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AI SUMMARY:

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Central Thesis:
The article examines various legislative strategies aimed at addressing the disproportionate siting of locally undesirable land uses (LULUs), such as waste facilities, in marginalized communities. It critiques these strategies for failing to adequately address the complexities of environmental justice, particularly due to differing conceptions of fairness. The author argues that without a clear understanding of what constitutes "fair" siting, proposed solutions risk being ineffective or unjust. The analysis highlights the need for a more nuanced approach that considers procedural fairness, proportional distribution of burdens, and the practical challenges of implementation.

Legal/Academic Issues Addressed:
- The disproportionate siting of LULUs in low-income and minority communities.
- Theoretical and practical challenges in defining "fairness" in facility siting.
- Evaluation of legislative strategies for achieving environmental justice.
- Analysis of procedural and substantive fairness in siting decisions.

Methodologies/Data Sources:
- Review of five legislative strategies for LULU siting: dispersion, impact statement, fair share, hybrid, and suspect class approaches.
- Analysis of specific statutes and proposed federal legislation, such as the Environmental Justice Act of 1992.
- Examination of case law, including Southern Burlington County NAACP v. Mount Laurel.
- Scholarly critique of existing proposals and their underlying theories of fairness.

Findings/Analysis:
- The dispersion approach focuses on preventing over-concentration but does not address broader distributional fairness.
- Impact statement approaches are procedural and lack substantive teeth to ensure equitable outcomes.
- Fair share and hybrid strategies attempt to allocate burdens equitably but face practical challenges, such as defining "fair share" and measuring burdens.
- The suspect class approach targets vulnerable communities but may not address all environmental justice concerns.
- Existing legislative proposals, such as the Environmental Justice Act, reflect weak notions of fairness and may be undermined by political influence.

Recommendations/Implications:
- Policymakers must grapple with competing theories of fairness to develop effective

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solutions.
- Future proposals should address practical challenges, such as defining neighborhoods and measuring burdens.
- Greater emphasis is needed on substantive fairness, including proportional distribution and equal concern for all communities.
- Advocates should monitor implementation to prevent political manipulation of siting decisions.

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Conceptions of Fairness in Proposals for Facility Siting

Vicki Been *

In searching for legislative solutions to the problem of disproportionate siting of facilities such as waste dumps, we must confront some fundamental ambiguities about the meaning of "environmental justice." The solutions that have been proposed to address the siting of various Locally Undesirable Land Uses (LULUs) reflect very different theories both about why disproportionate siting is wrong and about what would constitute "fair" siting. A hard look at those various theories reveals that they raise different kinds of philosophical challenges and practical problems. Only by focusing on what fairness means in the context of siting, and addressing head on the problems different conceptions of fairness pose, can we begin to critically evaluate how well different proposed solutions will work to achieve environmental justice.[1]

Five major legislative strategies for preventing discriminatory siting of various kinds of LULUs either have been adopted by state or local governments, or proposed for federal legislation. The first strategy is what I call the dispersion strategy. It is most commonly associated with group homes for the mentally disabled, but has been used for a variety of LULUs, including hazardous waste facilities.[2] Dispersion

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* Associate Professor of Law, New York University School of Law. I am grateful to Richard Revesz for comments on an earlier draft, and to the Filomen D'Agostino and Max E. Greenberg Research Fund at the New York University School of Law for financial support.

[1] This article looks specifically at the concepts of fairness in five proposed theories for facility siting. Both the underlying premise that the current siting of LULUs is unfair and the question of how steps to change the present siting processes may be justified under various theories of fairness are discussed in detail in 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).

[2] For surveys of statutes governing group homes, see Martin Jaffe & Thomas P. Smith, *Siting Group Homes for Developmentally Disabled Persons*, 397 AMERICAN PLANNING ASSOCIATION PLANNING ADVISORY

statutes prohibit "undue" or "excessive" concentration of a particular kind of LULU, or mandate rather arbitrary distance limits between LULUs. For example, a Wisconsin statute specifies that no group home shall be located within 2500 feet of another.[3] Some statutes tie the dispersion requirement to political jurisdictions — no county shall have more than one facility until all counties have at least one, for example.[4]

The proposed Environmental Justice Act of 1992,[5] while much different in form from the group home ordinances, essentially takes the dispersion approach. The Act would require the Environmental Protection Agency (EPA) to identify the 100 counties or other geographical units in the United States that contain the highest total weight of toxic chemicals.[6] Those areas would be classified as Environmental High Impact Areas (EHIAs). The Act then requires a health impact study to evaluate "the nature and extent, if any, of acute and chronic impacts on human health" in EHIAs as compared to other counties.[7] If the study finds "significant adverse impacts of environmental pollution on human health" in EHIAs, the Act declares a moratorium on the siting or permitting of any new facilities in an EHIA that would release toxic substances in quantities found to cause significant adverse impacts on human health.[8] Just as group home statutes say "no more facilities in already concentrated areas," the Environmental Justice Act says "no more facilities in an EHIA."

The second approach to the disproportionate siting problem, followed in a few states, is the impact statement approach.[9] One version of the approach requires

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SERVICE 17-19 (1986); Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 URB. LAW. 1 (1987). For an example of a dispersion requirement for hazardous waste facilities, see ALA. CODE § 22-30-5.1 (1990).

3 WISC. STAT. ANN. § 59.97(15)(a) (West 1988).

4 *See* ALA. CODE § 22-30-5.1 (1990).

5 H.R. 2105, 103d Cong., 1st Sess. (1993). The Environmental Justice Act of 1993 introduced by Senator Baucus (D-Mont.), S. 1161, 103d Cong., 1st Sess. (1993), tracks the House bill in many respects, but does not include a moratorium requirement and therefore does not adopt a dispersion approach.

6 H.R. 2105, 103d Cong., 1st Sess. § 102(B) (1993).

7 *Id.* § 401.

8 *Id.* § 403. Exceptions to the moratorium are allowed if there is a need for the facility, and if the facility will implement a comprehensive pollution prevention program and minimize uncontrolled releases of toxic substances.

9 *See, e.g.* CONN. GEN. STAT. ANN. § 22a-1b (West Supp. 1993); HAW. REV. STAT. § 343-2 (1985 & Supp. 1992); KY. REV. STAT. ANN. § 224.40-310 (Michie/Bobbs-Merrill 1991); MD. CODE ANN. NAT. RES. § 1-301(b) (1989); N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984).

that the agencies responsible for proposing or approving facility sites maintain statistics regarding the number and location of existing facilities within a neighborhood, and take the concentration of uses into account in making their decisions.[10] A more general version of the impact statement approach requires that decision-makers consider the impact a siting will have on the "quality of life" in the community.[11] An example is the legislation introduced by Congressmen Mike Synar (D-Okla.) and William Clinger (R-Pa.) and Senator John Glenn (D-Ohio) which would require that the process for permitting any new off-site solid waste treatment or disposal facilities include consideration of a "community information statement."[12] The statement would be prepared by an independent contractor agreed upon by the developer and the community.[13] It would consider the demographic characteristics of the host community and the presence of other solid waste treatment and disposal facilities or hazardous waste sites within the community.[14]

A third technique the states have used to ensure that the burden of a particular land use is spread over all communities is what I call the fair share approach. The New Jersey Supreme Court's *Mount Laurel* decisions, in which the court attempted to force exclusive suburbs to bear their fair share of the burden of providing low and moderate income housing, are the best known examples of this technique.[15] Basically, the approach uses mathematical models to quantify how a particular LULU should be allocated throughout a region.[16]

The fourth approach, represented by the New York City Fair Share requirements,[17] is a hybrid between the fair share and impact statement

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[10] *See* FLA. STAT. ch. 419.001 (1993); N.Y. MENTAL HYG. LAW § 41.34(c)(1) (McKinney 1992); OKLA. STAT. ANN. tit. 60, § 863C (West Supp. 1994); OR. REV. STAT. § 443.422 (1991).

[11] *See, e.g.*, KY. REV. STAT. ANN. § 224.40-310 (Michie/Bobbs-Merrill 1991); N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984); S.D. CODIFIED LAWS ANN. § 34A-9-1(4) (1992).

[12] H.R. 495, 103d Cong., 1st Sess. (1993); S. 533, 103d Cong., 1st Sess. (1993). *See* 139 CONG. REC. S2550 (daily ed. Mar. 9, 1993) (statement of Sen. Glenn); 139 CONG. REC. E151 (daily ed. Jan. 25, 1993) (statement of Rep. Synar); 139 CONG. REC. E135 (daily ed. Jan. 21, 1993) (statement of Rep. Clinger).

[13] H.R. 495, 103d Cong., 1st Sess. § 1(b) (1993).

[14] *Id.* § 1(d).

[15] Southern Burlington County NAACP v. Mount Laurel, 456 A.2d 390 (N.J. 1983); Southern Burlington County NAACP v. Mount Laurel, 336 A.2d 713 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[16] *See* DAVID LISTOKIN, FAIR SHARE HOUSING ALLOCATION 27-28 (1976).

[17] N.Y. CITY CHARTER, §§ 203-204 (1989); CITY PLANNING COMM'N, CRITERIA FOR THE LOCATION OF CITY FACILITIES (Dec. 3, 1990). For an overview of the fair share criteria, see William Valletta, *Siting*

approaches. In brief, New York's fair share program requires the mayor to publish an annual "citywide statement of needs" that identifies all new facilities or expansions that the mayor intends to propose in the subsequent two fiscal years, and specifies the borough, and if possible, the community, in which the mayor proposes to site the use.[18] The mayor also is required to provide an "Atlas of City Property" — a map revealing all existing city-owned property and its current use, as well as all state and federal social service land uses.[19]

The sites proposed by the mayor must conform with what have become known as "fair share criteria." Those criteria require city agencies deciding where to site facilities to take into account such factors as the facility's compatibility with the neighborhood's existing facilities and the extent to which the neighborhood's character will be adversely affected by a further concentration of such facilities.[20]

The New York City program thus adopts a basic "impact statement" approach by requiring that neighborhoods be provided with information they can use to evaluate the distribution of burdens within the city, and by requiring that siting decisions take into account the existing distribution. However, the New York City program reinforces the impact statement approach with additional features borrowed from the formulaic fair share approach. The City Planning Commission's fair share criteria establish separate criteria for siting facilities such as "local or neighborhood facilities" and "regional or citywide facilities", in much the same way that formulaic plans carefully define their allocation regions.[21]

Public Facilities on a Fair Share Basis in New York City, 25 URB. LAW. 1, 8-20 (1993); Barbara Weisberg, *One City's Approach to NIMBY*, 59 AM. PLAN. ASS'N J. 93 (1993); Edward N. Costikyan & Lesze U. Cornfeld, *New York City's New Charter: Land Use Regulations*, N.Y. L.J., Mar. 14, 1990, at 1; Stephen L. Kass & Michael B. Gerrard, *"Fair Share" Siting of City Facilities*, N.Y. L.J., June 21, 1990, at 3.

18 N.Y. CITY CHARTER, § 204(a), (b).

19 *Id.* § 204(d).

20 CITY PLANNING COMM'N, CRITERIA FOR THE LOCATION OF CITY FACILITIES art. 4.1(b) (Dec. 3, 1990). *See also id.*, at arts. 6.1(b), 6.51, 6.53 (containing different formulations of the requirement that site choices for the new facilities take into account the existing concentration of facilities).

21 The criteria distinguish between local or neighborhood facilities (those serving just the community district in which the majority of their clients live and work) and regional or citywide facilities (those serving several community districts, an entire borough, or the entire city). *Id.*, at arts. 5, 6. The criteria provide an illustrative list of each facility type. Branch libraries, fire stations, and senior citizen centers are examples of local facilities. Sewage treatment plants, landfills, group homes, and jails are examples of regional facilities. *Id.*, at Attachments A & B. For discussion of the importance of defining the allocation region, *see* LISTOKIN, *supra* note 16, at 31-33.

The fifth approach is what I call the "suspect class" approach. Rachel Godsil's Title VII proposal[22] falls into this category. The Environmental Equal Rights Act of 1993, proposed by Congresswoman Cardiss Collins (D-Ill.) is another example of this approach.[23] The approach identifies certain communities in which any siting attempt will receive special scrutiny. The proposed Environmental Equal Rights Act, for example, protects "environmentally disadvantaged" communities — those communities with disproportionate percentages of people of color, people living below the poverty line, or people whose income falls below the national average, and which already have a solid or hazardous waste facility or CERCLIS site.[24] Proposed sitings in those communities will be prohibited if the facility would be likely to adversely affect health, environmental quality, or economic well-being, unless no non-suspect alternatives exist.[25]

These are the types of solutions that have been proposed to achieve "justice" in the siting of LULUs. How ought we to evaluate and compare the solutions? I believe we have to start by stepping back to square one and asking what we mean by justice or fairness in the siting context. A great deal of the discussion seems to assume that we will know it when we see it. Surely there are gross abuses that all of us would agree are unfair. Once we get beyond those obvious injustices, however, fair siting can mean any number of very different things. Until we grapple with those differences, and reach some understanding of what would constitute "fair" siting, I fear our solutions will fall far short of the ideal.[26]

What different conceptions of fairness might underlie the various legislative strategies set out above? One conception, reflected in many of the arguments about environmental justice, would require that the burdens of LULUs be distributed on a proportional basis over all those who benefit from the LULU. The notion is like our thinking about jury service: jury service is a burden, but because we all benefit from having juries available, the burden should be spread evenly over society. A burden can be proportionally distributed in several ways. The *facilities* themselves

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22 Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991).

23 H.R. 1924, 103d Cong., 1st Sess. (1993); *see also* 139 CONG. REC. E1106 (daily ed., Apr. 30, 1993) (statement of Rep. Collins).

24 H.R. 1924, 103d Cong., 1st Sess. § 3(a)(D) (1993). CERCLIS sites are those listed in the Comprehensive Environmental Response, Compensation, and Liability Information System.

25 *Id.* § 3.

26 For an analysis of competing theories about the meaning of the terms "justice" and "fairness" in the siting of LULUs, *see* Been, *supra* note 1, at 1029-68.

could be physically apportioned, so that if a city needs five solid waste facilities, and has five identifiable communities or subdivisions, each community gets one facility. Alternatively, the *risk* of being chosen to house the facility could be apportioned — if the city needs one incinerator, each of its 100 neighborhoods would have an equal 1/100th chance of being chosen in a lottery for the site. Finally, the burden might be apportioned through a compensation scheme — each of the 99 neighborhoods spared the burden of the incinerator must pay the host neighborhood its damages. Although much of the language environmental justice advocates use seems to incorporate the proportionality notion, at least in its physical distribution sense, none of the proposed legislative solutions to the problem of environmental racism reflect more than a very weak version of this notion.

Another conception of fairness, which is the basis of the impact statement solutions, would focus not on the substantive outcomes of the siting process but on the fairness of the siting procedures themselves. Procedures would be considered unfair, at a minimum, if they discriminated on the basis of race or ethnicity. A more stringent requirement would require procedures to show what philosophers call "equal concern and respect" for all neighborhoods.[27] That means at bottom that the decision-maker has to pay just as much attention to the impact the LULU will have on a poor neighborhood or a neighborhood of color as she does to the concerns raised by a wealthier or white neighborhood. I call this the "treatment as equals" theory of fairness.

A third conception of fairness requires "progressive siting," and is based on the notion that a fair distribution of LULUs requires advantaged neighborhoods to bear more of the burden LULUs impose than poor and minority neighborhoods. One rationale for "progressive" siting is compensatory justice: advantaged neighborhoods should bear more of the LULU burden to make up for past discrimination against poor and minority neighborhoods. Another rationale is that progressive siting may be necessary to achieve equality of results, or equal impact of the burdens of LULUs. Because residents of poor and minority neighborhoods suffer from numerous disadvantages, such as poor health and barriers to mobility,[28]

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[27] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977).

[28] For discussions of the health status of African Americans, see STEPHANIE POLLACK & JOANN GROZUCZAK, REAGAN, TOXICS AND MINORITIES 1 (1984); 2 ENVIRONMENTAL EQUITY WORKGROUP, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, supporting

a LULU in those neighborhoods will cause a greater impact than one in more advantaged communities. Thus, to achieve equal impact, advantaged communities must bear a greater share of the burden of LULUs. This conception of fairness is reflected in the proposed Environmental Equal Rights Act.[29]

The final conception I want to discuss is what I call the "cost-internalization" requirement of fairness, which asserts that those who enjoy a product whose production creates waste should bear the full cost of that waste. If one neighborhood has three cars per family, while another neighborhood relies entirely on public transportation, the facility for the wastes generated in the production of cars should be located in the first neighborhood. The theory of cost-internalization asserts that if consumers are forced to bear the full cost of the production of products, they will reduce their consumption. This, in turn will force the producer to develop ways of preventing or reducing waste or pollution at its source. While the goal of pollution prevention is among the basic tenets of the environmental justice movement, it is not directly reflected in any of the existing legislative proposals. To the extent that each proposal makes it more difficult to site facilities, of course, source reduction will be encouraged.

There are several other conceptions of fairness that may be advanced to justify calls for environmental justice,[30] but even these few show that various proposals for ensuring fair siting reflect very different notions of fairness. Each of the notions of fairness leads to very different outcomes, and each poses distinct conceptual, practical, or moral difficulties. Let me give just a few examples. While I believe that the notion that burdens should be physically distributed on a proportional basis is a more comprehensive and morally sound notion of fairness than some of the others, that notion is plagued with practical difficulties. It requires that we have a mechanism for honestly deciding which neighborhoods have sites that are physically suitable for a facility, and which do not. We have not yet come up with an honest scheme for making such decisions. Even if we had such a system, it would mean that a community passed over for a waste facility because it lacked

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document 4-6 (1992); Beverly Hendrix Wright, *The Effects of Occupational Injury, Illness and Disease on the Health Status of Black Americans, in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 114 (Bunyan Bryant & Paul Mohai eds., 1992). For discussions of the mobility barriers faced by people of color, see John O. Calmore, *To Make Wrong Right: The Necessary and Proper Asputations of Fair Housing, in* THE STATE OF BLACK AMERICA 77, 88-100 (National Urban League 1989).

[29] *See* H.R. 1924, 103d Cong., 1st Sess. § 3 (1993).

[30] *See, e.g.*, Been, *supra* note 1, at notes 277-92 and accompanying text.

suitable sites would then have to bear its fair share by hosting some other LULU that imposes a burden equivalent to a waste facility. But we have no common yardstick by which to compare burdens. Risk assessment is plagued with difficulties even in ascertaining whether a waste facility in one community is equivalent to an identical facility in a different community, much less in determing whether an incinerator is equivalent to a landfill, a highway, or a prison.

In addition, to implement a proportional distribution scheme, we would have to agree upon how to define the neighborhood for which the burden of a LULU should be measured. We need to agree upon how factors such as need, land values, or differences in community values and social structures should enter into the calculation. Finally, we have to decide how to balance our quest for proportionality with other goals such as safety.

I have written more extensively about the various conceptions of fairness that may underlie the quest for environmental justice, and the kinds of moral and practical problems each conception poses.[31] The analysis is disheartening, as many in the environmental justice movement have pointed out, because every conception of fairness has at least some significant problems. Laying out the problems allows us to focus on finding solutions, and forces us to take a harder look at the various strategies for fair siting.

To illustrate the value of further attention to the meaning of fairness, the following discussion details the problems that my analysis suggests are contained in the proposed Environmental Justice Act and the proposed community information statement legislation. The Environmental Justice Act, as discussed above, adopts a dispersion approach to siting. It says, essentially, that once an area has an excessive concentration of polluting facilities, no more can locate in the area. The dispersion approach reflects a very weak version of the argument that the burden of LULUs must be physically distributed on a proportional basis. The approach is weak because it is concerned only about the dispersion of LULUs once a neighborhood already has reached some threshold of saturation. The proposed legislation says nothing about how the next hazardous waste facility should be sited, except that it cannot go into one of the 100 EHIAs. Those facilities barred from the EHIAs can open instead in the areas that ranked between 101 and 200 on the scale, while areas ranked 5000 continue to be spared the burden of any facilities.

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[31] Been, *supra* note 1.

An additional problem with the dispersion approach generally, and the proposed Act specifically, is that it addresses only a particular kind of burden — the burden of toxic chemicals — and is completely unconcerned with a comprehensive assessment of the burdens a neighborhood bears. After being prohibited from locating a facility in the 100th EHIA, a facility could very well locate in the 101st area, which has slightly fewer toxic emissions than the 100th EHIA, but also has a subway yard, a prison, a homeless shelter, a recycling center, and any number of other non-noxious, but nevertheless burdensome LULUs.

Another problem dispersion approaches generally share is their rather arbitrary and simplistic notions of neighborhoods. The Environmental Justice Act, as originally proposed, assumed that EHIAs should be determined on a county-wide basis.[32] The latest version requires the Agency for Toxic Substances and Disease Registry, in consultation with various other agencies, to determine what geographical unit is the appropriate basis for measuring EHIAs.[33] The change reflects a sensitivity to the problem of how neighborhoods should be defined, but gives no indication about how the definition will be determined. That question is quite complicated. For example, while data is typically available by political jurisdictions, such as counties, those jurisdictions vary widely in terms of population density. Unless the definition of the EHIA takes density into account, facilities turned away from the 100th EHIA might locate instead in the county that is 101st on the list, but has ten times the residential population of the 100th EHIA area.

The proposed Environmental Justice Act also depends upon a definition of EHIA that may be skewed by the very pattern of political influence that leads to disproportionate siting. While determining the "total weight of toxic chemicals present" in each area may sound like a purely scientific exercise, in fact it provides many opportunities for advantage-seeking by those with the greatest political access. The calculation will turn on questions such as how to measure the "relative toxicity" of the chemicals and how to take account of the impact the mode of the substance's release has on the substance's health effects. Those issues are fraught with value judgments. Just as the evidence suggests that wealthier neighborhoods are more successful at getting hazardous waste sites in their neighborhoods cleaned up than poorer neighborhoods,[34] it would not be surprising to find that the

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[32] S. 2806, 102d Cong., 2d Sess. § 3(2) (1992).

[33] H.R. 2105, 103d Cong., 1st Sess. § 102(a) (1993).

[34] Studies show that the EPA is less vigorous in its enforcement of environmental laws in minority communities. Marianne Lavelle & Marcia Coyle, *A Special Investigation: Unequal Protection: The Racial*

definition of the EHIA were tilted by politics. How well the Act will work for people of color and the poor is likely to turn on how diligently advocates for environmental justice monitor each step of the process.

In sum, the dispersion approach reflected in the Environmental Justice Act reflects an extremely weak notion of proportional physical distribution of LULUs. The feebleness of the notion renders the approach incapable of protecting neighborhoods other than those already suffering the most egregious over-concentrations of LULUs. Even in protecting those relatively few neighborhoods, the approach is insensitive to a host of concerns that should inform any siting decision.

What about the community impact statement approach used in several states and pending before Congress? In seeking to ensure that siting decision-makers consider the existing burdens communities bear and the additional injuries LULUs will impose, the impact statement approach tries to bring the concern shown to poor and minority communities up to par with that already shown to wealthier and white communities. It thus reflects the "treatment as equals" notion of fairness.

There is considerable reason to be skeptical of the ability of impact statements to change the behavior of siting decision-makers. The experience under the National Environmental Policy Act (NEPA)[35] and the state "little NEPAs" has fostered great dissatisfaction with the impact statement as a tool for "making bureaucracies think."[36] There is no reason to believe that the tool will work any better in forcing

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Divide in Environmental Law, NAT'L L.J., Sept. 21, 1992, at S2. *See also* Rae Zimmerman, *Social Equity and Environmental Risk*, 13 RISK ANALYSIS 6, 20 (Dec. 1, 1993) (finding that the higher the black population in a community, the less likely it was that National Priority List (NPL) sites had progressed to a particular stage of cleanup, especially when the community also was relatively poor; but, finding that the higher the Hispanic population, the more likely the cleanup had progressed). *But see*, John A. Hird, *Environmental Policy and Equity: The Case of Superfund*, 12 J. POL'Y ANALYSIS & MGMT. 323, 337 (1993) (finding no relationship between the pace at which NPL sites are cleaned up and the host county's socioeconomic characteristics).

35 42 U.S.C. § 4321 (1988).

36 This phrase is from SERGE TAYLOR, MAKING BUREAUCRACIES THINK (1984). Taylor's comprehensive study of the effect of NEPA on decisions of the Corps of Engineers and the Forest Service produced mixed results. *Id.* at 130. It found that "all districts and forests do better in terms of avoiding environmental damage than they did before NEPA." But, it found that the potential effectiveness of impact statements depends upon a complex balance of conditions. *Id.* at 295-313. Many of those conditions would not apply to the siting context. For example, NEPA forced the federal bureaucracy to hire thousands of environmental analysts, committed to environment protection, who worked from within to change the way the agencies approached their tasks. *Id.* at 252-53. It is far from clear that requiring an impact

siting decision-makers not only to think, but to think fairly. Indeed, impact statements have been used to address socio-economic impacts of various facilities for years, with no apparent effect on the distribution of LULUs.[37]

The major criticism of impact statements generally is that they have no substantive component, but are merely procedural.[38] The community information statement requirement now pending before Congress also fails to incorporate any substantive elements. It fails, for example, to specify how the impact a LULU will have on the proposed host neighborhood's qualify of life or concentration of burdens should be weighed against other siting considerations, such as cost or safety.

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statement about the social effects that a siting would have on a community would lead state and local siting agencies, or even federal permitting agencies, to add sociologists or environmental justice advocates to their staffs.

For criticisms of NEPA, *see* Lynton K. Caldwell, *A Constitutional Law for the Environment: 20 Years With NEPA Indicates the Need*, 31 ENVIRONMENT, Dec. 1989, at 7; Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 251-53 (1976); Thomas France, *NEPA—The Next Twenty Years*, 25 LAND & WATER L. REV. 132, 135 (1990); James A. Henderson, Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1462 (1978); Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1698-1705, 1712-17 (1993); Sen. Edmund S. Muskie & Eliot R. Cutler, *A National Environmental Policy, Now You See It, Now You Don't*, 25 ME. L. REV. 163, 172 (1973); Joseph L. Sax, *Enrichment Series: The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 245-48 (1973); Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041, 2046-84 (1992). *But see* COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEAR'S EXPERIENCE BY SEVENTY FEDERAL AGENCIES 23-25 (1976) (citing examples of the influence environmental impact studies had on federal decisions, and stating that most federal agencies reported that the environmental impact statement process was an important aid in planning and decision-making).

[37] Several state siting statutes now require decision-makers to take community impacts into account when permitting waste facilities. *See, e.g.*, ME. REV. STAT. ANN. tit. 38 § 1478(2) (1989) (hearings on proposed low-level radioactive waste facilities should address the social impact of the proposed facility on the surrounding area); MD. CODE ANN. NAT RES. § 3-706 (1989) (applicant for approval of hazardous waste facility shall submit information to allow consideration of environmental, social, technical, and economic impacts of proposed facility); MONT. CODE ANN. § 75-10-920 (1991) (approval of waste facilities should include consideration of "social changes resulting from facility impact on population"); VT. STAT. ANN. tit. 10 § 7012(f)(1) (1992) (procedure for licensing of low-level radioactive waste facilities shall include study of the social and economic impacts on the communities surrounding the proposed facility). *Cf.* IDAHO CODE § 39-5806 (1985) (requiring a state hazardous waste siting management plan that provides for "reasonable geographic distribution" of facilities); MICH. COMP. LAWS § 299.509(2)(f) (1992) (same). In addition, some state "little NEPAs" require environmental impact statements to include consideration of socio-economic impacts. *See, e.g.*, MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 5.12[12] (1990 & 1992 Supp.) (discussing New York's requirement that environmental impact statements study the effect the facility will have on "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.").

[38] *See* sources criticizing NEPA, *supra* note 36.

Even if impact statements are merely procedural, and even if they do not actually change the way regulators think, they may nevertheless provide useful ammunition for opponents of facilities. But unless all communities have equal resources to use such legal tools, which they do not, the availability of impact statements is unlikely to result in a fairer distribution of LULUs. Further, as Luke Cole has persuasively argued, procedurally focused law suits challenging the "i"s and "t"s of a community impact statement may be a tactical mistake in some circumstances.[39]

Given the NEPA model, it is not surprising that impact statements were offered as a solution to the problems of environmental injustice. The lessons of NEPA, however, suggest that impact statements are unlikely to produce substantive changes in the distribution of LULUs, or to do much to make communities chosen to host a LULU believe that they were afforded the same respect as the communities which managed to escape the LULU.

It is difficult to critically evaluate and improve upon proposals like the proposed Environmental Justice Act or the community impact statement requirement until we have thought more carefully about precisely what "fair" siting means. By avoiding that question, discussions of environmental justice tend to paper over the difficulties of each theory, rather than seeking solutions to those difficulties. We are better off in the long run to envision the ideal, confront the problems it poses, and work to find practical ways around them, rather than to set our sights (eyesight, that is) too low.

39 Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 647-54 (1992).