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FAIRNESS FOR SALE IN THE MARKETPLACE

RICHARD A. SAMP*

One of the reasons for the tremendous success in recent times of the environmental justice movement has been its ability to put forward a pretty vague agenda. Certainly, everybody is for justice and is against racism, and as a result, there have been a lot of different strands to what has been called environmental justice. I think one of the advantages of a program such as this today is that it starkly illustrates the competing strands. Any effort, any movement that is going to include both Dr. Lazarus and Professor Taibi really is not a unified movement of any sort.

On the one hand, there are the people such as Professor Lazarus who are very much concerned about distribution and think that what we need to have is fairness. On the other hand, there are those who perhaps are much more concerned with a fundamental reorientation of society.¹ I think that I can fairly say, from what I have heard, that Professor Taibi fits into that latter category, and these two strands really are very much competing with one another. My remarks today really are going to focus on the fairness argument, in part because my background is much more in civil rights-related law, and because fairness is an issue I think about much more often. The public perceptions of the purposes of the environmental justice movement have not really been along the lines of what Professor Taibi has been talking about.² The public has perceived the movement not as an effort to bring about a fundamental reorientation of society, but rather simply to distribute things in a fairer fashion.

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¹ Richard J. Lazarus, *Distribution in Environmental Justice: Is There a Middle Ground?*, 9 ST. JOHN'S J. LEGAL COMMENT. 481 (1994).

² Anthony D. Taibi, *Environmental Justice, Structural Economic Theory, and Community Economic Empowerment*, 9 ST. JOHN'S J. LEGAL COMMENT. 491 (1994).

I am not going to repeat what Dr. Greve has already been talking about, which is the fundamental lack of justifications for an environmental justice movement.³ Rather, I wish to point out that while everybody is in favor of fairness, I do not see any way that a system like that which has been proposed in several pieces of legislation before Congress, could ever really accomplish anything meaningful.

First of all, most people agree that there is very little way to measure fairness. The fundamental problem is that many people disagree as to what is a "locally undesirable land use" ("LULU"); what are the sort of things that I do not want in my neighborhood? For example, there are many neighborhoods that object to having group homes for released prisoners or for mentally and physically handicapped people in the neighborhood. Others would say, "Well, wait a second, that is part of your responsibility as a member of society; to accept people like that in your neighborhood." They would not consider such facilities to be LULUs at all; they are something that everybody should want in their neighborhood.

As another example, there are many people who would not want a sanitary landfill anywhere near their town or would not want to have a nuclear power plant within their metropolitan area. Others would say, "Wait a second, nuclear power is the cleanest, safest form of energy." Thus, any system that tries to equitably distribute these sorts of burdens is inevitably going to inevitably founder on the inability to reach any sort of consensus as to what really is a burden.

Secondly, the major issue that needs to be faced in trying to come up with any sort of redistribution scheme is whether or not current imbalances in distribution of LULUs are causally related to factors such as social class and race. There are a large number of studies that have been done regarding whether race is an independent factor or whether the real causes of unequal distribution are economic. But the point that all of these studies have failed to address is: what was the neighborhood like at the time of the original siting? That question is critical, because if current residents were not living in a neighborhood, the residents' skin color or social class can hardly have played a role in the siting

³ Dr. Michael S. Greve, *Environmental Justice or Political Opportunism?*, 9 ST. JOHN'S J. LEGAL COMMENT. 475 (1994).

decision. The vast majority of “environmental justice” studies have looked at LULUs that were sited at a time when there was not even a community in the vicinity of the waste dump—or whatever type of facility we are talking about—and the community built up later. Yet most of these studies assume that we can draw conclusions regarding the reasons for a siting decision from the composition of the *current* population.

There is substantial evidence to suggest that what brings poor people to the vicinity of a LULU is that the land costs are going to be less there. If that is the case, then most efforts to redistribute are bound to fail because the process will simply repeat itself. The moment that we start saying, “Wait a second, let’s redistribute these LULUs to the wealthier areas,” as an area becomes loaded down with undesirable sites of one sort or another, those who can afford to are going to move away. Those who will be replacing them are those who cannot afford to live elsewhere. That may not happen overnight, so maybe there is something to be said for an attempt at short-term fairness. History has shown, however, particularly in the instance of whites fleeing inner cities in response to perceived deterioration of the quality of life, that neighborhoods are going to change, and you are going to re-establish “inequities” in the siting of LULUs.

Having said that, there is no question that we ought to be concerned about proven instances of intentional racial discrimination, and we ought to try to make sure that intentional discrimination is not allowed to continue. In fact, EPA, in response to some complaints that have been filed, has taken a very careful look at siting decisions in several states.⁴ I would have no objection, if EPA finds that race was an intentional factor in these siting decisions, to an EPA effort to impose a remedy in these cases.

However, absent a finding of intentional discrimination, EPA really does not provide a solution. The one thing that appalls me as I read many of the articles that have been written in this area is that people say, “Title VI is a great untapped area for people to be looking at,” and I know later panels will be discussing this.

⁴ See Harris DeVille, *Catch Word or Catch 22?*, LA. INDUS. ENVTL. ADVISOR, June 1994, available in LEXIS, News Library, CURNWS File; Wilson Dizard III, *Regulators Say LES Must Reply to Environmental Racism Charges*, NUCLEAR FUEL, Mar. 14, 1994, at 6; *EPA to Investigate Pennsylvania Environmental Justice Complaint*, ENVT. WK., Apr. 21, 1994, available in LEXIS, News Library, CURNWS File.

The fact is, the Supreme Court has repeatedly stated that Title VI of the Civil Rights Act of 1964 has no application when there is not proof of intentional racial discrimination.⁵

That is true of most of the existing remedies, so that obviously some sort of new legislation is going to be required if proponents of "environmental justice" are to make any headway in the courts. Yet, any sort of new legislation is going to run into the practicality problems that I have been referring to up to this point.

One other objection to any legislation is that it would run counter to the theory underlying zoning law; the whole purpose of zoning laws over time has been to try to get away from equal distribution. The idea generally is that we ought to have an industrial portion of a community and we ought to have a residential portion of a community, so that the great majority of the people do not have to live next to the cement factory. The moment you start saying that you have to have undesirable sites equally distributed around a community, you are going to be running into the problem that zoning law has been designed to counteract. We ought to have spots that the great majority of people can live in, where we can minimize the undesirable features of their neighborhood.

There are certain types of undesirable facilities that perhaps can perhaps be exceptions to this rule. When you are talking about low-cost housing or other kinds of facilities where: 1) there is a demand for hundreds of facilities of that type in every metropolitan area, but 2) the facilities tend to be on a small scale, then I think there is something to be said for siting such facilities equally in all neighborhoods. To the extent that we, as a society, are going to mandate building of low-cost housing, every town ought to be doing their fair share. But when you talk about large-scale facilities, of which only a few are needed, such as radioactive waste dumps, it does not make sense to make sure that they are evenly distributed, because not only is it going to be a self-defeating process, but also it works against traditional zoning assumptions.

Finally, I think that we ought to understand the real agenda of many of those who are behind the "environmental justice" movement. That is the agenda that Professor Taibi is pursuing: a fun-

⁵ See *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 584 (1983); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

damental reordering of how we view ourselves as a society⁶ and getting away from the notion that economic growth is an unmitigated good. I, on the other hand, happen to subscribe to that notion. I happen to think that the one way—the surest way—of bringing people out of poverty in this country is to encourage economic growth. One obviously needs to be concerned about fairness; but as I said, fairness is not really the primary agenda of many people within the environmental justice movement. The primary agenda is to give people in communities of color the same tools that people in upper middle class neighborhoods have had up to this point, so that everybody will be able to defeat the “problems” in their community. The result will be to force changes in our industrial society because we will not be able to build the types of facilities that are needed to maintain an industrial society.

One solution that the environmental justice movement has generally been badmouthing, but that I think is one of the really few plausible solutions to public discontent over industrial siting decisions, is to allow people to bid for the right to have LULUs in their neighborhood. We should let the market work. We should give people economic incentives to accept LULUs. For example, we have virtually unlimited space in this country for landfills. The problem is that nobody wants one in their community. So let’s let people bid for landfills; let them say, “We will allow one in our neighborhood provided you pay us ‘X’ million dollars.” That sort of solution is going to leave the least number of people unhappy, and perhaps will get us away from what are clearly very strong perceptions of unfairness in the present siting system.

⁶ See generally Taibi, *supra* note 2.

