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## Environmental Justice and the Integration Ideal

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## ENVIRONMENTAL JUSTICE AND THE INTEGRATION IDEAL

RACHEL D. GODSIL\*

## INTRODUCTION

We are invited in this symposium to consider the paradox of the title: *Brown* is Dead? Long Live *Brown*! Is it possible to adhere to both declarations simultaneously? I cannot deny that there is evidence of *Brown*'s demise or at the very least ill health; though there is also recent evidence of its continuing vitality in both census data suggesting a decline in segregation and the Supreme Court's recent decision upholding affirmative action.<sup>1</sup> This essay has a different purpose, though. Here, I will argue that the disproportionate burden of pollution upon segregated communities of color compels the conclusion that there is a dire need to resuscitate *Brown* and press for implementation of its integrative promise.

In the 1980s, it became part of the national dialogue that neighborhoods comprised of predominantly Blacks and Latinos were more likely than white neighborhoods to be saturated with pollution. This finding electrified people living in such neighborhoods, as well as activists and academics, and resulted in the concept of "environmental racism."<sup>2</sup>

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1. See *infra* notes 12-16; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1 (1995). "The coining of the phrase 'environmental racism' is attributed to Dr. Benjamin Chavis, former Executive Director of the United Church of Christ Commission for Racial Justice, which released its landmark study documenting exposures to hazardous waste sites in 1987. [Dr. Chavis defines racism as] racial prejudice plus power. . . . Racism is more than just a personal attitude; it is the institutionalized form of that attitude." *Id.* at 87 n.1 (citing Benjamin F. Chavis, *Preface* in COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES* ix-x (1987)).

After two decades the issue that continues to bedevil activists, advocates, and scholars is how to respond to the disparate burden of environmental hazards. To date, the main responsive visions have been calls for more racially equitable distributions of environmental burdens and the empowerment of communities to better resist their fate.<sup>3</sup> Each of these visions presupposes racially segregated communities and posits that people of all races should share the burdens of pollution and waste. The primary contrary argument has been from those who deny that “environmental racism” exists as a problem.<sup>4</sup> According to this view, the disparate burden of environmental hazards upon people of color is simply a result of our market economy. Some of these market adherents contend that Blacks and Latinos bear a greater burden of environmental

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3. Luke Cole and Sheila Foster describe the institutionalization of environmental justice principles into federal policy as one lasting success of the environmental justice movement. But Cole and Foster view the transformative potential of environmental justice as more critical than specific government programs. See LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 161-64 (2001); See also Gauna, *supra* note 2; Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998); Deoohn Ferris, *New Public Policy Tools in the Grassroots Movement: The Washington Office on Environmental Justice*, 14 VA. ENVTL. L.J. 711 (1995); Deoohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L.J. 671 (1994). See, e.g., Robert D. Bullard, *Introduction to UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* xv, xvii (Robert D. Bullard ed., 1994):

Activists have targeted disparate enforcement, compliance, and policy formulation as they affect environmental and public health decision making on a wide range of issues, from toxic waste to urban transportation. . . .

These leaders are demanding a shared role in the decision-making processes that affect their communities. They want participatory democracy to work for them.

*Id.* at xvii. For a thoughtful critique of the ambiguity of the specific normative visions underlying the calls for equity, 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 (1993).

4. See, e.g., Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 85 (1996) (citing Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384-87 (1994); Christopher Boerner & Thomas Lambert, *Environmental Injustice*, 118 PUB. INT. 61, 65-68 (1995) [hereinafter Boerner & Lambert, *Environmental Injustice*]; Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 796 (1993)); Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REG. 195, 200-12 (1997) [hereinafter Lambert & Boerner, *Environmental Inequity*].

hazards because they have less power in the market and are thus apt to “come to the nuisance.”<sup>5</sup> Others suggest that communities comprised of Blacks and Latinos are what I will call “pollution magnets” because land is cheaper in these communities and because the communities are less able to attract other economic development and must accept polluting facilities.<sup>6</sup> Thus, market adherents suggest redistributing environmental burdens from areas currently comprised by people of color is both morally and ethically unnecessary since the current distribution does not necessarily reflect racism, but simply the distributional effects of our economy. In addition, they claim that any redistribution would be futile.<sup>7</sup> Any area containing polluting facilities will repel those able to leave (upper income whites) and attract those with no other options (lower income people of color). Therefore, redistribution will simply pollute more areas without resulting in a more racially equitable sharing of the burden. Instead, efforts should be directed at helping Blacks and Latinos gain more power in the market through eliminating employment or housing discrimination.

In this essay, I rebut the empirical underpinnings of the market adherents, but I also set forth the view that those of us con-

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5. Vicki Been has articulated the market theory, but also provided a nation-wide study that at least in one context – hazardous waste siting – contradicts the theory. See Been, *supra* note 4; 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 (1997) (findings of studies do not support the market claim). For additional refutation of the coming to the nuisance theory, see Manuel Pastor, Jr. et al., *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 *J. URB. AFF.* 1, 1-21 (2001). Notably, the study found that racial transition was an important predictor of the siting of toxic facilities. Professor Pastor suggests that communities comprised of multiple racial and ethnic groups possess less “social capital” – defined as formal and informal community organizations – than areas comprised of a single race and thus single-race communities may be better able to defeat an unwanted land use than an area with multiple racial and ethnic groups. See Manuel Pastor, POLITICAL ECONOMY RESEARCH INSTITUTE, *Building Social Capital to Protect Natural Capital: The Quest for Environmental Justice*, in *WORKING PAPER SERIES* No. 11, at 10 (Univ. of Mass. Amherst, 2001).

6. Some commentators have argued that current sitings in predominantly poor minority communities are not cause for concern because they are simply a result of “community preferences.” See, e.g., Blais, *supra* note 4, at 85 (citing Been, *supra* note 4, at 1384-87; Boerner & Lambert, *Environmental Injustice*, *supra* note 4, at 65-68; Lazarus, *supra* note 4, at 796); Lambert & Boerner, *Environmental Inequity*, *supra* note 4, at 200-12. But see Alice Kaswan, *Distributive Justice and the Environment*, 81 *N.C. L. REV.* 1031, 1037, 1081-86 (2003).

7. See *infra* notes 62-67.

cerned with environmental justice should focus more attention on housing integration as an ultimate goal. We must at least acknowledge that, in some instances, exit and integration may be the best option for residents of particularly environmentally beleaguered, racially segregated communities. This contention differs from much of my previous work. I, like many who have been working as environmental justice advocates, have been animated by a vision of community empowerment for residents of poor communities of color.<sup>8</sup> This vision tends to translate into the espousal of remedies aimed at preserving existing communities — “community preservationist” remedies. But I am concerned that I may have been reifying ‘the community’ at the expense of the individuals and families who may have distinct needs and aspirations. These needs and aspirations may in fact be better met by finding ways for people to leave their current communities than by seeking to overcome decades of pollution and neglect.<sup>9</sup>

I hope to begin a discussion of a broader normative dilemma: should we be striving for a racially segregated society in which environmental burdens are broadly distributed among different racial groups or a racially integrated society in which environmental burdens are highly concentrated? I admit a potentially unpopular preference for the latter. In this essay I will begin to sketch out why and suggest areas requiring further research. I acknowledge at the outset that my argument is partially rooted in my view that racial integration should be an ideal for our society apart from environmental concerns (though that argument is beyond the scope of this

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8. See, e.g., Rachel D. Godsil & James S. Freeman, *Jobs, Trees, and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. OF CONTEMP. LEGAL ISSUES 25 (1994) [hereinafter Godsil & Freeman, *Jobs, Trees and Autonomy*]; James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 FORDHAM URB. L.J. 547 (1994) [hereinafter Freeman & Godsil, *Question of Risk*].

9. Consistent with this view, in my most recent article, I propose what I call a “Resident’s Choice Rule” for nuisance disputes concerning proposed polluting facilities in already environmentally beleaguered communities. See Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L. J. 1807 (2004). This Rule would allow residents to decide by majority vote whether they preferred to enjoin a new facility or to receive damages in the form of the value of their home multiplied by a “segregation” multiplier to equal the value of a similar sized home in a neighborhood comprised primarily by racial minorities. *Id.*

essay).<sup>10</sup> I also admit that I am concerned that the vision of racially segregated communities bearing equal shares of pollution is politically impossible. I am convinced that the dynamics of racism would doom racially segregated communities of color to be the dominant group's dumping ground.<sup>11</sup> In other words, intractable as the issue of residential segregation has seemed, I think it may be essential as a remedy to environmental racism.

#### PART I: TWENTY-FIRST CENTURY SEGREGATION

The 2000 census results marked a decline in the residential segregation of Black Americans for the first time in twenty years.<sup>12</sup> Despite this more promising trend, Blacks and Latinos continue to experience extremely high levels of segregation — particularly in urban areas.<sup>13</sup> The statistics are stark: in more than twenty metropolitan areas, the vast majority of Blacks “live within large, contiguous settlements of densely inhabited neighborhoods that are packed tightly around the urban core. In plain terms, they live in

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10. Legal scholarship is beginning to witness a reinvigoration of racial integration as a democratic ideal. *See generally* SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004). For example, I share the view expressed by Michelle Adams that racial integration is crucial to “perfecting American democracy through the recognition of the dignity and worth of every person.” Michelle Adams, *Radical Integration* (unpublished manuscript, on file with author), at 16. John Powell has argued that integration will create a society “in which all individuals and groups have equal opportunities to fashion and participate in the democratic process.” *Id.* at 68 (quoting John Powell, *An “Integrated” Theory of Integrated Education* (The Civil Rights Project, Aug. 30, 2002)).

11. Vicki Been has exhaustively articulated the myriad ways in which wealthy white communities can thwart efforts to distribute environmental burdens in their neighborhoods. Been, *supra* note 3.

12. *See* EDWARD L. GLAESER & JACOB L. VIGDOR, THE BROOKINGS INST., *RACIAL SEGREGATION IN THE 2000 CENSUS: PROMISING NEWS* 3 (2001); Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, How. L.J., n.18 (forthcoming 2005) (citing LEWIS MUMFORD CTR., *ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND* (2001), *available at* <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/MumfordReport.pdf>); JOHN R. LOGAN, LEWIS MUMFORD CTR., *SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS AND HISPANICS IN METROPOLITAN AMERICA* (2002), *available at* [http://browns4.dyndns.org/cen2000\\_s4/SepUneq/SUReport/SURepPage1.htm](http://browns4.dyndns.org/cen2000_s4/SepUneq/SUReport/SURepPage1.htm); JOHN R. LOGAN ET AL., LEWIS MUMFORD CTR., *SEPARATING THE CHILDREN* (2001), *available at* [http://browns4.dyndns.org/cen2000\\_s4/Under18Pop/U18Preport/MumfordReport.pdf](http://browns4.dyndns.org/cen2000_s4/Under18Pop/U18Preport/MumfordReport.pdf) (discussing segregation of Black and white children).

13. GLAESER & VIGDOR, *supra* note 12, at 3.

ghettos.”<sup>14</sup> African Americans and Puerto Ricans are likely to live in segregated neighborhoods whether they live in urban areas or suburbs.<sup>15</sup> In northeast urban cities, Blacks and whites generally reside in deeply racially divided neighborhoods.<sup>16</sup>

In the United States in the beginning of the twenty-first century, “one’s neighborhood largely determines one’s achievements. Living in the wrong neighborhood often means a poor education, greater exposure to crime, fewer positive role models, and inadequate municipal services.”<sup>17</sup> As I have quoted elsewhere:

In a racially segregated city, any increase in Black poverty is necessarily confined to a small number of geographically isolated and racially homogenous neighborhoods. During times of recession, therefore, viable and economically stable black neighborhoods are transformed into areas of intense socioeconomic deprivation, where joblessness, welfare dependency and single parenthood

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14. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 77 (1993). Massey and Denton made this statement concerning 1980 census data, but the trend continued in the decades to follow. See Nancy A. Denton, *Are African Americans Still Hypersegregated?*, in *RESIDENTIAL APARTHEID: THE AMERICAN LEGACY* 49, 63 (Robert D. Bullard et al. eds., 1994) (addressing 1990 data).

15. Massey and Denton measure segregation according to five separate dimensions: unevenness, isolation, clustering (into a large contiguous enclave), concentration, and centralization. MASSEY & DENTON, *supra* note 14, at 74. Hypersegregation is the term Massey and Denton use to describe a pattern of segregation on at least four of the five dimensions. *Id.* They found Blacks to be hypersegregated in sixteen metropolitan cities in 1980. *Id.* Denton found twenty hypersegregated metropolitan areas using 1990 census data. See Denton, *supra* note 14, at 63; Douglas S. Massey, *The Residential Segregation of Blacks, Hispanics, and Asians: 1970 to 1990*, in *IMMIGRATION AND RACE: NEW CHALLENGES FOR AMERICAN DEMOCRACY* 44 (Gerald D. Jaynes ed., 1995) (finding that 40% of the total Black population in the United States lived in hypersegregated cities in 1990).

16. Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1608 (1995). In the South, degrees of segregation tend to be slightly less: while Blacks tend to live in defined neighborhoods, these neighborhoods are more likely to overlap with white neighborhoods. MASSEY & DENTON, *supra* note 14, at 77-78. There are exceptions to this tendency, however. Atlanta, Baltimore, and Dallas/Ft. Worth were all hypersegregated according to 1980 census data. *Id.* U.S. CENSUS BUREAU, *RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000* 59 (Aug. 2002).

17. Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1966 (2000).

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become the norm and where crime and social disorder are inextricably woven into the fabric of daily life.<sup>18</sup>

What became apparent only in the 1980s, however, is that segregation also leads to an increased burden of pollution.

A. *The Rise of the Environmental Justice Movement*

Few now dispute that “[e]nvironmental hazards are inequitably distributed in the United States, with poor people and people of color bearing a greater share of pollution than richer people and white people.”<sup>19</sup> This conclusion has been confirmed by scores of studies.<sup>20</sup> But the link of race and pollution only became a political issue in the mid-1980s, when activists and academics brought it to the fore. Although no one has studied whether the issue of environmental justice resulted from changing attitudes toward integration, it is perhaps not surprising that civil rights leaders began to pay attention to issues of pollution facing predominantly Black communities in the early 1980s. Noted scholars such as Alex Johnson have argued that the promise of integration that had been so bright in the 1960s and 1970s diminished in the 1980s.<sup>21</sup> Johnson contends that by 1980 it had become apparent that “the dream of integration had given way to the reality of increased segregation in

18. Godsil, *supra* note 9, at 1834. Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, U. PA. L. REV. 1203, 1210 (1995).

19. COLE & FOSTER, *supra* note 3, at 10. Even the most vociferous critics of the environmental justice movement acknowledge this fact. See, e.g., Dr. Michael S. Greve, *Environmental Justice or Political Opportunism?*, 9 ST. JOHN'S J. LEGAL COMMENT. 475, 476 (1994) (“[I]t is undeniably true that minorities and the poor live in less desirable environments than the wealthy.”).

20. COLE FOSTER, *supra* note 3, at 167-83 (an annotated bibliography of studies and articles that document and describe the disproportionate impact of environmental hazards by race and income); JAMES P. LESTER ET AL., ENVIRONMENTAL INJUSTICE IN THE UNITED STATES: MYTHS AND REALITIES 9-21 (2001). Sheila Foster and other environmental justice scholars caution against an exclusive focus upon the distribution of polluting facilities and argue that such a focus may obscure larger questions of political, economic, and social equality. See 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, 788-807 (1998). See also IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 16, 22-23 (1990). I agree entirely with Foster. But Alice Kaswan argues persuasively that distributional inequities alone should be sufficient to bring attention to a community's plight without other indicia of injustice. Kaswan, *supra* note 6, at 1054-56.

21. Johnson, *supra* note 16, at 1607.

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our major urban cities and the problems associated with such ghettos.”<sup>22</sup>

In the 1980s, national civil rights activists joined community members opposing the siting of a PCB-contaminated soil dump in the predominantly Black community of Afton, in Warren County, North Carolina.<sup>23</sup> The presence of well-known leaders drew national attention to what might otherwise have been a local dispute, and Walter Fauntroy of the Congressional Black Caucus was prompted to commission the United States General Accounting Office (“GAO”) to study the distribution of hazardous waste landfills

22. *Id.*

23. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 35 (1990) [hereinafter BULLARD, *DUMPING IN DIXIE*]:

Blacks did not launch a frontal assault on environmental problems affecting their communities until these issues were couched in a civil rights context beginning in the early 1980s. . . . Demonstrations and protests were triggered after Warren County, North Carolina, which is mostly black, was selected as the burial site for more than 32,000 cubic yards of soil contaminated with highly toxic PCBs (polychlorinated biphenyls). The soil had been illegally dumped along the roadways in fourteen North Carolina counties in 1978.

*Id.* See also Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASS-ROOTS* 15, 24-26 (Robert D. Bullard ed., 1993) [hereinafter *CONFRONTING ENVIRONMENTAL RACISM*]; COLE & FOSTER, *supra* note 3, at 19-34; LESTER ET AL., *supra* note 20, at 27-33; Been, *supra* note 3; Blais, *supra* note 4, at 75; Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 635-42 (1992) [hereinafter Cole, *Empowerment*]; Rachel D. Godsil, *Remediating Environmental Racism*, 90 *MICH. L. REV.* 394 (1991). For a discussion of the Warren County movement, see BULLARD, *DUMPING IN DIXIE*, *supra*, at 35-38 and DAVID E. NEWTON, *ENVIRONMENTAL JUSTICE: A REFERENCE HANDBOOK* 1-3 (1996). But the interplay between race and pollution was recognized decades before the emergence of a defined national movement. LESTER ET AL., *supra* note 20, at 25. For example, residents of a largely Black community in Houston held demonstrations to protest the siting of a city-owned garbage dump as early as 1967. COLE & FOSTER, *supra* note 3, at 19; LESTER ET AL., *supra* note 20, at 25. The largely Latino United Farm Workers began their organizing against pesticide poisoning in the 1960s. COLE & FOSTER, *supra* note 3, at 19-20. Indeed, in the early 1970s, as the mainstream environmental movement was growing, the recently created Council on Environmental Quality devoted a chapter of its second annual report to the environmental quality of inner cities. LESTER ET AL., *supra* note 20, at 25; See also Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 *YALE J. INT'L L.* 319, 327-28 (1993) [hereinafter Bullard, *Race and Environmental Justice*]; Cole, *Empowerment*, *supra*, at 637 n.58; Michele Tingling-Clemmons, *Twenty Years of Action by People of Color*, in *WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE AND ENVIRONMENT* 22, 22-23 (Dana Alston ed., 1990). *Contra* Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 *CONN. L. REV.* 719, 821 n.10 (1996). Professor Poirier notes that despite some brief discussions, there has not yet been a systematic exploration of the role of distributional and equity concerns in the early environmental movement.

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in the South.<sup>24</sup> This study found that three of four hazardous waste facilities in the South were located in predominantly Black communities.<sup>25</sup> Following the publicity surrounding the GAO study, academics began to undertake further studies of the distribution of environmental risks, and grassroots activists began to organize around both local disputes and wider environmental issues.<sup>26</sup> The culmination of early grassroots organizing was the First People of Color Environmental Leadership Summit (“the Summit”), held in Washington D.C., in October 1991.<sup>27</sup> The Summit resulted in “[u]nprecedented alliances . . . [and] conceptual linkages between seemingly different struggles, identifying common themes of racism and economic exploitation of people and land.”<sup>28</sup>

Following the Summit, activists and researchers continued to focus on establishing the empirical support for the claims that people of color and the poor are disproportionately burdened by varying forms of pollution.<sup>29</sup> The finding most surprising to many is that in studies analyzing only race and class correlations with environmental risk, “race is the most important predictor of risk.”<sup>30</sup> In other words, the issue was not simply the prevalence of poverty among minority group members. In the more multi-factor studies that included consideration of additional explanations for expo-

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24. BULLARD, DUMPING IN DIXIE, *supra* note 23, at 35-58.

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25. U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF CORRESPONDING COMMUNITIES 4 (1983).

26. BULLARD, DUMPING IN DIXIE, *supra* note 23, at 15-16; COLE & FOSTER, *supra* note 3, at 25; LESTER ET AL., *supra* note 20, at 28-29. Cole and Foster point out that academic studies finding a correlation between the placement of polluting facilities and race “dialectically” fueled and were fueled by the movement. COLE & FOSTER, *supra* note 3, at 25. Grassroots activists were aided by the studies when engaged in specific struggles, and, perhaps as importantly, realized that their individual struggles “were part of a national pattern.” *Id.* (quoting activist Mary Lou Mares). Conversely, the academics were guided and taught by the community residents. *Id.*

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27. See, e.g., COLE & FOSTER, *supra* note 3, at 31; Manuel Pastor, Political Economy Research Institute, *Environmental Justice: Reflections from the United States*, in CONFERENCE PAPER SERIES NO. 1 (Univ. of Mass. Amherst, Nov. 2002).

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28. COLE & FOSTER, *supra* note 3, at 32.

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29. See, e.g., *id.* at 167-83 (listing studies that document the disproportionate burden of pollution upon people of color and the poor, ranging from toxic waste dumps, air pollution, lead, and pesticides). LESTER ET AL., *supra* note 20, at 12-14 (listing the quantitative equity studies which test whether people of color are disproportionately exposed to environmental harm).

30. LESTER ET AL., *supra* note 20, at 14.

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sure to risk such as proximity to industry and manufacturing, political mobilization, the communities' overall environmental condition, and population and transit grids, race and class continue to constitute statistically significant predictors of risk — though not all studies found race to be the most important predictor.<sup>31</sup>

The most recent nationwide study of environmental risk consisted of a multi-level study of the role of race, class, and political mobilization and exposure to environmental risk as measured by the Toxic Release Index.<sup>32</sup> Based upon state, county, and city level analyses, researchers found that the percentage of Black and Latino residents to be a significant predictor of the presence of toxic releases.<sup>33</sup> They state that “as the percent black population increases, so does the level of two out of seven state-level environmental harms and four out of four city-level environmental harms.”<sup>34</sup> In addition, they found that outside of the South, increasing levels of the Black population are exposed to “higher levels of nitrogen oxide, carbon dioxide, and sulphur dioxide air pollutants and hazardous waste.”<sup>35</sup>

Several nationwide studies have documented the relationship between race and the presence of toxic wastes. In 1987, a nationwide study, *Toxic Waste and Race in the United States*, conducted by Charles Lee of the United Church of Christ's Commission for Racial Justice (“CRJ”), was published documenting the disproportionate<sup>36</sup> distribution of toxic waste<sup>37</sup> facilities in the United States.<sup>38</sup>

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31. *Id.* at 149-57.

32. *Id.*

33. *Id.* at 152-55.

34. *Id.* at 152.

35. *Id.*

36. Environmental burdens would be distributed “proportionately” if each racial or ethnic group were affected consonant with their proportion in the population at large; thus, the use of the term “disproportionate” means that a greater percentage of a particular racial or ethnic group is affected than one would expect given their proportion in the population at large. That a distribution is disproportionate does not in and of itself mean that the distribution is unfair or unjust. *See* Blais, *supra* note 4, at 80-81. But I adopt Alice Kaswan's cogent argument that under widely accepted theories of justice, the disproportionate distribution of environmental hazards is unjust. *See generally* Kaswan, *supra* note 6.

37. Toxic or hazardous waste is defined by the Environmental Protection Agency as “by-products of industrial production which present particularly troublesome health and environmental problems.” COLE & FOSTER, *supra* note 3, at 203 n.1 (quoting UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN

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The CRJ study measured the relationship between commercial hazardous waste sites and uncontrolled hazardous waste sites and the racial, socioeconomic, and ethnic makeup of communities in which they are located.<sup>39</sup> The study found that “race was consistently a more prominent factor in the location of commercial hazardous waste facilities than any other factor examined.”<sup>40</sup> In addition, the study found that three out of every five Blacks and Latinos live in communities with uncontrolled toxic waste sites<sup>41</sup> and that Blacks were over-represented in the population of cities with the highest numbers of uncontrolled toxic waste sites. This study was updated in 1994 using 1990 census data and researchers found even greater racial disparities in the concentration of people of color living in zip codes housing toxic waste sites.<sup>42</sup> While some have been critical of the CRJ methodology,<sup>43</sup> Professor Vicki Been conducted a nationwide study of the location of toxic waste facilities, using census tracts rather than zip codes, that confirmed that toxic waste facilities are disproportionately located near Black and Latino populations.<sup>44</sup>

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THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES xii (1987) [hereinafter TOXIC WASTES AND RACE].

38. See, e.g., COLE & FOSTER, *supra* note 3, at 55.

39. TOXIC WASTES AND RACE, *supra* note 37, at 9.

40. *Id.* at 15.

41. Uncontrolled toxic wastes are “closed and abandoned sites on the EPA’s list of sites which pose a present and potential threat to human health and the environment.” TOXIC WASTES AND RACE, *supra* note 37, at xii.

42. BENJAMIN A. GOLDMAN & LAURA J. FITTON, CTR. FOR POLICY ALTERNATIVES, NAACP & UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTE AND RACE REVISITED: AN UPDATE OF THE 1987 REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 1 (1994) (study found that from 1980 to 1993, the concentration of people of color in zip codes with toxic wastes increased from 25% to 31%).

43. See, e.g., Douglas L. Anderton et al., *Environmental Equity: Hazardous Waste Facilities: “Environmental Equity” Issues in Metropolitan Areas*, 18 EVALUATION REV. 123 (1994); Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229 (1994).

44. Been & Gupta, *supra* note 5. This study followed Been’s hypothesis that the cause of disproportionate land uses was not discriminatory siting patterns, but rather, the out-migration of whites and higher income people of color and the in-migration of poor whites and people of color who have fewer housing options. See Been, *supra* note 4.

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The findings of disparate burden of toxic waste were clearly the catalyst for the movement, but the chronic air quality problems in urban areas in the Northeast and California actually pose a greater threat to the immediate health and welfare of people of color.<sup>45</sup> Outdoor air pollution causes short-term adverse health effects and contributes to and aggravates chronic conditions such as asthma, lung cancer, and respiratory and cardiovascular diseases.<sup>46</sup> This is of particular concern to children and the elderly who are especially vulnerable to the effects of air pollution, including ozone and particulate matter: the Environmental Protection Agency ("EPA") states that short-term exposure to ozone can cause lung inflammation and that repeated exposure may "damage children's developing lungs and may lead to reduced lung function later in life."<sup>47</sup> Exposure to airborne particulate has been associated with aggravated asthma, bronchitis, heartbeat irregularities, and heart attacks.<sup>48</sup>

Equally troubling, Black and Latino children are disproportionately affected by lead poisoning.<sup>49</sup> While national blood lead levels are dropping, children of color have disproportionately high levels.<sup>50</sup> Recent studies suggest that even low levels of lead poisoning affect brain development, "lowering I.Q. scores and causing language and attention problems, as well as disturbing behavior."<sup>51</sup> Children with elevated lead levels are also more likely to engage in antisocial and criminal behavior.<sup>52</sup>

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45. EPA, *EPA's Draft Report on the Environment 2003*, at Chapter 1 — Cleaner Air, 1.1, 1-23.

46. *Id.*

47. *Id.*

48. *Id.*

49. Lazarus, *supra* note 4, at 815.

50. See Debra J. Brody et al., *Blood Lead Levels in U.S. Population*, 272 J. AM. MED. ASS'N. 277, 279 (1994); CTRS. FOR DISEASE CONTROL AND PREVENTION, *Preventing Lead Poisoning in Young Children* (1991) (lead poisoning much higher in African American communities than in white communities; rates vary with income levels).

51. See Jane E. Brody, *Even Low Lead Levels Pose Perils for Children*, N.Y. TIMES, Aug. 5, 2003, at F7. See also Paul Mushak, *The Landmark Needleman Study of Childhood Lead Poisoning: Scientific and Social Aftermath*, 2 PSR Q. 165 (1992); Herbert L. Needleman, *Childhood Lead Poisoning: Man-Made and Eradicable*, 2 PSR Q. 130 (1992) [hereinafter Needleman, *Childhood Lead Poisoning*]; Herbert L. Needleman et al., *Deficits in Psychologic and Classroom Performance of Children with Elevated Denture Lead Levels*, 300 NEW ENG. J. MED. 689 (1979) [hereinafter Needleman et al., *Deficits*].

52. Brody, *supra* note 51.

As I have argued elsewhere,<sup>53</sup> most studies to date are likely to have *underestimated* the disparate burden of environmental hazards. There have been few qualitative studies of the environment; rather, the studies tend to focus on easily measurable facilities such as commercial hazardous waste facilities and data reported to the EPA pursuant to the Toxic Release Inventory.<sup>54</sup> The few studies that are more qualitative support my view: Professors Morello-Frosch, Pastor, and Sadd have employed recent advances in air emissions inventories in their studies of air quality in Los Angeles to consider a broader range of outdoor air toxins and the effect of these emissions on human health.<sup>55</sup> They found that minorities “face more ambient air pollution and hence higher cancer risks at every income level.”<sup>56</sup>

The studies by Morello-Frosch, Pastor, and Sadd included emissions from large stationary sources, small-scale industry such as dry cleaners, auto body shops, and, most importantly, mobile sources.<sup>57</sup> The vast majority of other studies do not. By failing to include those facilities that most affect people’s daily experience of their environment, the studies are sorely lacking. In addition, most studies fail to measure the cumulative effect of polluting facilities and lack of municipal services faced by many poor, urban areas.

### B. *It’s the Market, Stupid*

While some will instinctively find the conditions facing communities of color deeply troubling, a more typical response to this evidence is to assume that the disparate distribution simply reflects “market dynamics” and thus there should be no government intervention. This response perhaps serves as evidence to support Pro-

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53. Godsil, *supra* note 9, at 1837.

54. See, e.g., FOSTER & COLE, *supra* note 3, at 167-83. There have been local studies that are more exhaustive – and as Vicki Been noted in 1993, the local studies tend to confirm the national findings. See Been, *supra* note 3, at 1012.

55. See, e.g., Morello-Frosch et al., *Environmental Justice and Southern California’s ‘Riskscape’: The Distribution of Air Toxics Exposures and Health Risks Among Diverse Communities*, 36 URB. AFF. REV. 551, 551-78 (2001); Pastor et al., *Who’s Minding the Kids? Pollution, Public Schools, and Environmental Justice in Los Angeles*, 83 SOC. SCI. Q. 263, 263-80 (2002).

56. Pastor, *supra* note 27, at 8 (describing studies listed above).

57. See Been & Gupta, *supra* note 5, at 9-10 (explaining the decision to study only commercial hazardous waste facilities).

fessor Bell's contention that *Brown* is indeed dead.<sup>58</sup> Rather than simply agreeing with Professor Bell, however, in this section, I will outline and seek to contest this response. There are two versions of the market dynamics critique: the "coming to the nuisance" claim<sup>59</sup> and what I will term the "pollution magnet" claim.<sup>60</sup> A third variant is the "community preferences" critique.<sup>61</sup> I will contend below that all three market critiques fail to support a do-nothing response to existing inequities.

The coming to the nuisance claim posits that polluting facilities were not disproportionately sited in minority communities at the outset; instead, "the 'dynamics of the housing and job markets' led people of color and the poor to . . . move to areas that surround waste facilities because those neighborhoods offered the cheapest available housing."<sup>62</sup> Specifically, the supposition is that polluting facilities cause people to become dissatisfied with the community and to leave. But whites find it easier to move away from the facility due to discrimination in the economic and housing markets, and thus, minorities who live near the facility stay and other minorities move into the less desirable housing left behind.

There are two replies to this argument. The short reply was provided by the nationwide study of the siting of commercial hazardous waste treatment storage and disposal facilities conducted by Vicki Been and Francis Gupta.<sup>63</sup> While Been was an early proponent of the market dynamics theory, she and Gupta concluded after completing the study that "[t]he analysis provides little support for the theory that market dynamics following the introduction of a . . . [hazardous waste facility] into a neighborhood might lead it to become poorer and increasingly populated by racial and ethnic mi-

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58. Derrick A. Bell, *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053 (2005).

59. While this position is most often associated with Vicki Been, see Been, *supra* note 4, at 1384; Been, *supra* note 3, at 1015, as is noted below, Been herself provided the study that disproved the thesis. Some commentators continue to adhere to the theory, however. See Lambert & Boerner, *Environmental Inequity*, *supra* note 4, at 202, 212.

60. I credit the term "pollution magnet" to my colleague Erik Lillquist who provided an insider's view of my attempt to critique market adherents.

61. See generally Blais, *supra* note 4.

62. COLE & FOSTER, *supra* note 3, at 60 (quoting Been, *supra* note 3, at 1016).

63. Been & Gupta, *supra* note 5, at 34.

norities.”<sup>64</sup> In other words, they did not find evidence that whites fled areas hosting hazardous waste sites, leaving them to be repopulated by Blacks and Latinos. Rather, Been and Gupta found that the current disproportionate correlation of hazardous waste facilities with Black communities likely reflected the siting of such facilities prior to 1970.<sup>65</sup> In addition, Been and Gupta found positive evidence to support the conclusion that Latinos are likely to populate communities sited for hazardous waste facilities.<sup>66</sup> In a study of toxic storage and disposal facility sitings within Los Angeles County, Manuel Pastor, Jim Sadd, and John Hipp found that “disproportionate siting matters more than disproportionate minority move-in; these authors also found, however, that “racial transition is also an important predictor of siting.”<sup>67</sup>

While these studies of hazardous waste sitings undercut the “coming to the nuisance” claim in the context of hazardous waste sites, there have been studies suggesting an increase in the number of poor people and minorities following the siting of polluting facilities.<sup>68</sup> In addition, there is significant anecdotal evidence to support this story. For example, in my most recent work, I explored the transformation of Camden, New Jersey from a fairly affluent, mainly white city to a highly polluted city comprised mainly of poor Blacks and Latinos.<sup>69</sup> The experience of Camden and cities like it suggest that poor Blacks and Latinos are sometimes forced to “come to the nuisance.” As common sense would dictate, when an area becomes saturated with polluting facilities, people who are able will often move away. Those without options will be forced to stay and others without options may also be forced to move in.<sup>70</sup>

The Camden story also supports the “pollution magnet” claim that once an area is saturated with pollution and houses only poor,

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64. *Id.* at 34.

65. *Id.* at 33.

66. *Id.*

67. Pastor et al., *supra* note 5, at 1.

68. See, e.g., Lambert & Boerner, *Environmental Inequity*, *supra* note 4, at 205 (studying demographic shifts following the siting of hazardous or polluting facilities in St. Louis and finding an increase in minorities). *But see* Kaswan, *supra* note 6, at 1138-39 (discussing studies and concluding the evidence supporting the coming to the nuisance theory is unclear).

69. Godsil, *supra* note 9, at 1822-32.

70. See Been, *supra* note 4, at 1389-90.



powerless Blacks and Latinos, it becomes a “magnet” for further polluting facilities because the land is cheap and the people living there lack the political power successfully to oppose the facility.

Some market adherents would argue that both the coming to the nuisance and the pollution magnet claims illustrate that the market is working. Polluting facilities are being sited where the land has the least value and where the people are least likely to protest. In response to the claims of unfairness keeping some people in these polluted areas, they will likely retort that people obviously consider themselves to be better off with the housing in places like Camden than being homeless or having to pay a greater portion of their income for housing elsewhere. But even market adherents should be willing to acknowledge that a market is only working if it is free from defects. If the market suffers from defects, then the notion that we as a society should not be concerned about the disproportionate burden of polluting facilities should become less palatable.<sup>71</sup>

As I have detailed in my previous work,<sup>72</sup> segregated communities are not simply the result of the invisible hand of the market. Rather, they were created by a combination of government and private racist practices. The federal government helped to create racially segregated Black and Latino inner cities and racially segregated white suburbs by subsidizing whites, but not Blacks and Latinos, to leave inner cities. White racism in the form of violence, racially restrictive covenants, and block busting contributed to keeping out even those Black and Latino families who had means. Federal loan practices also devalued the property in the cities by preventing investment in the cities through the mid-1960s. State and local governments used zoning to prevent polluting facilities and poor people from locating in suburbs. These practices kept

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71. See COLE & FOSTER, *supra* note 3, at 61. (“The implications of this alternative causal account is that where market dynamics produce current distributions, this fact renders the outcomes somehow more benign. This implication stands on its own terms, however, only if the market is unaffected by racial discrimination and other unjust processes.”). See also Kaswan, *supra* note 6, at 1143. (“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.”).

72. See Godsil, *supra* note 9, at 1838-50.

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poor people in inner cities, and allowed polluting facilities to locate near the racially segregated residential areas in inner cities. Federal environmental laws and their state analogues too have failed to focus adequate resources on protecting these same areas from the ill-effects of pollution and have regulated pollution in a way that has contributed to the concentration of pollution in certain areas. This is not the story of a well-functioning free market. Rather, poor Blacks and Latinos sometimes were forced to “come to the nuisance” because they were restricted from moving elsewhere. The neighborhoods in which they live became “pollution magnets” for the obvious reasons that they were zoned for industry and environmental laws did not restrict them, and also because the land had been so otherwise devalued.

The effect of this nexus of governmental practices is that industry has been allowed to externalize the costs of pollution onto the Black and Latino residents of inner cities. If zoning protected residential communities in inner cities as it does in suburbs, those wishing to purchase land for new facilities would have less land immediately available. This would make land in purely industrial areas more expensive. Industry would then either be required to pay higher costs of land, or negotiate to rezone areas not zoned for industry. If they sought to rezone areas that included residences, those residents would have much greater negotiating power to either prevent the siting or to be bought out. Residents in areas zoned for industry have little negotiating power to obtain either outcome.

Existing facilities are able to externalize costs even more effectively as a result of grandfathering provisions in the environmental laws. They spend significantly less on pollution prevention equipment because they are not subject to the pollution control laws. Until recently, if a facility wished to upgrade and increase emissions significantly, they were then subject to existing emissions laws, but even this requirement may be eliminated.<sup>73</sup>

These market defects have resulted in severe costs to residents in areas zoned for industry. These costs include pollution-related illnesses such as asthma, a greatly decreased quality of life due to

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73. See Katharine Q. Seelye, *Draft of Air Rule is Said to Exempt Many Old Plants*, N.Y. TIMES, Aug. 22, 2003, at A1.

the smells, noise, and sights of industry, and the net loss of property value. Moreover, an expressive harm is also created when a racially identifiable class of residents is forced to bear the costs of pollution when the rest of society reaps the benefits.<sup>74</sup> The individual residents often feel doubly victimized as they experience their illnesses as a direct result of societal racism.<sup>75</sup>

Some market adherents suggest that the proper response to the harms described above is not to redistribute environmental burdens from existing racially segregated communities, but to enforce fair housing and employment laws to ensure that mobility and job opportunities are not impeded by racism in the future.<sup>76</sup> While it is certainly necessary and laudable to increase enforcement of fair housing and employment laws, doing so will not address the market defects that have been identified, for the historical wrongs have created a phenomena akin to the “market lock-in model of discrimination” initially identified by Daria Roithmayr in the law school admissions context.<sup>77</sup>

In this work, Roithmayr borrows from economics and anti-trust theory to understand how natural market forces can create barriers to entry that make monopolies quite durable.<sup>78</sup> This happens when an “initial advantage or increase feeds back on itself to create an even larger advantage or increase.”<sup>79</sup> In the law school admissions context, Roithmayr contends that whites’ anticompetitive behavior during the segregation era has created a “locked-in, culturally specific network standard that favors whites.”<sup>80</sup> Thus, she claims that law school admissions are not, as posited, race neutral and efficient

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74. See generally Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 247-48 (2003).

75. See BULLARD, *CONFRONTING ENVIRONMENTAL RACISM*, *supra* note 23, at 8. “It is no mystery that environmental justice groups discussed in this volume are attacking the institutions they see providing advantages and privileges to whites while perpetuating segregation, underdevelopment, disenfranchisement, and the poisoning (some would use the term genocide) of their constituents.” *Id.*

76. See Blais, *supra* note 4, at 118-20; Been, *supra* note 3, at 1018-24; Lambert & Boerner, *Environmental Inequity*, *supra* note 4, at 197; Greve, *supra* note 19, at 477.

77. Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000).

78. *Id.* at 732.

79. *Id.*

80. *Id.* at 734.

products of the market, but rather are the products of earlier racist (anti-competitive) behavior of whites.<sup>81</sup>

The housing market is another example in which Blacks and Latinos face barriers to entry resulting from earlier racist or anti-competitive behavior.<sup>82</sup> Even though white residential areas in cities or suburbs have now lowered their express barriers to entry, the earlier actions created a significant “feed-back” loop in which the initial advantage continues to turn into an even larger advantage. Earlier anti-competitive behavior, including federal government disinvestment in the early decades of the twentieth century, expulsive zoning, and inadequate environmental protection, dramatically devalued property in inner cities.<sup>83</sup> Concurrently, the investment in suburbs, exclusionary zoning, and greater environmental protection increased property values in white suburbs while also ensuring that Blacks and Latinos lacked access to these resources. The present disconnect between property values in the inner cities and those in the suburbs makes it very difficult for many people to leave the inner cities and purchase homes in the suburbs. Thus, even if housing discrimination is no longer a problem (in other words, whites are no longer engaging in anti-competitive behavior), there remain significant barriers to entry.

Market adherents may respond that ending employment discrimination should allow Blacks and Latinos to find employment, which in turn will allow them greater resources and mobility options. Even if employment discrimination and housing discrimination are no longer significant barriers, however, if the current conditions remain constant, suburban whites will continue to gain advantage through the feed-back loop even without engaging in any anti-competitive or racist behavior. Thus, even market adherents should agree that the workings of the market alone will not ameliorate existing disparities and that some more broad-scale intervention will be required.

Die-hard market adherents may respond that the call for intervention *presumes* that community residents object to the current dis-

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81. *Id.* at 735.

82. For an interesting discussion of the barriers to entry to housing faced by people of color, see Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1117-22, 1144-53 (2002).

83. See Godsil, *supra* note 9, at 1838-71.

tribution of pollution. This presumption, they claim, is without basis. Rather, according to the “community preference” critique, community residents have exercised their preferences already, either through elected representatives who favored the facility or by choosing not to exit. According to the argument, developers seeking to build a polluting facility<sup>84</sup> may in fact prefer to locate in a “poor and/or minority communit[y]” because such a community will have no “carrots to dangle before the desired industry” except “the willingness to accept risk.”<sup>85</sup> This willingness to accept risk is simply a rational decision in light of the “constrained positions from which they enter the market and/or the political process.”<sup>86</sup> In sum, we should not interfere with the current distribution of polluting facilities because:

At some point, and at some level, representatives of host communities make political and market-based determinations to permit the challenged sitings. In addition, the residents of these communities have made decisions either to remain in the community after the challenged use was sited, or, in many cases, to migrate to a community playing host to such a land use. In such circumstances, it is not clear why these preferences are more suspect than the myriad of others that emerge from the political and market system.<sup>87</sup>

The argument is that a poor and minority community may rationally choose<sup>88</sup> to accept the risk of polluting facilities because they

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84. Blais prefers the term “environmentally sensitive” land use because she “questions the accuracy of the assumption that all of the challenged land uses are undesirable in every locality (particularly in the community in which they are located). Blais, *supra* note 4, at 78 n.8. While her sensitivity to language may be laudable to some, I will continue to refer to such facilities as “polluting facilities” because this Article questions whether any community with actual choices would ever voluntarily choose a polluting facility over some other sort of economic development. *See id.* (comparing poor and minority community’s choice of whether to host an “environmentally sensitive” land use with an affluent white community’s decision to exchange tax concessions to host high tech industrial enterprises).

85. Blais, *supra* note 4, at 105.

86. *Id.* at 81.

87. *Id.*

88. Blais’ reliance upon the supposed “choices” of residents of environmentally beleaguered cities is overly facile. For a thoughtful discussion of consent theory, see generally, DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989).

have few other choices if they want jobs and municipal services. Because it may be rational to value jobs and municipal services such as education and police protection more than environmental quality, any attempt to “interfere” with that choice — either by prohibiting concentrations of facilities or by empowering the dissenters within the community — will leave the community worse off.<sup>89</sup>

This account accepts as a given certain “constraints” faced by communities of color, such as lower land values, inadequate municipal services, and minimal economic opportunities. This account assumes away any potential limitations such communities may face in the political process: “scholars expressing concern about preferences revealed through the representative process must do more than simply invoke the once compelling complaint of underrepresentation of minorities.”<sup>90</sup> It is equally unimpressed by claims about a lack of public participation: “In reality, public participation at the state and local level has not been a significant problem for many years.”<sup>91</sup> Finally, it is claimed, anyone who disagrees with a decision to site a polluting facility may simply express their preferences with their feet.<sup>92</sup>

There is scant support for the assumptions underlying the community preference critique.<sup>93</sup> Rather, as Alice Kaswan details at length in her recent article responding to the “community preference” critique, actual 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 re-

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89. Blais, *supra* note 4, at 100-04.

90. *Id.* at 123-24. Blais acknowledges the contention advanced by public choice theorists that rent seeking behavior by powerful interest groups may bedevil attempts by less powerful minority groups to be heard in the political process. *Id.* at 127. She claims, however, that the “experience of successful minority organization around environmental equity issues belies this assertion.” *Id.* Curiously, none of her examples reflect a success resulting from the political process. Blais’ first example is the attempt to stop the siting of the PCB facility in Warren County, which as described *supra*, failed. *See id.* at 78. In her next two examples, minority communities were also unsuccessful in preventing the siting of new polluting facilities though the community “extract[ed] concessions involving capacity reductions and emission controls.” *Id.* at 128. The only successful opposition was in West Dallas — where the community prevailed as the result of a lawsuit. *Id.* at 128 n.223.

91. *Id.* at 126.

92. *Id.*

93. *See* Kaswan, *supra* note 6, at 1092-1133.

sidents.”<sup>94</sup> Community preference adherents may argue that the residents are simply “losers” in the political process, who may vote with their feet, or involve themselves in the political process to ensure better representation in the future.

As to the first response, it is clear that the persistence of housing discrimination and existing economic disparities prevent minorities and the poor from exercising their post-siting preferences with the ease suggested by the community preference critique.<sup>95</sup> As to the second, it is precisely when a certain group is always the “loser” in the political process that integrity of the political process becomes suspect.

Even discounting the problematic underpinnings of community preference theory, this critique might be convincing if it were true that redistributive remedies “would require communities to give up benefits (e.g., jobs, tax revenues, etc.) that may outweigh the value of the redistributed resource” thus entailing “a net loss for the recipients.”<sup>96</sup> In some instances, this argument has merit. For example, the literature suggests that some Native American nations have negotiated for hazardous waste facilities in order to obtain much needed resources and have considered paternalistic environmentalists who tried to oppose their decision.<sup>97</sup> Sadly, though, it is atypical for urban areas saturated with polluting facilities to gain any notable benefits from new facilities.<sup>98</sup> As I have discussed elsewhere, new industries often receive tax abatements for locating in economically distressed areas and rarely provide substantial numbers of entry-level jobs.<sup>99</sup> In any event, that potential must be determined contextually. It certainly does not support the blanket claim

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94. *Id.* at 1040.

95. *Id.* at 1138-44. While Blais acknowledges the existence of housing discrimination and the lack of mobility it causes, she nonetheless claims that the decision not to leave a polluted community “reveals something about the relationship between the perceived burdens imposed by a challenged facility and the benefits derived from remaining in the community.” Blais, *supra* note 4, at 127.

96. Blais, *supra* note 4, at 135.

97. Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933 (1992) (cited in CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY AND REGULATION 422 (2002)).

98. See generally Godsil, *supra* note 9.

99. *Id.* at 1873.

that the focus on the distribution of polluting facilities is “misdirected.”<sup>100</sup> But as the next Part will explore, the assumption that the “remedy” to environmental racism is to spread noxious facilities to all communities may be neither politically realistic nor normatively appealing.

## PART II: RECONSIDERING REMEDIES — COMMUNITY PRESERVATION OR INTEGRATION?

This Part will begin with the premise that we should be deeply troubled by the link between race and pollution. Our challenge is to determine how to respond. At present, most of us in the field have been seeking to construct a vision of an “equitable” distribution of polluting facilities as among white communities and communities of color.<sup>101</sup> With a few notable exceptions such as Robert Bullard, we have not focused on the underlying issue of housing segregation. Concurrently, housing scholars have engaged in debates about housing segregation which have tended to ignore the risks of pollution. I hope this essay is the beginning of a conversation between scholars in the fields.

### A. *Community Empowerment*

Most activists, advocates, and scholars addressing environmental justice issues propose as remedies various means of protecting

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100. Blais, *supra* note 4, at 93-94. Blais also claims that environmental justice scholars' emphasis on distributional equity prevent them from claiming that they are seeking to enhance health and safety since what is not healthy and safe for poor and minorities is not safe for white and wealthy. *Id.* at 135. But, this argument again ignores several layers of reality. First, and most simply, environmental justice scholars do argue for enhanced health and safety. Second, the focus on distribution often reflects failure of environmental command and control regimes to consider harms of cumulative impact – thus, even where emission limits are adequate if one facility is present, it may not be if multiple. Third, Blais seems not to understand the expressive harm if members of one racial group bear burdens while benefits are enjoyed by the majority. *See generally* Godsil, *supra* note 74.

101. This has proved more challenging than it would seem at first blush. As early as 1993, Vicki Been critiqued environmental justice activists and scholars for failing to set forth a clear normative theory of justice. Been, *supra* note 3, at 80. While many environmental justice scholars have engaged in highly sophisticated work and have set forth a dialogic vision of what constitutes environmental justice. *See, e.g.*, Foster, *supra* note 20; Kaswan, *supra* note 6, no one has yet published a response to Been's exhaustive critiques of the different normative approaches.



and preserving existing communities of color.<sup>102</sup> This protection or preservation takes various forms: preventing further siting of noxious facilities;<sup>103</sup> abating lead paint;<sup>104</sup> equal enforcement of environmental laws;<sup>105</sup> and perhaps most fundamentally, a transformative politics that will ensure that community members have an actual voice in the local decision-making processes.<sup>106</sup>

The debate within the environmental justice literature has been whether communities will best be protected by litigation,<sup>107</sup> new legislation or regulation,<sup>108</sup> or the political power garnered by grassroots organizing.<sup>109</sup> The vision that seems to animate environ-

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102. See, e.g., Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 *FORDHAM URB. L.J.* 523 (1994); Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495 (1994); Gauna, *supra* note 2; Naikang Tsao, *Ameliorating Environmental Racism: A Citizens' Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 *N.Y.U. L. REV.* 366, 379-405 (1992) (describing state statutory, common law, and constitutional litigation remedies).

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103. Tsao, *supra* note 102, at 394.

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104. See Brody et al., *supra* note 50; CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 50; Brody, *supra* note 51; Mushak, *supra* note 51; Needleman, *Childhood Lead Poisoning*, *supra* note 51; Needleman et al., *Deficits*, *supra* note 51.

105. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, *NAT'L L.J.*, at S1 (Sept. 21, 1992).

106. COLE & FOSTER, *supra* note 3, at 102. As Cole and Foster argue, a primary goal of the environmental justice movement is "to redefine existing power relations, to unsettle cultural assumptions about race and class, and to create new possibilities for historically marginalized communities in local decision-making processes." *Id.* at 105.

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107. Few have argued that litigation should be the only or main method used for environmental justice struggles, but many articles have focused on which litigation remedies would best serve communities in environmental justice disputes. See, e.g., Cole, *supra* note 102, at 526-30 (recommending a focus on environmental laws rather than civil rights laws); Gerrard, *supra* note 102, at 522 (discussing the use of environmental siting laws in environmental justice disputes); Gauna, *supra* note 2, at 39-57 (discussing the use of environmental citizen suits); Kaswan, *supra* note 6, at 1055-58 (noting that environmental siting laws may provide information that can assist communities in challenges to siting under the Equal Protection Clause); Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 *ARIZ. L. REV.* 1219, 1277-87 (1998) (discussing a new formulation of intent that would assist communities engaged in a challenge to a siting under the Equal Protection Clause); Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 *WM. & MARY ENVTL. L. & POL'Y REV.* 223, 239-51 (1995) (discussing use of anticipatory nuisance doctrine in siting disputes).

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108. See, e.g., Godsil, *supra* note 23, at 421-26 (proposing federal environmental justice legislation).

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109. Luke Cole is perhaps best known for the contention that law suits may be a mistake in environmental justice disputes on the ground that they take the struggle out of the streets and into the courts where industry has the advantage. See, e.g., COLE &

mental justice advocates and scholars (myself included) is of existing communities transforming themselves from quiescent recipients to empowered agents.<sup>110</sup> This is a powerful vision and certainly should not be discarded lightly. But it does not address segregation as a root cause of environmental injustices. Nor does it respond to the host of other ills attributed to segregation such as joblessness, poor education,<sup>111</sup> high crime rates, and the social and cultural isolation that “lead[ ] to political marginalization.”<sup>112</sup>

Environmental justice advocates and scholars have documented the role of segregation in leading to environmental racism and injustice,<sup>113</sup> yet most have not focused on integration as a remedy. Without discussing specific integrationist remedies, Cole and Foster note the difficulty of integration, mentioning current white aversion to integrated neighborhoods, and the aversion of some

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FOSTER, *supra* note 3, at 129-30; Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687 (1995); Cole, *Empowerment*, *supra* note 23. Cole acknowledges that civil rights law suits may be potent politically in the context of local fights, COLE & FOSTER, *supra* note 3, at 130, and has acknowledged that environmental laws may provide the bases for community empowerment. Cole, *Empowerment*, *supra* note 23, at 654-59. As counsel, Cole has also been crucial to many communities who have chosen to engage in legal challenges. For example, Cole is a co-counsel in the suit challenging St. Lawrence Cement.

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110. COLE & FOSTER, *supra* note 3, at 156-65. In previous work, I have shared this vision. See generally Freeman & Godsil, *Question of Risk*, *supra* note 8; Godsil & Freeman, *Jobs, Trees and Autonomy*, *supra* note 8. In my experience as a environmental justice litigator with the NAACP Legal Defense and Educational Fund, I had the honor of representing several communities that underwent the sort of transformative political experience celebrated by Cole and Foster. See Rachel Godsil, *The Street, the Courts, the Legislature and the Press: Where Environmental Struggles Happen*, in CHALLENGES TO EQUALITY: POVERTY AND RACE IN AMERICA 219 (Chester Hartman ed., 2001). Charles Barron, a community leader I worked with closely, has subsequently been elected to the New York City Council, where he has been an outspoken leader. See Vivian S. Toy, *Brooklyn Councilman to Run for Mayor in '05*, N.Y. TIMES, Jan. 20, 2004, at B3. Indeed, he attempted to run for mayor of New York City in 2004, though he exited the race to support another Black candidate. See Winnie Hu, *Councilman Expects to Quit Democratic Mayoral Race*, N.Y. TIMES, Feb. 9, 2005, at B6.

111. See generally GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996); *THE EDUCATION TRUST, EDUCATION WATCH: THE 1996 EDUCATION TRUST STATE AND NATIONAL DATA BOOK* 6-8 (1996).

112. COLE & FOSTER, *supra* note 3, at 69-70.

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113. Robert Bullard has been most prolific on the link between environmental racism and segregation. See, e.g., *CONFRONTING ENVIRONMENTAL RACISM*, *supra* note 23; BULLARD, *DUMPING IN DIXIE*, *supra* note 23; Bullard, *supra* note 3; Bullard, *Race and Environmental Justice*, *supra* note 23; Massey, *supra* note 15.

Blacks to living in all white neighborhoods.<sup>114</sup> But because residential segregation leads to the very political and economic conditions that cause environmental injustice, integrationist remedies must be part of the dialogue.

The only prominent environmental justice scholar to call specifically for integration (or at least an end to segregation) as a remedy to environmental racism is Robert Bullard, who has argued:

Institutionalized racism created the urban ghettos and accompanying housing, economic and environmental ills that afflict their inhabitants . . . . Southern and “Sunbelt” inner cities . . . are well on their way to duplicating the fiscal and infrastructural problems of urban centers . . . i.e., unemployment, dependency, limited education, crowded housing, and poverty . . . . The time is long overdue for the nation to turn its attention to the problems of housing discrimination, residential segregation, neighborhood disinvestment, redlining, and environmental racism – all of which contribute to urban decline.<sup>115</sup>

Bullard does not address, however, tensions between remedies to the societal ills he addresses, and therefore does not suggest ways to resolve those tensions.

### *B. Tensions between Integration and Community Preservation*

In the housing literature, scholars have long debated the competing philosophies of community preservation and integration.<sup>116</sup> Critical race scholars seek an emphasis on “spatial equality” rather

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114. COLE & FOSTER, *supra* note 3, at 68.

115. Massey, *supra* note 15, at 85.

116. Compare MASSEY & DENTON, *supra* note 14, at 225-27 (advocating integration) and Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479 (1995), with John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487 (1993). See also A. Brooke Overby, *Shaping American Communities: Segregation, Housing & The Urban Poor: The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431 (1995) (advocating strengthening black community); Michelle Adams, *Separate and Unequal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 455-64 (1996) (discussing the shortcomings of mobility programs and proposing instead an equalization strategy that would recognize the needs and desires of affected black families).

than integration.<sup>117</sup> John Calmore, for example, levies a critique against the “integration imperative” and suggests instead “non-segregation” as an alternative.<sup>118</sup> Nonsegregation allows people of color to choose whether to stay where they are, even if in an area comprised exclusively or predominantly of people of color, but also removes barriers to moving elsewhere.<sup>119</sup> Calmore contends that this option is necessary because integration forces Blacks to sacrifice community “for a better housing package.”<sup>120</sup> Spatial equality is intended to prevent this depressing choice.

Integrationists argue by contrast that racial integration is necessary to allow poor Blacks and Latinos to obtain access to the opportunity structure, which includes education, health care, and jobs, necessary to succeed in our society.<sup>121</sup> Some integrationists, notably John Powell and Florence Roisman, contend that whites as well as people of color have been harmed by segregation<sup>122</sup> and that “integration, . . . when properly conceived, is inclusive and transformative.”<sup>123</sup> Powell rejects the arguments made by community preservationists for “self-imposed segregation,” claiming that the majority of Blacks would prefer to live in integrated communities and reiterating the harm to the poor and minorities of isolation from the larger society.<sup>124</sup> According to Powell, integration of ur-

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117. Calmore, *supra* note 116, at 1498. Calmore cites Robert F. Forman, Gary Peller, and Henry W. McGee, Jr., among others, for the proposition that equalization within communities, rather than integration *per se*, should be the goal.

118. *Id.*

119. *Id.* (quoting ROBERT F. FORMAN, *BLACK GHETTOS, WHITE GHETTOS AND SLUMS* 46 (1971)).

120. *Id.* at 1504-05. Calmore quotes Black professionals who choose to remain in all-Black neighborhoods despite the financial ability to live elsewhere as valuing the proximity of other Black role models for their children, the “relief upon returning home to a black environment after having endured the job stress of ‘competing on a white playing field all day.’” *Id.* at 1507 (quoting Karen Grigsby Bates, *View Park: A Case Study in Racial Ironies*, L.A. TIMES, Sept. 18, 1989, at 1).

121. John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 758 (1996).

122. Powell quotes John Dewey for the proposition that an isolated community “makes for rigidity and formal institutionalizing of life, for static and selfish ideals within the group.” *Id.* at 777 n. 101 (quoting JOHN DEWEY, *DEMOCRACY AND EDUCATION* 99 (1916)). See also Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996) (discussing the limitations to suburban life).

123. Powell, *supra* note 121, at 778 (arguing against Black rejection of integration).

124. *Id.* at 786-87. Powell quotes studies finding that 12% of Blacks prefer to live in all-Black neighborhoods, while 31% would be unwilling to live in all-Black neighbor-

ban communities is necessary to their improvement because only an integrated community will attract resources and attention.<sup>125</sup> Finally, powell contends, the founding ideals of our country and our democracy require integration: "Integration makes it possible for those historically excluded from participating in society to be part of a larger community, while necessarily transforming that community."<sup>126</sup>

In contrast, following their ideological commitment, community preservationists argue for remedies that would increase the fiscal health of inner cities such as the creation of enterprise and empowerment zones, tax sharing which brings tax dollars from suburbs and exurbs to inner cities, and various efforts to increase home ownership in inner cities.<sup>127</sup> Community preservationists demand that HUD equalize the conditions in public housing.<sup>128</sup> Integrationists stress the importance of housing mobility programs that allow low-income people of color to move away from racially segregated communities.<sup>129</sup> Not surprisingly, for many, the ideal is to

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hoods. *Id.* at 786 n. 125 (citing MASSEY & DENTON, *supra* note 14, at 89-90). A majority of Blacks would prefer to live in a neighborhood that is 50% Black and 50% white, but 95% would willingly live in a neighborhood that is 15% Black. *Id.*

125. *Id.*

126. *Id.* at 792.

127. Florence Wagman Roisman, *Sustainable Development and Land Use Law: Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WID. L. SYMP. J. 87, 107-08 (1998) (citing CENTER FOR NATIONAL POLICY AND LOCAL INITIATIVES SUPPORT CORP., LIFE IN THE CITY: A STATUS REPORT ON THE REVIVAL OF URBAN COMMUNITIES IN AMERICA (1997)); ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 101-03, 132 (1994); John Kasarda, *Urban Change and Minority Opportunities*, in THE NEW URBAN REALITY 33, 34 (Paul E. Peterson ed., 1985); MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 84-87 (1997); U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, STATE OF THE CITIES 21-22, 28, 48-51 (1997); John P. Blair et al., *The Central City Elasticity Hypothesis: A Critical Appraisal of Rusk's Theory of Urban Development*, 62 J. AM. PLAN. ASS'N 345, 346-47 (1996); Georgette C. Poindexter, *Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process*, 15 VA. ENVTL. L.J. 37 (1995); Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES, Jan. 9, 1994, at Mag. 27; Robyn Meredith, *A Revival in the Motor City: U.S. Program Helps Return Industry to a Depressed Area*, N.Y. TIMES, Apr. 11, 1997, at D1).

128. Calmore, *supra* note 116, at 1515.

129. Roisman, *supra* note 127, at 108. The mobility program that stemmed from the Supreme Court's decision in *Hills v. Gautreaux*, 425 U.S. 284 (1976), known as the Gautreaux Assisted Housing Program, is perhaps the model mobility program. Lasting for twenty years, the Gautreaux program assisted seven thousand low-income Black families move from inner city Chicago to suburbs and other parts of Chicago. *See generally*

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have both: improve the central cities while allowing people full access to the suburbs.<sup>130</sup> But there are instances when a particular remedy is found to increase integration but potentially to lessen the likelihood of community preservation, or alternatively, a remedy may enhance an inner city community, but increase segregation.<sup>131</sup>

An example of this phenomenon is the Community Reinvestment Act of 1977 (“CRA”)<sup>132</sup> that scholars have found may actually have the effect of perpetuating racial segregation.<sup>133</sup> The CRA was enacted to eliminate the practice of redlining and to “encourage [financial] institutions to help meet the credit needs of the local communities in which they are chartered . . .”<sup>134</sup> In enforcing the CRA, federal regulators assess several factors: the location of the homes for which loans were sought (referred to as the geographic patterns of loan origination), a correspondence between deposits in a neighborhood and loan origination, and evidence of racially discriminatory practices.<sup>135</sup>

Schill and Wachter hypothesized that the combination of these factors have created an incentive for lending institutions to provide loans to poor people purchasing homes in poor communities, thus creating a “loan concentration effect” and steering poor people to purchase homes in poor communities.<sup>136</sup> To determine whether this hypothesis was correct, Schill and Wachter analyzed whether a poor person applying for a mortgage to purchase a home in a non-poor area was more likely to be rejected than a person purchasing a home in a poor area.<sup>137</sup> Using standard methods of assessing risk, one would assume that homes in non-poor areas would be a better value for a lending institution. But Schill and Wachter’s study

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LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000).

130. Roisman, *supra* note 127, at 112.

131. Or as John Calmore contends, the “let’s do it all” approach ignores the need to set priorities. Calmore, *supra* note 116, at 1512. R

132. Community Reinvestment Act of 1977, Pub. L. No. 95-125, tit. VIII, 91 Stat. 1147 (codified as amended at 12 U.S.C. § 2901-05 (1988 & Supp. V 1993)).

133. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1314 (1995).

134. 12 U.S.C. § 2901(b) (1988 & Supp. V 1993).

135. See Schill & Wachter, *supra* note 133, at 1321 (citing 12 C.F.R. § 228.7(e)-(f) (1994)). R

136. *Id.*

137. *Id.*

found that, rather than being less likely to be rejected when they apply for loans in non-poor neighborhoods, low-income applicants are almost three times more likely to be rejected than when applying in a poor neighborhood.<sup>138</sup> Similarly, the study found that “black applicants were more likely than white applicants to be accepted in predominantly black neighborhoods.”<sup>139</sup> Thus, an unintended consequence of the incentives created by the CRA may have been to intensify the spatial concentration of race and poverty in America’s cities.<sup>140</sup>

There are going to be repeated instances in which it may be necessary to choose whether community preservation or integration is paramount, and environmental justice concerns add an element of urgency to this choice. It is imperative that people of color not continue to have their health imperiled by toxins and their children poisoned by lead. Indeed, in a recent study of the United States Department of Housing and Urban Development (“HUD”) “Moving to Opportunity” demonstration, researchers found that children who moved to low-poverty neighborhoods “experienced fewer injuries, fewer asthma attacks, and improved mental health.”<sup>141</sup>

The question is how best to achieve that goal. There are two competing lessons from the post-civil rights era: one is that integration has been extraordinarily difficult to achieve and that some

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138. *Id.* at 1327.

139. *Id.* at 1328.

140. *Id.* at 1321. Schill and Wachter also note that, “[t]o the extent that the CRA encourages financial institutions to take undue risks,” the fact that some studies have reported higher than average rates of default among the poor and minorities might ultimately lead to greater disinvestment. *Id.* It is important to take into account, however, the studies showing that Black and Hispanics are rejected at substantially higher rates than whites even when controlling for variables such as credit history and socioeconomic status. See generally Glenn B. Canner, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RES. BULL. 859 (1991) (finding Black applicants to be rejected at a rate of 33.9%, Latino applicants to be rejected at a rate of 21.4%, white applicants to be rejected at a rate of 14.4%); Alicia H. Munnell et al., FEDERAL RESERVE BANK OF BOSTON, *Mortgage Lending in Boston: Interpreting HMDA Data*, in WORKING PAPER SERIES No. 92-7 (Oct. 1992) (after controlling for socioeconomic, locational, and credit history variables, finding Black and Latino applicants in Boston 56% more likely than whites to be rejected for a mortgage loan). For a discussion of these studies, see Schill & Wachter, *supra* note 133, at 1316-18.

141. CHOOSING A BETTER LIFE? EVALUATING THE MOVING TO OPPORTUNITY SOCIAL EXPERIMENT 321 (John Goering & Judith D. Feins eds., 2003).

within communities of color favor retaining a separate sense of community and culture, and the other is that segregation entrenches white political and economic dominance. I suggest, in addition, that integration may be a necessary precondition to environmental justice.<sup>142</sup>

On a concrete level, when a racially segregated neighborhood is already saturated with polluting facilities, and a new facility is proposed, the residents have a choice of fleeing or fighting. The environmental justice literature is replete with stories of people fighting (and sometimes winning) against proposed facilities; it has not generally celebrated decisions made by families to try to use the proposed new use as leverage to leave.<sup>143</sup> In a recent article, I suggested a remedy rooted in nuisance law that would allow residents of historically disempowered communities to choose by majority vote between an injunctive remedy enjoining the proposed polluting land use and a damages remedy that would allow them to purchase a home in a non-racially segregated community.<sup>144</sup> The “Resident’s Choice Rule” does not attempt to prejudge what any given community should choose. Instead, its goal is to provide residents of historically disempowered communities the kind of autonomy that the white middle class has enjoyed since the advent of zoning and land use laws.

Here, I want to suggest in brief why environmental justice advocates and scholars might want to focus on finding integrative strategies rather than community preservationist strategies – at least for the most polluted areas. First, the goal of equally distributing polluting facilities across communities is politically impossible. As Vicki Been demonstrated in her trenchant critiques of environmental justice advocates’ visions of environmental justice (including mine), wealthy white people will be able to isolate themselves from virtually any siting scheme.<sup>145</sup> Second, for many of the most pollut-

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142. See generally Roisman, *supra* note 127.

143. One exception to this general trend is instances in which communities live near Superfund sites. Environmental justice advocates have worked closely with communities to ensure that they have been relocated. EPA, SUPERFUND, CONFERENCES, available at <http://www.epa.gov/superfund/conferences/>. Indeed, in one instance, environmental justice advocates helped a community achieve a relocation package that rebuilt their community in another location so that they could stay together. *Id.*

144. Godsil, *supra* note 9, at 1871-86.

145. Been, *supra* note 3, at 1032-40 & 1047-52.



ing facilities, it is environmentally preferable to have a few large facilities, rather than many smaller facilities. A smaller number of large facilities will benefit from economies of scale that will allow for better-constructed facilities. In addition, as Michael Gerrard has written, transportation of certain materials is ultimately riskier than the storage of such materials.<sup>146</sup> Therefore, it is preferable to concentrate the creation and storage of certain materials rather than dispersing them. Third, land use and environmental planners generally agree — and I suspect most of us do as well — that, to the extent possible, it is preferable to concentrate noxious land uses away from people. Therefore, it seems generally preferable to move people away from polluting facilities to more environmentally suitable environs, rather than to pollute more places. Finally, I would argue that the existence of poor, politically marginalized communities allows the rest of us to externalize the burdens of pollution, as well as the burdens of responding to the needs of the poor. If we focus on economically and racially integrating our communities, ideally, the “they” becomes a “we.”

### C. *Pragmatics of Integration*

This essay is intended to be a catalyst for further discussion about both the normative ideal of integration and then the pragmatics of accomplishing this ideal. But some may contend that such a conversation is merely an exercise in academic idealism since integration has proved impossible to achieve. While conventional wisdom supports the view that integration has met with enormous white resistance, there is also some recent evidence of success. In a forthcoming paper entitled *Radical Integration*,<sup>147</sup> Professor Michelle Adams examines two housing mobility programs that provided opportunities for low-income residents, many African-American and Latino, to move to predominantly white or integrated communities: the Gautreaux Program. The Gautreaux Program arose out of *Hills v. Gautreaux*,<sup>148</sup> and a HUD sponsored

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146. Michael B. Gerrard, *Safety Hazards in Hazardous Waste Remediation*, 228 N.Y. L.J. 3 (2002).

147. Adams, *supra* note 10.

148. 425 U.S. 284 (1976). In *Gautreaux*, HUD was found liable for supporting the Chicago Housing Authority's program of segregating public housing and for engaging in discriminatory tenant selection procedures. *Id.* at 287 (citing *Gautreaux v. Chicago*

demonstration program, "Moving to Opportunity for Fair Housing."<sup>149</sup>

The Gautreaux Program is the country's most ambitious residential, racial, and economic integration effort to date.<sup>150</sup> The goal of the program was "movement of low-income Black families into predominantly white areas."<sup>151</sup> The program served approximately 6,000 families during a seventeen-year-period and was generally a very positive experience for the Gautreaux participants.<sup>152</sup> As Adams explains:

The Gautreaux movers perceived their new 'suburban neighborhoods as much safer than their former city neighborhoods — both during the day and night' While there is no question that some movers experienced racial hostility and negative social interactions in their new settings, after a time those negative interactions decreased and many movers reported 'finding a sense of community that they felt was lacking in their city neighborhoods.' At the same time, the suburban Gautreaux movers were also more likely to form interracial friendships than the Gau-

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Hous. Auth., 296 F.Supp. 907 (N.D. Ill. 1969)). The Court found that "the public housing system operated by [the Chicago Housing Authority] was racially segregated, with four overwhelmingly white projects located in white neighborhoods and with 99 1/2% of the remaining family units located in Negro neighborhoods and 99% of those units occupied by Negro tenants." *Id.* at 288 (citation omitted).

149. See HUD, Moving to Opportunity for Fair Housing, at <http://www.hud.gov/progdesc/mto.ctm>.

150. RUBINOWITZ & ROSENBAUM, *supra* note 129, at 2.

151. *Id.* at 39. Under the program, HUD provided rental assistance to allow participants to find housing in the private market. *Id.* at 37. As Adams notes:

More specifically, the Gautreaux Program provided recipients with Section 8 rental assistance which provides 'rent subsidies for low-income families to live in private housing, making up the difference between the market rent and a specified percentage of tenants' income.' The program required that at least 75% of the participants live in the suburbs, and it capped the number of participants who could choose to live in areas with large proportions of minority group members. 'The suburban movers left neighborhoods that were over 90 percent Black and entered areas that averaged 96 percent white.' The program also provided housing counseling to participants providing them with information about housing opportunities in suburban communities, and worked with the suburban real estate industry in order to facilitate the entry of black families into suburban areas.

Adams, *supra* note 10, at 146.

152. RUBINOWITZ & ROSENBAUM, *supra* note 129, at 67, 188. The program was formally established in 1981 and ended in early 1998. *Id.* at 188.

treaux movers who remained in the city. Suburban movers also experienced enhanced educational and employment opportunities as a result of relocation.<sup>153</sup>

Adams also details the general success of HUD's Moving to Opportunity for Fair Housing demonstration program.<sup>154</sup> This program began in the mid-1990s in order to determine whether the "federal Section 8 program rental assistance program, could be effectively used to assist poor, largely minority families in successfully relocating to private rental housing in working-class or middle-class neighborhoods."<sup>155</sup>

Again, the program showed evidence that racial and economic integration leads to positive outcomes:

First, MTO families lived in more racially and economically mixed communities. Second, MTO children in Boston and Baltimore attended better schools. Third, there were significant reductions in risky behavior, especially in marijuana use and smoking for [MTO] girls between the ages of 15 and 19. Fourth, MTO adults showed significant improvements in mental health and reductions in obesity. Finally, many MTO families remained in low-poverty areas after the one-year requirement period.<sup>156</sup>

Indeed, environmental justice advocates are beginning to recognize that relocation may be in the best interests of community residents living in the most environmentally devastated areas. For example, the Concerned Citizens of Norco ("Norco"), a community group comprised of residents living near the New Orleans Refinery Company in Louisiana's Cancer Alley, recently won a settlement in which the company offered residents the choice of relocating and selling their homes to Shell Petroleum Development Company or

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153. Adams, *supra* note 10, at 34-35.

154. *Id.* at 36-37.

155. *Id.* at 36 (quoting John Goering et al., *What Have We Learned about Housing Mobility and Poverty Deconcentration?* in *CHOOSING A BETTER LIFE? EVALUATING THE MOVING TO OPPORTUNITY SOCIAL EXPERIMENT 6* (John Goering & Judith D. Feins eds., 2003)).

156. Adams, *supra* note 10, at 37-38.

receiving home improvement loans at a favorable level.<sup>157</sup> A relocated Norco resident commented to Monique Harden, an environmental justice lawyer who heads the New Orleans-based Advocates for Environmental Human Rights, “I now have a beautiful house fit for a king.”<sup>158</sup> Harden appropriately responded: “Well, you deserve it. Because you are a king.”<sup>159</sup>

#### CONCLUSION

Sheryll Cashin suggests that the ideal of residential integration has “all but disappeared from public discourse” and that it “boasts few ardent constituents.”<sup>160</sup> Those who are concerned about continuing environmental injustice should consider whether we need to become ardent constituents of integration, as well as community preservation, in order to achieve the vision of an adequate environment for families.

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157. THE FORD FOUNDATION, CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES 97 (2004), available at [www.fordfound.org/publications/recent\\_articles/close\\_to\\_home.cfm](http://www.fordfound.org/publications/recent_articles/close_to_home.cfm).

158. *Id.*

159. *Id.*

160. CASHIN, *supra* note 10, at 734.

