail to take that impact into consideration, their decision demonstrates a lack of respect for the affected community that does suggest political injustice.[69])

The core of my thesis is that distributional injustice is a matter of concern regardless of its cause: it is a concern in *all* of the situations described above, whether the product of outright discrimination or utterly neutral factors. Nonetheless, this sketch of possible causes of distributive justice suggests that, in many instances, distributive injustice presents a concern not just in its own right, but because it implicates other forms of injustice as well.

D. Distributive Justice and Its Relation to Racial and Economic Justice

Theoretically, a problem of distributive justice exists whenever any individual or group is subjected to an "unfair" proportion of LULUs. On its own terms, the concept of distributive justice does not implicate race or class. If the population were completely integrated by race, class, and other demographic features, then the question would simply be whether Neighborhood A had more and/or worse LULUs than Neighborhood B. Under these circumstances, the question of distributive justice might be important, but it would not implicate the questions of racial and economic justice that are critical to the environmental justice movement.

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68. *See* DWORKIN, *supra* note 44, at 273 (observing that a group could be treated fairly but nonetheless receive a distributional burden); Kaswan, *Bridging the Gap*, *supra* note 14, at 240 (same).

69. *See* Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 840 (1992) (noting that environmental regulations could have a racial impact and that "the willful ignorance of that impact may itself be racist *even if* the intention behind the rule had no racial animus at all").

But patterns of residential living in the United States are highly segregated by race and class.[70] Neighborhood A is likely to have a completely different make-up from Neighborhood B. Economic segregation is widespread, and particularly evident in the sharp lines between wealthy suburbs and poor inner cities.[71] Although levels of racial segregation for African-Americans have been slowly decreasing since 1970,[72] a recent Brookings Institute study suggests, based on 2000 census figures, that "the large number of American metropolitan areas with extremely high levels of segregation remains quite striking."[73] For African Americans, the most segregated group in the United States,[74] the national average of a key segregation index is in the "hypersegregated" range,[75] and segregation is significantly above

70. *See generally* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES 4–8 (1996) (describing racial and class "spatial polarization" as a consequence of post-World War II suburbanization that excluded minorities). Professor Haar notes that race and class are also correlated: African Americans and Hispanic Americans frequently have less employment and lower incomes than whites. *Id.* at 7; *see also* RACE AND POLITICS: NEW CHALLENGES AND RESPONSES FOR BLACK ACTIVISM 6 (James Jennings ed., 1997) [hereinafter RACE AND POLITICS] (describing high rates of poverty among blacks and black-white segregation). As one author has noted, "[i]n terms of income, occupation, wealth, and other indicators, blacks still lag well behind the majority white population." Billy J. Tidwell, *Parity Progress and Prospects: Racial Inequalities in Economic Well-Being*, *in* THE STATE OF BLACK AMERICA 2000 287, 288 (2000).

71. *See* HAAR, *supra* note 70, at 5 (describing the striking "spatial polarization of poor and affluent"); Robert L. Smith & Dave Davis, *Gap Between Haves, Have-Nots Measured in Miles*, THE PLAIN DEALER, Sept. 15, 2002, at A1 (describing increasing economic isolation between rich and poor in major cities).

72. Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation in the 2000 Census: Promising News* 3 (Brookings Inst., Ctr. on Urban & Metropolitan Policy, 2001); *see also* U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980–2000 59 (Aug. 2002).

73. Glaeser & Vigdor, *supra* note 72, at 4 (discussing trends in African-American segregation).

74. *See* U.S. CENSUS BUREAU, *supra* note 72, at 4 (noting that "residential segregation was . . . higher for African Americans than for the other groups," including Hispanics or Latinos, Asians and Pacific Islanders, and American Indians and Alaskan Natives).

75. Glaeser & Vigdor, *supra* note 72, at 5. Based on 2000 census figures, the national dissimilarity index was 0.652. *Id.* A level above 0.6 is considered hypersegregated. *Id.* at 3. The dissimilarity index measures how many African-American residents would have to move from their existing census tracts to obtain an even distribution in the metropolitan area. *Id.* For example, if the index is 0.6, then 60% of the African-American residents would have to move to obtain an even distribution. *See id.*; *see also* U.S. CENSUS BUREAU, *supra* note 72, at 60 tbl.5-1 (indicating that average dissimilarity index for African Americans in 2000 was 0.640).

Of the 291 metropolitan areas analyzed in the Brookings Institute study, 74 were "hypersegregated," with dissimilarity indices greater than 0.6. Glaeser & Vigdor, *supra* note 72 at 4. One hundred sixty were "partially segregated," with dissimilarity indices

this national average in the nations' most populous areas.[76] The slow decreases in segregation over the last three decades[77] have been achieved through the integration of formerly all-white census tracts, not through the integration of heavily African-American census tracts,[78] and the decreases in segregation have been smallest in the areas with the greatest African-American populations[79] and the greatest amount of historic segregation.[80] Almost a third of the nation's African Americans currently live in neighborhoods that are 80% African-American or more.[81]

Levels of segregation for Latinos are significant, but slightly lower than those for African Americans.[82] In the Northeast, Latino segregation has reached "hypersegregation" levels.[83] As with African Americans, the highest levels of segregation exist in those regions with the highest percentages of Latinos.[84] In addition, while the levels of African-American segregation have been slowly decreasing over the last thirty years,[85] key aspects of Latino segregation have been

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between 0.4 and 0.6. *Id.* Only eighty-three metropolitan areas were considered "less segregated," with indices below 0.4. *Id.*

76. Glaeser & Vigdor, *supra* note 72, at 7; *see also* U.S. CENSUS BUREAU, *supra* note 72, at 59 (stating that levels of segregation for African Americans are correlated with metropolitan area population size, particularly for large areas with a population of one million or more).

77. *See* Glaeser & Vigdor, *supra* note 72, at 3–4 (describing decreases in segregation from 1970 to 2000).

78. *Id.* at 5. The number of census tracts whose percentage of African Americans exceeds eighty percent did not change from 1990 to 2000. *Id.*

79. *Id.* at 7. In metropolitan areas "that were more than 25 percent black in 1990, segregation declined least, by 2.8 percentage points." *Id.* Segregation decreased most in areas where African Americans were less than 5% of the population. *Id.*; *see also* U.S. CENSUS BUREAU, *supra* note 72, at 63 (noting that segregation is greater in areas with higher percentages of blacks).

80. Glaeser & Vigdor, *supra* note 72, at 5 (noting that the regions with the lowest historic levels of segregation had greater decreases in segregation); *id.* at 8 (noting that large metropolitan areas with substantial segregation have changed the least); *see also* U.S. CENSUS BUREAU, *supra* note 72, at 72 (noting that "the large metropolitan areas that had been the most segregated at the beginning of the period [1990] remained at or near the top of the list [in 2000]"). The U.S. Census Bureau study on segregation also notes that "[t]he top ten most segregated large metropolitan areas were in the older Northeast-Midwest 'Rust Belt'. . . ." *Id.*

81. U.S. CENSUS BUREAU, *supra* note 72, at 72. Many African Americans have left such virtually all-black areas, however, as demonstrated by the decrease in the percentage of people living in these areas from 1960, when almost half lived in census tracts that were eighty percent African-American. *Id.*

82. *See id.* at 78 tbl.6–1 (showing national dissimilarity index of 0.509 in 2000).

83. *Id.* at 84 tbl.6-2 (showing dissimilarity index for the Northeast region of 0.615).

84. *Id.* at 77.

85. *See supra* note 77.

increasing, not decreasing.[86] The reality, therefore, is that neighborhoods differ greatly in their demographic make-up.

To the extent that disparities in distribution are correlated with differences in race or income, the issue of distributive justice implicates fundamental notions about equity in our society that would not arise in a more integrated world. Although any inequity deserves concern, inequities that stem from and in turn create the pernicious effects of segregation change what could be an abstract question of distributive justice into one that is necessarily related to broader issues of racial and economic justice.

II. ON THE IMPORTANCE OF DISTRIBUTIVE JUSTICE

Distributional inequities are frequently discounted unless and until one demonstrates that they were caused by discrimination—by political injustice.[87] As one author has noted, in light of the difficulty

86. The dissimilarity index increased 1.5% from 1980 to 2000. *See* U.S. CENSUS BUREAU, *supra* note 72, at 78 tbl.6-1 (showing an increase in the dissimilarity index from 0.502 in 1980 to 0.509 in 2000). The isolation index, which measures the extent to which those in a census tract are more likely to be of the same race, *see* Glaeser & Vigdor, *supra* note 72, at 3 (explaining the isolation index), increased 21.5% from 1980 to 2000. *See* U.S. CENSUS BUREAU, *supra* note 72, at 78 tbl.6-1 (showing an increase in the isolation index from 0.454 in 1980 to 0.552 in 2000).

87. *See* THOMAS LAMBERT ET AL., A CRITIQUE OF "ENVIRONMENTAL JUSTICE" 7–8 (1996) (arguing that only discriminatory siting should be illegal); Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121, 138–39 (1997) (arguing that "disparate impacts or unequal results should be considered disproportionate only when other, non-racial factors do not explain siting"); Lawrence J. Straw, Jr., *Environmental Justice: Racial Gerrymandering for Environmental Siting Decisions*, 14 VA. ENVTL. L.J. 665, 671, 679–80 (1995) (critiquing environmental justice advocates who argue that disparate impacts should be addressed even if unaccompanied by discriminatory intent); *cf.* Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1167 (2000) (arguing that private litigants should not be given a cause of action against the disparate impacts of environmental permitting decisions and that the decision as to whether a disparate impact is problematic should be left to environmental agencies). Professor Vicki Been has suggested that evidence of distributional disparities is "flawed" because the studies do not establish that siting processes or intentional discrimination caused the distributional disparities. Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1014. She has, however, observed that proposals to make future siting decisions fairer are justified notwithstanding the absence of proof that prior decisions were unfair. *Id.* at 1016–18.

More broadly, Professor Michelman has noted that "the mainstream of our legal tradition has largely bypassed the outcome-appraising sort of distributional concern." Michelman, *Constitutional Welfare Rights*, *supra* note 40, at 963. Although there has been some opening to distributional concerns since Professor Michelman wrote almost thirty years ago, particularly in the context of civil rights laws pertaining to employment, housing, and disability rights, *see* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (2000); Fair Housing Act, 42 U.S.C. §§ 3604–3606 (2000); Americans with Disabilities Act

of proving that a given distributional injustice was caused by direct political injustice by siting authorities, "critics have easily scrutinized the distributive paradigm of environmental injustice with causation objections."[88] Some of these critics thus imply that, if the disparity was not caused by a racist or otherwise discriminatory siting decision, then the disparity is not problematic.[89] For example, if an area is subject to a disproportionate burden due not to discrimination, but to lower property values that attract industry, then "such is life;" we have not implicated "justice."[90] The argument echoes constitutional equal protection jurisprudence, under which the disparate impact of a government action is not relevant unless it can be linked to an intent to discriminate.[91] In the philosophical tradition, the view against addressing distributive justice is expressed most forcefully by Robert Nozick, who argued that efforts to achieve justice should not attempt to achieve particular distributional goals.[92] He argued that "whether

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of 1990, 42 U.S.C. §§ 12,101–12,213 (2000), his statement remains an accurate description of many areas of the law. As discussed *infra* notes 91, 103 and accompanying text, equal protection law remains intent and not impact focused. Although the Supreme Court has upheld Title VI regulations prohibiting disparate effects by state and local agencies receiving federal funds, *see* Alexander v. Sandoval, 532 U.S. 275, 281–82 (2001) (citing Supreme Court cases upholding Title VI disparate impact regulations and accepting such regulations as valid for the purposes of the case), they have not recognized a private right of action to enforce the regulations. *See id.* at 293.

88. Foster, *Justice from the Ground Up*, *supra* note 35, at 791. It should be noted that Professor Foster does not share this objection.

89. These critics are, to some extent, responding to environmental justice advocates who have implied that most or all distributional inequities are caused by racism. *See, e.g.*, COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 23 (1987) [hereinafter COMM'N FOR RACIAL JUSTICE] (arguing that factors related to race are likely to have played a role in the location of commercial hazardous waste facilities). But in questioning the likelihood that a distributional outcome was caused by racism, the critics go further to imply that a distributional outcome that was not created by racism does not present a public policy issue.

90. *See* Straw, *supra* note 87, at 675–77 (arguing that siting processes are not unjust because they are driven by economic factors such as real estate costs). *See generally* COLE & FOSTER, *supra* note 39, at 61 (observing that those who argue that current distributions result from market dynamics believe that "this fact renders the outcomes somehow more benign").

91. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (holding that disparate impact can provide evidence of discriminatory intent, but that disparate impact alone will not suffice to prove a violation of the Equal Protection Clause); Washington v. Davis, 426 U.S. 229, 239–42 (1976) (holding that the Equal Protection Clause is violated only by proof of discriminatory intent, not by evidence of disparate impact).

92. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 167–74 (1974). Professor Nozick believes that "end-state patterned" theories of justice—theories designed to

a distribution is just depends upon how it came about."[93] Process, not distributional outcome, should be the touchstone.

I argue that distributive justice is of critical independent significance. By focusing on distributive justice, one concentrates on what is experienced, regardless of cause. If inner-city African-American children are exposed to far more air pollutants than children in other neighborhoods, then that problem is one worth considering. The absence of a racist motive does not change the troubling distributional disparity. As Alan Freeman has stated in the Equal Protection Clause context, an exclusive focus on affixing blame directs attention to the "perpetrator" without sufficiently considering the conditions experienced by the "victim."[94] For the communities experiencing harmful and debilitating disparate impacts, it is problematic to argue that those impacts are not worthy of attention without an identified discriminatory cause,[95] or that the primary significance of the impacts is in what they tell us about their cause. A preoccupation with assessing why an inequity has arisen should not impede the effort to remove the disparity.

Distribution has also been recognized as an important aspect of justice by political philosophers. John Rawls's *A Theory of Justice* is a pivotal work articulating a conception of justice that includes a

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achieve certain outcomes—will inevitably interfere with individual liberty, the paramount virtue. *Id.* at 163.

93. *Id.* at 153.

94. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053–54 (1978). Professor Freeman argues that the Supreme Court's focus on discriminatory intent embodies the "perpetrator perspective," while an approach that gave a more significant role to disparate impacts would embody a "victim perspective." *Id.* at 1052–57.

95. Writers in the Equal Protection Clause context frequently argue that discriminatory impacts deserve redress. *See* Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 146–56 (1976) (arguing that the Equal Protection Clause's underlying concerns about the effect of state action on blacks would be better met by considering whether state action disadvantages the status of vulnerable groups than by focusing on whether particular state actors discriminated); Freeman, *supra* note 94 (urging greater consideration of impacts in order to address the negative experiences of the victims of discrimination); Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) (critiquing the Supreme Court's focus on discriminatory intent and its relegation of discriminatory impacts to a subsidiary role); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–46 (1997) (observing the extent to which the Equal Protection Clause "intent" test fails to address many pervasive forms of racial and gender inequality); *cf.* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication* 52 N.Y.U. L. REV. 36, 50–57 (1977) (proposing an Equal Protection test that would provide a greater role for disparate impacts than that permitted by the Supreme Court).

strong distributive component.[96] He argues that "[t]he justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in various sectors of society."[97] His reference to the distribution of "social conditions" clearly implicates the type of concerns raised by the environmental justice movement. Other formulations of the importance of distribution to justice abound. Professor Nicholas Rescher states that "justice consists in realizing to the greatest possible extent a distribution that renders to each a 'fair share' of the good (or evil) at issue."[98] Professors John Arthur and William Shaw have stated that the "issue which lies at the heart of all philosophizing about society [is]: What constitutes a just distribution of the benefits and burdens of economic life?"[99] A focus on distribution thus resonates with significant philosophical theories on the nature of justice.

Moreover, at least in the short-term, the distributional dimension of an environmental justice conflict may be more amenable to improvement than the political dimension. In some instances, distributional injustice may arise without political injustice. Recall the example of waste disposal sites clustered in an area that is geologically suitable. In that case, there is no "political injustice" to remedy; those affected would be best served by a siting process or remedy that simply protected communities from such disparate consequences. Or some decision-makers, such as environmental permitting officials, may have operated under statutory directives that were blind to potential distributional consequences.[100] They cannot be blamed for intentional discrimination.[101] Therefore, rules that

96. JOHN RAWLS, A THEORY OF JUSTICE (1971); *see* Michelman, *Constitutional Welfare Rights*, *supra* note 40, at 964 (noting that Rawls, unlike process-oriented theorists, demonstrates that there are generally shared principles of outcome-oriented notions of distributive-share justice).

97. RAWLS, *supra* note 96, at 7. The contours of Rawls's theory of distributive justice will be articulated further below, where I address the possible formulations of theories of distributive justice. *See infra* notes 139–41 and accompanying text.

98. NICHOLAS RESCHER, DISTRIBUTIVE JUSTICE: A CONSTRUCTIVE CRITIQUE OF THE UTILITARIAN THEORY OF DISTRIBUTION 6 (1966).

99. JOHN ARTHUR & WILLIAM H. SHAW, JUSTICE AND ECONOMIC DISTRIBUTION 2 (1978).

100. *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 787–92 (1993) (describing environmental laws' focus on aggregate, rather than distributional, effects).

101. *See* Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 602–05 (1996) (arguing that causes of environmentally disproportionate impacts are likely to be highly complex and are not necessarily attributable to racism).

require them to take distribution into account in the permitting process, and hold the government liable for the failure to do so, might better address distributional disparities that are not caused by intentional wrongdoing. Nor are the environmental statutes facially discriminatory. Thus, remedies based upon distributive inequities would provide protection against detrimental disparities that occur even in the absence of political or clear social injustice.

In those cases where distributional injustice is attributable to political injustice, that injustice may be very difficult to remedy. It could be the consequence of historical rather than present discrimination, such as the legacy of discriminatory zoning and residential housing patterns that have left their mark for generations.[102] To the extent present discrimination is suspected, the "intent" requirement makes legal redress very difficult to obtain under modern interpretations of the Equal Protection Clause.[103] Discrimination is rarely explicit,[104] and the multiplicity of factors that could plausibly influence a siting process, such as land costs, site characteristics, or other logistical factors, provide many opportunities for decision-makers to explain what might have been a discriminatory decision on nondiscriminatory grounds.[105] Discrimination is not only rarely explicit, some contend that it is often unconscious—the product of repeated but unexamined social practices and deeply ingrained cultural assumptions.[106] If current legal rules require a demonstration of discriminatory intent to address political injustice, that intent will be hard to find, and justice difficult to achieve. While the political and social injustices that cause some distributional disparities should

102. *See supra* notes 70–86 and accompanying text (discussing existing segregation); *infra* notes 389–400 (discussing the history of discriminatory zoning and land use practices).

103. *See* Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387, 464–81 (1999) (discussing application of the Equal Protection Clause to environmental siting cases).

104. *See generally* Siegel, *supra* note 95, at 1135–36, 1141–43 (observing that decision-makers rarely discriminate explicitly, making discrimination harder to detect).

105. *See infra* notes 285–95 (discussing objective criteria used in siting decisions). At this stage in the argument, I am assuming that the criteria themselves are legitimate, but that they are being used to hide an illegitimate purpose. For example, a siting decision may be justified based upon a logistical consideration that is not, in fact, of importance to the siting entity. The fact that some of these criteria, even when legitimately used, may have troubling distributional impacts is a separate issue discussed *infra*, notes 318–33 and accompanying text.

106. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339–44 (1987); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE. L.J. 1717, 1806–09 (2000).

be addressed where possible, the difficulty of doing so suggests that communities could be better off if they had direct mechanisms for improving distributional disparities.

Professor Sheila Foster has cautioned that inquiries into the nature of environmental justice should not be limited to distributional analyses, but should instead look behind the distributions to determine the range of political, social, and economic factors that have led to the disparities.[107] She argues that focusing on distributive justice "often obscures our consideration of the social structure and institutional context that play a role in determining the patterns of distribution."[108] Professor Foster acknowledges the relevance of distributive patterns, but sees them as a starting point for a more in-depth consideration of the "social processes underlying distributional patterns."[109]

I agree with Professor Foster that a full understanding of the nature of environmental justice requires consideration of the intricate linkages between distributions and their social, political, and economic causes. I simply have a different focus from Professor Foster. My focus is not on what is necessary to understand the full nature of environmental injustice; that indeed requires a full inquiry into political and social forces. Instead, my focus is on what information is necessary to trigger the need for a remedy. My argument is simply that information about distributional disparities alone is a sufficient predicate to regulatory action; a community should not have to demonstrate any sort of suspect causation before being entitled to attention.

Writing in political philosophy, Professor Iris Marion Young has suggested a deeper critique of a focus on distributive justice. Like Professor Foster, she argues that focusing on distributive justice could fail to address the deeper social problems that cause disparities to arise[110] because it presupposes rather than scrutinizes institutional structures and processes.[111] Ultimately, a primary focus on distribution could implicitly support unjust institutions, since it takes

107. Professor Foster critiques the tendency of environmental justice studies to analyze only distributional facts, as though those facts speak for themselves, without a deeper inquiry into the nature and cause of the results. Foster, *Justice from the Ground Up*, *supra* note 35, at 788–807. As a result, these studies are vulnerable to criticism for failing to establish causation, *id.* at 791–96, and, in turn, failing to provide a basis for a normative understanding of the processes that lead to distributive disparities. *Id.* at 796–98.

108. *Id.* at 790.

109. *Id.* at 791.

110. *See* IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 16 (1990).

111. *Id.* at 22–23.

them as given.[112] Her concern is not just with the study of discrimination, however, but the development of distributionally-based remedies. For example, affirmative action efforts tend to focus on distributions: who gets employment or opportunities for higher education. That focus fails to address such critical underlying structural issues as who decides who is "qualified" for employment and why some have the means to attain these qualifications while others do not.[113] A focus on distribution is ultimately depoliticizing, Professor Young argues, because potential challenges to the existing systems of power and control become rechanneled into distributive "solutions" that dissipate the thrust of critical social movements.[114] Professor Young does not argue that distributive justice is irrelevant,[115] but she does argue that issues of political and social justice should be the primary focus.

Professor Young's concern that a preoccupation with distributive justice could lead to a failure to question and challenge unjust social and institutional structures is an important caution. If the environmental justice movement were reduced to simply counting how many facilities end up here and there, then critical aspects of the movement would indeed be lost. Many environmental justice leaders are not simply challenging the number of facilities to which they are subject, but also the fairness of decision-making and underlying power structures.[116] Challenging environmental decisions is one step in a broader engagement over the nature of economic and political power. The goal of sustained challenge is a greater political voice—a voice that may transcend particular disputes over particular facilities.[117] It is also important to identify the widespread inequities

112. *Id.* at 198.

113. *Id.* at 199–200.

114. *Id.* at 70–72, 89–90. Professor Young describes the history of industry-labor accords in this vein: industry and labor came to agreements about how to distribute economic rewards, but did not address underlying issues of power and control. *Id.* at 70–72.

115. *Id.* at 16, 19, 37, 91.

116. *See* Foster, *Justice from the Ground Up*, *supra* note 35, at 778 (observing that decision-making structures, social structures, and institutional contexts are critical to environmental racism claims); Charles Jordan & Donald Snow, *Diversification, Minorities, and the Mainstream Environmental Movement*, *in* VOICES FROM THE ENVIRONMENTAL MOVEMENT: PERSPECTIVES FOR A NEW ERA 71, 90 (Donald Snow ed., 1991) (stating that the fundamental issue in environmental justice disputes are "[w]ho shall choose, and how shall the choices be made?").

117. Professor Robert Bullard has stated that grassroots environmental "leaders are demanding a shared role in the decision-making processes that affect their communities. They want participatory democracy to work for them." Robert D. Bullard, *Introduction* to UNEQUAL PROTECTION, *supra* note 12, at xvii; *see also* YOUNG, *supra* note 110, at 34, 91–

that may lie behind current land use distributions. Furthermore, addressing political and social processes will also likely improve distributive justice given their role in causing disparities. Nonetheless, given the difficulty of devising effective remedies for many past and present forms of political and social injustices,[118] and the real world consequences of distributional inequities, I argue that it is appropriate for the movement to direct at least some of its efforts toward distribution-focused remedies.

I conclude this Section on the "importance of distributive justice" with a significant qualification about how distributive justice fits into the broader picture. Notwithstanding the critical importance I attribute to distributive justice, I recognize that it may not be the only factor that is ultimately relevant in the context of facility siting.[119] It is possible that the outcome of a siting decision could be distributively unjust, but, nonetheless, be justified overall. For example, there may be very important reasons, such as safety considerations, why a facility needs to be placed in an area that is already subject to a disproportionate number of other facilities. I argue that distributive justice should be an important factor, but recognize that it cannot always be the sole factor that determines facility siting.

Nonetheless, the presence of a worthwhile overriding justification for a distributively unjust outcome does not erase the distributional injustice. We do not have "justice" simply because we can explain the disparity. In such situations, distributional injustice must be recognized as a tradeoff, even if ultimately an acceptable tradeoff; it is not erased by the existence of other justifications for the distributively unjust outcome. Determining how distributive justice should be balanced with other goals presents one of the major challenges that specific policy initiatives will have to address.[120]

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93 (suggesting a model of justice grounded in full public participation and meaningful democracy).

118. *See supra* notes 102–06 and accompanying text (describing obstacles to effective remedies for addressing political and social injustice).

119. *See generally* Christopher Ake, *Justice as Equality*, 5 PHIL. & PUB. AFF. 69, 71 (1975) (suggesting that justice is one virtue among others, and that people may deem it socially ideal "to balance the claims or demands of justice against those of other social virtues").

120. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1038–39 (noting that distributional goals must be weighed against other siting factors); Lambert, *supra* note 87, at 1173–74 (arguing that "some disparity-causing decisions are, on balance, 'good' because they are necessary to attain other worthy objectives . . . . As in all of life, tradeoffs are ubiquitous").

III. CONCEPTIONS OF DISTRIBUTIVE JUSTICE

To this point, I have primarily conceptualized distributive justice in comparison with political justice. In this Section, I focus on distributive justice itself, and consider how theories of justice in the LULU context relate to and emerge from broader concepts of distributive justice.[121]

Most distributive theories of justice are inherently consequentialist; in other words, they focus on outcomes.[122] Utilitarianism is the quintessential consequentialist theory. According to classic utilitarianism, the best distribution is that which will lead to "the greatest good for the greatest number."[123] As many critics of utilitarianism have noted, however, this theory does not provide a satisfying answer to the question of how goods (or bads) ought to be distributed among people. For example, the greatest amount of good (e.g., the highest possible Gross National Product) might be achieved by distributing a great deal of wealth to many, but leaving some in dire poverty.[124] Given its potential for serious

121. Some theories that are characterized as theories of "distributive justice" are, in fact, focused on the process by which the distribution was achieved. In other words, for some, if the process is just, then the resulting distribution is just, even if it is in practical terms unequal. *See* NOZICK, *supra* note 92, at 153 (arguing that a distribution is just if it arises from a just means (assuming, as he does, an originally just distribution)). For example, Professor Vicki Been identifies certain types of siting proposals as those intended to achieve an "equal dispersion" (in contrast to process-based proposals), and includes a lottery as a type of "equal dispersion" theory. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1030. Under a lottery theory—a lottery for "bads" rather than "goods"—each community would have an equal chance of being selected as a site for a LULU. *Id.* Since this theory rests on the fairness of the process by which communities are selected for LULUs rather than on the fairness of what communities ultimately experience, I would argue that it is rooted in conceptions of political rather than distributive justice. My goal, however, is to disengage political and distributive justice so as to promote a focus on distributive justice in its own right. I would argue that a just process is a just process; that a process is just does not answer the question of whether the resulting distribution is just. *See* ARTHUR & SHAW, *supra* note 99, at 4 (noting that a fair procedure could nonetheless lead to an unjust result).

Not all theorists treat lotteries as theories of distributive justice. Some have identified them as models for procedural, not distributional justice. *See* PETER S. WENZ, ENVIRONMENTAL JUSTICE 234–35 (1988).

122. *See* ARTHUR & SHAW, *supra* note 99, at 9 (describing consequentialist theories of distributive justice); ANDREW DOBSON, JUSTICE AND THE ENVIRONMENT: CONCEPTIONS OF ENVIRONMENTAL SUSTAINABILITY AND THEORIES OF DISTRIBUTIVE JUSTICE 70 (1998) (noting that consequentialist theories of justice assess the outcome of procedures by a standard that is external to the procedures used).

123. *See* RESCHER, *supra* note 98, at 8; ARTHUR & SHAW, *supra* note 99, at 7. This formulation of utilitarianism is often attributed to the 19th century philosopher Jeremy Bentham. *See* ARTHUR & SHAW, *supra* note 99, at 100.

124. *See* RESCHER, *supra* note 98, at 25–27; ARTHUR & SHAW, *supra* note 99, at 7.

inequality, the potential for some to suffer for the greater good, Rawls deems the "principle of utility . . . to be inconsistent with the idea of reciprocity implicit in the notion of a well-ordered society."[125] Our search for a compelling theory of distributive justice thus goes beyond utilitarianism to find a theory that resonates more strongly with notions of fairness.

The potential for undesirable inequality in a utilitarian distribution leads us to a theory of equality as another potential basis for evaluating whether a distribution is just.[126] Isaiah Berlin has stated:

> no reason need to be given for . . . an equal distribution of benefits—for that is 'natural'—self-evidently right and just, and needs no justification . . . . The assumption is that equality needs no reasons, only inequality does so . . . .[127]

Mr. Berlin's comment is applicable to the distribution of harms, not just benefits. The critical question then becomes: what does equality mean? It quickly becomes clear that strict equality as such is not necessarily consistent with distributive justice, since it is arguably unjust to treat people in the same way if they are different.[128] Instead, the concept can be articulated as: "People who are alike in all relevant respects deserve the same things."[129]

The next critical issue becomes, if equality requires that we treat different people differently, and like people alike, then what differences matter, and how much? A number of factors are frequently mentioned. For example, a theory of justice might distribute goods on the basis of need.[130] Another set of factors turns on the issue of "desert": of distribution accomplished in proportion

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125. RAWLS, *supra* note 96, at 14.

126. *See* Aristotle, *The Varieties of Justice*, *in* JAMES P. STERBA, JUSTICE: ALTERNATIVE POLITICAL PERSPECTIVES 14, 18 (1980) (excerpt from a translation of Aristotle's NICHOMACHEAN ETHICS stating that "what is unjust is unequal, what is just is equal"); Ake, *supra* note 119, at 71 (arguing that justice in society is best understood as "equality of the overall level of benefits and burdens of each member of that society").

127. Isaiah Berlin, *Equality as an Ideal*, *reprinted in* JUSTICE AND SOCIAL POLICY 128, 131 (Frederick A. Olafson ed., 1961), *quoted in* NOZICK, supra note 92, at 347 n.41.

128. *See* RESCHER, *supra* note 98, at 74–75; *see also* Aristotle, *supra* note 126, at 18 (stating that "[i]f the persons are not equal, they will not have equal shares; it is when equals . . . [have] unequal shares, or persons who are not equal [have] equal shares, that quarrels and complaints arise").

129. WENZ, *supra* note 121, at 23; *see also* ARTHUR & SHAW, *supra* note 99, at 3 (observing that "[i]njustice in one sense of unfairness occurs when like cases are not treated in the same fashion").

130. *See* ARTHUR & SHAW, *supra* note 99, at 6–7; RESCHER, *supra* note 98, at 73, 75–76. The socialist/Marxist principle of "to each according to need" arguably resonates with this theory of distributive justice. *See id.* at 223.

to what people receiving the goods (or bads) deserve.[131] Factors implicating "desert" include: one's innate ability; the level of effort expended; the actual achievements attained; and moral merit. Philosophers differ over the appropriate role of these factors: which are defensible and which not;[132] how much weight they should have relative to one another; and how one should measure and compare within and across categories.[133] As the discussion below makes clear, however, these thorny dilemmas need not be resolved where the distribution of LULUs is at issue.

In the context of siting LULUs, I argue that none of these factors justify a deviation from a general principle of equal distribution. In explaining the operation of "desert-based" factors, most theorists assume the distribution of "goods"—who deserves to have more money, more things, or more jobs. These factors are less compelling where the distribution of a "bad," like a LULU, rather than a "good," is at stake. No community "deserves" a LULU due to some defect in ability, effort, achievement, or moral standing.[134] Principles related to

131. *See* ARTHUR & SHAW, *supra* note 99, at 4, 135–38 (discussing theories of distributive justice based on "desert"); RESCHER, *supra* note 98, at 53–55 (arguing that justice requires that goods go to the most deserving); WENZ, *supra* note 121, at 22 (defining distributive justice in terms of what people "deserve"); Aristotle, *supra* note 126, at 18 (stating that "[e]verybody agrees that just distribution must be in accordance with merit of some sort").

132. Such controversies include, but are not limited to: (1) Is need, independent of "desert," a sufficient justification for distribution?, *see* ARTHUR & SHAW, *supra* note 99, at 6–7; RESCHER, *supra* note 98, at 76; (2) Is it just to distribute based on innate ability since it is a matter of chance and bears no relation to effort or achievement?, *see* ARTHUR & SHAW, *supra* note 99, at 136; RAWLS, *supra* note 96, at 73–74 (observing that a distribution based on natural ability would be based upon a "natural" lottery and therefore arbitrary from a moral perspective); RESCHER, *supra* note 98, at 76–77 (noting that it is unjust to base distribution on innate ability without considering how it is used); (3) Should distribution be based on effort if unaccompanied by actual achievement?, *see id.* at 77–78; and (4) Is it just to distribute based on achievement if that achievement did not reflect effort or need?, *see id.* at 79. Clearly, these principles are not mutually exclusive. Professor Rescher argues that all of these factors (among others) must be considered in assessing the legitimacy of a claim for a particular distribution, and that no single factor is sufficient. *See id.* at 81–83.

133. How does one evaluate one need versus another need? *See* ARTHUR & SHAW, *supra* note 99, at 6–7. How does one compare different types of effort: for example, how does one compare physical versus mental effort, or consider hours worked versus the degree of hardship? *See id.* at 136–37. How does one compare and measure relative "achievement"? *Id.* How does one define moral worth? *Id.* at 137.

134. It is conceivable that one could argue that, to the extent LULUs are more often placed in poor neighborhoods, the poor deserve more LULUs and the rich deserve to be free of LULUs. The rich have earned their money and power and the poor, through their own inadequacy, have failed to earn money and power. Thus, the poor "deserve" LULUs as one of the consequences of their self-created poverty. Poverty is rarely, however, a self-imposed condition, and disparities in LULUs traceable to poverty are therefore not

"just deserts" therefore do not justify inequalities in distribution in the LULU context, however much these principles might be applicable in other contexts.

The role of community need as a justification for differing distributions is somewhat more complex, but ultimately similar. As indicated above, at this stage in the analysis we are assuming that LULUs are generally considered "bads." A community would not have a "need" for something that is considered a "bad."[135] Thus, so long as LULUs are treated as "bads," community need does not present a factor justifying an unequal distribution of LULUs. (The preference theory of distributive justice, discussed further below,[136] addresses the possibility that a community would find a LULU a good, not a bad.)

The factors of need and desert focus on the recipients of a given distribution. Other factors that could justify unequal distributions turn on extrinsic societal considerations unrelated to the person or persons receiving the distribution.[137] The most important of these echoes in the utilitarian theory discussed above: distributions should serve the common good.[138] While I argue that the classic utilitarian conception of the greatest good for the greatest number is an unsatisfying theory of distributive justice, there are other formulations along these lines that are more compelling. John Rawls's famous "difference principle" falls into this category.[139] Unlike the traditional utilitarians, Rawls uses equality as a starting point for conceptualizing distributive justice. He justifies inequalities under limited circumstances, however, if they will result "in compensating benefits for everyone, and in particular for the least

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"deserved." I take as given that poverty is generally a consequence of historic and present social and economic factors over which individuals have only limited control.

135. Under standard theories of distributive justice, the "need" factor is intrinsic—it focuses on the need experienced by those to whom the good or bad is distributed—here, the relevant community. The issue of whether "societal" needs justify an unequal distribution of LULUs is an extrinsic factor. This type of factor is discussed below. *See infra* notes 137–40 and accompanying text.

136. *See infra* Section IV.A.

137. *See* RESCHER, *supra* note 98, at 80–81 (noting difference between factors associated with extrinsic and intrinsic claims for justice).

138. *Id.* at 80. Another factor suggests that income, goods, and services should be distributed in whatever way the market dictates. *Id.* at 80–81. This factor, standing alone, fails to present a moral basis for an unequal distribution. If the argument is that the market serves to distribute goods pursuant to need or desert, then those reasons provide the justification for the inequality, not the market itself; the market is simply a vehicle for achieving a distribution that otherwise has a moral basis.

139. *See* RAWLS, *supra* note 96, at 76–80 (defining and elaborating the difference principle).

advantaged members of society."[140] While Rawls does justify inequality on behalf of the general welfare, he differs from classic utilitarianism because he would not accept a distribution that allows some to endure a greater disadvantage for the benefit of others.[141]

The difference principle could be applied to LULU siting both narrowly and broadly. Applied narrowly and directly, the issue would be whether the inequality of imposing more LULUs on poor and minority areas would be justified because it assists "the least advantaged." Assuming that LULUs are "bads," not "goods," such inequality would clearly violate the difference principle because it worsens rather than betters the condition of these less advantaged communities.

The difference principle is also violated if one attempts to apply it more broadly. One could argue that siting LULUs in poor neighborhoods helps society at large because such areas are presumptively the cheapest, and therefore economically efficient. But in order to satisfy the difference principle, one must be able to show not only that there is a general benefit to society, but that no one is made worse off in the process, particularly the least advantaged. It is highly implausible that any societal efficiency gain from siting a LULU on cheap land would trickle down and benefit the *impacted community* enough to offset the negative impact of the LULU.[142] (Again, the presumption here is that the LULU is a "bad" that is not desirable to the impacted community.) Thus, the inequality of siting LULUs in poor neighborhoods is not justified under the difference principle because, even if it has some benefits for society overall, those benefits are not likely to compensate the impacted communities for the LULU's net negative impact.

Where LULUs are at issue, concepts of "need," "desert," and theories like Rawls's difference principle do not justify deviations from equality as a distributional goal. Equality is therefore a guiding

140. *Id.* at 14–15; *see also id.* at 62 (noting, under his "general conception" of justice, that "[a]ll social values . . . are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage"); *id.* at 83 ("[s]ocial and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged").

141. *Id.* at 64–65; *see also id.* at 77 (noting that utilitarians are indifferent to how the sum of benefits are distributed among people). He states that "the difference principle is a strongly egalitarian conception in the sense that unless there is a distribution that makes both persons better off . . . , an equal distribution is to be preferred." *Id.* at 76.

142. *Cf.* RACE AND POLITICS, *supra* note 70, at 8–9 (arguing, generally, that a "supply-side" approach to economic development policy that caters to corporations in the hopes that economic benefits will "trickle down" to poor communities has failed to improve blacks' living conditions).

principle in determining whether the distribution of LULUs is just. It should be emphasized that I speak here only of distributive justice. As indicated above, there may, at times, be justifications for siting facilities unequally.[143] But that does not make the outcome distributively just; distributive injustice must be viewed as a real tradeoff, however acceptable a tradeoff we may find it.

Assuming that equality is the relevant touchstone for determining distributive justice, the question remains: how does one define equality in the LULU siting context? I argue that there are two, sometimes competing, theories of distributive justice that are both based upon equality but define the term differently: the "equal division" model and the "community preferences" model.[144] I sketch each theory briefly here, to be developed further in the following Sections.

The most common assumption about what we mean by distributive justice is that of a physically equal distribution of undesirable land uses.[145] The assumption is that if there are more LULUs in some neighborhoods than others, then the distribution is not equal.

The community preferences model has been raised to challenge the assumption that the unequal division of land uses is necessarily unjust. This alternative model of distributive justice flows from the theory of distributive justice developed above: strict physical equality might not be the appropriate measure if there are relevant differences. Professor Lynn Blais has suggested that one such

143. *See supra* note 119 and accompanying text.

144. A third theory is plausible. One could argue that LULUs should be distributed in proportion to the degree communities benefit from the activities causing LULUs. In other words, those who experience industrial society's benefits should experience its burdens in equal proportion. Physical inequality in distribution would be justified if differing communities "deserved" differing numbers of LULUs to bring their burdens into proportion with the benefits they enjoy, and avoid imposing burdens on those who do not experience compensating benefits. Professor Bullard has implicitly suggested such a theory in his discussion of the distribution of hazardous waste facilities, where he observes that "[c]ommunities that host hazardous waste disposal facilities (importers) receive fewer economic benefits (jobs) than do communities that generate the waste (exporters). The people who benefit the most bear the least burden." Bullard, *supra* note 56, at 11; *see also* Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 273 (1992) (observing that "minorities pay the pollution costs of industrial production, while the benefits accrue to society in general").

While intriguing, and a model worthy of consideration in developing specific policies to address distributive justice, for simplicity's sake this Article will focus on the two more predominant theories discussed in the text.

145. *See, e.g.*, Kuehn, *supra* note 36, at 10,683–84 (describing distributive justice in terms of an equal distribution of land uses).

difference is communities' relative preferences for land uses commonly referred to as "undesirable."[146] Under the community preferences model, the relevant barometer for determining equality would be whether people's preferences are met equally, not whether LULUs are equally divided. Where there are different preferences, there should be different distributions. Thus, what might be considered distributively unjust under the equal division model would not necessarily be considered distributively unjust under the community preferences model.

IV. DISTRIBUTIVE JUSTICE UNDER THE EQUAL DIVISION MODEL

A. Distributive Justice as an Equal Division of LULUs

The conception of distributive justice that most readily comes to mind is of an equal division of LULUs. Considered narrowly, distributional injustice would exist wherever a particular community was subject to more or worse LULUs than other communities.[147] Thus, a community could argue that it is unfairly subject to more industrial uses than other neighborhoods. Similarly, a community could argue that, even though other communities contain some LULUs, it hosts LULUs having more adverse impacts than the LULUs located in other communities. Considered broadly, distributive injustice would exist if more and worse LULUs are located in poor and minority neighborhoods. The idea of equal division often, although not necessarily, assumes that LULUs have objective burdens that will be viewed by everyone in the same way.[148] If everyone evaluates the benefits and burdens of various land uses in the same way, then distributive justice would be achieved by equal distribution.

As Professor Vicki Been has made clear, the problems with measuring fairness pursuant to this theory and devising efforts to

146. *See* Blais, *supra* note 22, at 81.

147. *Cf.* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1028–30 (describing the "fairness as equal division" theory). Professor Been's analysis is organized around the theories of fairness associated with types of siting proposals, rather than the concept of distributive justice on its own terms.

148. Even if people had differing preferences, some might argue that those differences are borne of self-destructive impulses or imperfect information that justify overriding them. The equal division model might thus be deemed appropriate even if differing preferences were acknowledged.

satisfy the theory are formidable.[149] It is difficult, for example, to craft an objective measure for comparing the relative harm from different types of LULUs.[150] Furthermore, the issue of how to define the identity or boundaries of a "neighborhood" being affected by LULUs is complicated and contested.[151] These definitional challenges do not, however, impugn the coherence of the theory itself as a model for conceptualizing a "just" distribution.[152]

Some would argue that the equal division model of justice could be satisfied without actually equalizing the distribution of LULUs; instead, communities enduring a disproportionate burden could be compensated.[153] The compensation could be in the form of money, or could involve community benefits like health facilities or recreational centers.[154] Under this theory, the LULUs might not be evenly dispersed, but the communities having more LULUs would have the disparity equalized by compensating benefits. Because each community is being equalized, though by differing means, this theory falls under an "equal division" theory. However, the compensation model presents numerous ethical and practical difficulties not raised

149. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1032–39 (describing many of the practical obstacles that would stand in the way of assessing the equality of a dispersion and attempting to design a program to equalize dispersions).

150. *Id.* at 1033–34.

151. *See id.* at 1034–35; Kenneth Warren, *Evidentiary Issues: Proving Intent and Effect and Defining the Affected Community*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 32, at 397, 410–19. *See generally* Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is How We Measure*, 21 FORDHAM URB. L.J. 633 (1994) (detailing issues in measuring environmental equity statistically); John A. Fahsbender, Note, *An Analytic Approach to Defining the Affected Neighborhood in the Environmental Justice Context*, 5 N.Y.U. ENVTL. L.J. 120 (1996) (describing the sometimes competing factors that are relevant to identifying the definition of "affected" neighborhoods).

152. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1033 (noting that definitional problems do not discredit the theory itself, but show problems that must be resolved to implement it); *cf.* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1256–57 (1970) (arguing that his criticism of a disparate impact test in equal protection law is not based on the definitional and measurement difficulties associated with such a test). This Article is designed to analyze the nature of and need for distributive justice; these definitional debates belong to subsequent efforts to develop specific policy proposals.

153. *See, e.g.*, Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1031 (describing compensation proposals); Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REG. 195, 214–28 (1997) (proposing compensation).

154. *See* Lambert & Boerner, *supra* note 153, at 214 (identifying such possible forms of compensation as payments to affected landowners, payments to local government entities, healthcare or education grants, and recreational options).

by the pure equal-division-of-LULUs' model.[155] Any future efforts to develop specific policies to pursue distributive justice under the equal division model will have to confront the issue of whether, and to what extent, compensation is an appropriate mechanism.

B. *Evidence of Distributive Injustice Under the Equal Division Model*

This Section considers the environmental justice movement's "broad" claim of distributive injustice: that, overall, LULUs have not been distributed evenly among demographic groups, and are instead more heavily concentrated in poor and minority communities.[156]

There is some evidence that social service LULUs are disproportionately located. Services for the homeless, group homes for the mentally disabled, and community correctional facilities, like halfway houses, tend to be clustered in minority and low-income communities.[157] Moreover, the more undesirable the social service, the greater the concentration in poor or minority neighborhoods. For example, halfway houses are correlated with higher percentages of minorities and the poor than homes for the developmentally disabled.[158]

Most of the studies in the environmental justice context have concerned polluting LULUs.[159] A recent book, *Environmental Injustice in the United States: Myths and Realities*, summarizes an

155. Professor Been summarizes many of the primary concerns. It is not clear that increased health risks can or should be compensated by money payments or their equivalent. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1040–46. In addition, the attractiveness of compensation, and associated LULUs, may be a function of underlying wealth disparities. *Id.* at 1041. Poorer communities may also have less information with which to make informed decisions about the tradeoffs between the LULU and the proffered compensation. *Id.* As poor communities, they will also have fewer resources to engage effectively in the negotiations that lead to compensation.

156. This Article frequently refers to disparities impacting "poor and minority neighborhoods" collectively, rather than differentiating impacts on the poor versus impacts on minorities. Not all studies differentiate the role of class versus the role of race—although where such data are separately analyzed, it is included. More generally, however, while the respective roles of race and class are important in some contexts, it is not significant for the purposes of this general essay on distributive justice.

157. *See* Been, *What's Fairness Got to Do With It?*, *supra* note 19, at 1013–14 (citing a New York City study on homeless shelters and general studies on the mentally disabled and halfway houses).

158. *Id.* at 1014.

159. Good compilations of these studies can be found in COLE & FOSTER, *supra* note 39, at 167–83; CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW POLICY & REGULATION 56 (2002).

extensive review of the existing literature.[160] The authors note that many case studies in particular regions have identified localized distributional disparities, with some studies focusing on impacts to communities of color and others focusing on impacts to low-income communities.[161] The authors also review more quantitative statistical analyses of distributional outcomes. They observe that pre-1992 studies:

> generally determined that race (either in the presence or absence of a control for social class) was associated with higher rates of exposure to environmental hazards for a variety of geographic areas, such as regions, counties, [Standard Metropolitan Statistical Areas], or ZIP codes, and for a variety of environmental harms, such as air pollution, solid waste, pesticides, hazardous waste, and toxins . . . .[162]

Other reviewers of this literature have likewise concluded that it reveals widespread inequities.[163]

Myths and Realities states that post-1992 studies generally confirmed the trend of earlier studies.[164] Those that considered the

160. JAMES P. LESTER, DAVID W. ALLEN & KELLY M. HILL, ENVIRONMENTAL INJUSTICE IN THE UNITED STATES: MYTHS AND REALITIES (2001) [hereinafter MYTHS AND REALITIES].

161. *Id.* at 9–20. While these case studies provide an important step in the research process, the authors note the difficulty of generalizing beyond the particular case being studied. *Id.* at 17.

162. *Id.* at 13.

163. For example, Luke Cole observes that "the poor suffer disproportionately from environmental hazards." Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 622 (1992) [hereinafter Cole, *Empowerment as the Key*]. He points to an extensive array of local and national studies correlating income levels with such environmental harms as toxics production and disposal, solid waste, air pollution, and lead poisoning, among others. *Id.* at 622–24. Cole also observes that "people of color are exposed to more environmental dangers than white people," *id.* at 624, and points to an extensive array of local and national studies correlating race with the same types of harms analyzed in the income studies. *Id.* at 624–28. Professor Been similarly points to an array of studies indicating that poor and minority communities are more likely to be subject to toxics than others. Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1009–14. In 1992, the EPA released a report entitled *Environmental Equity* that surveyed existing data on relative pollution burdens. *See* ENVIRONMENTAL EQUITY REPORT, *supra* note 28. The report concluded that there are differences in exposure to environmental pollutants according to socioeconomic factors and race. *Id.* at 11, 13. The report noted, however, that it was not clear whether these disparate exposures resulted in actual health impacts. *Id.*; *see also* Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY. L.Q. 1, 5 (1997) (listing studies); Lazarus, *supra* note 100, at 801–06 (reviewing the data on disproportionate distribution of environmental risk).

correlation of environmental harms with race and class found that race tended to be "the most important predictor of risk."[165] Many of the post-1992 studies analyzed correlations of environmental problems with not only race and class, but other factors as well. These studies tended to find that race and class were still important predictors of risk, although not always the most important ones.[166]

Myths and Realities also presents the results of the authors' own research. Unlike many of the studies they reviewed, which focused on a single unit of analysis (e.g., zip codes or census tracts), their study focused on three different geographic levels: state, county, and city.[167]

In comparing states, they considered a wider range of environmental harms than had been considered by other individual studies, which tended to focus on one or another harm, but not a range of harms together.[168] These harms included air pollution (two types),[169] hazardous waste (as in generation and disposal sites), solid waste, toxic waste (as in certain indicators of toxic releases),[170] and water pollution (two types).[171] Comparing levels of inequity among states, they found that African-American concentrations were correlated with five of the seven types of environmental harms they researched,[172] and Hispanics were correlated with four of the seven in some or most regions of the country.[173] Social class, measured by income and education levels,[174] was correlated with two of the seven

164. MYTHS AND REALITIES, *supra* note 160, at 14; *see also id.* at 57–58 (noting studies' findings that race is a significant factor); *id.* at 59–60 (noting studies' findings that class if often a significant factor).

165. *Id.* at 14.

166. *Id.* Some of the additional factors considered by other studies were "industry and manufacturing, political mobilization, population density, severity of the communities' overall environmental crisis, and transportation grids." *Id.*

167. *Id.* at 17–18.

168. *Id.* at 79–80.

169. *Id.* at 81. The study analyzed ozone emissions and toxic chemicals released to air as one type of harm, and the levels of nitrogen oxides, carbon dioxide, and sulphur dioxide released as another type of harm. *Id.*

170. *Id.* at 83–84.

171. *Id.* at 84. The study analyzed the extent of water-system violations as one factor and toxic and chemical pollution as another. *Id.*

172. *Id.* at 105–06. The study found injustice with respect to African Americans in connection with all of the factors except solid waste and the degree of water-system violations. *Id.* at 104–05. Two of the five areas of inequity were found to occur regionally rather than nationally. *Id.* at 105–06.

173. With respect to Hispanics, the study found injustice nationally in connection with hazardous waste and regionally with respect to toxic waste and both of the water pollution factors. *Id.*

174. *Id.* at 60.

environmental harms[175] when associated with additional factors that also affected the degree of environmental harm.[176]

In comparing counties, the study focused on one important form of environmental harm: toxic air emissions.[177] They found that, to a greater or lesser extent, both African-American and Hispanic counties were exposed to higher levels of toxic emissions than other counties.[178] For African Americans, the correlation was particularly strong in the Sunbelt states.[179] For Hispanics, the correlation was not present in many cases, but was strong where combined with "low social class, western regionalism, and low county fiscal capacity."[180]

In comparing cities, the study compared cities with populations over 50,000,[181] and once again focused on toxic air emissions.[182] The study found a strong correlation between African-American cities and toxic releases, but did not find a strong correlation between Hispanic demographics and toxic releases.[183] The study also found a strong correlation between social class and toxic releases,[184] a correlation that was stronger on the city level than on the state and county levels.

Considering all of the analyses done of all of the respective factors at the state, county, and city level, *Myths and Realities* concludes that "[e]vidence of race-based environmental injustice is evident . . . in nearly 86 percent of the equations that focus on the percent black population."[185] For Hispanics, they report an incidence of environmental injustice in fifty percent of their analyses.[186] Social

175. *Id.* at 104–05. Class was associated with releases of nitrogen oxides and carbon and sulphur dioxides. *Id.*

176. *Id.* Class appeared to moderate the impact of "pollution potential"—i.e., where a state appeared to have high pollution potential in light of its industrial character, the pollution potential was mitigated in proportion to social class. *Id.* at 104.

177. *Id.* at 113–14. The study used data from the Toxic Release Inventory, an inventory created by reports from all large sources of toxic emissions. *See id.* at 114–15. Such companies are required to report all toxic emissions sources, including both smokestacks and unaccounted for emissions (known as "fugitive" emissions). *Id.* at 113–15.

178. *Id.* at 129.

179. *Id.* at 121–24, 129–30. The Sunbelt states include: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. *Id.* at 132.

180. *Id.* at 128–30.

181. *Id.* at 135.

182. *Id.* at 133–34. The precise factors analyzed and data used did, however, differ in some respects. *Id.*

183. *Id.* at 145–46 (summarizing results).

184. *Id.* at 146 (summarizing results).

185. *Id.* at 152.

186. *Id.* at 154.

class proved to be correlated with environmental harm in thirty-five to fifty percent of the equations, and was at times particularly relevant where class was analyzed together with race.[187] While the study does not reveal inequities at every geographic level with regard to every type of pollution analyzed, it confirms many of the widespread disparities observed in previous studies, particularly with regard to race, and especially with regard to African Americans.

An issue that is likely to arise in connection with the *Myths and Realities* study is the relatively large size of the units of analysis: the smallest unit, cities, is larger than that used by most other studies, which typically consider zip codes or census tracts.[188] Large units create potential "aggregation" problems: they may not reveal significant variations within the chosen unit.[189] For example, while there may be a high minority population in a county, that population is not distributed evenly. The environmental harms identified in the county may or may not be located near minority residents. The aggregation objection is apt if the primary issue is actual exposure to harm. Where broader issues are at stake, however, such as understanding the political, social, or economic dynamics of large-scale distributional patterns, larger units of analysis are appropriate. In general, it is worthwhile to have data about distributional equity at a number of different levels, and focusing on cities, counties and states reveals patterns that might not be revealed with a smaller unit of analysis.

To provide a fuller range than that provided by the *Myths and Realities* study I will briefly discuss the most significant nationwide studies on the distribution of hazardous waste sites that use smaller units of analysis. I focus on hazardous waste studies because hazardous waste site distribution is one of the few issues for which there are national studies.

The United Church of Christ Commission for Racial Justice ("UCC Report") conducted the first major national survey on the distribution of hazardous waste sites.[190] Using zip codes as the unit of analysis, the study found that the percentage of minorities near controlled hazardous waste facilities was higher than in communities

187. *Id.* at 151–52.

188. The authors were aware of this potential criticism, but justified their choice. *Id.* at 17–18, 85–86.

189. *Id.* at 18.

190. COMM'N FOR RACIAL JUSTICE, *supra* note 89, at ix.

without such facilities.[191] Based upon a descriptive study, the UCC Report concluded that uncontrolled toxic waste sites are concentrated in minority communities.[192] The economic status of a community was also correlated with the presence of hazardous waste facilities, but was not as strong an indicator as race.[193] A follow-up report completed in 1994 concluded that the average percentage of minorities living near hazardous waste facilities had increased since the original 1987 UCC Report.[194]

Some commentators have contended that, for various reasons, the UCC Report's reliance on zip codes was problematic, and that census tracts should have been used instead.[195] Two similar studies on the distribution of hazardous waste sites have been done using census tracts. The University of Massachusetts's Social and Demographic Research Institute ("SADRI") evaluated demographic data regarding the distribution of commercial hazardous waste facilities.[196] Unlike most of the studies referenced above, the SADRI study concluded that there was no statistically significant disparity between the minority populations in census tracts with hazardous waste facilities and those without.[197] The SADRI study did, however, find a correlation between facility distribution and certain socioeconomic factors.[198]

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191. With respect to controlled hazardous waste facilities, the UCC Report concluded that the average percentage of minorities in communities with one facility was likely to be higher (24% minority) than in communities without such facilities (12% minority). *Id.* at 13. Where a community contained two hazardous waste facilities or a facility that was one of the nation's five largest landfills, the average percentage of minorities was 38%. *Id.*

192. *Id.* at 23.

193. *See id.* at 13, 15–16, 41–42.

194. *See* D. BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED 2–5 (Center for Policy Alternatives 1994). The updated study was conducted by the UCC Commission as well as by the Center for Policy Alternatives and the National Association for the Advancement of Colored People.

195. *See, e.g.*, Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVTL. L. 1, 4–5 (1995) (arguing that a number of factors make census tracts preferable) [hereinafter Been, *Evidence of Environmental Justice*]; LAMBERT ET AL., *supra* note 87, at 5 (arguing that census tracts are preferable to zip codes because they are smaller and therefore more precise); Kevin, *supra* note 87, at 134–35 (noting that use of census tracts is preferable to zip codes).

196. *See* Been & Gupta, *supra* note 163, at 8 (describing the SADRI study).

197. *See id.* (summarizing the SADRI report results).

198. *See* Kevin, *supra* note 87, at 134 (discussing the SADRI study). The relevant socioeconomic factors were: lower male employment rate; employment in industrial jobs; and lower housing values. *Id.*

A subsequent study[199] using census tracts did, however, find a link between race and distribution, and criticized some of the pivotal assumptions made in connection with the SADRI study. Professor Been argues that the SADRI researchers' inappropriate elimination of many relevant census tracts from consideration "reduced the differences between the racial and ethnic composition of host and non-host tracts."[200] When the relevant census tracts were included in the analysis, Professor Been found that the percentage of African Americans or Hispanics in a census tract was a significant predictor of whether the tract hosted a hazardous waste facility.[201] Professor Been found that income, particularly very low income, was not a significant predictor of hazardous waste facilities.[202] The national hazardous waste studies thus present somewhat mixed results.

The results of the national hazardous waste studies, the *Myths and Realities* study, and the many additional studies that have been conducted depend upon important, but debated, methodological choices.[203] As indicated above, the unit of analysis is critical: state, county, city, zip code, census tract, or "neighborhood." I would argue that there is value to evidence from all of these levels, and that the appropriate unit of analysis depends upon the nature of the facilities being studied and the purpose of the study. A study evaluating the health effects from facilities having highly localized impacts would ideally use a small unit of analysis. Facilities having more widespread impacts would suggest the need for larger units of analysis. On the other hand, a study focusing on the equity of siting decisions, that is

199. Professor Been's study was designed to assess not only the current distribution of hazardous waste sites, but to analyze whether current disparities existed at the time of siting or arose subsequently through the operation of the housing market.

200. *See* Been & Gupta, *supra* note 163, at 16 (describing the SADRI study's elimination of 18,000 non-host tracts from comparative analysis). The SADRI researchers apparently eliminated many tracts without hazardous facilities from comparison because they believed that the eliminated tracts would not have been viable alternatives for the hazardous facilities in question. *Id.* at 16. The researchers appeared to presume that if the eliminated tracts would not have been viable, then their lack of hazardous facilities would not have been attributable to racial factors. Professor Been questions this assumption, concluding that the eliminated tracts might have been viable for certain types of hazardous waste facilities. *Id.* at 16–17; *see also id.* at 16 n.54 (referencing additional critiques of the SADRI methodology).

201. *See id.* at 31, 33. Note that the degree to which the relative number of minorities affected the *siting* of hazardous waste facilities is a different issue.

202. *See id.* at 34.

203. *See* Been, *Evidence of Environmental Justice*, *supra* note 195, at 8. *See generally* Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research*, 14 VA. ENVTL. L.J. 615 (1995) (examining the methodologies of key studies); Zimmerman, *supra* note 151 (discussing methodological issues raised by environmental equity analyses).

not necessarily limited to evaluating the direct physical risks from the facility, could use a variety of units of analysis, including very large units, to identify the political dimension of siting decisions.[204]

Other important issues include how to define a "minority" community,[205] and whether the baseline for determining disparate impact should be the national average or the average for the state or region under study. Researchers must also consider whether studies should focus on the presence of facilities versus actual risk from those facilities.[206] If the relevant inquiry concerns political and social equity, then the presence of facilities may be the appropriate factor. If instead, the inquiry concerns physical harm, then risk may be the suitable factor.[207] The science of statistical analysis is enormously complex, and there are many variations in the manner in which analysis is conducted that can affect outcomes. Researchers differ in their choices and the importance they attach to them.[208] The validity and conclusions of studies are regularly challenged. Although some studies are undoubtedly better than others, in many instances the controversies turn on differences of opinion for which there are few right answers.

Notwithstanding the disputes about methodology, the vast majority of the studies demonstrate some degree of inequity in the distribution of LULUs on the basis of race and/or income, with race being the more frequently relevant factor.[209] While these studies do not prove anything about the presence of distributive injustice in every locality, they do support the "broad" claim of distributive injustice—that the overall pattern of LULU distribution is unequal. This corresponds with the visual image of urban America: clean,

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204. *Myths and Realities* appears to have taken such an approach. *See supra* notes 167–87 (discussing their studies at the state, county, and city levels); *see also supra* notes 188–89 and accompanying text (discussing size of analytical unit).

205. *See* LAMBERT ET AL., *supra* note 87, at 4–5; Been, *Evidence of Environmental Justice*, *supra* note 195, at 14–15.

206. *See* LAMBERT ET AL., *supra* note 87, at 6.

207. Studies finding disparities have also been critiqued because they focus on relative rates of exposure rather than the absolute number of those exposed. *See id.* at 5. Where the relevant issue is fairness, however, the relative rates of exposure rather than absolute numbers exposed does appear to be a relevant inquiry, which is not to say that absolute numbers are not also of interest.

208. *See generally* MYTHS AND REALITIES, *supra* note 160 (discussing complex methodological choices). For example, some have criticized the UCC Report for using "discriminate" rather than "regression" analysis techniques because the discriminate analysis is less able to differentiate among the effects of multiple variables. *See* Lazarus, *supra* note 100, at 802 n.56.

209. I use the data for the purpose of referring to the equity of basic distributions, not the physical harm resulting from that proximity.

green, wealthy and white suburbs juxtaposed with poor and minority residents living near industrial facilities, homeless shelters, bus stations, and the like.

The evidence from the aforementioned studies tells us that the existing distribution of land uses does not satisfy the dictates of an "equal division" theory of distributive justice. Although the evidence says nothing about the causes of these inequities—whether they are neutral factors, discrimination in siting, broader social injustices, or post-siting housing dynamics—identification of causes is not necessary to prove distributive injustice.[210] Focusing on what communities now experience, the evidence reveals that the existing division of LULUs is pervasively unequal.

V. DISTRIBUTIVE JUSTICE UNDER THE COMMUNITY PREFERENCES MODEL

A. *Distributive Justice as the Equal Satisfaction of Community Preferences*

Professor Lynn Blais has argued that this evidence of disproportionate distribution does not necessarily tell us whether the disparities are unjust.[211] As discussed above, the equal division model generally rests on the assumption that all communities measure the benefits and burdens of various land uses in the same way. If, however, communities value different land uses differently, then a different model of distributive justice may be appropriate: one that evaluates justice by whether people's preferences are equally met, not by whether they are all subject to the same number of disagreeable land uses. As indicated above, I term this the "community preferences" model of distributive justice. Under this model, disproportionate distributions would be just if the disparities matched differing preferences.

In addition to Professor Blais, others have implicitly suggested that an assessment of distributive justice ought to consider relative

210. *See* MYTHS AND REALITIES, *supra* note 160, at 136 (observing that "a positive relationship between race and environmental harms constitutes evidence of environmental injustice" whether caused by "a conscious effort to place hazards in minority communities or ... simply ... the unintended consequences of industrial development and existing demographic patterns").

211. Professor Blais states that the environmental justice "literature presents no coherent theory about why the current distribution—even if disproportionate—should be considered *unfair*." Blais, *supra* note 22, at 80.

preference satisfaction.[212] Implicit evidence of the theory is pervasive in many of the ongoing debates about environmental justice. For example, in response to proposed EPA guidance documents suggesting that environmental permitting agencies must take the disparate impact of permits into consideration or risk violating Title VI of the Civil Rights Act,[213] many commentators questioned whether this disparate impact approach would interfere with the ability of host communities to obtain desired facilities.[214] They thus assumed that a disparate impact—an unequal division—would not be unjust if communities desired the LULU at issue in a permitting decision notwithstanding its disparate impact. Coming from the left, Professors Eric Yamamoto and Jen-L Lyman have critiqued the environmental justice movement for failing to recognize the critical differences among various ethnic communities in their attitudes about particular land uses, and cautioned against absolute positions that ignore such distinctions.[215] They thus implicitly adopt the view that justice should be considered in light of the unique preferences of particular communities.[216]

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212. *See, e.g.*, LAMBERT ET AL., *supra* note 87, at 15 (arguing that communities should be free to accept facilities even if they are unequally distributed); Seth D. Jaffe, *The Market's Response to Environmental Inequity: We Have the Solution; What's the Problem?*, 14 VA. ENVTL. L.J. 655, 656 (1995) ("Fairness cannot be defined as an even distribution of LULUs across all communities," and that the government should not interfere with siting processes "if host communities in fact want these projects . . . ."); Kevin, *supra* note 87, at 140–41 (discussing communities' desire for LULU sitings, thereby implying that a distribution would not be unjust if desired by community residents); *cf.* MYTHS AND REALITIES, *supra* note 160, at 14–15 (noting plausible definition of environmental justice that would take into consideration whether minority or poor community, having the requisite information, chose to respond to that information).

213. *See supra* note 19 and accompanying text (discussing Title VI guidance).

214. *See, e.g.*, Editorial, *EPA's Job Killers*, DETROIT NEWS, July 21, 1998, at A6 (describing concern that environmental justice policy barring disparate impact would reduce economic development in minority communities); Pamela Newman-Barnett, *Mayors Join Critics of EPA Environmental Justice Rule*, DAILY AM CONG., July 7, 1998 (same); Henry Payne, *Planting Prosperity or Sowing Racism? EPA Policy that Bars Polluting Plants from Minority Communities Comes Under Attack*, PITTSBURGH POST-GAZETTE, June 15, 1998, at A9 (same); Donna Porstner, *Chambers Align to Fight Against 'Environmental Justice' Policy*, WASH. TIMES, July 20, 1998, at D17 (same).

215. *See generally* Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311 (2001) (exploring the meaning of "environmental justice" by focusing on race as it merges with the environment). For example, Yamamoto and Lyman note that a "hazard-free physical environment" may be less important to some communities than the economic and political empowerment opportunities that could accompany development. *Id.* at 320–22, 329–31.

216. Yamamoto and Lyman reject the "one-size-fits-all" approach used by many in the environmental justice movement. *Id.* at 329. The "equal division" model of distributive justice could be characterized as such an approach.

Under the community preferences model, the critical question would therefore be the extent to which communities are equally satisfied with the land uses that surround them, not the extent to which the land uses and their impacts are equally distributed.[217] Different communities may have differing degrees of tolerance for the burdens imposed by the various types of LULUs. What might be a highly objectionable LULU to one community may be only moderately annoying to another. Some communities might rise up in arms against a small clinical hospital; others might be merely indifferent. Some communities may be more attuned to and concerned about environmental quality than others.[218]

Moreover, many LULUs bring a mix of benefits and burdens. For some communities, the benefits could outweigh the burdens, with the net result that an arguably "undesirable" land use becomes, overall, a desirable land use.[219] Professor Blais reflects this possibility in her use of the term "environmentally sensitive land uses" rather than "locally undesirable land uses,"[220] and in referring to possible "differentials" in facility distribution patterns rather than "disproportions."[221] The benefits could include direct services, such as medical care needed within the community.[222] Many LULUs, both industrial and service-oriented, could bring significant employment

217. Professor Been's reference to a theory of fairness based on an "equal initial split and competitive bidding" resonates with the theory of distributive justice suggested here. Under the "competitive bidding" conception, communities would be given a limited number of veto rights against LULUs. Simplifying slightly, communities would choose when to exercise their vetoes. What one community vetoes another community might allow, and vice versa. This form of distributing LULUs would be more likely to meet unique community preferences than a mechanical equal distribution model. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1052–55 (articulating competitive bidding proposal based upon a theory devised by Professor Ronald Dworkin). The competitive bidding theory for how to distribute LULUs appears to rest on an underlying conception that distributive justice is achieved when community preferences are met (and, to some extent, not met) equally.

218. *See id.* at 1037–38 (noting that different communities might have differing degrees of aversion to risk). As discussed below, Professor Been observes that these differences in risk-aversion may be traceable to underlying inequalities.

219. *See* Blais, *supra* note 22, at 81; LAMBERT ET AL., *supra* note 87, at 15–17 (arguing that communities may find that facilities provide net benefits); *cf.* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1024–25, 1036–37 (acknowledging argument that an assessment of the full impact of LULUs should consider the net effect of perceived burdens and perceived benefits).

220. *See* Blais, *supra* note 22, at 78 n.8.

221. *Id.* at 80 n.18 (referring to remarks by Professor Richard Markovits).

222. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1035–36 (noting that certain communities may have a greater need for certain LULUs than others).

opportunities to a community.[223] A significant enterprise could improve an area's tax base.[224] Moreover, some communities are plagued by abandoned properties, industrial and otherwise, that degrade the community environment.[225] A LULU might be considered an improvement on the existing environment, notwithstanding certain undesirable features. The movement to develop "brownfields"—former industrial properties—reflects the judgment that communities could improve their lot by encouraging the development of new facilities on existing abandoned, industrial properties.[226]

The community preferences model is rooted in insights stemming from neoclassical economic theory. In a nutshell, neoclassical economic theory assumes that individuals have particular preferences regarding all key aspects of life,[227] and that they have the capacity to act rationally in seeking to satisfy those preferences.[228] The "market" is the medium through which individuals and other actors make choices, consistent with their preferences, about what to do and where to be. Under the neoclassical model, the ability of private actors to realize their preferences through the market is critical to

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223. *See id.* at 1036; Blais, *supra* note 22, at 102; Kevin, *supra* note 87, at 141; Lambert, *supra* note 87, at 1177.

224. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1037; Lambert, *supra* note 87, at 1177.

225. *See* Joel B. Eisen, *"Brownfields of Dreams?": Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 891–92; Gabriel A. Espinosa, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 VILL. ENVTL. L.J. 1, 9 (2000) (reporting Congressional Office of Technology Assessment estimate of tens of thousands to 450,000 brownfields sites nationwide).

226. *See* Carol M. Browner, *Brownfields Are Becoming Places of Opportunity*, 13 J. NAT. RESOURCES & ENVTL. L. i–vi (1997–1998); Eisen, *supra* note 225, at 893–95 (describing community advantages of brownfields development). *See generally* Espinosa, *supra* note 225, at 20–29 (describing successful brownfields redevelopment projects); Eileen Gauna, *EPA at 30: Fairness in Environmental Protection*, 31 ENVTL. L. REP. 10,528, 10,551–54 (2001) [hereinafter Gauna, *EPA at 30*] (describing potential economic and environmental advantages of brownfields).

It should be noted that a number of these authors express concern about whether brownfield development, at least as currently undertaken, will necessarily provide an overall net benefit to affected communities. *See* Eisen, *supra* note 225, at 1020–30 (identifying potential problems with brownfields programs); Gauna, *EPA at 30*, *supra*, at 10,551–54 (same).

227. *See* Blais, *supra* note 22, at 94; Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 152–53, (1977–1978) [hereinafter Michelman, *Political Markets*].

228. *See* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 6–11 (1976); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–4 (5th ed. 1998); Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 666 (1990).

maximizing individual welfare. Maximizing individual welfare is, in turn, critical to maximizing overall social welfare.[229] Many fundamental allocative and distributional consequences flow from the realization of private preferences through the invisible hand of the market.[230] Social welfare is maximized by respecting the allocation.[231] Professor Blais's analysis assumes there is a "market" that operates to distribute land uses and/or residents in response to resident preferences.[232]

In general, under this view, the market is superior to government-led distributional efforts. For example, the market preserves individual liberty by allowing individuals to make choices for themselves rather than having choices imposed by the government.[233] It is also the most efficient mechanism for insuring that people's differing tastes are satisfied, since residents know what they want better than the government, and are more likely to have their preferences met if they, rather than the government, make key decisions.[234]

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229. *See* Blais, *supra* note 22, at 99; Cass R. Sunstein, *Disrupting Voluntary Transactions*, *in* 31 NOMOS 279, 281 (1989); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1129 (1986) [hereinafter Sunstein, *Legal Interference*]; *see also* West, *supra* note 228, at 660, 661 (noting that conservative theorists believe that the satisfaction of individual preferences is "the source of value" in society).

230. *See* Blais, *supra* note 22, at 94.

231. *See* Milton Friedman, *Methodology of Positive Economics*, *in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 28, 38 (Avery Wiener Katz ed., Foundation Press 1998) (noting that economists often believe "that the interest of society is reducible to the interests of its individual members"); Michelman, *Political Markets*, *supra* note 227, at 152–53 (noting economic conception of human experience in which "there can be no objective good apart from allowing for the maximum feasible satisfaction of private preference as revealed through actual choice").

232. *See* Blais, *supra* note 22, at 94–108.

233. *See id.* at 99; *cf.* Jules Coleman, *Efficiency, Utility and Wealth Maximization*, *in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW, *supra* note 231, at 11, 13 (presenting "libertarian" defense of free market exchange).

234. *See* Blais, *supra* note 22, at 99; *cf.* Friedman, *supra* note 231, at 38 (noting that economists believe in "consumer sovereignty—the idea that individuals are ordinarily the best judges of their own interests"); Thomas Schelling, *Economic Reasoning and the Ethics of Policy*, *in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW, *supra* note 231, at 18, 24–25 (noting the principle of market economics "that most people are better at spending their own money than somebody else is at spending it for them"); West, *supra* note 228, at 666–69 (noting that conservative theorists believe that judges are unable to evaluate individuals' differing and personal preferences, and should therefore defer to such preferences as expressed through private contracts and political markets rather than intervening).

Economists describe an "efficient" market as one that moves resources to their most highly valued uses. *See* Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV.

One might argue that, even if free markets provide the ideal mechanism for sound organization, the concept is simply inapplicable in the land use siting context. As will be discussed in detail below, the land use siting process is not an unencumbered market in which residents choose their desired land uses, or even in which facility siters and communities negotiate freely toward preference-matching outcomes.[235] In many instances, LULU siting involves a political decision, whether by local, state, or other political entities.[236] Nonetheless, preference theory remains relevant. The neoclassical economic theories that have informed the market preference-based view of social welfare have a political analog: public choice theory.[237] Under public choice theory, the political forum is similar in function to the market: both serve as venues where private preferences are weighed and decisions maximizing private preferences could, at least theoretically, be realized.[238] While not everyone's preferences could

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431, 440–41 (1996) (describing why economists value efficiency). In the land use context, one would argue that land uses move to the locations where they are most desired.

The term "efficient" is also used here in general terms to mean the most effective mechanism toward a desired end. A full discussion of all of the possible definitions of "efficiency" and how they relate to the market theory articulated here is beyond the scope of this Article. *See, e.g.*, POSNER, *supra* note 228, at 13–16 (discussing differing types of "efficiency").

235. As the discussion below will reveal, some authors' depiction of the land use siting process as a market negotiation between the facility proponent and the affected community is deeply flawed. *See* Roy Whitehead, Jr. & Walter Block, *Environmental Justice Risks in the Petroleum Industry*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 67, 83–84 (2000) (implying that siting process consists of a market transaction between the affected community and a facility).

236. The land use siting process, and the role of political decision-making within it, is discussed extensively below. *See infra* Section VI.D.2.

237. Others have described this theory as basic "pluralism." *See* Baron & Dunoff, *supra* note 234, at 452–53.

238. *See id.* at 453 (describing this theory in terms of "pluralism"); Blais, *supra* note 22, at 97 (observing that public choice theory views the political process like the market, and assumes the government's role is to "combin[e] private preferences into a social decision") (quoting DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 44 (1991)); *id.* at 98 (observing that "the role of the political process is . . . to translate private preferences into social choices"); Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 441–43 (1988) (describing political public choice theory and its relation to economic theory); Michelman, *Political Markets*, *supra* note 227, at 148 (stating that, under the public choice model, "[t]here is no public or general social interest, there are only concatenations of particular interests or private preferences"); West, *supra* note 228, at 661 (observing that conservative theorists believe that the political process yields laws that reflect citizen preferences); *cf.* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 19–28 (1998) [hereinafter Gauna, *The Environmental Justice Misfit*] (discussing "pluralist" model of administrative agencies, in which agencies juggle stakeholders' private preferences).

be satisfied by every decision, this model envisions an on-going sequence of decisions involving trade-offs and compromises that lead, in the long run, to an expectation that "everyone would enjoy a net balance of political gains in excess of losses."[239]

As with the pure market model, market advocates would likely argue that the political choice model would perform its preference-meeting functions best if allowed to operate freely in response to each community's preferences. Government efforts to resolve distributional issues more broadly, through, for example, general restrictions on disparate impacts, would interfere with communities' capacity to meet preferences in individual cases.[240] Thus, whether the private or the public "political" market is at stake, community preferences will most likely be met and liberty will be preserved if the government does not impose an overarching distributional program.

Assuming a community preferences model, how does one measure whether its dictates have been met? Clearly, some degree of preference satisfaction is implicit in the model, or its very basis of justification—maximizing social welfare through maximizing varying individual preferences—would be lost. Even a strong proponent of the model, however, is unlikely to measure justice under this theory by requiring one hundred percent resident satisfaction. Having all LULU siting decisions hinge upon the unanimous consent of all members of affected communities would make for poor public policy. There may be a variety of factors that could justify a siting decision notwithstanding community opposition. There are undoubtedly more LULUs than there are people who want them. Furthermore, if a LULU is undesirable to all, it may be impossible to find a consenting community. Where the undesirable LULU is necessary, requiring an

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It is worth noting that much of the public choice literature is, in fact, highly critical of the ability of the political system to fairly and accurately mediate preferences. *See, e.g.*, Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 U. COLO. L. REV. 2121, 2124 (1990) (observing that social choice theorists conclude that the democratic process is incapable of producing meaningful or rational results); Michelman, *Political Markets*, *supra* note 227, at 157 n.48 (noting that some of the public choice literature is skeptical that majoritarian processes can optimize preferences efficiently).

239. Michelman, *Political Markets*, *supra* note 227, at 173.

240. Although government decisions imposing across-the-board outcomes, such as a prohibition on disparate impacts, are also a consequence of the "public choice" process, they differ from site-specific decisions because they do not weigh the unique preferences associated with each site. Under the individual preference-maximizing view of the market and political decision-making, one assumes that those political decisions that maximized the opportunities for individuals to seek site-specific preferences would be valued over political decisions that muted this individual-welfare maximizing function.

unattainable community assent could interfere with the ability to resolve important social and environmental problems.[241]

Thus, while some degree of preference satisfaction is necessary to the attainment of justice under the community preferences model, the critical issue is whether the ratio of satisfaction to dissatisfaction is equivalent. If some communities were able to have more of their preferences met than other communities, then we would not have distributive justice under the community preferences model.

As with the equal division model of distributive justice, the challenge of measuring fairness pursuant to this theory is formidable. This theory shares all of the practical difficulties in defining "communities" that the equal division model presents.[242] In addition, preferences are frequently individual and subjective. As such, the task of determining what a "community" prefers presents a daunting task. It is not clear how one would identify a community's "preference," or how the differing views within a community would be assimilated into an overall level of preference, or who would speak for a community in attempting to gauge a community's relative satisfaction with its LULUs or the prospect of future LULUs.[243] Although these are major challenges that must be faced by anyone choosing to design an implementing policy, they do not undermine the coherence of the overall theory.

To what extent do advocates of the community preferences model believe that its dictates have been met? Professor Blais implies that the community preferences model is sufficiently satisfied—or, at least, satisfied sufficiently to preclude the need for government involvement. She has concluded that:

> a community decision to act as host for an environmentally sensitive land use, or a private determination to live near

241. *See* Orlando E. Delogu, *"NIMBY" Is a National Environmental Problem*, 35 S.D. L. REV. 198, 198–201 (1990) (discussing social and environmental consequences of widespread opposition to LULUs).

242. *See supra* notes 149–51 and accompanying text.

243. For example, it is possible that a vocal minority could claim to speak for the majority. The inaccuracy could be mistaken or intentional. Given the likelihood of a divergence of viewpoints within a community, it may be difficult to ascertain the "majority" opinion. The dispute over the Shintech siting dispute in Louisiana provides a case in point. An NAACP poll of residents in the affected parish showed that seventy-three percent of the residents favored the plant. Lambert, *supra* note 87, at 1178. Another poll, however, indicated, that fifty-two percent of the residents living closest to the site *opposed* construction of the facility. *Id.* at 1178 n.78; *cf.* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1045 (arguing, in context of negotiation over compensation, that it may be difficult to determine who represents and speaks for a community's position).

> one, can be viewed as rational and informed, and the political and market determinations leading to the current distribution of environmentally sensitive land uses can be understood to accurately reflect rational and legitimate private preferences and collective judgments.[244]

To be sure, Professor Blais, like most neoclassical economists, acknowledges that the market does not always work perfectly to maximize the satisfaction of private preferences.[245] Inequalities in wealth impact individuals' abilities to realize their preferences,[246] as do persistent problems of discrimination.[247] Even if it is not perfect, however, neoclassical economists believe it is often better to let the market operate than to interfere in its operation through an across-the-board government effort at improving distribution.[248] Government intervention poses a threat to the liberty and efficiency goals achieved by the market.[249] Government efforts to control siting would be paternalistic, questioning communities' ability to choose desired land uses for themselves.[250] Moreover, the government

244. Blais, *supra* note 22, at 82. In the siting context, Professor Blais acknowledges that the benefits of a siting decision will not necessarily outweigh the burdens for every individual within a community. *Id.* at 104–08. But she questions whether those benefited or burdened are necessarily divided along race or class lines. *Id.*

245. *See id.* at 95–97.

246. *See id.* at 96–96 (in market context); *id.* at 98 (in political context); *id.* at 118 (in housing context).

247. *See id.* at 93–94 (referring to impact of class and race differences on revealed preferences); *id.* at 118–19 (referring to discrimination in housing market).

248. Professor Blais argues that "[m]easures designed to interfere with the preferences revealed through . . . [the market and the political process] generally demand substantial justification." *Id.* at 94; *see also id.* at 116–17 (arguing that interference with markets is justified only by "significant and exceptional process failures"). Although extreme market failure could justify government intervention, she concludes that, "[i]n most contexts . . . market defects are considered de minimis and thought not to distort unduly the preferences measured by the system." *Id.* at 117; *see also* Kenneth A. Shepsle & Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417, 417 (1984) (questioning usefulness of government intervention in certain cases, notwithstanding identified market failure). Recent market advocates thus critique many of the underlying assumptions of the post-New Deal welfare economists, who had advocated government intervention as an antidote to market failure. *See* WILLIAM C. MITCHELL & RANDY T. SIMMONS, BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY 3–19 (1994).

249. *See* Blais, *supra* note 22, at 99.

250. *See* Whitehead & Block, *supra* note 235, at 86 (arguing that elitist environmentalists attempting to control siting are insulting the dignity of those who choose to live near LULUs). *But see* Sheila Foster, *Piercing the Veil of Economic Arguments Against Title VI Enforcement*, 10 FORDHAM ENVTL. L.J. 331, 343–45 (1999) [hereinafter Foster, *Piercing the Veil*] (arguing that, since communities affected by LULU siting decisions do not have an effective voice in those decisions, their views are not being overridden by "paternalistic" government efforts).

suffers from so many of its own functional failures that there is no assurance that it will function better than the market.[251] Professor Blais concludes that "while disquieting vestiges of social injustice remain in our society, no convincing argument has been made for rejecting measured preferences concerning environmentally sensitive land uses."[252]

This conclusion raises the critical question of whether the market in fact meets community preferences sufficiently to preclude consideration of other initiatives to guide LULU distribution. If it does not, then the market's goals of achieving "liberty" and "efficiency" are not being furthered because residents are not able to have their preferences met, or at least met equally. Neither individual nor social welfare is being maximized.[253] If preferences are not being met, or are being met unequally under current market conditions, then exclusive reliance on the market will not serve to meet the goals of the community preferences model.

Before analyzing the likelihood that preferences are met, a few words on the preferences model itself are in order. Although this Article takes the community preferences model as a given, it is worth noting that fundamental critiques could be leveled against it. If unequal distributions of LULUs were to cause serious harm to a community, it is not clear that preferences for the LULUs should be honored.[254] More broadly, preferences are a function of social context, and if that context is unjust, the resulting preferences may not form a legitimate basis for social decision-making.[255] A community's preferences and, more particularly, its weighing of the benefits and costs of LULUs, may be significantly shaped by factors such as relative wealth and race.[256] On a fundamental level, poorer

251. *See* MITCHELL & SIMMONS, *supra* note 248 (arguing that, due to widespread "public failure," government intervention is not likely to remedy "market failure"); Shepsle & Weingast, *supra* note 248, at 425 (arguing that, under certain circumstances, the market may be more efficient than government, even where there is some degree of market failure).

252. Blais, *supra* note 22, at 83.

253. *Cf. id.* at 116 (noting, theoretically, that market defects can prevent individuals from maximizing welfare).

254. *See* Sunstein, *Legal Interference*, *supra* note 229, at 1131 (noting that private preferences that produce harm to a person should not be gratified).

255. *See id.* at 1131 (noting that argument against gratifying private preferences is sometimes based on "the inevitable preference-shaping effect of the legal rules that allocate entitlements and wealth in the first place").

256. This inquiry is similar to that discussed in regard to "compensation" proposals. *See supra* notes 153–55 and accompanying text. It differs, however, because here the benefits of concern are those derived from the LULU itself rather than from an external compensating source.

communities may place a lower value on environmental quality than wealthier communities because other needs may appear more pressing[257] and because they may not have the knowledge or resources to recognize the full harms associated with certain LULUs.[258] Poor and minority communities may also value the purported benefits of LULUs more highly due to their need for employment.[259] They could be more likely to welcome the siting of a LULU, or move toward one, than those with greater economic options and security. It is thus questionable whether it is "just" to allow a distribution that places more LULUs, with their inevitable burdens, in poor and minority communities when the differing preferences are borne of disparities in wealth and a legacy of discrimination.

The preceding suggests why it may be inappropriate to accept certain preferences *for* LULUs. It may also be inappropriate to accept certain preferences *against* LULUs. Opposition to low-income housing, group homes for the disabled, and the like may be born of prejudices that the legal system should not simply accept as given.[260] More broadly, one could argue that community preferences against LULUs are obstacles to be overcome, not satisfied.[261] Widespread

257. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1038 (observing that white communities may be more risk-averse than minority communities because they have more time and resources to devote to environmental problems). Historically, civil rights leaders were skeptical about environmentalism due, in part, to concern that devoting resources to environmental protection would divert resources from poverty alleviation. *See* KATHLYN GAY, POLLUTION AND THE POWERLESS: THE ENVIRONMENTAL JUSTICE MOVEMENT 19 (1994) (describing civil rights movement concern that environmentalism would divert attention from equal justice issues); Lazarus, *supra* note 100, at 788–89 (describing minority leaders' reactions to environmentalists in the 1970s).

258. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1041 (discussing information deficit in context of compensation). The argument could also run the other way, however. Communities could be more concerned about risk than the scientific evidence warrants.

259. *See* Blais, *supra* note 22, at 102. Some argue that LULUs rarely provide promised job benefits. *See, e.g.*, Foster, *Piercing the Veil*, *supra* note 250, at 340–43 (1999) (demonstrating, through examples, that new LULUs often fail to employ members of the poor and minority communities in which they locate); Kuehn, *supra* note 36, at 10,701–02 (same).

260. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985) (holding that city's denial of a permit for a home for the mentally retarded based on community sentiment was not rationally related to a legitimate governmental interest when the sentiment was based on "negative attitudes" and unsubstantiated fears); *see also* Sunstein, *Legal Interference*, *supra* note 229, at 1130 (observing the legal system's rejection of preferences based on discrimination).

261. *See, e.g.*, STEERING COMM. ON UNMET LEGAL NEEDS OF CHILDREN AND COMM'N ON HOMELESSNESS AND POVERTY, NIMBY: A PRIMER FOR LAWYERS AND

local opposition to unwanted land uses has come to be known as the "Not-In-My-Back-Yard," or "NIMBY" phenomenon.[262] Communities who cry NIMBY are often considered selfish, short-sighted, and an obstacle to providing needed social services and other necessary but undesirable land uses.[263]

This Article is not, however, the place to determine the ultimate legitimacy of theories of distributive justice. The benefits and drawbacks to the equal division and community preferences models, and their role in specific public policies addressing environmental justice, will be the subject of future work. Instead, this Article addresses an important preliminary inquiry: whether the evidence of distributive injustice under the equal division model is moderated or eliminated by using a community preferences rather than an equal division model of justice.

B. Assessing Distributive Injustice Under the Community Preferences Model: The Need to Review Process to Assess Distribution

Under the community preferences model of distributive justice, an unequal distribution of LULUs would not necessarily constitute distributional injustice. Everyone might be equally satisfied, notwithstanding different exposures to LULUs.[264] The question, then, is how to determine whether we have justice under the community preferences model.

Direct evidence on relative satisfaction of preferences is impossible to obtain; it is not feasible to research the extent to which siting decisions actually meet community preferences for every

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ADVOCATES, AM. BAR ASS'N 17–85 (1999) [hereinafter NIMBY PRIMER] (detailing strategies for overcoming community opposition to social service facilities).

262. *See id.* at 5; Delogu, *supra* note 241, at 198.

263. *See* NIMBY PRIMER, *supra* note 261, at 5 (observing that NIMBYism can delay or prevent the siting of necessary social services); Delogu, *supra* note 241, at 198–201 (describing the local and national consequences of NIMBY attitudes); Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 502–16 (1994) [hereinafter Gerrard, *Victims of NIMBY*] (identifying the "victims" of NIMBYism); Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241, 245–46 (1994) (articulating argument that NIMBYism is parochial and selfish). It should be noted that some of these authors question whether NIMBYism is necessarily as destructive or morally reprehensible as its critics suggest, particularly in the non-social service context. *See* Gerrard, *Victims of NIMBY*, *supra*, at 516–20 (identifying the beneficiaries and benefits of various forms of NIMBYism); Wheeler, *supra*, at 246–50 (analyzing justifications for NIMBYism).

264. Once again, the reference to "equal satisfaction" does not mean that all communities are fully satisfied, since universal satisfaction may not be achievable. It means that all communities enjoy about the same relative degree of satisfaction in comparison with dissatisfaction. *See supra* note 241 and accompanying text.

LULU around the nation. The closest one can get is to analyze the *likelihood* that preferences have been met, and met equally. To analyze this likelihood, one must evaluate the processes impacting land use distributions to determine whether the *processes* are likely to have generated equitable *distributions* under the community preferences model. While this Article is primarily devoted to the question of fair distribution, it considers processes to help predict likely distributions, not to evaluate the processes in and of themselves.

The inquiry first focuses on the land use siting process to determine what it tells us about the likelihood that the resulting distributions meet preferences. An important threshold question is whether there is evidence that land use siting decisions had a disparate impact when they were made;[265] the data about the disparate distribution of LULUs discussed above address only the current demographics,[266] not the demographics at the time of siting. However, these studies are limited, and they tell us only about distribution, not about preferences.

To evaluate the likelihood that preferences are equally met, the Article identifies the factors that generally govern the initial distribution of land uses, evaluate the extent to which community preferences are likely to play a role, and, to the extent community preferences do play a role, evaluate whether they are satisfied equally. The analysis first considers market forces, regulatory requirements, and other types of "objective" factors that may influence the placement of LULUs.[267] The Article then analyzes the political process associated with siting decisions,[268] considering both general zoning provisions[269] and the site-specific political determinations that are often made in connection with controversial land uses.[270] Finally, it considers whether statutes that explicitly require public participation in the siting process or in permitting decisions are likely to increase the extent to which community preferences are taken into account equally.[271]

The Article then evaluates whether the post-siting housing market is likely to lead to distributions that satisfy community

265. *See infra* Section VI.A.
266. *See supra* Section IV.B.
267. *See infra* Section VI.C.
268. *See infra* Section VI.D.
269. *See infra* Section VI.D.1.
270. *See infra* Section VI.D.2.
271. *See infra* Section VI.E.

preferences equally.[272] Regardless of what occurs at the siting stage, the market could, conceivably, remedy any distributional inequities that arise from the siting process. Residents could move toward or away from LULUs depending upon their preferences, thus leading to an equal satisfaction of preferences. The analysis also considers whether post-siting housing market dynamics have the opposite effect: whether they are likely to exacerbate rather than improve disparities in the extent to which the distribution of LULUs meets community preferences equally.

Although the primary thesis of this Article is that distributive injustice is worthy of concern in its own right, political and social injustice provide additional (though not necessary) arguments for addressing disparities. Since the discussion of siting processes and the housing market will inevitably expose many of the political and social causes of distributive injustice, I also note below how they provide additional grounds for addressing distributional disparities.[273]

VI. IS THE LAND USE SITING PROCESS LIKELY TO SATISFY COMMUNITY PREFERENCES EQUALLY?

A. *Evidence of Siting Decisions' Disparate Impact*

A first issue to consider in assessing the land use siting process is the extent of the disparities resulting from that process. While the presence or absence of disparities does not indicate whether they are the result of differing preferences or not, it would at least provide a starting point for analysis. The demographic evidence presented above suggests that many LULUs are *currently* disproportionately located in poor and minority neighborhoods.[274] But since the current demographics could have evolved after an initially neutral siting decision, evidence of current demographics does not prove that the original siting decisions had a disparate impact. Unfortunately, however, the data on the impact of actual siting decisions are too limited to be of significant use.

Professor Been has conducted several analyses of landfill sitings.[275] Two small and fairly localized studies did indicate

272. *See infra* Section VII.

273. *See infra* Section VI.F (addressing political injustice in the land use siting process) and Section VII.C (addressing political injustice in the housing market).

274. *See supra* Section IV.B.

275. Her studies of demographics at the time of siting decisions were designed to determine whether the existence of current disproportionate distributions were a function of initially disproportionate siting decisions or of post-siting housing market dynamics.

disproportionate impacts on African-American neighborhoods.[276] Professor Been's largest study, of 608 hazardous waste sites sited between 1970 and 1994,[277] revealed that, during this time period, the locations selected were not disproportionately African-American or poor, but that they were disproportionately Hispanic.[278] Nevertheless, the study noted that African-American communities are more likely than others to host a hazardous waste landfill.[279] The current disparity may be a consequence of disproportionate siting or post-siting housing market dynamics that took place prior to 1970, the beginning of the study period.[280] The study observed that working class and lower-middle income neighborhoods were more likely to be

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See, e.g., Been & Gupta, *supra* note 163, at 9; Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1398 (1994) [hereinafter Been, *Market Dynamics*].

276. Her study of the demographics associated with the placement of commercial hazardous waste landfills in the southeastern United States found that "all of the host communities were disproportionately populated by African Americans at the time of the sitings." Been, *Market Dynamics*, *supra* note 275, at 1398. Her study of waste facilities in Houston, Texas, revealed that "the siting process had some disproportionate effect[,]" with about half of the facilities sited in disproportionately African-American neighborhoods. *Id.* at 1403.

Another study reveals similarly disproportionate siting decisions. Manuel Pastor, Jim Sadd, and John Hipp found that toxic facilities in Los Angeles County were disproportionately sited in areas that had more minority, poor, and blue-collar residents, had fewer homeowners, lower home values and rents, and a lower percentage of college-educated residents. Manuel Pastor, Jr. et al., *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. URB. AFF. 1, 9, 12 (2001).

277. Been & Gupta, *supra* note 163, at 10, 19–27.

278. *Id.* at 27. In the similar, though not identical, context of existing hazardous waste facilities' decisions to expand capacity, one study noted that expansion decisions "had a disproportionate effect on low income communities and communities of color." Been, *Market Dynamics*, *supra* note 275, at 1396–97 (discussing Professor James Hamilton's study).

SADRI has also analyzed whether hazardous waste facilities have been sited disproportionately in poor and minority communities. *See* John Michael Oakes et al., *A Longitudinal Analysis of Environmental Equity in Communities with Hazardous Waste Facilities*, 25 SOC. SCI. RES. 125, 125 (1996). Their study found no evidence that facilities were sited in poor or minority communities when compared with other areas having significant industrial employment. *Id.* at 137 (using existing census tracts); *id.* at 142 (accounting for changes in census tracts between 1970 and 1990). The authors, however, limited the comparison sites. Instead of comparing affected tracts to all census tracts without waste facility sitings, they limited the comparison to those without sitings but that were nonetheless within a metropolitan area or rural county having at least one facility. *Id.* at 130. Since the comparison group included only census tracts in areas already having waste sites, and no tracts in areas devoid of all development (which may have been whiter and more affluent than the comparison tracts used), the results of the study are of limited value. *See also supra* note 200 and accompanying text (discussing similar limitations to SADRI study of existing waste facility distribution).

279. Been & Gupta, *supra* note 163, at 33.

280. *Id.* at 32.

chosen for hazardous waste facilities than poor or wealthy communities.[281] Although the studies provide some evidence of disparate siting decisions, they are limited in extent and do not indicate whether disparities were a function of differing preferences.

B. Overview of Land Use Siting Processes

The following discussion of land use siting processes is intended to determine whether they are likely to meet community preferences equally. The analysis does not address whether land use siting processes *should* address community preferences; instead, it critically evaluates the contention that they do so fairly.

If communities and LULU proponents negotiated on an equal footing about where to put various land uses, then, at least theoretically, the resulting distribution might reflect community preferences and interests.[282] In fact, that image of an affected community's role does not correspond with the complex reality of land use decision-making. In general, the primary players are facility promoters and regulatory entities, with some role for underlying municipal zoning decisions. The communities in which facilities are to be placed often play only a tangential role in the siting process.

Where private LULUs are at issue, such as various types of industry and many hazardous and other waste facilities, the industry itself plays a key role in selecting site locations.[283] State or local governments are critical in siting the many LULUs that are public facilities, such as landfills, prisons and jails, and social services like hospitals and homeless shelters. Other high-profile LULUs, like some hazardous waste facilities, may involve a mix of private and public control.[284]

But site selection does not occur in a vacuum; it involves not only a search for those characteristics deemed desirable by the facility

281. *Id.* at 34.

282. The inevitability of differences in power between communities and LULU proponents, and differences in power among different communities, makes this image purely theoretical.

283. *See* MICHAEL B. GERRARD, WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING 47–49 (1994) [hereinafter GERRARD, WHOSE BACKYARD] (discussing siting of hazardous waste facilities); Michael B. Gerrard, *Stopping and Building New Facilities*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 32, at 465, 468 [hereinafter Gerrard, *Stopping and Building New Facilities*] (regarding private industry).

284. *See* Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 403–06 (1991) (describing mechanisms states use to work with the private sector in siting hazardous waste facilities).

proponent, but meeting whatever local, state, and/or federal legal requirements will ultimately be imposed. Siting processes thus often involve a strong political or regulatory component, regardless of whether they are initiated by a private or public entity.

Not surprisingly, siting processes vary tremendously depending upon the nature of the facilities and the infinite variation of federal, state, and local priorities and procedures. The importance of certain factors will also vary depending upon the type of LULU at issue: for example, "objective factors" may play a particularly important role for large industrial or public works projects, while local zoning and local politics may play a particularly large role for social service LULUs. The analysis below cannot be encyclopedic; instead it is intended to provide a general overview of both the objective and political factors that are most significant in understanding the likelihood that current distributions meet community preferences equally.

C. *Do Objective Factors Satisfy Community Preferences Equally?*

1. Siting Criteria

Numerous "objective" factors influence the land use siting process. Although individual needs vary, large-scale manufacturers often consider a wide range of factors, such as real estate costs; the physical features of the property; access to transportation, such as highways, rail, river, or oceans; access to raw materials; access to markets; infrastructure and site development costs; the presence and cost of the requisite labor force; and government regulation.[285] Other factors include safety considerations, potential environmental liability, and to a somewhat lesser extent, tax abatements and incentives, proximity to similar businesses, and local zoning.[286] Certain types of facilities may have very specific criteria; for example, landfills are likely to require water-tight soils to avoid leaching into underground water sources.

285. *See* Heidi Gorovitz Robertson, *One Piece of the Puzzle: Why State Brownfields Programs Can't Lure Businesses to the Urban Cores Without Finding the Missing Pieces*, 51 RUTGERS L. REV. 1075, 1110–19 (1999) (discussing factors companies use in selecting sites); Straw, *supra* note 87, at 666–67 (discussing classical market siting criteria). *Site Selection* magazine profiles various industries and frequently identifies these types of factors, in addition to industry-specific factors. *See generally* SITE SELECTION, *at* http://www.siteselection.com (last visited on Feb. 28, 2003).

286. Robertson, *supra* note 285, at 1110–19.

Many additional criteria are imposed on industrial and waste facilities by local, state, and federal law.[287] These include a wide range of technical criteria, including environmental and other factors. Many states have compiled lengthy lists of the relevant criteria. For example, the California Energy Commission has identified twenty technical areas, ranging from air quality to cultural resources, that must be considered in reviewing construction permits for power-generating plants.[288] Hazardous waste facilities are particularly likely to be subject to extensive technical criteria.[289]

For many forms of social service LULUs, proximity to the population to be served may be an important factor. Facility proponents may seek hospital sites close to population centers, and homeless shelters close to areas with a significant homeless problem. Like industrial or public works projects, the cost of land, costs of developing the land, and the cost of doing business in an area are also likely to be important factors.

To a limited extent, community preferences themselves have become one of the "objective" factors for siting entities.[290] In the

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287. *See* Straw, *supra* note 87, at 667.

288. *See* CAL. ENERGY COMM'N, ENERGY FACILITY LICENSING PROCESS: DEVELOPERS GUIDE OF PRACTICES AND PROCEDURES 19–39 (2000) (Staff Report/Draft) [hereinafter CAL. ENERGY COMM'N DEVELOPERS GUIDE] (providing the purpose, scope, and approach to be considered by the California Commision's staff in the different technical areas), *available at* http://www.energy.ca.gov/siting/documents/2000-12-07_700-00-007.PDF (on file with the North Carolina Law Review); *see also* CONN. SITING COUNCIL, APPLICATION GUIDE FOR AN ELECTRIC GENERATING FACILITY § VIII(I)(1) (2000) (listing technical specifications required to be included in facility applications), *available at* http://www.ct.gov/csc/cwp/view.asp?a=945&Q=247580&cscPNavCtr=|#31223 (on file with the North Carolina Law Review).

289. *See, e.g.*, CONN. SITING COUNCIL, APPLICATION GUIDE FOR A HAZARDOUS WASTE FACILITY §§ VII(A)–(K) (1995) (listing environmental, land use, and public need criteria to be addressed by siting applicants), *available at* http://www.ct.gov/csc/cwp/view.asp?a=945&Q=247586&cscPNavCtr=|#31226 (on file with the North Carolina Law Review); DEP'T OF ENVTL. PROT., COMMONWEALTH OF PA., COMMERCIAL HAZARDOUS WASTE FACILITIES: PHASE I SITING CRITERIA 1–2 (2001) (explaining geological, technical, social, and environmental criteria that applicants must satisfy), *available at* http://www.dep.state.pa.us/dep/deputate/airwaste/wm/HW/Facts/FS1963.pdf (on file with the North Carolina Law Review); DEP'T OF ENVTL. PROT., COMMONWEALTH OF PA., COMMERCIAL HAZARDOUS WASTE FACILITIES: PHASE II SITING CRITERIA 1–2 (2001) (explaining environmental, economic, and transportation criteria that affect a site's overall suitability), *available at* http://www.dep.state.pa.us/dep/deputate/airwaste/wm/HW/Facts/FS1964.pdf (on file with the North Carolina Law Review).

290. *See* FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.10[3][b] (Release #50, 2001). It should be noted that I am referring to community preferences as a substantive criterion. I am not referring to the many other situations in which communities are given a procedural role in the siting process, without weight being attached to the community preferences expressed through such procedures. *See generally*

prison siting context, Tennessee encourages communities to express their interest in hosting a correctional facility, and final state approval is contingent upon the local citizenry's expression of majority support at a public hearing.[291] While California has the power to override local opposition to power-generating facilities, the California Energy Commission nonetheless encourages applicants to address local issues to avoid the delays and complications that would be necessary if the Commission were forced to override local land use restrictions that would otherwise bar the facilities in question.[292] Many states encourage the consideration of such factors as community perception[293] and most at least include the opportunity for community input.[294] Practically speaking, in order to lessen siting costs, companies may seek sites where residents are less likely to offer vigorous or effective opposition.[295]

On the other end of the spectrum, frustration with community opposition to certain types of important LULUs led some states to adopt state override provisions designed to thwart local opposition and prioritize other objective criteria.[296] Such provisions are particularly likely in the context of prisons,[297] hazardous waste facilities,[298] and power-generating facilities.[299] While states with

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infra notes 450–58 and accompanying text (noting that public participation provisions generally do not insure that community preferences will have substantive weight in siting decisions); *supra* note 50 and accompanying text (noting that procedural requirements do not necessarily insure substantive results).

291. NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, ISSUES IN SITING CORRECTIONAL FACILITIES 17 (1992) (on file with the North Carolina Law Review). More generally, the National Institute of Corrections emphasizes the importance of dealing with community sentiments in the siting process. *See id.* at 10–12.

292. CAL. ENERGY COMM'N, DEVELOPERS GUIDE, *supra* note 288, at 10.

293. *See, e.g.*, ALA. CODE § 22-30-5.1(d)(1) (Michie 1997) (encouraging consideration of community perception in siting hazardous waste treatment or disposal sites); KY. REV. STAT. ANN. § 224.46-830(2)(a) (Michie 1995) (same).

294. *See infra* notes 435–49 and accompanying text (describing public participation provisions included in many environmental siting and permitting processes).

295. *See* COLE & FOSTER, *supra* note 39, at 70–71.

296. For example, the Connecticut Siting Council may override local decisions on electric generation facilities, hazardous waste facilities, and low-level radioactive waste management facilities. Conn. Siting Council, Jurisdiction and Responsibilities, *available at* http://www.ct.gov/csc/cwp/view.asp?a=895&q=248310 (last modified Sept. 19, 2002) (last visited Feb. 28, 2003) (on file with the North Carolina Law Review). The California Energy Commission similarly may approve power-generating facilities that do not conform to local planning and zoning. CAL. PUB. RES. CODE § 25,525 (West 1996 & Supp. 2002).

297. For example, in Florida the state may override local prison siting decisions. NAT'L INST. OF CORR., *supra* note 291, at 17. In light of major siting controversies, the Arizona Legislature took over the prison siting process. *Id.* at 16.

298. *See* GRAD, *supra* note 290, at § 9.10[3][b].

override authority may sometimes include community approval as a relevant factor in the siting process,[300] the overall purpose of these provisions is to reduce the role of community preferences and to increase the relative weight of arguably "objective" criteria.

To a very limited extent, environmental justice considerations themselves are emerging as a potential factor in some siting decisions. Federal agency siting decisions are subject to President Clinton's Executive Order on Environmental Justice, which requires federal agencies to consider the impact of their decisions on minority and low-income communities.[301] In addition, several states have environmental justice policies that encourage state and local agencies to consider the impact of siting decisions on minority and low-income communities.[302] Moreover, state and local government agencies receiving federal funding are subject to Title VI of the federal Civil Rights Act, which prohibits discrimination generally[303] and, per regulations implementing Title VI, prohibits actions having a discriminatory impact.[304] Based on interpretations of these

299. *See* Gerrard, *Stopping and Building New Facilities*, *supra* note 283, at 470. For example, as California faced a state energy crisis in the spring and summer of 2001, the state was prepared to override the San Jose City Council's decision not to rezone to accommodate a new power plant. In the face of that certain override, the City Council reversed its position in exchange for concessions and a "community benefits" package. *See* Maria Alicia Gaura, *Mayor's Power Plant Reversal; Gonzales Now Touts Benefits to San Jose*, S.F. CHRON., May 31, 2001, at A18; Timothy Roberts, *Council's Reversal a Sign Crisis Rules*, SILICON VALLEY/SAN JOSE BUS. J., June 8, 2001, at 3, *available at* http://www.bizjournals.com/sanjose/stories/2001/06/11/story3.html (on file with the North Carolina Law Review).

300. For example, as described above, the California Energy Commission, which can override local zoning and opposition, encourages applicants to attempt to obtain community approval. *See supra* note 292 and accompanying text.

301. *See* Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (2000).

302. *See generally* Barlow, *supra* note 32, at 140–56 (detailing selected states' environmental justice programs). For example, Connecticut, Delaware, and New Hampshire have state policies that require agencies to at least assess impacts on demographic groups. *Id.* at 143–46.

303. *See* 42 U.S.C. § 2000(d) (2000). Section 601 of Title VI states that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." *Id.*

304. *See, e.g.*, 40 C.F.R. § 7.35(b) (2002) (stating that state and local agencies receiving EPA funds "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin." EPA's regulations are typical; to implement Title VI, virtually all federal agencies adopted boilerplate regulations like EPA's prohibiting actions having a discriminatory effect. *See* Mank, *supra* note 19, at 11,147 n.28 (2000). The EPA regulations also state that the recipient agency "shall not choose a site or location of a facility that has the purpose or effect of . . . subjecting them to discrimination." 40 C.F.R. § 7.35(c).

regulations that emerged in the early 1990s, a state agency decision to issue an environmental permit in an area already suffering from a concentration of undesirable land uses could be deemed to have caused a prohibited disparate impact.[305]

2. Objective Criteria, Community Preferences, and Distribution

Given the myriad factors that could influence a given siting decision, which, if any, are likely to lead to decisions that reflect community preferences? Given the sheer number of factors that are likely to influence a given decision, the inquiry here cannot hope to prove direct cause and effect. Nonetheless, it is worth observing the potential influence various factors could have on the likelihood that a siting decision will meet community preferences equally, even if any one factor is unlikely to be determinative.

a. Factors that Could Satisfy Community Preferences

One might expect a correlation with community preferences where economic incentive or tax abatement packages play a role in the siting process. In some cases, this factor might well tend toward satisfaction of community preferences. However, incentives have likely played a relatively limited role in the siting of most LULUs. A study on the impact of economic incentives on corporate siting decisions found that they were not generally important in developing the initial pool of candidate sites, although they did become important once the location was included in the final "short" list.[306] It is also not clear whether the local governments offering economic incentives represent the preferences of the neighborhoods in which the sought-after facility is to be located. For example, the fact that a

305. *See, e.g.*, Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 531–32 (1994) [hereinafter Cole, *Environmental Justice Litigation*] (proposing use of Title VI in 1994); Lazarus, *supra* note 100, at 834–39 (discussing potential use of Title VI in 1993). The EPA reflected this position when it issued guidance documents interpreting its Title VI regulations to apply to environmental permitting decisions. *See* INTERIM GUIDANCE, DRAFT RECIPIENT GUIDANCE and DRAFT REVISED INVESTIGATION GUIDANCE, *supra* note 19 (articulating EPA policy that Title VI regulations could prohibit state environmental permitting programs receiving federal funds from causing disparate impacts). It should be noted that despite the ostensible power behind the Title VI regulations, EPA's guidance suggests that the EPA does not expect agencies to deny or revoke permits if disparate impacts are found, but instead recommends other steps to reduce the impact. *See* 65 Fed. Reg. 39,650, 39,683 (June 27, 2000).

306. *See* Robertson, *supra* note 285, at 1112–13. In a study conducted by Professor Robertson of thirty-four business relocation decisions, tax abatements and incentives had a medium priority in the initial screening process. *Id.* at 1117.

city government expressed an interest in attracting business through tax incentives does not mean that those neighboring the ultimate site for the facility desired it.[307] Furthermore, whatever a company's responsiveness to economic incentives if offered, it is not clear how often they are offered. In particular, economic incentives are not likely to play a significant role with respect to smaller LULUs, such as homeless shelters or small industrial facilities.

Direct community preference criteria may face legal obstacles. The Court of Appeals for the Fourth Circuit found explicit community preference criteria illegal, in large part due to the power they give a community over the fate of the developer's property rights. In *Geo-Tech Reclamation Industries, Inc. v. Hamrick*,[308] the Fourth Circuit addressed a provision in West Virginia's solid waste permitting statute giving the State the authority to deny a waste facility permit when it is "significantly adverse to the public sentiment ... where the solid waste facility ... will be located."[309] The court held that the State is permitted to consider the well-being of communities affected by solid waste facilities,[310] but that allowing the State to rely on community sentiment itself would make the state "potentially subservient to selfish or arbitrary motivations or the whims of local taste." Whether all courts would address community preference criteria in as restrictive a manner as the Fourth Circuit is, however, unclear.[311]

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307. *Cf.* Terry Props., Inc. v. Standard Oil Co., 799 F.2d 1523, 1527, 1534–35 (11th Cir. 1986) (describing local government effort to site an industrial facility that included white city officials and white representatives of industrial development groups, but not residents of the African-American community where the facility was ultimately sited).

308. 886 F.2d 662 (4th Cir. 1989).

309. *Id.* at 663 (quoting W.VA. CODE § 20-5F-4(b) (Supp. 1989)).

310. *Id.* at 665–66.

311. *Geo-Tech* rested on a line of cases addressing a similar but slightly different question. While *Geo-Tech* considered whether it was appropriate for the government to have the *discretion* to base permit approval on public sentiment, other cases have addressed provisions that actually *condition* permit approval on neighbor consent.

Geo-Tech followed the approach of those cases that have deemed neighbor-consent provisions an impermissible delegation of power by the state to potentially arbitrary and selfish private individuals. *See* Washington *ex. rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122–23 (1928) (holding that a Seattle zoning ordinance conditioning special permit approval for homes for children or the aged upon the consent of two-thirds of nearby property owners violated the permit applicant's due process rights); *see also* Eubank v. City of Richmond, 226 U.S. 137, 144 (1912) (holding that a local ordinance that delegated authority to set building setback lines to nearby residents was an unconstitutional exercise of the police power); Bozick v. Cobb County, 242 S.E.2d 48, 49 (Ga. 1978) (per curiam) (holding that a local provision conditioning liquor license approval on the absence of objections from neighboring property owners is an unconstitutional denial of due process and equal protection).

Assuming it is not subject to legal challenge, the inclusion of community preferences as a criterion for site selection might lead to at least the chance of a greater correlation between a siting decision and the surrounding community's preferences. Nonetheless, this factor is not common, particularly historically.[312] More generally, a community preference criterion is one among many; there is no assurance that it will play an important role in a final decision.[313] Finally, as with communities that have offered financial incentives to

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But not all neighbor-consent provisions have been found unlawful, and courts evaluating community preference provisions and using the neighbor-consent provision cases as precedent may have options that are more accepting than the *Roberge* line of cases mentioned above. In at least some cases, if the ordinance in question gives communities the power to *remove* rather than *impose* a land use restriction, then the ordinances have been found constitutional. *See* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917) (holding that a local ordinance banning billboards *unless* one-half of the neighboring property owners agreed to remove the restriction was constitutional); Silverman v. Barry, 845 F.2d 1072, 1086–87 (D.C. Cir. 1988) (holding that a provision prohibiting condominium conversions unless a requisite number of tenants consented was constitutional). In essence, citizens can elect to forgo the protections the law would otherwise afford. *See id.* at 1087.

Another line of cases, potentially inconsistent with those cases finding neighbor-consent provisions unconstitutional, hold that if the activity to be restricted constitutes a nuisance, then neighbor-consent provisions are constitutional. *See* Bourque v. Dettore, 589 A.2d 815, 824 (R.I. 1991) (holding that an ordinance prohibiting the issuance of licenses for junkyards if the majority of neighbors object is constitutional due to the objectionable character of the land use). These cases build on dicta in *Roberge* suggesting that a direct community role in another property owner's use permit could be justified if the proposed land use were "inconsistent with public health, safety, morals or general welfare." *Roberge*, 278 U.S. at 121. However, it is not clear whether the *Roberge* Court was laying out a new and clear principle or, instead, was simply working hard to distinguish the *Cusack* case, discussed above.

Finally, the Supreme Court has upheld ordinances that require a formal referendum in connection with land uses. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 679 (1976) (holding that a local ordinance requiring all zoning changes to be approved by a fifty-five percent referendum vote was constitutional). *See generally* DANIEL R. MANDELKER, LAND USE LAW § 6.04 (4th ed. 1997) (discussing constitutionality of delegation-to-neighbors provisions); KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 21.16 (4th ed. 1996) [hereinafter YOUNG, 4TH ED.] (discussing local government provisions requiring neighbor consent for the issuance of special use permits).

312. *See* GERRARD, WHOSE BACKYARD, *supra* note 283, at 66 (noting that siting laws generally focus on environmental factors and generally relegate community concerns to the political process). It is also ironic that some of the examples of siting processes including references to community preferences that were identified above are coupled with state override provisions, *see supra* note 292 and accompanying text, which arguably represent the antithesis of a concern for community preferences. The reference to community approval in siting processes involving state overrides may be intended to provide partial "compensation" for having effectively removed local control.

313. *Cf.* COLE & FOSTER, *supra* note 39, at 77 (noting that it is not clear what weight socioeconomic factors are given in hazardous waste facility siting decisions).

encourage investment, one faces the risk that the preferences of those truly neighboring the facility will not be taken into consideration.[314] Thus, while a criterion for community preference may lead to siting decisions that are more likely to satisfy community preferences than siting criteria without such a provision, they are not prevalent enough, do not play a significant enough role, and are not carefully enough applied to be a significant factor in assuring us that most siting decisions have satisfied community preferences equally.

To the extent that companies seek locations where they are less likely to encounter opposition, we have no assurance that the *reason* they are less likely to encounter opposition is the community's preference for the facility. Companies may seek locations where the communities are less able, not less willing, to oppose a proposed facility. The communities less likely to express opposition are often "those with poorly educated residents of low socioeconomic status,"[315] communities that are frequently populated by people of color.[316] These communities are assumed to have less capacity to mount effective opposition than wealthier and better-educated communities.[317] Thus, to the extent the desire to avoid effective

314. For example, in a major national search for a site for a uranium enrichment plant, community support was one of the "principal criteria for site selection." *In re* La. Energy Servs., L.P., 45 N.R.C. 367, 388 (1997) (final initial decision). But the facility proponent met only with area officials who did not live in and were not representative of the small, poor, largely African-American towns closest to the proposed site location. *Id.*

315. COLE & FOSTER, *supra* note 39, at 70.

316. *Id.* at 71.

317. Cole and Foster draw attention to a report commissioned by the California Waste Management Board on how to site waste incinerators. The report emphasized the importance of political, not just engineering factors, and suggested that companies should target small rural communities whose residents were low-income, older, poorly educated, and poor (among other things). *Id.* at 71. Although waste companies disavowed this approach, their siting decisions have been consistent with the recommendations. *Id.* at 72.

In a study of hazardous waste facility decisions to expand capacity, which are more common than facility siting decisions, Professor James Hamilton found that facilities were more likely to expand in areas with lower median household incomes, lower education levels, higher poverty levels, higher nonwhite populations, and lower populations. James T. Hamilton, *Testing for Environmental Racism: Prejudice, Profits, Political Power?*, 14 J. POL'Y ANALYSIS & MGMT. 107, 122–23 (1995). After controlling for a range of variables, he argues that the critical factor explaining the differences is the likelihood that the community would engage in collective political action to oppose the facility expansion decision. *Id.* at 107, 111, 123, 125, 126–27. The potential to engage in collective action was measured by voter turnout rates and a set of additional relevant variables. *See id.* at 118. The higher the potential for collective action, the lower the probability that hazardous waste facilities would expand. *Id.* at 129. Professor Hamilton also notes that the potential for collective action may be related to institutionalized racism "[t]o the extent that racism in political markets or outcomes in housing, education, and employment markets affect political participation." *Id.* at 129.

public opposition is an important criterion in the site selection process, it is likely to skew distribution to the poor and minority communities least able to resist. This factor fails to respond equally to community preferences.

b. Factors Independent of Community Preferences

The criteria considered so far are those most likely to lead to LULU distributions correlated with community preferences. In contrast, most of the criteria described in this Section operate independently of a community's preference for the facility in question. The criteria are ostensibly "neutral" in terms of their impact on particular societal groups. Geological characteristics say nothing about the type of community where a facility should go or a community's preference for a landfill. Proximity to a railroad says nothing about a particular community's preference for a major manufacturing facility. Social service LULUs may go to where needs are present, regardless of community demographics. And land costs are often touted as a "neutral" factor unrelated to community demographics and the preferences of neighboring communities. Considering the community preference model of distributive justice, we come to the not surprising conclusion that the objective criteria provide no assurance that siting decisions will gravitate to the locations where residents desire them. Nonetheless, while not meeting preferences, the criteria, stated abstractly, at least appear likely to satisfy or frustrate all communities' preferences equally.

Practically, however, the criteria may not always satisfy or frustrate equally all communities. In some cases, ostensibly "objective" criteria may in fact tend to lead to LULU sitings that satisfy the preferences of some more than others.[318] In light of widespread racial and economic segregation, apparently neutral factors can operate to reinforce underlying inequities.[319] Consider, for example, the apparently neutral criterion of "access to transportation." To the extent poor and minority communities are more likely to live along highways and railroad tracks, siting decisions influenced by transportation concerns would be more likely to impact poor and minority neighborhoods, regardless of the communities'

318. COLE & FOSTER, *supra* note 39, at 72 (arguing that ostensibly "race-neutral" factors have disparate impacts).

319. *Id.* at 66–68 (noting that, where segregation has created long-standing inequities, race-neutral policies often operate to reinforce those existing inequities).

desire for the projects in question.[320] Thus, this "objective" criterion could lead to a disproportionate concentration of LULUs in poor and minority neighborhoods that is not explained by any evidence of greater community preference for the LULUs.

Another factor that might lead to a concentration of LULUs in poor and minority neighborhoods is the extent to which decision-makers attempt to place certain social services close to the perceived need for the services. Since social needs tend to be greater in poor and minority communities, this factor is likely to lead to a greater concentration of social service LULUs in poor and minority communities. One could argue that, to the extent a social service LULU provides a service needed by a particular community, that LULU would likely meet the preferences of that community. Arguably, differences in distribution would then be justified by differences in community preferences.

That may not always be true, however. For example, residents in an area with many homeless persons may argue that their community is not the "source" of the problem, and that the placement of homeless shelters simply creates and perpetuates the concentration of homeless in their neighborhoods. Since homeless individuals do not, by definition, have a home, there is no reason why homeless shelters should be located in poor neighborhoods; those neighborhoods have no more of a need for them than any other.[321] Thus, while one could posit that social service LULUs would be desired more by the poor and minority communities in which they are likely to be placed than they would be by communities that do not currently appear to face the need for them, that assumption may be misplaced in some instances.

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320. *Id.* at 73 (observing that "[p]roximity to major transportation routes may also skew the siting process toward communities of color, as freeways appear to be disproportionately sited in such communities").

A recent controversy provides a typical example. In 1999, the St. Lawrence Cement Company selected a poor, African-American neighborhood in Camden, New Jersey, for a new industrial facility in part because of its status as a port town. Marcia Coyle, *Backyard Blues*, NAT'L L.J., Oct. 15, 2001, at A10. The company wanted the deep-water port to obtain raw materials from Europe and also believed that this port was necessary to expand operations into its target domestic market. *Id.*; *see also supra* notes 1–7 (describing this siting dispute).

321. Since homelessness is a society-wide problem, homeless shelters should arguably be distributed in all communities, rather than concentrated in the poor communities where they are currently more likely to be found. *Cf.* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1036 (observing that residents of poor neighborhoods "may argue that they are no more responsible for the plight of those needing social services than residents of wealthier neighborhoods").

Land costs present one of the most complex factors. Since many facilities, both public and private, are concerned about costs, they are likely to gravitate toward the lowest cost location when considering equally acceptable alternatives.[322] Property values are likely to be lower in poor and minority communities.[323] Using land costs as an important factor in facility siting is thus likely to lead to a greater concentration of facilities in poor and minority communities,[324] regardless of their desire for the facilities.

Giving the community preferences model the benefit of the doubt, however, one could speculate that the poor areas with inexpensive land may be somewhat more likely to desire the services, jobs, and economic base that can come with development projects than wealthier communities, even if the projects come in the form of LULUs.[325] Thus, the disparate concentration of LULUs in poor and minority areas due to cheaper land costs conceivably could be justified by the assumption that these areas would have a greater preference for such facilities.[326]

But acknowledging that possibility does not mean it is always or even often true. The environmental justice movement itself has arisen out of poor and minority communities' opposition to LULU siting proposals.[327] The political culture reveals that poor and minority communities do not necessarily desire more LULUs. They may not be willing to make the quality of life sacrifices. And they may be aware that LULUs do not necessarily bring with them the jobs or economic investment that are often presumed. For example, in many instances, new industrial developments do not hire from the neighborhoods in which they are located.[328] If land costs skew

322. *See* COLE & FOSTER, *supra* note 39, at 72; Straw, *supra* note 87, at 675–76; *see also* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 516 (1992) (addressing hazardous waste facilities).

323. *See* COLE & FOSTER, *supra* note 39, at 72; Collin, *supra* note 322, at 516–17.

324. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1039 n.196 (noting study of hazardous waste treatment facility site options in Albany, New York, that "revealed that the choice that minimized the cost of the siting increased the inequity of the siting by 110%").

325. *See* Straw, *supra* note 87, at 676–77; Whitehead & Block, *supra* note 235, at 68.

326. For the purposes of this Article, the community preference model is assumed to be legitimate, and preferences are taken at face value. Preliminary criticisms of accepting preferences as given are articulated *supra* notes 254–59 and accompanying text.

327. *See, e.g.*, Bullard, *supra* note 39, at 24 (discussing local efforts to oppose LULUs in minority neighborhoods throughout the nation).

328. *See* COLE & FOSTER, *supra* note 39, at 77–78 (describing numerous examples in which LULUs did not bring employment benefits to their local communities); Kuehn, *supra* note 36, at 10,701–02 (same).

LULUs to poor and minority neighborhoods, one cannot presume that that skewing is justified by differences in community preferences.

Some criteria that appear "objective," and thus appear likely to be at least neutral with respect to community preferences, may be more subjective than they first appear.[329] That subjectivity may leave room for other factors, such as bias, that would lead to the satisfaction of the preferences of some communities more than others. For example, a Minnesota law governing the siting of waste containment facilities includes as one of six general factors the "intrinsic suitability of the sites."[330] The issue of what makes a site "suitable" is deeply subjective, and leaves room for the conscious or unconscious intrusion of bias. Factors such as "impact on quality of life" present similar risks.[331]

In addition, to the extent objective criteria appear neutral with respect to community preferences, it is worth noting that they are not always followed.[332] It is possible that they are not followed due to the intrusion of subjective or political factors that might result in the favoring of some communities over others, leading to inequality in the satisfaction of preferences.[333] Even "objective" criteria are not as infallible or neutral as they might appear on the surface.

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329. *See* GERRARD, WHOSE BACKYARD, *supra* note 283, at 52–53 (noting that seemingly objective criteria in fact express subjective value judgments).

330. MINN. STAT. ANN. § 115A.20(b) (2002).

331. In one well known case, those attempting to site a uranium enrichment facility evaluated the impact of the facility on "quality of life." *In re* La. Energy Servs., L.P., 45 N.R.C. 367, 388 (1997) (final initial decision). The site evaluators paid more heed to the "quality of life" impact of building the facility near a lake used for recreation than they did to the impact on a poor African-American community neighboring another possible location, thereby favoring the needs and lifestyles of the more affluent community. *Id.*

332. *See* GERRARD, WHOSE BACKYARD, *supra* note 283, at 53 (observing that the proper application of siting criteria is often questionable).

333. For example, in a case in which I was involved, county supervisors selected a site for a jail near a minority community that violated many of the county's stated criteria: it did not meet the initial size requirements; though the county had sought lands without wetlands, it contained protected wetlands, requiring extensive regulatory work to obtain uncertain approval; initial studies suggested the need for follow-up hazardous waste analyses due to the potential for past dumping; and, surprising though it may seen, the site was already designated for affordable housing. *See* Collinsville Civic & Improvement League Comments on Morris County's Individual Freshwater Wetlands Permit Application 39–41 (June 1, 1994) (on file with the North Carolina Law Review) (describing extent to which site selected in minority community failed to meet the county's objective siting criteria).

Another example was revealed in 1994 testimony before Congress: residents opposed to the construction of a hazardous waste incinerator in low-income Gregg Township, Pennsylvania, stated that the decision to site the facility in their community violated numerous "objective" criteria, including location on protected agricultural lands, close proximity to a penitentiary, and close proximity to a significant river. *See EPA and*

To the extent environmental justice factors themselves become "objective" criteria in siting processes, it is possible that they will counteract some of the other objective factors that have the potential to concentrate land uses in poor and minority communities. Most of these criteria, however, are too new to have had an impact on existing distributions, and they are thus unlikely to have counteracted factors that historically placed land uses in poor and minority neighborhoods regardless of their preferences. It is also unclear how strong a role the environmental justice factors are playing and could play in future siting decisions.[334] Their role in the future is uncharted territory; for our purposes, it is enough to conclude that they are unlikely to have increased the likelihood that existing land use distributions have met community preferences equally.

Thus, some objective factors, like geologic conditions, are unlikely to affect different communities differently, and will operate independently of community preferences. Other factors, like access to transportation, perceived proximity to need, land costs, and other more subjective factors may affect poor and minority communities more than others in ways that do not reflect differences in preferences. The recent emergence of environmental justice criteria does not alter this overall description of existing conditions. Many of these factors may be legitimate and useful, particularly if carefully applied. But their legitimacy is not the issue. For our purposes, the

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State Hazardous Waste Disposal Facility Siting Policies: Hearings Before the Environment, Energy, and Natural Resources Subcommittee of the Committee on Government Operations, 103d Cong. 115–17 (1994) (Statement of Clyde Peeling, Vice President, Organizations United for the Environment).

A study of the Environmental Impact Statement for the uranium enrichment facility described above, *see supra* note 331, revealed numerous methodological flaws, including improper utilization of established siting criteria. *See* Daniel C. Wigley & Kristin S. Shrader-Frechette, *Environmental Racism and Biased Methods of Risk Assessment*, 7 RISK 55, 58 (1996).

334. For example, the Executive Order is not legally enforceable. Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (2000) (stating that the order does not "create any right . . . enforceable at law or equity . . . [and] shall not be construed to create any right to judicial review involving . . . compliance or noncompliance"). On its own terms, it is not clear how strong a role environmental justice concerns are expected to play in federal agency decisions. *See* Binder et al., *supra* note 31 at 11,140–50 (describing uneven federal agency implementation of the Executive Order). Recent interpretations of many agency Title VI regulations to apply to environmental permitting decisions still represent a novel application of Title VI, and remain highly controversial. *See generally* Mank, *supra* note 19 (describing recent disputes over the Title VI regulations and recent EPA guidance documents designed to interpret the regulations). The Supreme Court has also ruled out private enforcement of Title VI, *see* Alexander v. Sandoval, 532 U.S. 275, 293 (2001), leaving poorly staffed federal agencies with sole enforcement responsibilities.

critical point is that they do not lead to distributions of land uses that meet the dictates of the community preferences model.

D. Does the Political Process Satisfy Community Preferences Equally?

Objective factors are rarely the sole determinant of a siting decision. The political process plays an important role in land use siting. Overarching decisions are made when cities and counties adopt land use planning regulations, comprehensive plans, and zoning ordinances.[335] In addition, many facilities require case-specific political decisions to go forward. While these processes raise important issues of political justice, the focus for the purposes of this Article is on the outcome of these processes: whether they are likely to lead to siting distributions that meet community preferences equally.

1. Local Zoning Ordinances

Zoning ordinances establish the land uses that are permissible within different "zones" in a given locality. A primary purpose of zoning has always been to separate incompatible land uses, and, in particular, to separate "noxious" industrial uses from residential areas.[336] Under many zoning ordinances, industries have been placed in separate zoning districts.[337] That many industrial facilities are found close to one another rather than spread evenly over a municipal area is, thus, unsurprising. In theory, at least, an uneven distribution of LULUs is consistent with good zoning.

But is that uneven distribution just? If industrial development is separated equally from all residential neighborhoods then we do not implicate issues of distributive justice. However, the evidence reveals that significant numbers of industries, as well as other types of LULUs, are located in and near residential areas, and that they are more likely to be found in poor and minority neighborhoods.[338] The inquiry at this stage is: are these disparities the result of zoning ordinances that have directed industrial development to communities

335. *See* PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW 138 (1998) (noting that "fundamental policy decisions are made by the local legislative body . . . [and that] [z]oning is therefore an inherently political process").

336. *See* Eric Damian Kelly, *Zoning*, *in* THE PRACTICE OF LOCAL GOVERNMENT PLANNING 251, 270 (Frank. S. So & Judith Getzels eds., 2d ed. 1988).

337. *See id.* at 268, 270.

338. *See supra* Section V.B (discussing evidence of unequal distribution of LULUs).

that desired it? Or, at least, have zoning ordinances met community preferences for industry and other LULUs equally? If so, then we would have distributive justice under the community preferences model.

In theory, a community could express its preferences for various types of land uses through the political processes associated with the development and modification of local zoning ordinances. If a neighborhood did not want industrial development in certain areas, then its elected representatives could reflect that preference in the ordinance. Conversely, if a community wanted the economic or other benefits of industrial development, then that preference could be reflected in the ordinance. Since public officials are to be responsive to the sentiments of their electorate, land use plans and zoning ordinances should respond to resident preferences, thus meeting the dictates of the community preferences model.

In reality, however, land use plans and zoning ordinances are not likely to reflect resident preferences equally. Local zoning is a highly political process, possibly the " 'most political of local functions.' "[339] Zoning ordinances, which are typically adopted on a city-wide basis, will undoubtedly meet the goals of some neighborhoods, but are unlikely to meet the preferences of all. Land use planning and zoning processes often reflect differences in political power.[340] Wealthy neighborhoods may be more likely to have their preferences realized than poor neighborhoods.[341] Elected officials are dependent upon

339. *See* SALSICH & TRYNIECKI, *supra* note 335, at 138 (quoting W. FISCHEL, THE ECONOMICS OF ZONING LAWS 32 (1985)).

340. *See generally* Brion, *supra* note 238, at 443–47 (describing ways in which political processes are influenced by differences in power and other undemocratic forces); *id.* at 497–98 (noting that participatory power depends upon "the command of material resources" and that such resources are not equitably distributed).

It should be noted that the *Myths and Realities* study ostensibly evaluated whether "political mobilization" was correlated with the distribution of LULUs, and found no correlation in thirteen of the fourteen settings they studied. *See* MTYHS AND REALITIES, *supra* note 160, at 149–51. However, the study's definitions of political mobilization limit the relevance of their findings. At the state and county level, political mobilization was defined by reference to voter turnout. *Id.* at 60. I would argue that voter turnout is not an effective proxy for political power, power that is reflected as much through informal influence as through formal voting. Due to practical difficulties, the study did not use voter turnout in analyzing political mobilization at the city level. *Id.* at 61. Instead, it used the median value of owner-occupied homes as its proxy for political mobilization. *Id.* (The use of that proxy clearly assumes that political power is linked to wealth.) Any data revealed as a consequence of this analysis address the role of relative wealth, not the role of relative political power. The study's conclusion that differences in political power are irrelevant in the siting process is thus unconvincing.

them for fundraising for reelection,[342] and wealthy citizens' greater financial resources allow them to participate in the lengthy, convoluted proceedings in a manner that may be outside the reach of poorer residents, who do not have the resources or sufficient leisure time for this type of political engagement.[343]

Moreover, despite improvements in the last few decades, race is still linked to political power. Until the Voting Rights Act of 1965,[344] African Americans were frequently excluded from voting through numerous mechanisms that prevented them from having a voice in government,[345] including the local governments that developed the zoning ordinances that shaped most of the land use patterns we see today. After the Voting Rights Act was passed, many local and state governments adopted measures designed to circumvent the Voting Rights Act through new and subtle forms of vote dilution.[346] Stemming in part from the Supreme Court's invalidation of some of these subtle forms of vote dilution,[347] African-American voting power has improved, but only relatively recently.[348] A rough proxy for the

341. *See* Glynn S. Lunney, Jr., *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 MICH. L. REV. 157, 159 n.7 (2000) (observing that wealth is correlated with political power).

342. *See id.* (noting that the wealthy have more political power than the poor in part due to politicians' dependence upon fundraising for election and reelection).

343. *See* Reich, *supra* note 144, at 277 (observing that a lack of technical and financial resources can impede "access to key planning decisions such as . . . zoning").

344. 42 U.S.C. § 1973 (2000).

345. *See* Sonia R. Jarvis, *Historical Overview: African Americans and the Evolution of Voting Rights*, *in* FROM EXCLUSION TO INCLUSION: THE LONG STRUGGLE FOR AFRICAN AMERICAN POLITICAL POWER 17, 26–27 (Ralph C. Gomes & Linda Faye Williams eds., 1992) (describing mechanisms, such as the poll tax, literary tests, white primaries, party membership (in all-white parties), that kept African Americans from participating in electoral politics).

346. These mechanisms included, among others, gerrymandering of voting districts by splitting black populations into several districts where they would be a minority; switching from district to at-large elections; and increasing the qualifying requirements for independent candidates. Frank R. Parker, *Eradicating the Continuing Barriers to Effective Minority Voter Participation*, *in* FROM EXCLUSION TO INCLUSION, *supra* note 345, at 73, 75–77; *see also* Jarvis, *supra* note 345, at 29 (describing post-Voting Rights Acts mechanisms to dilute or limit black voting).

347. The Supreme Court struck down some of the post-Voting Rights Act vote-dilution measures in 1969 and continuing into the 1970s. Parker, *supra* note 346, at 77–78 (describing Allen v. State Bd. of Elections, 393 U.S. 544 (1969), and White v. Regester, 412 U.S. 755 (1973)).

348. For example, the number of African Americans registered to vote was 9.2% less than whites in 1968, but only 3.4% less than whites by 1988. *See* Theresa Chambliss, *The Growth and Significance of African American Elected Officials*, *in* FROM EXCLUSION TO INCLUSION, *supra* note 345, at 53, 62–63. Black voter turnout in 1966 was 15.3% lower than white voter turnout, but only 3.8% lower in 1986. *Id.* at 64. It is interesting to note that things got worse before they got better. In 1976, the voting gap between whites and

weakness of African-American voting power can also be seen in the relatively few numbers of African Americans elected to office. Although the number of elected officials has increased significantly in percentage terms,[349] as of the early 1990s, African Americans held less than 1.5% of elected offices despite constituting 12.2% of the population.[350] Professor Owen Fiss has suggested that, despite the elimination of obvious voting barriers, "structural limitations on the political power of blacks still persist."[351] African Americans are statistically a "minority" relative to the majority, tend to have a lower economic status, and have been the "object of 'prejudice' " in a manner that can "make it advantageous for the dominant political parties to hurt them."[352]

These concerns apply equally to other minority groups. Voter turnout and registration rates among Hispanic and Asian-American citizens are significantly less than those for white voters and considerably less than those for black citizens.[353] In addition, because the percentage of residents who are citizens and, therefore, eligible to vote is smaller in Latino and Asian communities than in African-American communities,[354] the lack of political power is likely to be as

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blacks was 12.7%. Between 1968 and 1976, the percentage of blacks registered to vote fell from 66.2% to 58.5%. *See* Jarvis, *supra* note 345, at 29. In the 2000 election, 62% of white non-Hispanic citizens voted, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000 3 (2002), and 57% of black citizens voted, *id.* at 3–4, a 5% difference.

349. The number of black elected officials in the United States went from 1,469 in 1970 to 8,868 in 1998. Eddie N. Williams & Margaret C. Simms, *The Evolution of Black Political Power*, *in* THE STATE OF BLACK AMERICA 2000 91, 94 (2000). In comparison, prior to the passage of the Voting Rights Act, in 1965 there were only 280 black elected officials. Chambliss, *supra* note 348, at 53.

350. Chambliss, *supra* note 348, at 54. The latest data she reports for elected officials is in 1989, when there were 7,226. *Id.* The 1998 level of 8,868, *see supra* note 349, while larger than the 1989 level, does not represent a wholesale change from the 1989 figure.

351. Fiss, *supra* note 95, at 152.

352. *Id.* Professor Fiss notes that the increasing election of black officials in some cities should be considered "the exception, not the rule." *Id.*

353. In the 2000 election, voter turnout for Hispanic citizens was 45%, while turnout for Asian and Pacific Islander citizens was 43%. U.S. CENSUS BUREAU, *supra* note 348, at 4. In comparison, turnout was 62% for white citizens, *id.* at 3, and 57% for black citizens, *id.* at 3–4. Voter registration rates were as follows: Hispanic: 57.3%; Asian and Pacific Islander: 52.4%; black: 67.5%; white: 70.4%. *Id.* at 6 tbl.B ("Reported Voting and Registration by Selected Characteristics: November 2000"). Combining the effect of voter turnout and voter registration, "the voting rate for Asians and Pacific Islanders was 25 percent of the voting-age population . . . , while for Hispanics, [this proportion was] 28 percent." *Id.* at 2–3.

354. Based on 2000 census data, 41% of U.S. Asian and Pacific Islander residents are not citizens and 39% of Hispanics are not citizens. *Id.* at 2. In comparison, only 2% of whites and 6% of Blacks are not citizens. *Id.*

significant as or more significant than in the case of African Americans. Latino and Asian communities may also be less able to participate in local government zoning decisions due to language barriers.[355]

In sum, minority and poor communities are less likely to have effective voting power and less able to participate effectively in land use planning and zoning decisions than other communities, thus lessening the likelihood that their preferences are equally met.

Existing evidence supports this theory. In a study of thirty-one census tracts in seven cities,[356] Professor Craig Anthony Arnold found that "low-income, minority communities have a greater share . . . of industrial and commercial zoning, than do high-income white communities."[357] He observed that industrial uses were frequently permitted near residential homes in low-income communities of color, "creating the very sort of incompatibility of uses that zoning is designed to prevent."[358] Commercial uses were "also located in greater concentrations in low-income, high-minority neighborhoods than in high-income, low-minority neighborhoods."[359] Many of these "commercial" uses were industrial in character, including vehicle storage yards, warehousing, machine shops, drilling, and the like.[360] While these differences in zoning could have been caused by differing preferences,[361] Professor Arnold also notes a wide variety of other factors that are not related to community preferences: "intentional discrimination by government decision makers, institutional

355. *See* Reich, *supra* note 144, at 277.

356. Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 76–86 (1998).

357. *Id.* at 77.

358. *Id.* at 81.

359. *Id.* at 82.

360. *Id.* Professor Arnold's description of various "commercial" districts is compelling:

> [In Wichita,] limited and general manufacturing, vehicle storage yards, warehousing, welding and machine shops, and vehicle repair uses are allowed by right, and solid waste incinerators, mining and quarrying, rock crushing, and oil and gas drilling are conditional uses. In about 30% of [a] San Antonio tract . . . permitted uses include electro-plating, brewery, chicken hatcheries, poultry slaughter and storage, machine shop, and certain kinds of manufacturing . . . . Santa Ana's General Commercial (C2) districts may contain automotive garages, blueprinting and photo-engraving businesses, metal shops, automotive equipment wholesalers, research laboratories, farm products wholesalers, and tire recapping businesses . . . .

Id. He notes that "[t]hese 'commercial' land uses may involve storage and processing of hazardous or toxic materials, generation of large amounts of waste, emission of fumes, odors, and air-borne particulates, and imposition of large unsightly structures on local neighborhoods." *Id.*

361. *Id.* at 87.

discrimination embedded in the land use regulatory system, market forces . . . lack of political power or resources, or most likely some complex and variable combination of many or all of these."[362]

Another limitation on the ability of zoning to meet community preferences, particularly in the context of siting the most controversial LULUs, is state laws that authorize overriding local zoning. As discussed above, such overrides are common in the case of hazardous waste facilities, power plants, and prisons.[363] Where local decisions are overridden, they obviously will not meet local preferences. While there may be very good reasons for state overrides,[364] it is clear that they place a limitation on the degree to which we can be assured that zoning will lead to land use distributions that reflect resident preferences.[365] However, state overrides might be expected to operate equally—while they keep land use siting from meeting community preferences, in theory they affect all communities equally.[366]

The zoning process is also limited in its ability to respond to *changing* preferences. If an area would like to limit the range of permitted uses, generally to less intensive uses, then it faces a number of potential obstacles. Landowners with existing commercial and industrial uses are likely to have considerable political power in resisting attempts to change zoning.[367] Where changes occur, the owners affected by the change, whose land uses suddenly become "nonconforming uses" under the new zoning ordinance,[368] have powerful political[369] and legal interests.[370] The ordinances generally

362. *Id.* at 87–88.

363. *See supra* notes 296–300 and accompanying text (discussing state override provisions in the context of objective siting criteria).

364. Some vital but noxious land uses may be virtually impossible to site without overriding local preferences.

365. *See* Arnold, *supra* note 356, at 130–32 (discussing role of state override provisions in muting the influence of local opposition to siting decisions).

366. This more equitable outcome assumes that state override authority is exercised more fairly than local authority. *See* Tessa Meyer Santiago, Note, *An Ounce of Preemption is Worth a Pound of Cure: State Preemption of Local Siting Authority as a Means for Achieving Environmental Equity*, 21 VA. ENVTL. L.J. 71, 76 (2002) (suggesting the creation of state regulatory boards with final approval authority over all land use decisions having environmentally significant consequences as a mechanism for overcoming local discrimination).

367. *See* Arnold, *supra* note 356, at 130–38.

368. *See* SALSICH & TRYNIECKI, *supra* note 335, at 154 (defining "nonconforming uses").

369. As the drafters of the American Law Institute's Model Land Development Code noted, "local governments have been reluctant to exert strong pressure on nonconforming

grandfather, rather than eliminate, the nonconforming uses.[371] The ordinances do, however, often prohibit changes in the nature or purpose of the use,[372] limit reconstruction or expansion,[373] or, if the nonconforming use is abandoned, prohibit its resumption.[374] Some states allow the nonconforming uses to be eliminated over time through amortization provisions that provide a term of years sufficient for the owner to recoup its investment,[375] but these provisions have not been upheld everywhere[376] and are often limited

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uses," particularly where the use is generating local employment and tax income. *Id.* at 158.

370. *See* YOUNG, 4TH ED., *supra* note 311, § 6.02, at 485–86 (observing that the early drafters of zoning ordinances, "for legal and political reasons, avoided a frontal attack on nonconforming uses," and that this pattern has continued); *id.* § 6.06 (same).

371. *See* MANDELKER, *supra* note 311, § 5.68; SALSICH & TRYNIECKI, *supra* note 335, at 154. Zoning ordinances rarely apply retroactively, *see id.* at 154, and some states prohibit municipalities from applying them retroactively. *Id.* Court decisions on the permissibility of retroactively prohibiting certain uses vary, with some courts holding that permitted uses can be changed retroactively and others holding that such retroactivity runs afoul of the takings clause. *See* MANDELKER, *supra* note 311, at 195–96; *see also* SALSICH & TRYNIECKI, *supra* note 335, at 154 (describing case in which retroactive application was held to violate a takings clause).

372. *See* MANDELKER, *supra* note 311, § 5.69, at 196; SALSICH & TRYNIECKI, *supra* note 335, at 156.

373. *See* MANDELKER, *supra* note 311, § 5.70, at 198–99; SALSICH & TRYNIECKI, *supra* note 335, at 155–56. For example, when the city of East Austin "downzoned" parcels from industrial to commercial or residential uses, the objectionable existing uses were not shut down, but were simply prohibited from expanding or changing to new industrial uses. Arnold, *supra* note 356, at 100–01.

Ironically, the limitation on reconstruction often functions to degrade the land use. If an owner cannot remodel a building to serve current needs, he or she may stop maintaining the building entirely. *See* Kelly, *supra* note 336, at 263. Then, the nonconforming use is not only nonconforming, but dilapidated and a blight to the community. *See* YOUNG, 4TH ED., *supra* note 311, § 6.35, at 597–98.

374. *See* MANDELKER, *supra* note 311, § 5.71, at 199–200; YOUNG, 4TH ED., *supra* note 311, § 6.65, at 676–82.

375. *See* MANDELKER, *supra* note 311, § 5.72, at 201–02; YOUNG, 4TH ED., *supra* note 311, § 6.71, at 697. Not surprisingly, the larger the investment, the longer the amortization period. *See* MANDELKER, *supra* note 311, § 5.72, at 201; *see also* SALSICH & TRYNIECKI, *supra* note 335, at 157–58 (describing various factors affecting the length of amortization provisions). Most modern amortization periods range between one and five years. SALSICH & TRYNIECKI, *supra* note 335, at 158. Salsich and Tryniecki suggest that the period is not intended to provide compensation, but simply to provide notice for the owner to come into compliance. *Id.* at 157.

376. Some states have found the elimination of nonconforming uses, even with an amortization provision, to be an unconstitutional taking under state law. *See* MANDELKER, *supra* note 311, § 5.72, at 201. For example, see *Pennsylvania Northwestern Distributing, Inc. v. Zoning Hearing Board*, 584 A.2d 1372, 1376–77 (Pa. 1991). Most courts have, however, upheld amortization provisions if the period is reasonable and reflects a reasonable balance between the owner's property rights and the pubic interest to be served by the ordinance. *See* SALSICH & TRYNIECKI, *supra* note 335, at 157–58.

in scope.[377] While property owners have a legitimate interest in being able to continue existing uses, it must be acknowledged that the nonconforming use doctrine impedes a community's capacity to respond to changing preferences, and thus decreases the likelihood that current preferences are met.[378]

Attempts to make zoning more protective encounter obstacles in addition to the nonconforming use doctrine. While most courts give considerable deference to legislative zoning changes,[379] others allow such changes only if certain criteria can be met, often to the detriment of a community attempting to improve its environment.[380] In addition, if the zoning change is directed narrowly to one or a few facilities, the effort risks challenge as impermissible "spot zoning."[381] Furthermore, while a devaluation of property values as a consequence of zoning is not generally considered sufficient to constitute an unconstitutional taking,[382] in some states a significant devaluation of property could lead to a successful takings challenge or be struck down as an unreasonable exercise of the police power.[383]

The foregoing discussion addresses why the current land use planning and zoning process faces limits in responding to current preferences and in doing so equally. In order to understand the role of zoning in meeting current resident preferences, one must also

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377. One commentator has noted that amortization provisions tend to be applied to a limited range of uses, such as relatively insubstantial structures like signs, and relatively land-intensive uses such as junkyards. *See* MANDELKER, *supra* note 311, § 5.72, at 201.

378. *Cf.* YOUNG, 4TH ED., *supra* note 311, § 6.02, at 484–85 (observing that protection for nonconforming uses has prevented zoning from accomplishing its goal of properly separating incompatible land uses); Arnold, *supra* note 356, at 129–30 (noting limitations on effectiveness of rezoning to impact current land uses in light of nonconforming use doctrine, but arguing that rezoning is useful as a long term strategy).

379. Arnold, *supra* note 356, at 110.

380. *See id.* In some states, a zoning change is permissible only if the municipality can demonstrate that there has been "a substantial change in the character of the neighborhood . . . or a mistake in the existing zoning." *Id.* at 111; *see also* SALSICH & TRYNIECKI, *supra* note 335, at 199 (discussing "change or mistake" rule). In other words, if the land uses have become more desirable in an area, that change in circumstances can be reflected in more protective zoning. A community that wants to change land uses simply due to changing preferences would not, however, meet these criteria. In fact, the worse the circumstances for the neighborhood, the less likely it is for the decision-makers to be able to show "changed conditions" justifying the change in zoning. Arnold, *supra* note 356, at 110–11.

381. *Id.* at 111–12; *see also* SALSICH & TRYNIECKI, *supra* note 335, at 197–98 (describing spot zoning).

382. *See* SALSICH & TRYNIECKI, *supra* note 335, at 200; YOUNG, 4TH ED., *supra* note 311, § 3.26, at 157–60.

383. SALSICH & TRYNIECKI, *supra* note 335, at 200; , YOUNG, 4TH ED., *supra* note 311, at § 3.26.

consider the legacy upon which present efforts build. Historically, zoning has not functioned in an equitable fashion, and has failed to ensure that community preferences have been equally met.

Zoning did not become common until the 1920s.[384] Although common in the 1920s and 30s, its impact became more significant during the period of expansive construction after World War II.[385] By this time, however, industrial areas already existed in most large cities.[386] Local zoning ordinances did not eliminate existing uses, even if they were incompatible with the planned zoning designation.[387] While the hope was that these nonconforming uses would disappear, that did not occur.[388] The primary effect of the ordinances was to keep *new* industry out of new residential areas (particularly suburbs); the ordinances did nothing about *existing* industry concentrations in older residential areas. These concentrations did not necessarily reflect community preferences, but the private market factors that had led to their original placement.

The juxtaposition of industrial and residential uses is not simply a happenstance of history, however, nor is the inequitable distribution of such juxtapositions. Some of the earliest zoning provisions were expressly designed to create racial segregation.[389] Even after racial zoning was ruled unconstitutional in 1917,[390] many municipalities

384. Zoning did not become a common technique until after publication of the Standard State Zoning Enabling Act in 1922 and 1926. *See* Kelly, *supra* note 336, at 252. Localities were also more comfortable enacting zoning after 1926, when the United States Supreme Court declared it constitutional in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *Id.*

385. *See id.*

386. *Cf.* YOUNG, 4TH ED., *supra* note 311, § 6.02, at 484 (noting that zoning ordinances were not enacted until half a century after major rural to urban migration).

387. *See id.* at 484–85.

388. *Id.* at 485.

389. *See* DOUGLAS MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 41 (1993) (describing black-white segregation law passed in Baltimore in 1910, segregation laws passed in numerous Virginia cities between 1911 and 1913, and additional segregation laws passed in North Carolina, Georgia, Kentucky, Missouri, Oklahoma, and Louisiana cities between 1913–1916); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 744–45 (1993) (describing segregation zoning ordinances in southern and border cities enacted at the beginning of the Twentieth Century).

390. The Supreme Court invalidated racial zoning in *Buchanan v. Warley*, 245 U.S. 60, 82 (1917). The basis for the Court's decision was not the denial of equal protection, *id.* at 81, but the zoning restriction's unconstitutional interference with the owners' property rights: the owners' rights to transact property with the buyer and seller of their choice, regardless of color. *Id.* at 81–82; *see* Dubin, *supra* note 389, at 745–46.

persisted in enacting explicit or implicit racial zoning.[391] Segregation did not result in "separate but equal" zoning for communities of color; zoning was often less protective for minority neighborhoods.[392]

In particular, some communities of color have been subject to "expulsive zoning," defined as "the practice of superimposing incompatible zoning ... through lower-grade zoning or zoning authorizing noxious commercial or industrial uses which undermine the quality of the residential environment and discourage continued residencies."[393] Such zoning is termed "expulsive" because it was expected to prompt existing residents to leave.[394] While many black residents were displaced by industrial zoning, many remained in the now-industrial areas, surrounded by incompatible and undesirable land uses.[395] As discussed further below, there are many reasons, independent of a preference for LULUs, that might have kept poor and minority residents in place, such as poverty and housing

391. *See* Dubin, *supra* note 389, at 749–50. Professor Dubin discusses post-*Buchanan* racial zoning in Texas generally, where the state explicitly authorized local racial zoning, *id.* at 750 n.47, and in selected Texas, North Carolina, Oklahoma, Florida, and Alabama cities. *Id.* (discussing Texas, North Carolina, and Oklahoma); *id.* at 750 n.49 (discussing Florida, Alabama, and Texas); *see also* Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of* Euclid, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 101, 106–07 (Charles M. Haar & Jerold S. Kayden eds., 1989) (describing post-*Buchanan* racial zoning in New Orleans, Norfolk, Dallas, Indianapolis, Winston-Salem, Dade County, Florida, and Birmingham).

392. *See* Dubin, *supra* note 389, at 759 (observing that " 'separate' has also meant 'unequal' in the land use area"). Professor Dubin observes that many of the land use techniques leading to segregation, both explicit and implicit, have been accompanied by inequality in living conditions. *Id.* at 758–64; *see also supra* notes 341–46 (discussing evidence that existing zoning is less protective of low-income, high-minority communities than of high-income, low-minority communities). Examples abound. In East Austin, Texas, the city explicitly planned a "Negro District" that would combine industrial uses and African-American housing. Arnold, *supra* note 356, at 99. In Charlotte, North Carolina, the judge in a school desegregation case observed that almost all of the industrial land use in the city was located in the black community. Dubin, *supra* note 389, at 763 (discussing Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1365 (W.D.N.C. 1969)). In Cocoa, Florida, the town's historic African-American community had been subject to incompatible zoning for decades, with various noxious commercial uses such as auto body shops and junkyards permitted within the neighborhood. *See id.* at 771, 789 (describing historic information included in community's complaint against the city in litigation over the city's new land use plans).

393. *See* Dubin, *supra* note 389, at 742, 762 (discussing Professor Yale Rabin's theory of expulsive zoning); *see also* COLE & FOSTER, *supra* note 39, at 69, 73 (same); Collin, *supra* note 322, at 509 (same).

394. *See* Rabin, *supra* note 391, at 101–02.

395. *See id.* at 119 (indicating that the "mixed-use conditions, so common in low-income black neighborhoods," suggests that expulsive zoning has been widespread, and implying that the result of expulsive zoning is to create such mixed-use areas).

discrimination.[396] In any case, zoning whose purpose was "expulsive" presents the antithesis of zoning designed to meet community preferences.

Local municipalities' tendency to "overzone" for industrial uses in the hopes of increased revenue could also have been—and continue to be—a factor in the lesser protections afforded low-income or minority communities. In a twelve-city study of expulsive zoning conducted by Yale Rabin, he found that, where insufficient vacant land existed for the desired industrial designations, such zoning was often applied to existing black residential areas.[397] Where local governments have been pressured to provide affordable housing, they have sometimes done so by zoning such areas in the middle of industrial tracts.[398]

Low-income neighborhoods have also received less zoning protection than wealthier neighborhoods, in part because they have served as buffers between the more highly valued single-family residences and industrial or commercial development.[399] As Professor Arnold states:

> Buffer zones are perhaps one of the major reasons why low-income and minority neighborhoods have so much industrial and commercial zoning: the multi-family housing, where many low-income and minority people live, is purposefully placed near the industrial and commercial uses to create a buffer that protects high-income, white, single-family neighborhoods.[400]

Viewed historically, zoning has therefore clearly failed to meet community preferences equally. The doctrine of nonconforming uses, discussed above, makes it very difficult to undo this legacy of discriminatory zoning. Other legal and political obstacles to rezoning would likewise impede the ability to overcome the legacy of discriminatory zoning.[401] History has a strong effect on the present.

The foregoing discussion of the zoning process is intended solely to determine whether zoning can be relied upon to meet community

396. *See supra* note 64 and accompanying text (describing impediments to housing mobility for the poor and people of color); *infra* note 499 and accompanying text (same).

397. Dubin, *supra* note 389, at 763 (discussing Rabin study).

398. *See id.* at 764 (describing New Jersey municipality's zoning of land for affordable housing in an industrial area in response to a court-ordered requirement that the municipality eliminate zoning that effectively excludes the poor ("exclusionary zoning") and include zones in which affordable housing would be permissible).

399. Arnold, *supra* note 356, at 119.

400. *Id.*

401. *See supra* notes 367–83 and accompanying text (discussing obstacles to rezoning).

preferences equally, an analysis that is necessary in light of the difficulty of gathering direct empirical evidence about the degree to which preferences are equally satisfied. The ultimate legitimacy and operation of zoning ordinances are not at issue here. For our purposes, the critical point is that zoning has not led to distributions of land uses that meet the dictates of the community preferences model.

2. Political Forces Affecting Particular Siting Decisions

The political process is important not only in the formation of zoning ordinances, but also in the placement of individual facilities. Where public entities are responsible for siting a LULU, such as a utility, landfill, homeless shelter, or jail, the siting process will generally involve a facility-specific decision-making process. The outcome will be determined not only by objective siting criteria, regulatory requirements, and zoning provisions, but by a political choice about where to locate the facility in question.

Even where siting decisions are in the hands of private parties, as is frequently the case for industrial uses and some social service entities, facility-specific discretionary approvals required under local zoning afford a role for local political decision-making. There are two relevant types of permits: conditional use permits for certain types of land uses in certain zones, and variances, which grant an exception to the usual ordinance provisions. In addition, where a project is inconsistent with existing zoning, proponents may seek to amend the zoning ordinance.

Typically, lists of land uses permitted in different zoning districts are divided into "permitted" and "conditional" uses.[402] "Permitted" uses may be constructed " 'as of right' " within the zoning district without the need for any discretionary local approval of the use itself.[403] For example, single-family homes are typically permitted, as-of-right, uses in a residential zone.

"Conditional" or "special" uses, however, are listed as permitted in the zone, but are not "as of right." Instead, they require discretionary approval by the local agency to determine if the use is acceptable at the specific location where it is proposed and to determine whether it meets certain criteria.[404] For example, an area

402. *See* SALSICH & TRYNIECKI, *supra* note 335, at 207.

403. *See* MANDELKER, *supra* note 311, § 6.39, at 249.

404. *See id*, § 6.54, at 264; *see also* YOUNG, 4TH ED., *supra* note 311, § 21.01, at 691–94 (describing special permits).

could be designated for residential single-family use, but may allow hospitals so long as the hospital applies for and receives a "special-use" permit.

Nonetheless, considerable discretion may exist. For conditional use permits, local government discretion varies by the degree of flexibility given in the authorizing statute and the apparent willingness of courts to grant local governments more or less discretion.[405] But even in those cases where the local government is required to grant the permit if stated criteria are met,[406] thus appearing to leave relatively little discretion, the generality of the requirements, such as whether the conditional use is "compatible" with "the surrounding area," nonetheless provides significant room for the government's discretionary judgment.[407] Thus, the conditional use approval process often provides a considerable role for local political judgments.

Variances allow exceptions to normal zoning provisions when the normal zoning provisions will create a hardship or practical difficulties.[408] Typically, "area variances" allow exceptions to normal height, bulk, site area, and setback standards.[409] Many (but not all) states permit "use variances," which may allow uses normally not permitted in a zoning district.[410]

If the proposed use is incompatible with existing zoning, a zoning ordinance amendment may be requested. As one commentator has stated, "In no other area of American administrative law are requests

405. *See* MANDELKER, *supra* note 311, § 6.57, at 266–68 (describing cases in which local governments have been given relatively little discretion); *id.* § 6.58, at 268 (describing cases in which local governments have been given somewhat more discretion).

406. *See* YOUNG, 4TH ED., *supra* note 311, § 21.19, at 779–80 (stating that permits must be granted if they meet the criteria in the ordinance).

407. *See* MANDELKER, *supra* note 311, § 6.57, at 267; *see also* NIMBY PRIMER, *supra* note 261, at 39–40 (observing that permits are usually granted if the use is " 'in harmony with the appearance and the orderly development of the district ... and not ... detrimental to the orderly development of adjacent districts' " (citing Doe v. City of Butler, 892 F.2d 315, 317 (3d Cir. 1989))). The degree to which community preferences themselves can be an explicit factor in the local government's decision is a complex question discussed below. *See infra* notes 418–27 and accompanying text.

408. *See* MANDELKER, *supra* note 311, § 6.41, at 250.

409. *See id.* § 6.42, at 251; YOUNG, 4TH ED., *supra* note 311, § 20.07, at 426–27.

410. *See* MANDELKER, *supra* note 311, § 6.42, at 251 (discussing use variances); *id.* § 6.43, at 252–53 (discussing minority approach prohibiting use variances); YOUNG, 4TH ED., *supra* note 311, § 20.06, at 424–25 (defining use variances). Some courts have held that changes in use should be made through an amendment to the zoning ordinance, a legislative process, rather than through a use variance, an administrative process. MANDELKER, *supra* note 311, § 6.43, at 252; YOUNG, 4TH ED., *supra* note 311, § 20.73, at 660–64.

for amendments to the law so frequent that there are specific application forms . . . ."[411] Use variances are likely to provide a role for the political process if the proposed use is not consistent with existing zoning. Where a zoning amendment is at issue, local officials have broad discretion in exercising this legislative function,[412] a function that has been described as more "politically charged" than requests for special permits or variances.[413]

Given the political nature of these decisions, the issues, for the purposes of this Article, are the extent to which the political processes associated with individual siting decisions have reflected—and continue to reflect—community preferences, and the extent to which these political processes reflect preferences equally.

While the amount of political leeway in individualized siting or permitting decisions is likely to be more limited than in the more clearly political context of zoning,[414] the existence of political discretion inhering in many of the site-specific decisions described above suggests that community preferences are likely to play a role. The political pressures facing zoning boards or local legislators are likely to be similar to those confronted in the zoning context.[415] Theoretically, publicly elected officials desire reelection and should therefore be responsive to community preferences.[416] To the extent that an agency, and not an elected official, is making a siting decision, as may be the case where the government is responsible for siting a public facility, the agency may not be as responsive to public sentiment because it does not have the same electoral fears. Nonetheless, agencies, and the public officials within them, are subject to political forces. Agency decisions are likely to be affected

411. Kelly, *supra* note 336, at 258.

412. *Id.* For an example of a local decision to grant a zoning amendment request, see *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149–50 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992), in which a municipal authority had changed local zoning from agricultural to industrial to place a solid waste landfill in an African-American neighborhood. *See also* Reich, *supra* note 144, at 274 (describing decision by predominately white parish council to rezone a single-family residential district in an African-American town to heavy industrial use to accommodate a rayon and polyvinyl chloride plant).

413. NIMBY PRIMER, *supra* note 261, at 37–38.

414. The degree of discretion varies, as suggested above. Local legislative bodies are likely to have more discretion in responding to requests for zoning amendments than administrative bodies, who administer statutes, are likely to have in responding to requests for special use permits, variances, or various other types of permits.

415. *See supra* notes 339–55 and accompanying text.

416. *See* NIMBY PRIMER, *supra* note 261, at 46 (observing, in the context of local decisions on special use permits, variances, or zoning amendments, that "pressure to oppose the facility can be very persuasive to officials who know they must rely on the community to be re-elected").

by anticipated reactions from higher executive officials (who are subject to electoral pressure), from the legislative bodies that fund the agencies, from the electorate itself, and from those affected by agency action.[417] Thus, public agencies could also be expected to be somewhat responsive to community preferences.

Where the decision in question affects a private developer, as is often the case where conditional use permits, variance requests, or zoning amendments are sought, the courts have established limits on the role of community preferences in order to protect the rights of the property owners whose development is affected.[418] Decision-makers generally cannot ground their decisions in the existence of community opposition in and of itself.[419] As one court has stated, " 'public clamor' " is "not an adequate legal basis for . . . [a] decision."[420]

Decision-makers are, however, permitted to consider community input when it raises valid concerns that provide a rational basis for a decision-maker's denial of a developer's request. Community preferences predicated on legitimate state concerns like traffic congestion, crime, noise, or safety are entitled to consideration and could provide a lawful basis for governmental action.[421] As one court

417. *See* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1065–66 (1990); *cf.* DOUGLAS YATES, BUREAUCRATIC DEMOCRACY: THE SEARCH FOR DEMOCRACY AND EFFICIENCY IN AMERICAN GOVERNMENT 66, 68, 69 (1982) (describing bureaucracies as their own "political interest groups" that will, among other activities, lobby Congress to pursue their interests).

418. In this Section, I discuss the legal status of decisions informally based on community preferences. For a discussion of the legal status of formal community preference criteria, see *supra* notes 308–11 and accompanying text.

419. *See, e.g.*, Browning-Ferris Indus. of St. Louis, Inc. v. City of Maryland Heights, 747 F. Supp. 1340, 1349 (E.D. Mo. 1990) (arguing that public opposition does not provide a defensible basis for denying the renewal of a landfill's operating permit); McCollum v. City of Powder Springs, 720 F. Supp. 985, 989–90 (N.D. Ga. 1989) (invalidating local policy of denying liquor licenses when nearby residents object); Ross v. City of Yorba Linda, 2 Cal. Rptr. 2d 638, 644–46 (Cal. Ct. App. 1991) (holding that a city could not deny a request to rezone a parcel based upon the mere fact of community opposition); Church of Jesus Christ of Latter-Day Saints v. Planning Bd.of the Town of Clifton Park, 687 N.Y.S.2d 794, 795 (N.Y. App. Div. 1999) (holding that denial of a special use permit for a church was arbitrary and capricious because "generalized community objection, without more, is an improper basis for denial of a special use permit"); Davis County v. Clearfield City, 756 P.2d 704, 711–12 (Utah Ct. App. 1988) (holding that public opposition itself was not an adequate basis for denying a conditional use permit for a substance abuse facility). *See generally* YOUNG, 4TH ED., *supra* note 311, § 21.19, at 783 (stating, with respect to special permits, that "[t]he generalized objections of neighbors are insufficient to support a denial of permit"); *id.* § 21.28 (stating that community opposition, in and of itself, is not an appropriate basis for denying a special use permit).

420. *Davis County*, 756 P.2d at 712.

421. *See, e.g.*, Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 500–01 (2d Cir. 2001) (holding that local decision-makers could have relied solely on community

has stated: "We decline to equate the accommodation of legitimate community concerns to a victory of mob rule . . . ."[422] On the other hand, if community preferences against a facility are not predicated on legitimate state concerns and appear to be motivated by improper motives, such as fear, bias, or bad faith, then a decision denying a permit would be deemed unconstitutional.[423]

Although willing, in principle, to accept legitimate community concerns as a rational basis for government decision-making, some courts have created a high standard for proving the existence of such concerns. Particularly where administrative decisions are at issue, such as the decision on whether or not to grant a special use permit,[424] courts have been unwilling to accept neighborhood "opinion" and have instead required some sort of expert testimony or investigation to support the contention in question.[425] As one court has stated:

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opposition to deny a special use permit for a convenience store since that opposition was rooted in legitimate state interests such as traffic and safety); Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1387 (11th Cir. 1993) (holding that local decision-makers can legitimately deny a permit to build a mini-warehouse based on citizen concerns that were "fact-based . . . [and] rationally related to legitimate general welfare concerns"); Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 685 (3d Cir. 1991) (holding that it is valid for a city to consider nearby residents' legitimate concerns in deciding whether to issue a dance hall license); City of Lowell v. M & N Mobile Home Park, Inc. 916 S.W.2d 95, 101 (Ark. 1996) (holding that the reasonable opinions of local residents about the traffic, noise, and property value impacts of rezoning for mobile home use provide a rational basis for a city's decision-making).

422. *Midnight Sessions*, 945 F.2d at 685.

423. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (holding that community sentiment against a home for the mentally retarded was not rationally related to a legitimate governmental interest where based on "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding"); *see also Midnight Sessions*, 945 F.2d at 685 (observing that government decisions based on community sentiment could violate the developer's due process rights if motivated by "the public's negative attitudes or biases, unfounded fears or speculation, prejudice, self-interest, or ignorance").

424. Some courts differentiate their standard of review depending upon whether a legislative action, such as a request for rezoning, or an adjudicative action, such as a ruling on a conditional use permit, is at issue. These courts provide a presumption of validity to legislative actions but review adjudications to determine whether they are supported by substantial evidence. *See* Ralph L. Wadsworth Constr., Inc. v. W. Jordan City, 2000 UT App. 49, P16, 999 P.2d 1240, 1243 (Utah Ct. App. 2000). The stricter evidentiary standards, discussed *infra* notes 425–26, appear to arise in connection with adjudicative decisions.

425. *See, e.g.*, Chanhassen Estates Residents Assoc. v. City of Chanhassen, 342 N.W.2d 335, 340 (Minn. 1984) (en banc) (finding that the city improperly denied conditional use permit for drive-in McDonalds because non-specific testimony about traffic hazards was insufficient to rebut city engineer's contrary testimony); Retail Prop. Trust v. Bd. of Zoning Appeals of Town of Hempstead, 722 N.Y.S.2d 244, 246 (N.Y. App. Div. 2001) (ruling that town's denial of a special use permit for a department store was arbitrary and capricious because "[t]he generalized complaints of the residents as to . . . increased traffic,

"denial of a conditional use must be based on something more concrete than neighborhood opposition and expressions of concern for public safety and welfare."[426] Not all states apply such high standards, however; others have made clear that, even where administrative decisions are at issue, public testimony will be considered credible without the need for expert validation.[427]

Thus, legally speaking, community preferences can have some, but not unlimited, impact. A community's simple opposition to a facility, in and of itself, will not provide a legitimate basis for a government decision not to take action necessary to development. Community preferences cannot, *per se*, govern individualized political decisions. However, a decision that reflects legitimate community concerns is defensible. Preferences articulated in such terms have at least the potential to be influential, although the standards for their acceptability may vary by jurisdiction and by whether the government action is legislative or administrative.

Assuming, then, that community preferences based upon accepted factors can have influence, the question is whether communities are equally effective in having their preferences reflected in individualized decisions. One confronts here many of the issues that arise in connection with the political process associated

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and the summary criticisms of the experts who testified on behalf of [a neighboring town], were uncorroborated by any empirical data, and thus, insufficient to counter various expert opinions"), *rev'd*, 774 N.E.2d 727 (N.Y. 2002), *remanded to* 753 N.Y.S.2d 527 (N.Y. App. Div. 2003); *Wadsworth*, 2000 UT App at P18–19, 999 P.2d at 1244 (holding that city's denial of conditional use permit for outdoor storage of heavy industrial equipment based on neighbors' concern that it would be a nuisance lacked substantial evidence because the staff did not undertake an investigation of the public's concerns); *Davis County*, 756 P.2d at 711–12 (concluding that Planning Commission decision to deny a conditional use permit to a residential treatment facility lacked a rational basis because community assertions, such as concerns about property values, were not supported by studies or provided by experts such as real estate appraisers).

426. *Chanhassen Estates Residents Assoc.*, 342 N.W.2d at 340.

427. *See, e.g.*, Prince v. County Comm'n of Franklin County, 769 S.W.2d 833, 835 (Mo. Ct. App. 1989) (stating, in connection with a conditional use permit for a farm equipment retailer, that "[t]estimony of property owners regarding the value of their property and the effect of administrative action upon that property is competent opinion evidence"). The issues also arise in administrative settings. Professors Gillette and Krier observe that agencies can make decisions " 'in the public interest' only if all the various interest groups are indeed able to voice their wants effectively." Gillette & Krier, *supra* note 417, at 1067. If "some groups enjoy a comparative advantage in catering to administrative needs and desires . . . ," then agency attention can be diverted from the public interest. *Id.* Although Gillette and Krier focus specifically on agency capture by the regulated community at the public's expense, the arguments are equally applicable to differing access opportunities within the public sphere.

with zoning ordinances.[428] All of the weaknesses of the political process generally manifest themselves in these individual decisions.[429] Many in the environmental justice movement have implied that poor and minority communities may have difficulty organizing to have their preferences heard, and that the preferences of politically powerful groups are listened to while the preferences of poor, minority and relatively powerless neighborhoods are not.[430] In fact, many argue that the opposition of politically influential communities

428. *See supra* notes 339–55 and accompanying text. The issues also arise in administrative settings. Professors Gillette and Krier observe that agencies can make decisions " 'in the public interest' only if all the various interest groups are indeed able to voice their wants effectively." Gillette & Krier, *supra* note 417, at 1067. If "some groups enjoy a comparative advantage in catering to administrative needs and desires", then agency attention can be diverted from the public interest. *Id.* Although Gillette and Krier focus specifically on agency capture by the regulated community at the public's expense, the arguments are equally applicable to differing access opportunities within the public sphere.

429. For example, in considering the issuance of use variances, studies have found "substantial abuses." MANDELKER, *supra* note 311, § 6.43, at 252. In many cases, they are not required to be consistent with a comprehensive plan. *See id.* § 6.49, at 259. Thus, a community, especially one with little political power, could find that an undesirable use had been approved even though it was not listed as a permitted or conditional use in the zoning district.

430. *See, e.g.*, Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 346 (1993) (arguing that minorities' lack of political power may be one cause of disproportionate burdens); Cole, *Empowerment as the Key*, *supra* note 163, at 628 (same); Gauna, *Obstacles and Incentives*, *supra* note 11, at 32–33 (same); Godsil, *supra* note 284, at 399 (same); Lazarus, *supra* note 100, at 806–11 (same); Pastor et al., *supra* note 276, at 3 (observing argument that hazardous facilities are located in minority communities because of their lack of political power, which is itself rooted in a lack of "social capital and community efficacy").

In a study of requests for zoning changes from residential use to commercial use in San Antonio, Texas, the "Anglo-dominated Zoning Commission" granted requests much more often in low-income Latino neighborhoods than in other areas of the city. *See* Dubin, *supra* note 389, at 778 (describing study by Professor Charles L. Cotrell). The Latino neighborhoods were thus less likely to be protected from shifts to more intensive zoning. *Id.* While this could conceivably have been a function of the neighborhoods' preferences for more intensive zoning, less benign explanations are also possible.

A study of siting decisions for toxic facilities in Los Angeles suggests that minority communities in ethnic transition may be particularly vulnerable. The degree of "ethnic churning"—the transition from, for example, an African American to a Latino population—proved to be a significant factor in predicting facility siting. Pastor et al., *supra* note 276, at 10–11, 15. One explanation for this result is that the ties necessary for effective social organization in opposition to a proposed siting are more likely to form in homogeneous communities and less likely to form in mixed communities, like those undergoing ethnic transition. *Id.* at 10, 12.

In a study of commercial hazardous waste facilities' decisions to expand capacity (a decision made more frequently than siting decisions), Professor James Hamilton found that facilities were more likely to expand in communities that had lower indicators of political power, including lower rates of voter participation. *See* Hamilton, *supra* note 317, at 118, 129.

has driven LULUs to poor and minority communities.[431] As Professor Robert Bullard has called it, the NIMBY attitudes of the wealthy may have resulted in "PIBBY"—Place in Black's BackYards.[432] Under this scenario, LULUs are concentrated in poor and minority neighborhoods not because these neighborhoods want them, but because more influential neighborhoods have been more effective in having their preferences acknowledged.

The argument should not be overstated. At times, poor or minority communities have been successful in articulating their preferences against a facility in a manner that ultimately prevails.[433] And it is likely that the preferences of wealthy and influential communities are not always heeded. But the discussion here focuses on whether, generally speaking, we can be assured that all communities have an equal voice in the political process that doles out unwanted land uses.

As with zoning ordinances, the existing distribution is a consequence not only of siting decisions being made now, but of past

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431. *See, e.g.*, GAY, *supra* note 257, at 23 (describing shift in site for medical incinerator from suburban community to poor urban neighborhood); Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 728 (1993) (noting success of white affluent communities in shifting undesirable sitings to low-income minority communities); Gauna, *Obstacles and Incentives*, *supra* note 11, at 31–32 (stating that unwanted land uses are shifted to communities that lack resources to resist them).

432. ROBERT BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 4–5 (1990). *But see* Been & Gupta, *supra* note 163, at 33 (arguing that hazardous waste siting decisions between 1970 and 1990 did not reflect the "PIBBY" phenomenon because sitings were not more likely to occur in African-American neighborhoods than others); Gerrard, *Victims of NIMBY*, *supra* note 263, at 514–16 (arguing that, in recent waste disposal facility sitings, there is little evidence of NIMBY).

433. Note, however, that this success may rest on the ability to raise successful legal challenges to the siting in question rather than on the ability to have enough political power to see preferences realized. For example, in *Pueblo para el Aire y Agua Limpio v. County of Kings*, a community group successfully challenged a county's permit approval for a proposed toxic waste incinerator based on the county's failure to translate documents into Spanish, the language spoken by the neighboring community. 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357, 20,358 (Cal. Super. Ct. Dec. 30, 1991); *see* Cole, *Environmental Justice Litigation*, *supra* note 305, at 528–30. The county subsequently decided not to locate the incinerator in Kings County. Catherine Verhoff, *Environmental Racism: Why Communities of Color Lose in Environmental Politics*, 1 ENVTL. L. & PRAC. 26, 29 (1994). In *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915 (1998), *vacated as moot*, 524 U.S. 974 (1998), the community argued that the state agency violated Title VI of the Civil Rights Act by issuing a permit to a soil remediation facility. *Id.* at 927. The Third Circuit upheld the right of the community group to bring a private right of action against the state agency. During the litigation, the company decided not to build the facility in Chester. (Subsequently, the court's ruling was effectively overruled by the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001), which held that there is no private right of action to enforce Title VI regulations prohibiting disparate impacts.)

siting decisions. Even if we did not currently witness disparities in treatment, the question is whether the distributional legacy we have received meets community preferences equally. Given the pervasive racism in this country's history, the political component of individualized siting decisions in the past likely concentrated undesirable land uses in minority rather than majority areas.[434] Individual siting decisions do not necessarily respond to community preferences, and to the extent that they do respond, they do not necessarily do so equally. The politics of siting are unlikely to lead to distributions that meet the dictates of the community preferences model.

E. Do Public Participation Provisions Satisfy Community Preferences Equally?

So far, the discussion has considered the impact that objective factors and political processes have on matching LULUs to community preferences. While these features of the siting process may, overall, result in disparities in the degree to which community preferences are met, one might argue that siting procedures that explicitly include requirements for public participation would do a better job at meeting preferences equitably.

Where the LULU proponent is a public entity, like a county for a landfill or a city for a homeless shelter, the government entity is likely to be governed by a local or state decision-making process that includes provisions for community participation.[435] If the federal government is siting the facility, providing funding, or requiring permits for a private or local project, then the LULU proponent must prepare a review of environmental impacts and obtain community input pursuant to the National Environmental Policy Act (NEPA).[436] In many states, state-initiated, funded, or permitted activities must also complete a review of environmental impacts and obtain community input pursuant to state-equivalents of the federal NEPA

434. *See supra* notes 344–50 and accompanying text (describing history of minority exclusion from voting and civic participation).

435. *See* Godsil, *supra* note 284, at 403–05 (describing public participation in those states with "super review" procedures for siting hazardous waste facilities); *id.* at 405–06 (describing public participation in those states taking a "site designation" approach to hazardous waste siting).

436. NEPA requires that environmental impact statements be "made available . . . to the public." *See* 42 U.S.C. § 4332(C) (2000); *see also* 40 C.F.R. § 1506.6 (regulations outlining agency requirements for public involvement).

statute.[437] If the LULU proponent is a private entity, such as a manufacturer, and the LULU requires permits to operate, the permitting process is likely to require some form of public participation. Thus, typical air and water pollution permitting programs require public participation as part of the permitting process,[438] as do programs for the permitting of waste facilities.[439] Furthermore, local zoning decisions for conditional use permits, use variances, or zoning amendments are likely to include public participation elements.[440]

Public participation provisions generally provide for public notice and some opportunity for public involvement. Notice requirements vary widely from facility to facility and from state to state regarding who must be provided notice, how they are to be notified, and at what stage notice must be sent.[441] Some siting processes involve early notice to a broad range of players;[442] other

437. *See* Heather E. Ross, Comment, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY J. ENVTL. L. 353, 369–72 (1994) (observing that twenty-eight states have enacted NEPA-equivalents for state-sponsored activities).

438. *See* U.S. EPA, Office of Solid Waste and Emergency Response, PUBLIC INVOLVEMENT IN ENVIRONMENTAL PERMITS: A REFERENCE GUIDE § 2-3 (2000) [hereinafter EPA REFERENCE GUIDE] (noting that most federal permitting programs require a public comment period); *see also id.* §§ 2-5 to 2-13 (describing public involvement required under the federal Clean Air Act); *id.* §§ 2-22 to 2-24 (describing public involvement required for pollution permits under the federal Clean Water Act). These requirements apply whether the permitting program is administered by the federal government or by states who have been delegated permitting authority. *Id.* § 2-1.

439. *See* Gerrard, *Victims of NIMBY*, *supra* note 263, at 498–99 (observing that environmental permits requiring citizen participation would be required for such waste-handling LULUs as hazardous waste facilities, municipal solid waste facilities, medical waste facilities, high-level radioactive waste facilities, and transuranic waste facilities); *see also* EPA REFERENCE GUIDE, *supra* note 438, at §§ 2-26 to 2-28 (describing opportunities for public involvement required under the federal Resource Conservation and Recovery Act, the federal hazardous waste permitting law); Sheila Foster, *Public Participation*, *in* THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 32, at 185, 190–94, 201–06 [hereinafter Foster, *Public Participation*] (describing special public involvement requirements under the Resource Conservation and Recovery Act and describing additional state public participation procedures for hazardous waste facility permits).

440. Public hearings are required for zoning approvals and amendments, variances, conditional use permits, and most other land use approvals. William R. Klein, *Building Consensus*, *in* THE PRACTICE OF LOCAL GOVERNMENT PLANNING 423, 425 (3d ed. 2000); YOUNG, 4TH ED., *supra* note 311, § 22.17, at 45.

441. *See* Foster, *Public Participation*, *supra* note 439, at 202–03; *see also* NIMBY PRIMER, *supra* note 261, at 42 (observing that most zoning ordinances require special permit or variance applicants to notify the surrounding community); YOUNG, 4TH ED., *supra* note 311, § 22.17-21, at 45–62 (describing notice requirements in connection with land use zoning and permits).

442. For example, Connecticut requires that, once an application for an electricity generating plant is filed, the proponent must provide notice to local and nearby municipal decision-makers, "affected community groups," such as conservation organizations, and

permitting processes involve later and less extensive notice.[443] The EPA has established minimum notice requirements for state agencies administering environmental permits that do not require public notice until the agency has published its draft intent to approve or deny a permit.[444]

Once notice is provided, the public is given some opportunity to participate. Types of participation include written comments, informal workshops, public meetings, site visits, or other gatherings to obtain public input.[445] Some agencies also hold formal hearings.[446] During such hearings, the public is generally permitted a limited time for comments after the applicant makes an initial presentation.[447] Some of the formal hearing requirements are quite extensive.[448]

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abutting landowners through direct mail and newspaper notices. CONN. GEN. STAT. § 16-50*l*(b) (1958 & Supp. 2002).

443. *See* Foster, *Public Participation*, *supra* note 439, at 202–03 (noting that some states require notice only after a preliminary permit decision is made or a draft permit has been issued).

444. *See* EPA REFERENCE GUIDE, *supra* note 438, at § 3. While states are encouraged to do general outreach, such as legal advertisements, radio announcements, signs, and to maintain public information depositories, their mailing lists need only include people or organizations who have asked to be on the list. *Id.* §§ 3-4 to 3-6. The agency must, however, inform communities about the list by publishing a notice about it in newspapers and periodicals. *Id.* §§ 3-6 to 3-7.

445. *Id.* §§ 3-4 to 3-6. Hearings are generally held in connection with zoning-related determinations. *See* NIMBY PRIMER, *supra* note 261, at 43 (describing zoning hearing process).

446. *See* Foster, *Public Participation*, *supra* note 439, at 203–05.

447. *See id.* at 204–05.

448. For example, both the California Energy Commission and the Connecticut Siting Council require witnesses to petition for intervenor status in order to have their remarks considered a part of the formal record. *See* CAL. ENERGY COMM'N, ENERGY FACILITIES LICENSING PROCESS: A GUIDE TO PUBLIC PARTICIPATION (explaining process for becoming an intervenor in California energy facility siting), *available at* http://www.energy.ca.gov/siting/guide_license_process.html (last visited Feb. 28, 2003) (on file with the North Carolina Law Review); Presentation by Roberta Mendonca, Public Advisor, California Resources Agency, California Energy Commission (Apr. 15, 1999) (same), *available at* http://www.energy.ca.gov/sitingcases/1999-04-15_public_advisor.html (on file with the North Carolina Law Review); Public Participation Proceedings before the Connecticut Siting Council, *at* http://www.ct.gov/csc/cwp/view.asp?a=947&Q=247610&cscPNavCtr=|#31230 (last visited Feb. 28, 2003) (on file with the North Carolina Law Review) (explaining process for becoming an intervenor in Connecticut energy facility siting proceedings). The California Energy Commission requires intervenors to serve papers on other parties, to swear an oath, answer data requests from other parties, submit to cross-examination, and to file and serve post-hearing briefs when necessary. *See* ENERGY FACILITIES LICENSING PROCESS: A GUIDE TO PUBLIC PARTICIPATION, *supra*; Mendonca presentation, *supra*. The Connecticut Siting Council requires intervenors to respond to pre-hearing questions, submit to cross-examination, and provide twenty copies of all filings. *See* Public Participation Proceedings before the Connecticut Siting Council, *supra*.

Occasionally, public input takes the form of citizen advisory groups. These typically consist of stakeholders involved in a particular permit who meet with the agency issuing the permit.[449]

The widespread presence of community participation provisions creates the appearance that community views about proposed facilities play a critical role in facility siting. If that were so, then facility siting might truly respond to and reflect community preferences, to the extent possible. Despite this appearance, however, public participation provisions are generally *not* designed to give the public a substantive role in the decision at hand.

Community preferences must be heard, but most siting provisions do not require the siting decision-maker, whether it be the public siting entity or an agency granting a necessary permit, to respond to the preferences. According to a recent EPA guide for public involvement, public participation activities should consist of disseminating, gathering, and exchanging information.[450] These functions would serve to inform the public of the agency's actions and inform the agency of the public's views, but they do not otherwise provide a role for public input. Most provisions governing the siting process and providing for public participation do not tell the decision-maker what role, if any, community sentiment should play in the decision, much less require the assent of the community in which the LULU is to be placed.

Under NEPA, for example, public participation is a critical aspect of the statute.[451] But, NEPA does not impose a duty on the decision-maker to consider the views of the community, much less the environmental impacts identified in the environmental review process.[452] So long as the public is allowed to participate, the decision-maker is free to decide where and how to locate a facility, without regard to the sentiments expressed in the public participation process. Where an agency is considering whether to grant a pollution

449. *See* EPA REFERENCE GUIDE, *supra* note 438, § 4-23; Foster, *Public Participation*, *supra* note 439, at 205–06.

450. *See* EPA REFERENCE GUIDE, *supra* note 438, §§ 1-1 to 1-2.

451. *See* 42 U.S.C. § 4332(C) (2000) (requiring that all environmental impact statements be made available to the public); 40 C.F.R. § 1506.6 (2001) (providing regulations governing public involvement in the NEPA process).

452. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1066–68 (noting that NEPA's procedural requirements have not been effective in shaping decision-makers' substantive decisions); *supra* notes 50–51 and accompanying text (discussing the limits of procedural requirements); *see, e.g.*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam) (holding that NEPA imposes only procedural, not substantive, requirements on decision-makers).

permit, it is not clear that the environmental statutes, on their own, give the agency the authority to base its decision on the community's preference for or against the facility.[453] In these settings, the purpose of the public meetings is largely to create a forum for the exchange of technical information, not for obtaining public approval or disapproval.[454] The same is true in the context of hearings held on local land use decisions.[455]

The public may also have to contend with the strong role given project proponents in many siting processes. The initial review of an application for a zoning-related permit or an environmental permit normally involves only the applicant and the agency, not the community to be affected by the proposed permit.[456] Many important technical questions are discussed at this stage.[457] From the public's standpoint, significant, and potentially disputed, policy interpretations may therefore be decided before the local community has the chance to participate. Once these issues have been resolved between the agency and the applicant, it becomes more difficult for the agency to change its interpretation or position in response to later public input.[458] The application process, and the dynamic between agency and applicant, thus limits the role of public participation and, ultimately, community preferences, in permitting decisions. Thus, we cannot conclude that public participation provisions will ensure that the siting or permitting decisions that are made will correspond to community preferences. Nonetheless, when considered formally,

453. *See* Ann Bray, Comment, *Scientific Decision Making: A Barrier to Citizen Participation in Environmental Agency Decision Making*, 17 WM. MITCHELL L. REV. 1111, 1131 (noting, in a Minnesota study of agency responses to public participation, that agency officials preferred to deal with scientific issues and did not believe they could or should take other factors into consideration).

454. *See* John C. Duncan, Jr., *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J. ENVTL. L. 169, 212–13 (1999) (observing that public participation involves information exchange rather than actual participation in decision-making processes).

455. *See* YOUNG, 4TH ED., *supra* note 311, § 21.28, at 807 (observing that zoning-related decisions should not "be controlled or even unduly influenced by opinions and desires expressed by interested persons at public hearings" and that the purpose of such hearings is to obtain facts, not respond to preferences).

456. *See* DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 8.16, 8–31, 32 (2001). For example, the California Energy Commission encourages applicants to participate in meetings with its staff and other regulatory agencies prior to the submission of a formal application. *See* CAL. ENERGY COMM'N DEVELOPERS GUIDE, *supra* note 288, at 6. Once the application is submitted, the agency reviews the adequacy of the data before notifying the public of the application. *Id.* at 6, 8.

457. *See* SELMI & MANASTER, *supra* note 456, § 8:16, at 8–31.

458. *See* BENJAMIN DAVY, ESSENTIAL INJUSTICE: WHEN LEGAL INSTITUTIONS CANNOT RESOLVE ENVIRONMENTAL AND LAND USE DISPUTES 63–64 (1997).

public participation procedures appear to operate equally: even if communities are not satisfied through them, theoretically all communities would be equally unsatisfied.

In reality, however, public participation opportunities may be more relevant to substantive outcomes than they appear in theory. Commentators differ in their assessment about how influential participation provisions are likely to be. Some claim they are virtually meaningless.[459] Others claim that they do have some effect.[460] No entity likes to appear insensitive to public sentiment. Where public officials are making the decision, the public officials may have to face their electorate. That may create an incentive to be responsive to public sentiment against a LULU. Where regulatory agencies are making key decisions, the agencies do not have to worry about losing the next election, but they face their own political pressures.[461] Thus, as a practical matter, public participation processes may create a greater likelihood that siting decisions will respond to community preferences than one would expect considering the laws and regulations on their own.

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459. *See* Foster, *Public Participation*, *supra* note 439, at 204–05 (arguing that public hearings often have little influence on agency decisions); Bray, *supra* note 453, at 1137 (concluding, based on study of public participation process for hazardous waste facilities in Minnesota, that citizens rarely participate effectively in scientific decisions); *cf.* Gauna, *The Environmental Justice Misfit*, *supra* note 238, at 31–36 (suggesting that, to the extent administrative agencies are based upon the model of agency expertise, they are insensitive to public input).

460. *See* Arnold, *supra* note 356, at 60–63 (discussing potential of public participation provisions in NEPA and other permitting processes to advance community interests); Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 571 (1997) (observing potential of public participation provisions to empower communities and impact government decisions); *see also* Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, HARV. ENVTL. L. REV. 93, 129 (1999) (implying that NEPA's public participation process creates the potential for meaningful participation); Daniel A. Mazmanian & David Morell, *The "NIMBY" Syndrome: Facility Siting and the Failure of Democratic Discourse*, *in* ENVIRONMENTAL POLICY IN THE 1990S 233, 240 (Norman J. Vig & Michael E. Kraft, eds., 2d ed. 1994) (noting that "the wider arena for participation in siting decisions [has] vastly expanded the opportunities for local opposition" and that such opposition has been effective); Walter A. Rosenbaum, *The Politics of Public Participation in Hazardous Waste Management*, *in* THE POLITICS OF HAZARDOUS WASTE MANAGEMENT 176, 191–92 (James P. Lester & Ann O'M. Bowman eds., 1983) (noting that forty-six percent of (forty-two out of ninety-four) hazardous waste permit applications facing public opposition in Pennsylvania were "rejected, withdrawn, appealed, or otherwise delayed," and concluding that "public activism was clearly influential, if not decisive, in a great number of [these] permit determinations").

461. *See supra* note 417 and accompanying text (discussing political forces driving administrative agencies).

Assuming that public participation provisions do lead decision-makers to respond to community preferences to some extent, the next question becomes whether decision-makers will respond equally or, instead, respond more to the preferences of some than others. Here we return to the analysis considered in connection with the political process accompanying zoning or individual siting decisions. Just as the political process is likely to be, and to have been, skewed by the political influence of the neighborhoods in question,[462] an entity's response to public input in formal public participation forums is likely to sway with the degree of influence of the "public" in question.

Moreover, while public participation provisions ostensibly provide equal opportunity for public participation, they do not necessarily guarantee that all members of the public will participate equally.[463] Poor and minority communities may face greater obstacles, and hence have less influence, than other communities. They may receive less notice;[464] may, in light of fewer educational

462. *See supra* notes 415–16 and accompanying text.

463. These disparities arise even where elaborate public participation procedures have been developed to improve community participation. Luke Cole analyzed the implementation of California's Tanner Act, which mandates the creation of "local assessment committees" ("LAC"), including representatives of the public, to assist local governments considering hazardous waste facilities. *See* Luke W. Cole, *The Theory and Reality of Community-Based Environmental Decisionmaking: The Failure of California's Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY L.Q. 733, 736–39 (1999) (describing Tanner Act requirements). The process worked well where there was a relatively homogenous community, significant expertise among the participants, and where funds were provided for technical assistance. *Id.* at 740–42, 751 (describing Martinez experience). In another case, the local government subverted the process by picking only project supporters for the LAC, including only one Latino member on the LAC despite the plan to site the facility in a 95% Latino community, and holding meetings forty miles away from the targeted community. *Id.* at 743–45 (describing Kettleman City siting experience). In a third case, the county initially did not include any residents of the targeted community on the LAC, did not appoint any Latino members although the targeted community was over 50% Latino, and, for most of the history of the process, did not provide Spanish translation of the meetings although the majority of attendees did not speak English. *Id.* at 745–46 (describing Buttonwillow experience). The county suspended the LAC for over two years, and then gave only ten weeks for input. It refused to translate the relevant documents or provide any technical assistance for evaluating them. *Id.* at 746. Cole argues that one of the factors that appeared to explain the differences in experiences was race: the process worked well in a homogeneous community, Martinez. However, it worked very poorly where the relevant county decision-makers were white and the affected communities were Latino. *Id.* at 752.

464. Official documents for providing notice, like the Federal Register or its state equivalents, are unlikely to be read by community groups unfamiliar with the administrative process. Moreover, agencies are generally required to mail notice only to landowners, not to low-income renters. *See, e.g.*, CONNECTICUT SITING COUNCIL, APPLICATION GUIDE FOR AN ELECTRIC GENERATING FACILITY, *supra* note 288, § VII (stating that notice of a permit application must be sent to all abutting landowners). While

resources, face even higher barriers than other citizens in responding to highly technical agency documents;[465] may be unable to participate effectively due to language barriers;[466] may have less time to participate in agency proceedings;[467] and are likely to have fewer financial resources to engage in the process and hire experts to assist them in responding to an unwanted land use.[468]

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most siting processes allow community members to be placed on a mailing list, *see* EPA REFERENCE GUIDE, *supra* note 438, § 3-7, unsavvy residents may not be aware of this opportunity.

465. Documents associated with facility approval are frequently lengthy and written in technical and legal language that may be "incomprehensible to the average layperson." Foster, *Public Participation*, *supra* note 439, at 188. One analyst of NEPA found that environmental impact statements were "too long and technical" for the public to use. *See* James W. Spensley, *National Environmental Policy Act*, *in* ENVIRONMENTAL LAW HANDBOOK 483, 519 (Thomas F.P. Sullivan ed., Government Institutes 16th ed. 2001); *see also* Johnson, *supra* note 460, at 600 (observing that technical nature of the environmental review documents may impede effective participation by some communities).

466. *See* Reich, *supra* note 144, at 277 (noting that people of color may lack access to key permitting decisions due to language problems).

467. Hearings on large facilities can be quite extensive, and hearings held during the day are difficult for wage-earning individuals to attend. Where full participation in hearings is limited to formal intervenors, the obstacles increase. Residents may be intimidated by the application process, by the need to submit to cross-examination, and by other formal legal requirements. *See supra* note 448 (discussing intervention process).

468. *See generally* Foster, *Public Participation*, *supra* note 439, at 186 (observing that low-income communities and communities of color enter decision-making processes with fewer resources, "less time, less information, and less specialized knowledge concerning the legal, technical, and economic issues involved" than communities that are "less disadvantaged"). In order to comment effectively, communities must often hire technical consultants. *See* Gauna, *The Environmental Justice Misfit*, *supra* note 238, at 66 (observing that decision-makers give weight to commentators with expertise but ignore "community residents or dismiss[] them as hysterical"). A study of public participation in Minnesota found that agency staff were "skeptical about the accuracy of citizen scientific data" and that such data rarely influenced agency decisions. Bray, *supra* note 453, at 1128. Hiring experts, who are more likely to be listened to by decision-makers, is likely to be beyond the means of many poorer communities.

Even obtaining the documents may be beyond the means of some communities. For example, the Alabama Department of Environmental Management charged $0.40 per page for copies of documents, a cost that could easily accrue into hundreds of dollars. *See Environmental Protection Agency Cabinet Elevation—Environmental Equity Issues: Hearing before the Legislation and National Security Subcommittee of the Committee on Government Operations, House of Representatives*, 103d Cong. 150 (1993) (Testimony of Mrs. Kaye Kiker).

As the environmental justice movement develops, environmental or civil rights public interest groups could assist disadvantaged communities in overcoming these limitations. *See, e.g.*, Cole, *Empowerment as the Key*, *supra* note 163, at 673 n.236 (discussing the 1991 formation of the Environmental Poverty Law Working Group, created to provide expertise and resources for legal services offices undertaking environmental cases); Peggy M. Shepard, *Issues of Community Empowerment*, 21 FORDHAM URB. L.J. 739, 742 (1994) (discussing partnership between Harlem community organization and the Natural Resources Defense Council, a national environmental

If some groups use the public participation system more effectively than others, then, to the extent that public participation provisions do affect substantive siting decisions, one can expect that they will decrease siting where public participation exists and is effective and increase siting where there is less, or less effective, participation.[469] If the poor and minorities are less able to use public participation provisions effectively, then they are more likely to be subject to land uses that do not match their preferences.

In sum, public participation provisions do not necessarily ensure responsiveness to community preferences. They are usually designed to provide and obtain information, not to give public viewpoints a substantive role in siting decisions. Moreover, to the extent that siting decision-makers are responsive, differences in communities' political power and available resources may lead them to respond more to the views of wealthy members of the majority than those of the poor and minorities. While public participation processes have the potential to improve the responsiveness of siting decisions, we cannot be assured that, in their operation to date, they have helped achieve justice under the community preferences model.

F. The Land Use Siting Process and Political Justice

My central thesis is that distributive injustice is worthy of public policy attention, regardless of cause. But, as discussed above, if the cause of a distributional inequity is some form of political or social injustice, then that presents additional grounds for concern.[470] In this Section, I will briefly identify the political and social injustices that might underlie some facets of the land use siting process described in the previous Section.

As described above, certain objective factors, such as cheaper land values, may lead to disparate siting of LULUs in poor and minority neighborhoods, regardless of those neighborhoods' preferences. While that distributive inequity is worth considering in its own right, the reason why land costs are lower in some of these neighborhoods may present issues of social justice that provide

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organization). The movement is too recent, however, to have had a significant impact on low-income and minority public participation in many past siting processes.

469. *See supra* notes 315–17 and accompanying text (describing tendency to site facilities where there is likely to be less organized opposition); *supra* notes 430–32 and accompanying text (discussing theory that wealthy and non-minority communities' NIMBY leads to PIBBY—placement in black's backyards).

470. *See supra* notes 59–67 and accompanying text (describing distributive justice caused by political and social injustice).

additional grounds for concern. Land values are strongly influenced by how the "market" perceives the value of land. Land owned by minorities is frequently given a lower value than if that same land were owned by whites.[471] The negative value associated with minority-owned property is a consequence of racist assumptions.[472] Distributional disparities caused by lower land values are thus related, albeit indirectly, to the racist assumptions and history that lower the land's value in the first place.[473]

Similarly, that poor and minority neighborhoods end up receiving many social service LULUs is a legacy of the conditions that made the neighborhoods poor and segregated.[474] When one considers that the cause of the need for social services is rooted in racism and systemic economic problems, the distributional disparities become more troubling than they would be if considered on their own.

As discussed above, the subjectivity of certain siting factors, such as "suitability" and "quality of life impacts," leaves room for potential bias, including decision-making that violates political justice by favoring the interests of some over those of others. While the exercise of discretion might frequently be exercised in an even-handed fashion, discretion leaves open the possibility that political injustice could infuse even ostensibly "neutral" factors. Thus, in some cases, even the most neutral-seeming "objective factors" may be infected with political or social injustice that makes the resulting distributional disparities more troubling.

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471. *See* COLE & FOSTER, *supra* note 39, at 72; Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1059–60 (1998). Land costs vary for many reasons, including the presence of existing industrial uses. *See* MYTHS AND REALITIES, *supra* note 160, at 59. Here, I explore only the issue of differences in land values attributable to race, not the other factors that influence land value.

472. One could argue that minority neighborhoods have lower property values due not to racism, but to such problems as higher crime and lower educational achievement. But the poverty and discrimination that lead to crime and lower educational achievement are themselves a legacy of segregation and discrimination.

473. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1066 (noting that, if racism is a factor in lower land values, then including cost considerations in the siting process "would inject society's prejudice against the poor and minorities into the siting process"). *See generally* Foster, *Justice From the Ground Up*, *supra* note 35, at 800–01 (noting that siting processes incorporate factors that are determined by underlying structural inequalities).

474. *See, e.g.*, MASSEY & DENTON, *supra* note 389, at 17–59 (describing development of segregation); Nancy Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1996) (describing discriminatory private and public actions that have led to existing segregation); *see supra* notes 70–86 (describing existing segregation).

The problems of political and social injustice are even more apparent when one considers the political processes associated with the land use siting process. While many of the distributional problems associated with zoning do not implicate political justice concerns,[475] political justice issues are raised to the extent that current zoning processes benefit the powerful more than the powerless. Many of the potential concerns about power disparities in the zoning process are replicated in the context of individualized siting decisions and in responses to public participation opportunities. I am by no means arguing that all such decisions and processes are infected with political injustice; many may be perfectly fair. But the potential for community preferences to be met unequally due to political injustice is present.

And social justice issues are raised by the historical legacy of segregation, expulsive zoning, and other practices that led to much less protection of poor and minority communities. Due to the difficulty of changing land uses once they have been established, these past social injustices have an enduring impact on current distributional equity.

Inequities in meeting community preferences are thus caused, to some extent, by underlying political and social injustices. While the disparities are of concern regardless of cause, the presence of these inequities adds an additional basis for concern about the resulting distributive injustice.

G. Conclusion

The community preferences model suggests that disparities in the distribution of LULUs might be justified by differences in community preferences. Since it is not feasible to assess preferences directly, I have instead examined the *likelihood* that they are met by the land use siting process. The "market" in land use does not operate to meet preferences. The objective factors that govern the private market only incidentally respond to resident preferences, and often skew land uses to poor and minority neighborhoods regardless of preference. Although the political "markets," like zoning and individual siting or permit decisions, do respond to some resident preferences, they are not necessarily designed to serve preferences and, to the extent they

475. For example, the nonconforming use doctrine's limits on changing zoning to match current preferences may be justified by respect for existing property rights. At least considered on its own terms, it does not present an issue of political justice.

do so, they do not serve all communities' preferences equally.[476] Thus, the land use siting process does not lead to distributive justice under the community preferences model.

VII. ARE POST-SITING MARKET DYNAMICS LIKELY TO SATISFY COMMUNITY PREFERENCES EQUALLY?

A. The Argument that Resident Preferences Are Met Through Post-Siting Housing Market Dynamics

The story does not, however, end with the siting process. Even if the siting process were to frustrate resident preferences, it is possible that post-siting dynamics in the housing market could rectify disparities. Residents dissatisfied with a siting decision could move away; those who wanted to be near a particular land use could move toward it.[477] Professor Blais states that "members of the host community may express their preferences concerning residential proximity to environmentally sensitive land uses with their feet."[478] As noted above, Professor Blais uses the term "environmentally sensitive land uses" rather than "undesirable land uses" due to their potential desirability.[479]

Professor Blais argues that poor or minority residents may choose to live close to environmentally sensitive land uses due to the job opportunities and other benefits such uses provide.[480] By way of example, she describes how industrial development in Richmond, California, attracted residents during the last century.[481] In the 1940s, war-based production, in particular, attracted southern African-Americans seeking employment.[482] Although the Richmond example has been used by environmental justice advocates "to provide evidence of the injustice of the existing distribution of

476. Given that most of the public choice literature is highly skeptical of the government's ability to properly maximize preferences, this conclusion is not surprising. *See supra* note 238 (discussing skepticism of political markets expressed in public choice literature).

477. Professor Lynn Blais suggests that, after a siting decision has been made, "residents of these communities have made decisions either to remain in the community after the challenged use was sited, or . . . to migrate to a community playing host to such a land use." Blais, *supra* note 22, at 81.

478. *Id.* at 126; *see also* Whitehead & Block, *supra* note 235, at 84–86 (arguing that residents demonstrate their interest in purportedly undesirable land uses by choosing to move toward them).

479. *See* Blais, *supra* note 22, at 78 n.8.

480. *Id.* at 102.

481. *Id.* at 114–15.

482. *Id.* at 115.

environmentally sensitive land uses,"[483] Professor Blais concludes that "the fact that most of its residents are minorities appears to be directly attributable to individual choices to seek employment in a highly industrialized area."[484]

A critical issue is whether the housing market functions well enough to allow people to express their residential preferences in response to the siting of environmentally sensitive land uses. Professor Blais recognizes that in some instances defects in the housing market will impair residents' abilities to express their true preferences. The poor are limited in their choice of housing by their ability to pay,[485] and are more likely to "live near environmentally sensitive land uses because that property is less expensive."[486] Furthermore, she acknowledges that racial discrimination in the housing market reduces housing opportunities for minorities in comparison with non-minorities.[487] The conclusion she draws from these defects in the market, however, is that they may impair the ability of minorities and the poor to move *to* undesirable land uses. Minorities and the poor may be unable to express their preferences to live in areas offering employment and other benefits that derive from industrial land uses.[488] She thus suggests the possibility that defects in the post-siting housing market keep the concentrations of minorities and the poor near environmentally sensitive land uses artificially low rather than artificially high. Overall, however, she implies that the defects in the housing market are relatively insignificant and that there is sufficient residential mobility to correlate existing residential patterns with resident preferences.[489]

B. Critique of Reliance on Post-Siting Housing Dynamics

This Section will first look at the limited data on post-siting housing market mobility.[490] Because there are relatively few studies

483. *See id.* (citing Charles Lee, *Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities*, 14 VA. ENVTL. L.J. 571, 575 (1995), and Jane Kay, *California's Endangered Communities of Color*, *in* UNEQUAL PROTECTION, *supra* note 12, at 155, 165–68).

484. Blais, *supra* note 22, at 115.

485. *Id.* at 118.

486. *Id.*

487. *Id.* at 119–20.

488. *Id.*

489. *See id.* at 126–27.

490. The studies on post-siting housing market mobility were designed to determine whether current disparities were present at the time of siting decisions or, instead, arose subsequently. In large part, the purpose of these analyses has been to determine whether distributional inequity is caused by land use siting processes or by post-siting market

and none of them address the role of preferences, I then evaluate the housing market to determine the likelihood that it would allow for post-siting mobility leading to the equal satisfaction of preferences.

Although they have received considerable attention, relatively few studies on post-siting housing market mobility have been conducted.[491] Where done, they often encompass a limited geographic area. In addition, the subject matter is limited: most studies have addressed housing mobility following hazardous waste facility sitings, just one among many LULUs, and relatively rare events at that.[492]

Professor Been has conducted a highly elaborate national study comparing the demographics of communities hosting hazardous waste facilities at the time of siting with their current demographic make-up.[493] Overall, the evidence from that study did "not support the argument that market dynamics following the siting of a TSDF [a hazardous waste facility] change the racial, ethnic, or socioeconomic characteristics of host neighborhoods."[494]

Other studies, generally considering smaller geographic areas, have had mixed results. Some have shown some increase in the numbers of minorities and the poor subsequent to the siting of

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dynamics. The purpose here, in contrast, is simply to obtain a background understanding of the data in order to assess preference-motivated mobility.

491. *See* Pastor et al., *supra* note 276, at 4 (observing that little research has been done to determine the extent to which existing concentrations of toxic facilities in minority and poor communities are a consequence of minorities moving to the area after the initial siting).

492. *See* Oakes et al., *supra* note 278, at 143 (regarding the relative rareness of waste facility sitings).

493. Been & Gupta, *supra* note 163.

494. *Id.* at 29. The mean value of socioeconomic factors did decrease after facilities were sited, *id.* at 28, but multivariate analysis controlling for multiple variables did not correlate economic changes with facility sitings. *Id.* at 28–29. Changes in African-American and Hispanic percentages were not statistically significant, *id.* at 28, and, under the multivariate analysis, were not generally correlated with facility sitings. *Id.* at 29.

The SADRI researchers also evaluated demographic changes after the siting of hazardous waste facilities from 1970–1990. They found that the percentage of blacks did increase, but at a rate that was the same or less than in other industrial areas. Oakes et al., *supra* note 278, at 138. The authors therefore conclude that the siting of waste facilities does not trigger demographic shifts. *Id.* Their evidence, however, does appear to suggest that industrial development is likely to increase numbers of blacks, a finding that supports the market mobility hypothesis. The authors did additional statistical analyses that found that hazardous waste facility sitings had no impact on subsequent numbers of black or Hispanics, *id.* at 145, but it is not clear how this evidence relates to their earlier data. The authors ultimately conclude that the longitudinal changes they observe are "similar to those in other more industrial areas," *id.* at 147, suggesting, again, the possibility that they have observed increases in the number of minorities in industrial areas.

hazardous waste facilities or other undesirable land uses.[495] Others have shown decreases in the percentages of poor and minorities.[496] For most of the studies, it is not clear, however, whether the changes in demographics were the result of certain groups moving into the neighborhoods, other groups moving out, or a combination of the two. None of the studies address how demographic changes—or their absence—relate to actual community preferences.

Absent sufficient concrete evidence about demographic responses to LULU sitings and their relation to community preferences, this Article reviews the factors that are *likely* to influence housing mobility. In addition to assessing the likelihood that mobility would reflect LULU preferences generally, the Article addresses whether the housing market is likely to allow residents of differing economic classes and races to meet preferences equally.

Demographic stability following a land use siting decision, like that found in Professor Been's national study of housing dynamics following the siting of hazardous waste facilities,[497] does not prove that, on balance, the residents desired the facilities in question. Residents of the host community may have many reasons to stay, such as family, a close-knit community, schools, a beloved house or

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495. For example, a study of demographic shifts following the siting of hazardous waste facilities, landfills, and incinerators in the St. Louis area showed an increase in the percentage of minority residents following siting. *See* Lambert & Boerner, *supra* note 153, at 205. When inactive hazardous waste sites were included in the analysis, the study found that, between 1970 and 1990, poor and minority concentrations increased as well. *Id.* at 206–07. The study does not indicate whether the percentage shifts were caused by increasing numbers of poor and minority residents or by the departure of nonminority and wealthier residents.

Professor Been's study of the housing dynamics following the siting of landfills and mini-incinerators in Houston, Texas, found significant increases in the percentages of poor and minority residents following the sitings. Been, *Market Dynamics*, *supra* note 275, at 1403–05.

496. In a study of the demographic dynamics following the siting of four major southeastern hazardous waste landfills, Professor Been found that the percentage of African Americans declined "precipitously" in two cases and decreased somewhat, though not as significantly, in the other two. Been, *Market Dynamics*, *supra* note 275, at 1399. Relative poverty, median family income, and median housing value changed only marginally, with an increase in relative median housing value in two of the four counties. *Id.* at 1399–1400.

A study of post-siting market dynamics associated with the siting of high-capacity toxic facilities in Los Angeles County found that increasing numbers of minorities did not move into neighborhoods with hazardous facilities after they were sited; instead, a modest number of minorities moved out. Pastor et al., *supra* note 276, at 13, 15, 18; *see also id.*, at 4 (describing the Shaikh and Loomis study of post-siting market dynamics associated with the siting of stationary sources of air pollution in Denver, Colorado, that found "no evidence of minority move-in").

497. *See supra* note 494 and accompanying text.

garden, or a long history in the area, not to mention the realities of inertia.[498] To say that people "vote with their feet" suggests a mobility in response to an undesirable land use that is unrealistic in light of the many variables that affect the critical decision about where to live. That residents choose to stay in an area does not mean they are indifferent to the environmentally sensitive land use. While this factor may prevent preferences from being satisfied through the housing market, it at least applies equally across demographic groups.

Stability following a land use siting decision could also result from acknowledged defects in residential housing markets, such as wealth disparities and housing discrimination, rather than residents' satisfaction with the new land use. These defects do result in disparities in the market's ability to meet preferences. Those with fewer financial resources will clearly have fewer options if they desire to move. In addition, housing segregation, and associated housing discrimination, remain pervasive, resulting in fewer options for minorities seeking a new community.[499] Thus, to the extent the demographics of a poor or minority community remain stable after the siting of a LULU, it is possible that that stability is a consequence of being effectively trapped. Since the poor and minorities are more likely to experience these defects, it will be harder for them to have their preferences met than other residents.

Professor Blais's conclusion that these defects keep minorities and the poor from moving *to* environmentally sensitive land uses may be true in some cases, but overall seems somewhat strained.[500] While theoretically possible, it is important to recognize that discrimination and the realities of unequal wealth distribution could be leaving

498. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1019 (observing that individuals will not choose to move away from an undesired LULU if the costs of relocating, such as real estate transaction costs and psychological costs, are greater than the negative impact of the LULU).

499. *See, e.g.*, COLE & FOSTER, *supra* note 39, at 68–69 (discussing discrimination in the housing market; MASSEY & DENTON, *supra* note 389, at 96–109 (describing studies showing persistent racial housing discrimination); Been, *Market Dynamics*, *supra* note 275, at 1389–90 (describing effect of housing discrimination on the ability of people of color to live in high quality neighborhoods); *see also supra* note 64 and accompanying text (discussing discrimination-based restraints on housing mobility). Cole and Foster also observe that, even absent overt discrimination, minorities may be reluctant to move into white neighborhoods in which they are likely to be isolated. COLE & FOSTER, *supra* note 39, at 68.

500. It is ironic that the post-siting market dynamics analysis that Professor Blais uses to suggest that defects in the housing market may keep the poor and minorities from moving to environmentally sensitive land uses has generally been utilized to determine whether defects in the housing market lead to greater, rather than smaller, concentrations of the poor and minorities near undesirable land uses.

minorities and the poor trapped near land uses they would prefer to avoid. But even in those cases where her contention is true, the housing market is meeting preferences unequally.

As indicated above, some studies do show evidence of increasing concentrations of poor and minorities after undesirable land uses are sited.[501] The demographic shifts could be caused by the departure of wealthy and nonminority residents, who leave behind a higher concentration of poor and minority residents who are less able to move than their counterparts.[502] While such shifts show that the housing market allows some to meet their preferences—those who leave—the disparate demographic shift may imply that some are able to do so better than others. Thus, even where there is mobility, it may not operate to meet preferences equally.[503]

It is, however, possible that increasing concentrations of poor and minorities near new LULUs are a consequence of their movement toward the land uses.[504] That mobility may reflect their preferences for the land uses, and therefore lead to a greater satisfaction of distributive justice under the community preferences model. On the other hand, to the extent the LULU siting reduced property values, the mobility may reflect the desirability of cheaper housing or job opportunities, not a preference for the new land uses. The move may be made in spite of the land use.

Nonetheless, residents who choose to move to LULUs for the cheaper housing or jobs are receiving a net gain in having their preferences met from their preexisting circumstances; otherwise, one would presume that they would not have made the move. In that sense, then, this form of mobility could be seen as serving the

501. *See supra* note 495 and accompanying text.

502. *See* Been, *Market Dynamics*, *supra* note 275, at 1389–90 (noting that the siting of undesirable land uses is likely to lead to a downhill spiral that "will induce those who can leave the neighborhood—the least poor and those least subject to discrimination—to do so").

503. This is not to say that minorities are always unable to move. As indicated above, percentages of African Americans decreased following the siting of hazardous waste landfills in the south. *See supra* note 496 (describing the Been study). The data, however, do not make clear the full story behind the dynamics. Professor Been hypothesizes that African-American residents may have been displaced by white residents attracted to the jobs provided by these large facilities. *See* Been, *Market Dynamics*, *supra* note 275, at 1405–06; *see also infra* note 508 and accompanying text (discussing possible displacement of minority residents).

504. *See* Lambert & Boerner, *supra* note 153, at 206–07 (speculating that post-siting increases in the proportion of poor and minority residents near industrial and waste sites in St. Louis were the result of an influx of these groups).

community preferences model.[505] To the extent the model goes farther to assert that residents actually *desire* the land uses around them, however, then mobility prompted by cheaper housing or jobs, rather than by the undesirable land use, would not satisfy the model. However one views it, such mobility is not likely to operate equally. The cheaper housing or jobs are likely to be particularly desirable for minorities and the poor, who may have a more difficult time finding affordable housing or jobs than those with higher incomes who are not subject to discrimination.[506]

In some cases, percentages of poor and minorities have decreased, rather than increased, after a LULU has been sited.[507] These shifts may reflect the ability of these groups to meet their preferences by moving away from an undesirable facility. The data do not make clear the full story behind the dynamics, however. Professor Been hypothesizes that decreases in African-American residents after the siting of several landfills in the southeast may represent their displacement by white residents attracted to the jobs provided by these large facilities.[508] The incoming white residents might have their preferences met, but the departing residents may have theirs frustrated. Thus, this type of mobility may or may not be a reflection of the departing residents' preferences about the land uses.

The degree to which the housing market can be trusted to meet private preferences decreases when one assumes a starting baseline of disproportionate siting. If environmentally undesirable land uses are sited disproportionately in poor or minority neighborhoods, then the housing market is not starting from a neutral baseline. As discussed above, there has been some tendency, at least historically, to site undesirable facilities in minority or poor neighborhoods.[509] As Professor Blais concedes, the initial allocation of legal entitlements

505. *See* Whitehead & Block, *supra* note 235, at 86 (arguing that "[t]he fact that poor and black people are attracted to the higher paying jobs in the petroleum industry is very strong evidence that they regard the package of slightly dirtier air and higher wages as preferable to the slightly cleaner air and lower wages back where they came from"); *cf.* Blais, *supra* note 22, at 120 (suggesting that "residential proximity to environmentally sensitive land uses offers opportunities foreclosed by illegal and invidious discrimination [in the housing market]").

506. *See* Been, *Market Dynamics*, *supra* note 275, at 1389–90; Lambert & Boerner, *supra* note 153, at 202.

507. *See supra* note 496 (describing Been study of housing market dynamics following the siting of four southeastern hazardous waste facilities and Pastor study of housing market dynamics following the siting of hazardous facilities in Los Angeles).

508. *See* Been, *Market Dynamics*, *supra* note 275, at 1405–06.

509. *See supra* notes 275–81 and accompanying text.

can play an important role in the ability of the market to respond to private preferences.[510] If a person is not near undesirable land uses and prefers it that way, that person's preference against undesirable land uses is easy to fulfill. But if a person prefers not to be near undesirable land uses but finds him or herself nonetheless subject to them, the ability to act on that preference is much more difficult than in the situation where no action need be taken. Even if the housing market were completely fair, the cost of moving, in material, psychological, and social terms may exceed the benefit to be gained by distance from the undesirable land use. Where the housing market imposes constraints based on wealth and race, the cost and difficulty of moving in order to realize the preference against the undesirable land use becomes even greater. Where both the market in land uses and the housing market make it difficult for poor and minorities to act upon private preferences against proximity to undesirable land uses, it is difficult to have faith in the housing market as an adequate mechanism for meeting resident preferences.

It is, of course, possible that people move toward environmentally sensitive land uses whose benefits they desire. But the fact that past residents of a community might have gravitated toward land uses they found desirable does not tell us whether the land uses still meet the preferences of current residents. Professor Blais's description of African-American migration to Richmond's post-war thriving industry is a case in point. She implies that the disproportionate number of African Americans in Richmond arose by choice and represents the true expression of private preferences and the proper functioning of the market. But can we be so sure that current residents share the enthusiasm of their relatives who came to the area several generations earlier? Current Richmond residents have mobilized against the city's industrial pollution through the West County Toxics Coalition.[511] That earlier generations were willing to accept environmental problems in exchange for jobs does not mean that one can conclude that current residents are satisfied with current environmental conditions. Moreover, it is not clear that earlier generations understood the implications of the tradeoffs they were making. One of the features of the environmental justice movement is that it has sparked in minority communities a new awareness of environmental risks. The historic absence of that

510. Blais, *supra* note 22, at 95–96.

511. *See* Bullard, *supra* note 39, at 15, 29, 35–36 (discussing West County Toxics Coalition's efforts to reduce pollution in Richmond, California).

awareness should not be read to discount the articulated preferences against pollution expressed by a newly-informed community.

Thus, the housing market cannot solve inequities that might have been created by the land use siting process. There is no viable "market" whose invisible hand matches community preferences with available land uses. Although the market does have some mobility that allows some preferences to be met, preferences are met unequally, thus failing to achieve distributive justice under the community preferences model.

C. *The Housing Market and Political Justice*

This Section has focused on the housing market's failure to allow different residents to meet their preferences equally. My central thesis is that this distributional outcome is troubling in its own right. The concern is amplified, however, when one considers the apparent causes of the inequity. Just as the social and racial inequalities impacting land use siting processes make the distributional consequences of those processes more noteworthy,[512] inequities in housing markets make the resulting inequalities in the ability to meet preferences more problematic. For example, the fact that discrimination in the housing market may leave minority residents trapped near LULUs, while their white neighbors are able to depart,[513] exacerbates concern about an inequity that is independently troubling. Similarly, the fact that minority residents may be drawn to live near LULUs, because discrimination and patterns of segregation leave them with fewer options for affordable housing than others, renders the resulting distributional disparities particularly troubling.[514] The fact that social injustice plays a role in causing distributional disparities is not irrelevant.

CONCLUSION

This Article makes the case for addressing distributive justice. Distributive justice is critically important to the everyday lives of those who experience its injustice. The damage is felt regardless of whether the cause was intentional discrimination or the vagaries of the market. While discriminatory processes deserve attention as well, one should not have to point to a discriminatory process before

512. *See supra* Section VI.F (discussing the land use siting process and political justice).

513. *See supra* notes 64, 499 and accompanying text (describing discrimination in housing markets).

514. *See supra* note 504 and accompanying text.

addressing a distributively unjust outcome. And addressing discriminatory processes is a long, slow, endeavor. In the meantime, efforts should also be directed toward improving outcomes.

Distributive injustice is pervasive regardless of how we define "distributive justice." That injustice is relatively easy to see under the "equal division" model. Many studies indicate the inequitable distribution of LULUs in poor and minority neighborhoods. But it is also true under the "community preferences model," a model that has been raised to question the presence of distributive injustice and the need for efforts to combat it. While one could not, practically speaking, survey the nation to determine every resident's relative satisfaction of preferences, an analysis of the processes by which land uses and residents are distributed reveals that equal satisfaction is highly unlikely.

Objective factors, such as siting criteria established by facility proponents and government regulators, are generally not designed to meet community preferences. Moreover, some of these factors skew LULUs to poor and minority neighborhoods regardless of preference, suggesting that those neighborhoods are less likely to have their preferences met than other neighborhoods. While some of these factors are neutral in nature, others are tainted by potential social and political injustices that provide additional cause for concern.

At first glance, political processes, such as zoning and individual siting decisions, might seem more likely to meet community preferences, and meet them equally, than objective factors. But low-income and minority communities are not likely to wield as much influence as wealthier and nonminority communities, and are therefore less likely to have their preferences met. Zoning is also limited in its ability to respond to changing preferences. And a long history of segregation and discriminatory zoning has a significant on-going effect on current land use patterns that keeps those patterns from reflecting preferences equally. Nor are the explicit public participation provisions included in many environmental and land-use decision-making processes likely to make a significant difference. Many of these provisions are designed for the exchange of information, not to assess and respond to preferences. To the extent that they do lead decision-makers to be more responsive to preferences, inequalities in political influence are likely to result in inequalities in meeting articulated preferences. Thus, the land use siting process will not necessarily meet community preferences, and,

to the extent preferences are met, they are not likely to be met equally.

We have no assurance that the inequities created by the siting process have been cured by post-siting housing market dynamics that have redistributed people closer to the land uses they prefer. If anything, the housing market may have deepened the degree to which peoples' preferences are unequally met. When economic constraints and discrimination keep the poor and minorities from having the same mobility as wealthier and nonminority residents, they are less able to satisfy their preferences. While injustice will not characterize every individual case or every community, there is just as serious a likelihood of pervasive distributive injustice under the community preferences model as under the equal division model.

Advocates of the community preferences model fear government efforts to intervene in the siting process because they believe that the market functions more effectively than paternalistic government efforts. The government does not know people's preferences, and so will force people into situations they do not desire and interfere with their ability to lead their lives as they choose.[515] But the analysis above indicates that neither the land use siting process "market" nor the housing market serve to meet community preferences effectively, much less equally.[516] In light of the market's manifest failure to meet preferences, and meet them equally, the argument against government intervention loses force. If preferences are not met, then the goals of a market system are not met: social welfare is not maximized because individual preferences are not maximized. Liberty is not achieved if residents cannot realize preferences. The system is not efficient because land uses and residents are not well matched, and because the market is not proving to be an effective mechanism for providing the requisite matches. The government is not *per se* "interfering" with market values if the market is not achieving those values on its own.

Market advocates have also argued that, if the market has defects, then the defects themselves should be addressed, rather than

515. *See* LAMBERT ET AL., *supra* note 87, at 15–17 (arguing that government efforts to control siting interfere with communities' ability to choose facilities they may want); *see also supra* notes 233–34, 240 and accompanying text (describing arguments in favor of market approaches and against government intervention).

516. *See* Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1298–99 (1997) (observing, in the environmental justice context, the inequity in free economic markets, which favor those with money, knowledge, and skills over others).

attempting to interfere with the market to overcome the effects of the defects. For example, if discrimination in the housing market keeps minorities from having the same mobility as whites, then discrimination should be addressed, rather than attempting to control land use siting processes.[517] As elaborated above, however, ameliorating the deep and complex legacy of discrimination is a long-term and enormous undertaking that is unlikely to be resolved anytime soon.[518] While all efforts should be made to do so, it is appropriate for the government to address directly the consequences of this on-going legacy by improving the equity of land use distributions.

Thus, regardless of which model of distributive justice one adopts, and regardless of one's belief in the values a market system promotes, broad-scale governmental initiatives to improve equity are appropriate. There are, of course, risks inherent in any such effort. One confronts the possibility of "public failure" as well as "market failure."[519] And government efforts must be designed with the realities of existing institutions and markets in mind.[520] But in light of pervasive inequities, there is little to be gained by doing nothing. A misguided faith in the market should not stand in the way of initiatives to improve distributive equity.

This Article defines and establishes the importance of distributive justice and demonstrates the pervasiveness of distributive *in*justice regardless of how it is defined. This Article is designed to counter complacency that might arise if one were to adopt the community preferences model and then assume that the siting process or the housing market meet preferences adequately.

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517. *See, e.g.*, Blais, *supra* note 22, at 120 (arguing that, if minority residents find themselves pushed toward living near environmentally sensitive land uses due to housing discrimination, then "the appropriate remedy would be to continue the crusade against the discrimination" rather than control land use siting).

518. *See supra* notes 102–06 and accompanying text.

519. *See* Shepsle & Weingast, *supra* note 248.

520. For example, some have questioned whether remedies to the siting process would improve distributive justice in light of post-siting housing dynamics that could lead to an increase in the concentration of poor and minorities residents regardless of the initial siting demographics. *See* Been, *Market Dynamics*, *supra* note 275, at 1386 (suggesting that, if existing concentrations of poor and minorities around LULUs were caused by post-siting housing dynamics, then it is unclear "whether even an ideal siting system that ensured a perfectly fair initial distribution of LULUs would result in any long-term benefit to the poor or to people of color"). While this concern is worth bearing in mind, the absence of such a trend in several of the post-siting market dynamic studies, *see supra* notes 493–96 and accompanying text, suggests that increasing the fairness of initial siting decisions would likely have a positive impact on distributive justice.

To move forward in addressing distributive justice, much work remains to be done. Serious consideration needs to be given to whether one should adopt the equal division model, the community preferences model, or a combination of the two. Whichever model is chosen, serious definitional challenges are posed.[521] Deciding upon and defining the right model are, or course, only the initial steps. Concrete mechanisms for achieving distributive justice require analysis and development. There are existing initiatives to consider, like EPA's interpretation of Title VI,[522] or New York City regulations requiring all boroughs to accept their "fair share" of LULUs,[523] or unsuccessful legislative efforts proposed in the early 1990s.[524] In addition, some of the existing processes that fail to achieve distributive justice might be modified so as to do better. New factors could be included as objective criteria, zoning processes could be improved, public participation procedures could be more equitable and effective. And, although this Article argues that distributive justice is a serious issue deserving serious concern, those siting LULUs have legitimate needs, and good land use planning and environmental permitting must consider values in addition to equity. Any proposals for improving distributive justice will have to consider the role of distributive justice relative to such other values and concerns. This Article demonstrates why these future steps are ones worth taking.

521. *See supra* notes 149–51 and accompanying text (discussing definitional challenges posed by the equal division model); *supra* notes 242–43 and accompanying text (discussing definitional challenges posed by the community preferences model).

522. *See supra* note 19 (discussing EPA's recent interpretation of Title VI, which may impact state agencies' ability to issue permits if the permits would lead to a disparate impact).

523. *See* Been, *What's Fairness Got to Do with It?*, *supra* note 19, at 1005 (describing " 'fair share' criteria" adopted by New York City in 1990 designed to make sure that every borough within the city, and each neighborhood within each borough, "bear its fair share of undesirable land uses").

524. *See supra* note 19 (discussing the Environmental Justice Act of 1992, which would have limited siting toxic chemical facilities in the nation's most contaminated areas, and the Environmental Equal Rights Act of 1993, which would have protected poor or minority communities that were already environmentally disadvantaged from hazardous or solid waste facilities).