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## It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis

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# NOTES

## **It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis**

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## I. INTRODUCTION

More than 120 years have passed since the states ratified the Fourteenth Amendment, making equal protection of the laws a constitutional right for all citizens. Since the Amendment's passage, courts and academics have struggled to define exactly what government actions are prohibited by the Equal Protection Clause.<sup>1</sup> Courts and scholars generally have understood equality to mean that similar groups should be treated similarly.<sup>2</sup> This definition recognizes that differences exist between people and that ensuring that all people are treated equally in spite of these differences would inhibit progress. The United States Supreme Court, however, has not interpreted the Clause to require that the government always treat similar groups similarly due to concerns that this requirement would stymie government activity.<sup>3</sup> Rather, the Court has said that it will invalidate a government action under the Equal Protection Clause only when the government has displayed unfair and unequal treatment toward an identifiable group and when certain suspicious circumstances indicate the government did not have good reason to do so.<sup>4</sup>

In the 1970s, the Court developed the discriminatory intent standard to narrow the class of suspicious circumstances that would invoke the Clause's protection. The intent standard requires plaintiffs to show that the state's act disparately affected them and that the act was motivated by discriminatory intent. Otherwise, the Court would merely examine whether the state had a rational basis for its actions, virtually assuring that the challenge would fail.

The discriminatory intent standard is based in part on the idea that racial discrimination is conscious, willful, and morally reprehensi-

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1. Many core government acts necessarily involve shifting rights or privileges from one party to another, thus treating them unequally. See, for example, *Washington v. Davis*, 426 U.S. 229, 248 (1976) (noting that "a whole range of tax, welfare, public service, regulatory, and licensing statutes . . . may be more burdensome to the poor and to the average black than to the more affluent white").

2. See Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344 (1949): "The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated."

3. For example, the court has stated:

[N]either the [Fourteenth] [A]mendment . . . nor any other amendment, was designed to interfere with the power of the State . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.

*Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

4. Over time, the Court has changed what it considers to be suspicious circumstances. Compare *Wright v. Council of Emporia*, 407 U.S. 451, 462 (1972) (saying the primary focus in equal protection cases is whether the governmental act had a discriminatory effect), with *Washington*, 426 U.S. at 240 (saying the essential element in equal protection cases is whether the government had a discriminatory purpose).

ble.<sup>5</sup> Current studies of the dynamics of racism, however, demonstrate that this understanding of racial discrimination is incomplete: many people learn racist attitudes early in life and unconsciously use them to process information about their environment and to decide how to act.<sup>6</sup> This type of racism has been described as "aversive racism."<sup>7</sup> Aversive racists consciously know that racism is wrong, yet their cognitive development essentially has predisposed them to make decisions based on racist beliefs anyway. The result is that aversive racists take conscious steps to avoid racism within themselves, yet their unconscious prejudgments still influence their decisions. Actors motivated by aversive racism, therefore, may discriminate against a target racial group without consciously intending to do so.

Additionally, scholars now understand that racism may operate on an institutional as well as individual level.<sup>8</sup> Institutional racism occurs when the group in power structures its social institutions so as to maintain its dominance over other groups.<sup>9</sup>

This Note examines aversive, institutional racism for the purpose of determining whether new understandings about racism require a modification of equal protection analysis. To illustrate the causes and effects of institutional racism, this Note focuses on situations in which a government body sites an environmental hazard in or near a neighborhood with a high percentage of minority residents. Statistics show that a substantial correlation exists between the racial make-up of a neighborhood and the likelihood that an environmental hazard will be located nearby.<sup>10</sup> Some scholars have termed this phenomenon "environmental racism," even though these instances often lack any evidence of conscious discriminatory intent on the part of the decisionmakers. To a person who believes that conscious intent is a necessary component of racial discrimination, it may seem more likely that economic factors, rather than racial prejudices, motivate decisions to place environmental hazards in minority neighborhoods.<sup>11</sup> Further-

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5. See note 146.

6. See the discussion in Part II.A.

7. The conscious type of racism that concerns the Supreme Court—called "dominative racism"—has become increasingly less common in America for a variety of socioeconomic and political reasons. See the discussion in Part II.C.

8. See Part II.B.

9. This action may be motivated by the in-group's desire to stay on top or by the in-group's commitment to a moral-based ideology that dictates that the in-group is morally superior to other groups. In either case, institutions reflect the racist tendencies of all the members of the society. Thus, institutional discrimination may manifest both dominative and aversive tendencies. See the discussion in Part II.B.

10. See authorities cited in notes 168-69.

11. For example, since property values in minority neighborhoods are often low, the costs of polluting in these areas will be low as well. Since the marginal costs of pollution control will likely

more, to the extent that racial discrimination could influence these decisions, many states and counties have procedural safeguards to protect neighborhoods chosen to host environmental hazards.<sup>12</sup> This Note will address these arguments and show that they rest on flawed assumptions. In many cases, these economic or procedural protections may be illusory.<sup>13</sup> If racism does in fact drive the phenomenon that minorities bear a disproportionate share of the risk associated with environmental hazards, the courts should modify the equal protection analysis to prohibit insidious as well as invidious discrimination.

Part II of this Note examines the concept of racism, how it exists in the unconscious, and how it manifests itself as apparently rational behavior. Part III briefly sketches the development of equal protection jurisprudence and demonstrates how and why the Supreme Court developed its intent-based approach to equal protection. This Part also explains how the intent standard manifests a misunderstanding of racism. Part IV uses environmental racism to illustrate the inadequacy of the intent standard. This Part draws on the discussions in Part II to demonstrate how racist influences operate in a specific institutional framework and how intent inadequately measures racial discrimination in such cases. Part V suggests ways that the courts could adapt equal protection jurisprudence to redress true instances of institutional racism without handcuffing legislative bodies.

## II. THE PSYCHOLOGY OF RACISM

Racism in its most basic sense is the manifestation of a person's tendency to attach significance to an individual's race.<sup>14</sup> Accordingly,

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exceed the benefits, polluting in poor neighborhoods may be the most cost-efficient option available. See A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. Colo. L. Rev. 871, 873 (1992) (presenting this as the welfare economics argument). Also, environmental hazards such as trash incinerators and toxic waste facilities may provide jobs in low-income neighborhoods, making these areas logical hosts because they stand to benefit from the facility. Finally, some states allow a host neighborhood to approve or reject a siting proposal. This usually means the neighborhood may receive financial inducements from the the entity seeking to build the hazardous facility. See notes 205-14 and accompanying text. For discussion of the economic "logic" behind burdening the poor with environmental hazards, see *Pollution and the Poor: Why "Clean Development" at Any Price is a Curse on the Third World*, *The Economist* 18 (Feb. 15, 1992).

12. See the discussion in Part IV.B.

13. See the discussion in Part IV.

14. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 322 (1987). See also Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. Colo. L. Rev. 839, 840 (1992) (defining racism as "those activities which support or justify the superiority of one racial group over another"); Joel Kovel, *White Racism: A Psychohistory* 3 (Columbia, 1984) (describing racism as "a set of beliefs whose structure arises from the deepest levels of our lives . . . and from the patterns of our fundamental social activities"); Gordon W. Allport, *The Nature of Prejudice* (Addison-Wesley, 1954) (describ-

racism operates in the following way: Whites and minorities, consciously or unconsciously, are influenced by notions that whites are superior to nonwhites and that nonwhites are more like animated things than full-fledged human beings.<sup>15</sup> Having recharacterized the nonwhite in nonhuman terms, a person influenced by racism may then justify mistreating nonwhites without feeling the guilt or empathy that normally accompanies harming a fellow human being.<sup>16</sup>

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ing racism as the process of labelling a person on the basis of that person's most prominent feature); James M. Jones, *Prejudice and Racism* 172 (Addison-Wesley, 1972) (saying that "[r]acism results from the transformation of race prejudice and/or ethnocentrism through the exercise of power against a racial group defined as inferior, by individuals and institutions with the intentional or unintentional support of the entire culture").

The term "racism" connotes a great deal of negative and value-laden impressions that this Note wishes to avoid. This Note does not treat racism as a morally reprehensible personal choice, but as the result of social cognitive learning processes. For an individual to process and understand her environment, she must use cognitive shortcuts called stereotypes. These stereotypes are often exaggerations, oversimplifications and generalizations, yet people accept them as fact for purposes of making judgments about new situations. See William B. Helmreich, *The Things They Say Behind Your Back 2* (Transaction Books, 1984). While unconscious racial stereotyping can cause severe injury to others, it constitutes only a fraction of the mostly harmless stereotyping that people employ to understand their surroundings. As such this Note considers racism an extremely harmful social and political condition that should be eradicated without the use of moral-based rhetoric. Racism is not undesirable because it is wrong for people to feel racist; it is undesirable because of the harm it causes to others. One who believes that racial stereotyping is evil or aberrational fundamentally misunderstands the dynamics of racism and encourages people to bury their racist tendencies deeper in their unconscious, further entrenching the problem in society. "There is an emotional punch to calling someone a racist. . . . Willingness to use such labels can intimidate some opponents into silence." Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 Const'l Comm. 395, 402 (1991). Accordingly, racism must be neutralized as a concept before society can expect to address it realistically.

15. See Kovel, *White Racism* at 36 (cited in note 14). Kovel argues that the dehumanization of nonwhites often takes the form of myth-like "symbolic fantasies"—delusions that members of other races are not human—which justify racial discrimination and hatred. *Id.* at 82. He observes: "What counts to men is what their symbolic apparatus can seize upon; and nothing is more evident than the blackness of black skin (even if it really is brown)." *Id.* at 82-83. As an example of a symbolic fantasy based upon skin color, Kovel offers the white myth that blacks are dirty and smelly people. *Id.* at 83. See also Kenneth B. Clark, *Dark Ghetto: Dilemmas of Social Power* 68 (Harper & Row, 1967) (noting that blacks are portrayed as "animal-like and brutish in their appetites"); Winthrop D. Jordan, *White Over Black* 31 (Penguin, 1969) (noting the suspicion in Elizabethan England that Africans committed bestial acts with monkeys). See generally Helmreich, *The Things They Say Behind Your Back* at 59-91 (detailing common stereotypes about blacks).

For a discussion of how members of a minority group may be influenced by notions that their group is inferior to whites, see notes 160 and 163.

16. See Kovel, *White Racism* at 83. The degree of mistreatment or negative sentiment accordingly seems to correspond to the decrease of human value suggested by the symbolic fantasy. For example, several advocates of genocide have used metaphors of filth and disease to recharacterize the objects of their racism in nonhuman terms. For example, Adolph Hitler described the Jews as "suffering from a poisonous infection" and "desir[ing] to infect others with the same disease." Richard A. Koenigsberg, *The Psychoanalysis of Racism, Revolution, and Nationalism* 13-14 (Library of Social Science, 1977). Similarly, one of Josef Stalin's assistants justified the 1930s purge in the Soviet Union by describing it as "cutting into good flesh in order to get rid of the bad." *Id.* at 15. Koenigsberg points out that disease metaphors are part of a symbolic fantasy

The notion that nonwhites are less than human often takes the form of stereotypes.<sup>17</sup> For example, opponents to racial integration of the public education system in middle-class white suburban neighborhoods say they do not want their children subjected to bad influences—crime, juvenile delinquency, drug addiction and teenage pregnancy.<sup>18</sup> While the concern for the moral environment in the schools may be legitimate, the proposed exclusionary solution is based on the principle that blacks are necessarily linked to these bad influences and, therefore, exposure to blacks would create a bad influence on white children.<sup>19</sup>

#### A. *The Dynamics of Individual Racism: Dominative and Aversive Types*

Social cognitive psychologists have found that racist beliefs can develop early in a person's life and become deeply rooted in their minds. People learn negative stereotypes about other races and ethnicities as children.<sup>20</sup> These lessons are critical to a child's development because they help her form a sense of identity—that is, they help her develop notions of self and others.<sup>21</sup> The interrelationship between self-identity, social-identity and racial beliefs is so complex that a person's beliefs

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that has as a goal the active eradication of a certain race from society. As such, they represent extremist dominative racist tendencies.

In contrast, aversive symbolic fantasies are considerably milder. For example, the symbolic fantasy that blacks are poor because they are lazier than whites, Helmreich, *The Things They Say Behind Your Back* at 59-91, would support a decision not to hire a black worker, but would not support genocide.

17. Stereotypes may result from a cognitive process called "projection," whereby an individual accuses others of negative motives or feelings she senses in herself but cannot express openly. Helmreich, *The Things They Say Behind Your Back* at 4 (attributing this theory to Professors Bruno Bettelheim and Morris Janowitz). They allow the individual to rationalize the mistreatment of another racial, ethnic or cultural group. Id. Stereotypes are comforting in that they provide a sense of group continuity, tradition and an easy way to understand and categorize other people without having to get to know them too deeply. Kovel, *White Racism* at 212-13 (cited in note 14). See the discussion in notes 14 and 16.

18. Senate Select Committee Hearing on Equal Educational Opportunity, Part 5; De Facto Segregation and Housing Discrimination 2966 (Sept. 1, 1970) (comments of Anthony Downs). The unstated goal behind this stereotype would be to avoid contact with blacks. This example appropriately would be described as an instance of aversive racism. See Part II.A.

19. Even young children may possess racist symbolic fantasies. A 1940s study of 103 four-year-olds, white and black, showed a common belief that whites were better than blacks, in part because they were not as dirty as blacks. Mary Ellen Goodman, *Race Awareness in Young Children* 37-38, 46 (Addison-Wesley, 1952).

20. William A. Barnard and Mark S. Benn, *Belief Congruence and Prejudice Reduction in an Interracial Contact Setting*, 128 J. Soc. Psych. 125, 126 (1988); Donn Byrne and Terry J. Wong, *Racial Prejudice, Interpersonal Attraction, and Assumed Dissimilarity of Attitudes*, 65 J. Abnormal & Soc. Psych. 246, 251-52 (1962).

21. See Goodman, *Race Awareness in Young Children* at 19-21, 24. Professor Lawrence has argued that "[i]ndividuals learn cultural attitudes and beliefs about race very early in life, at a

about different races, once learned, are highly resistant to change. Because a person's sense of self-worth is intertwined with her sense of self and social-identity, the resistance of these ideas to change is generally desirable from a stability standpoint. A successful challenge to a person's racial stereotypes could require a devastating reordering of her entire self-perception.

Cognitive psychologists further explain that learning processes are facilitated by the development of schemas—mental constructs that facilitate the processing of new, unfamiliar stimuli by comparing them to familiar ones and drawing conclusions about the new based on what the person knows about the familiar.<sup>22</sup> Once a person matches a new situation with a familiar one, she will then begin to react to the new situation according to how she would react to the familiar one. In constructing a schema, a person will take cues from those who seem more knowledgeable about the situation.<sup>23</sup> Absent better evidence to the contrary, the person often will conform to the beliefs and attitudes of these "experts."<sup>24</sup> Since young children seldom will have "better evidence" about other races and ethnicities than what their elders tell them, parents, schoolteachers and others close to the child have tremendous influence.<sup>25</sup>

Of course, parents and schoolteachers are not morally culpable for perpetuating racism in this country. Sometimes they have facilitated the construction of racist schemas in children while carrying out socially beneficial functions. For example, society places great value on teaching history and patriotism to children, therefore, American and European history courses are part of nearly all elementary school curricula. Schoolteachers (and conscientious parents) bear the responsibility for teaching children history. A recurring lesson in these history courses is the domination of nonwhite groups by whites: whites conquered the American Indians and Mexicans; they enslaved the Africans; and they have devastated the land in several East Asian countries.<sup>26</sup> As

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time when it is difficult to separate the perceptions of one's teacher (usually a parent) from one's own." Lawrence, 39 Stan. L. Rev. at 337-38 (cited in note 14).

22. See Susan T. Fiske and Shelley E. Taylor, *Social Cognition* 98 (McGraw-Hill, 2d ed. 1991); Hazel Markus, *Self-Schemata and Processing Information About the Self*, 35 J. Personality and Soc. Psych. 63 (1977).

23. See Robert B. Cialdini, *Influence: Science and Practice* 108 (Scott, Foresman, 2d ed. 1987); Albert Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory* 47 (Prentice-Hall, 1986).

24. Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 Vand. L. Rev. 73, 96 & nn.92-93 (1993).

25. David Milner, *Children and Race* 55-62 (Sage, 1983).

26. Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture*, 77 Cornell L. Rev. (forthcoming 1992).



children become familiar with these basic historical realities, they draw the seemingly logical conclusion that whites are superior to nonwhites.<sup>27</sup>

Not all racism operates according to the same dynamics. Joel Kovel has classified racism into two types: dominative and aversive.<sup>28</sup> Dominative racists openly seek to oppress blacks;<sup>29</sup> aversive racists innately believe in white superiority, but feel guilty about holding this belief.<sup>30</sup> Both dominative and aversive types have racially discriminatory beliefs ingrained in the unconscious part of their brain from their childhood.<sup>31</sup> The main difference between dominative and aversive racists is that an aversive racist's conscious mind will not allow itself to entertain raw racist messages from the unconscious because guilt, logic, and reason all reject such messages as "wrong." The unmanifested unconscious racist feelings do not go away when rejected; rather, they are reformulated, disguised, and adorned with trappings of logic and reason, in order to survive the scrutiny of the conscious mind.<sup>32</sup> Thus, when an aversive actor manifests racism, that manifestation already has been cleansed of evidence of discriminatory intent. The message that emerges from this

27. See *id.*; Lawrence, 39 *Stan. L. Rev.* at 322-23 (cited in note 14) (stating that "our historical experience has made racism an integral part of our culture"); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 *Harv. C.R.-C.L. L. Rev.* 133, 142 (1982) (describing the effects that racial stereotypes have upon minority children). The lesson with respect to East Asian races may be different, however, given American history after World War II. America's military fiasco in Vietnam and Japan's success in American markets to the detriment of American manufacturers would teach that East Asians are superior to whites. See Helmreich, *The Things They Say Behind Your Back* at 93-114 (detailing stereotypes that the Japanese are "hardworking, ambitious, and competitive" and "highly educated and intelligent"); *id.* at 115-41 (detailing stereotypes that the Chinese are "sly, sinister, and deceitful," "inscrutable," and "learned and wise").

28. Kovel, *White Racism* at 54-55 (cited in note 14).

29. *Id.* at 55-60. Others have used the terms "old-fashioned racism" or "red-neck racism" to describe racism that manifests itself by public expression of racial hatred, doctrines of racial inferiority, and support for segregation. See John B. McConahay and Joseph C. Hough, Jr., *Symbolic Racism*, 32 *J. Soc. Issues* 23, 24 (No. 2, 1976). Kovel's term seems preferable as it is more descriptive than "old-fashioned racism" and less prejudicial than "red-neck racism," which reflects the Northern myth that the American South is the only situs for overt racism in the United States.

30. Kovel, *White Racism* at 54-55, 60-61. See also Lawrence, 39 *Stan. L. Rev.* at 335 (cited in note 14). Kovel suggests that some whites who classify themselves as liberals fall into the aversive racist category. He says liberals' inner negative feelings about blacks create a guilt that they try to assuage by trying to ameliorate discrimination against blacks. Kovel, *White Racism* at 55. For a discussion of dominative and aversive racism in depth, see *id.* at 54-61.

31. See text accompanying notes 14-21.

32. Lawrence, 39 *Stan. L. Rev.* at 331 (applying psychoanalytic principles gleaned from Anna Freud, *The Ego and the Mechanisms of Defence* (International Universities, 1946)). See Freud, *The Ego and the Mechanisms of Defence* at 7-8 (noting that when instinctual impulses from the unconscious id pass through to the conscious ego, they must "conform to ethical and moral laws by which the super-ego seeks to control the behavior of the ego," and that after the clash between ego and id, "no longer do we see an undistorted id-impulse but an id-impulse modified by some defensive measure on the part of the ego"). See generally Sigmund Freud, *The Ego and The Id* (Hogarth, 1927).

process appears to be the product of an unbiased, objective mind but actually reflects the person's unconscious racial biases.

In contrast, a dominative racist's conscious mind does not reject the initial raw racist messages. Acts motivated by dominative racism, therefore, are not hard to detect because the actor has no guilt-based incentive to mask evidence of discriminatory intent.

### B. *The Dynamics of Institutional Racism*

Institutional racism may be analyzed under one of two theories: symbolic racism or social dominance. Symbolic racism theory says that whites' antiblack sentiments are not the result of short-term, material self-interest, but derive instead from "a blend of antiblack affect" and "traditional moral values embodied in the Protestant ethic."<sup>33</sup> Symbolic racism theorists illustrate institutional racism by arguing that even whites who do not have children that are affected personally by a busing program will oppose such programs generally because they threaten to undermine traditional moral values.<sup>34</sup>

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33. David O. Sears and Donald R. Kinder, *Whites' Opposition to Busing: On Conceptualizing and Operationalizing Group Conflict*, 48 *J. Personality & Soc. Psych.* 1141, 1141 (1985); McConahay and Hugh, 32 *J. Soc. Issues* 23 (cited in note 29). But see Lawrence Bobo, *Whites' Opposition to Busing: Symbolic Racism or Realistic Group Conflict?*, 45 *J. Personality & Soc. Psych.* 1196, 1197 (1983) (arguing that the black political movement by its very nature acts as a threat to whites who fear losing their own interests and privileges, and characterizing white racism as a shared group interest rather than a moral-based ideology).

Despite their differences, Sears and Kinder agree with Bobo that experimental results indicate that racist attitudes are the primary determinant of whites' opposition to policies that favor blacks. These scholars disagree primarily as to how broadly to define "self-interest."

34. Sears and Kinder, 48 *J. Personality and Soc. Psych.* at 1143. Whites may perceive a busing program as a threat to moral values because "it conjures up images . . . of innocent white children being sent far from their safe white neighborhoods into schools jammed with academically unmotivated, disorderly, dangerous blacks." David O. Sears and Donald R. Kinder, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 *J. Personality & Soc. Psych.* 414, 421 (1981).

For an example of how symbolic racist reasoning may incorporate "traditional" moral values, see Jerry Roberts, *Quayle Blames Riots on Decline of Family Values*, *San Francisco Chronicle* A1 (May 20, 1992) (quoting former Vice President Dan Quayle as saying that "I believe the lawless social anarchy which we saw [in the Rodney King riots] is directly related to the breakdown of the family structure," and that it was time "to renew our public commitment to our Judeo-Christian values"). It is not this Note's intent to label the former Vice President a "racist," but to use his statement as an example of this kind of moral-based reasoning.

Symbolic racism and traditional moral values are not necessarily unique to political conservatives. See John J. Ray and F. H. Lovejoy, *The Generality of Racial Prejudice*, 126 *J. Soc. Psych.* 563, 563-64 (1986) (stating that experiments show that political conservatism has proven to be a poor predictor of racial or ethnic prejudice in Australia); Kovel, *White Racism* at 55 (discussing dynamics of aversive racism in political liberals). Nevertheless, symbolic racism is very common among people who firmly believe that economic welfare results from one's personal control over finances, and not from external factors. Patrick C.L. Heaven and Adrian Furnham, *Race Prejudice and Economic Beliefs*, 127 *J. Soc. Psych.* 483, 485, 487-88 (1987).

Alternatively, some scholars explain institutional racism by reference to social dominance theory. This theory characterizes all complex human social orderings as caste systems, complete with status levels and varying degrees of possible movement from one caste level to another.<sup>35</sup> The caste system's stability is maintained by three factors: (1) the aggregate of instances of institutional racism in society;<sup>36</sup> (2) the aggregate of instances of individual racism from members of a "hegemonic group" to members of a "negative reference" group in society;<sup>37</sup> and (3) the amount of manifested behavioral differences caused by racism at different caste levels.<sup>38</sup> The amount of race- and racism-related activity that a particular individual will contribute to society is determined by intrapersonal factors, such as social comparison and social identity,<sup>39</sup> "legitimization myths,"<sup>40</sup> and self-esteem

35. Jim Sidanius, Erik Devereux, and Felicia Pratto, *A Comparison of Symbolic Racism and Social Dominance Theory as Explanations for Racial Policy Attitudes*, 132 *J. Soc. Psych.* 377, 380 (1992).

36. Institutional discrimination involves hegemonic institutions such as the legal system, government, and schools allocating social value among different caste levels. *Id.* Hegemonic groups are those in power—in America, white males are considered hegemonic. Negative reference groups are those that are disempowered because of the stigma attached to their prevalent characteristic, be that race, gender, creed, national origin or sexual identity.

37. *Id.*

38. Sidanius, et al., call this "behavioral asymmetry." *Id.* They state that "the behavioral repertoires of individuals belonging to groups at different levels of the social hierarchy will show significant differences that have been produced by the dynamics of, and in turn reinforce and perpetuate, the group-based hierarchy system." *Id.*

39. Social comparison and social identity describe the process of comparing one's own group (the "in-group") with other groups (the "out-groups") to form a positive social identity for the in-group. *Id.*; Henri Tajfel, *The Social Psychology of Minorities* (Minority Rights Group, Report No. 38, 1974). This process may work in reverse for some members of negative reference groups. These persons are already members of the out-group, and when they compare themselves to the in-group, they may conclude that their group is inferior. See notes 160 and 163.

40. "Legitimation myths" are a coherent set of socially accepted attitudes that give moral and intellectual legitimacy to unequal distributions of social value. Sidanius, Devereux, and Pratto, 132 *J. Soc. Psych.* at 380-81 (cited in note 35). In that sense, they are similar to symbolic fantasies. See notes 15-16 and accompanying text. Sample legitimation myths include "meritocracy is egalitarian," and "blacks' brains are smaller than whites'." See Sidanius, Devereux, and Pratto, 132 *J. Soc. Psych.* at 380-81.

The prevalence of these myths may be explained by the belief incongruence theory. See Barnard and Benn, 128 *J. Soc. Psych.* at 126 (cited in note 20). This theory states that people develop perceived dissimilarities between their race and other races to reinforce the negative beliefs they learned at childhood about other races. They perceive that the other races have inherently different belief systems. This conclusion reinforces negative racist feelings by combining logic and "objective" factual data to support one's feelings of superiority. See *id.*

For discussion and debunking of scientific data that purports to support legitimation myths, see Halford H. Fairchild, *Scientific Racism: The Cloak of Objectivity*, 47 *J. Soc. Issues* 101 (No. 3, 1991). Fairchild points out that even today, some scientists allege physical and intellectual differences between blacks and whites in the face of overwhelming evidence to the contrary. *Id.* at 108. For example, Fairchild notes recent works published by J. Phillippe Rushton that theorize that evolution has made Asians superior to whites and whites superior to blacks. See, for example, J.

maintenance.<sup>41</sup> Unlike the symbolic racism theory, the social dominance theory is driven by the hegemonic group's desire to stay on top, as opposed to any commitment to a moral-based ideology.

### C. *The Historical Progression From Dominative to Aversive Racism*

Over the course of time, a combination of political and economic factors gradually have shifted the prevalent type of racism in this country from dominative to aversive.<sup>42</sup> When agriculture was the dominant source of economic gain, whites imported blacks to America from Africa to maximize the utility of white-owned lands. Without some form of slavery, labor costs would have been astronomical since mechanization had not yet reduced the need for manual labor and less whites would

Phillippe Rushton, *Race Differences in Behaviour: A Review and Evolutionary Analysis*, 9 *Personality & Individual Differences* 1009 (1988). Rushton bases his conclusion that blacks are inferior on a number of flawed assumptions. For example, he says whites exhibit more sexual restraint than blacks, a generalization he confirms by pointing to a study that (he says) shows the races differ in genitalia size. *Id.* at 1015. Fairchild, 47 *J. Soc. Issues* at 108. That study, Fairchild notes, says the complete opposite: that "[c]ontrary to some widely accepted myths, the size of the penis is not related to a man's build, skin color, or sexual prowess." *Id.*, quoting E.J. Haeberle, *The Sex Atlas: A New Illustrated Guide* 28 (Seabury, 1978). Fairchild found that Rushton's conclusions that whites were more intelligent than blacks—based upon the "fact" that whites have larger brains—similarly were unfounded. See Fairchild, 47 *J. Soc. Issues* at 107 (noting, for example, that Rushton cited studies for support of his proposition that actually concluded that brain size was unrelated to race). See generally Hans J. Eysenck, *The I.Q. Argument: Race, Intelligence and Education* (Library, 1971) (theorizing that black Americans are descended from a less intelligent segment of the black race because their ancestors failed to evade the slavetraders). Professor Helmreich points out that Eysenck's assumptions could not be proven. See Helmreich, *The Things They Say Behind Your Back* at 76 (cited in note 14) (saying there is no way to ascertain whether Africans had an opportunity to evade capture at all).

41. Self-esteem maintenance, also known as egomaintenance, occurs when an actor's discrimination itself enhances the actor's own ego. Sidanius, Devereux, and Pratto, 132 *J. Soc. Psych.* at 380 (cited in note 35).

42. See James M. Jones, *The Concept of Racism and Its Changing Reality*, in Benjamin P. Bowser and Raymond G. Hunt, eds., *Impacts of Racism on White Americans* 28-30 (Sage, 1981) (noting research that indicates that the norm for acceptable expressed racial attitudes has shifted from negative to positive, but that studies also show that negative racial attitudes still persist); Kovel, *White Racism* at 32, 192-97 (cited in note 14); Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *Harv. L. Rev.* 518, 524 (noting that the *Brown* decision coincided with the rising international threat of communism and arguing that America's abandonment of segregation provided credibility to the world that democracy was a better form of government). Professor Lawrence argues: "Increasingly, as our culture has rejected racism as immoral and unproductive, this hidden prejudice has become the more prevalent form of racism." Lawrence, 39 *Stan. L. Rev.* at 335 (cited in note 14).

Of course, the societal transformation from dominative to aversive racism did not occur overnight. The change in racist attitudes lagged behind the change in economic method of production, especially in people who did not necessarily benefit from the new order. See Kovel, *White Racism* at 212 (cited in note 14) (speculating that most Americans retain a mixture of dominative and aversive racist beliefs).

have been able to afford to own land.<sup>43</sup> Further, in the minds of slave-owning Southerners, the institution of slavery preserved social stability by ensuring privilege for whites and eliminating poverty.<sup>44</sup> In effect, blacks bore the burden of keeping white socioeconomic status intact.

The institution of slavery—marked by abuse, fatigue, starvation, and cruelty—embodied pure dominative racism since it expressly treated blacks as only partially human. The American legal regime considered slaves to be property: they could be bought, sold, beaten, raped, killed, and generally used with impunity.<sup>45</sup> Even the Constitution only considered slaves to be three-fifths of a person for representation and tax purposes.<sup>46</sup>

The Industrial Revolution eventually made slavery obsolete, as factories and machines gradually replaced plantations and farm labor as more efficient means of generating profits.<sup>47</sup> With technology increasing the potential for maximizing production, industry magnates did not have time for the direct “hands-on” domination of blacks that slavery required. In a factory setting, indirect control over large quantities of blacks was much more efficient.<sup>48</sup> In broad terms, the transition could be described as whites giving up complete domination of blacks in ex-

43. See Edmund Sears Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* 295-99 (Norton, 1975) (saying that Virginia planters used slavery to drive down production costs, thus creating an economy with more independent landowning producers than an efficient market would ordinarily support).

44. Antebellum Southern newspapers espoused slavery as the key to white independence. For example, *The Richmond Enquirer* wrote that, “[in] this country alone does perfect equality of civil and social privilege exist among the white population and it exists solely because we have black slaves,” and that “[f]reedom is not possible without slavery.” Guyora Binder, *Mastery, Slavery, and Emancipation*, 10 *Cardozo L. Rev.* 1435, 1448 (1989) (quoting *The Richmond Enquirer*).

45. See John W. Blassingame, *The Slave Community* 163 (Oxford, 1972). Professor Blassingame describes some of the aspects of slavery in graphic detail:

Characteristically, stocks closed on hapless women and children, mothers cried for the infants torn cruelly from their arms, and whimpering black women fought vainly to preserve their virtue in the face of the lash or pleaded for mercy while blood flowed from their bare buttocks.

*Id.*, quoted in Kendall Thomas, *A House Divided Against Itself: A Comment on “Mastery, Slavery, and Emancipation,”* 10 *Cardozo L. Rev.* 1481, 1485 (1989).

46. See U.S. Const., Art. I, § 2, cl. 3. This clause eventually was amended by the Fourteenth and Sixteenth Amendments.

47. In areas like the North where industrialization took hold quickly, slavery and dominative racism were abandoned because of inefficiency. In contrast, the South, which took longer to industrialize, retained the vestiges of dominative racism for a comparably longer period of time. See Bell, 93 *Harv. L. Rev.* at 524-25 (stating that “there were whites who realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation”).

48. See Kovel, *White Racism* at 197 (cited in note 14) (saying that “[f]or the industrial North, the primary object of degradation was labor itself”).

change for material gain.<sup>49</sup> This exchange of domination for profit somewhat blurred racial boundaries in the economic caste system: some blacks were permitted to rise up the system, and many whites were relegated to the same economic status as blacks, although whites were given preferential treatment whenever possible.<sup>50</sup>

This transition did not mean that racism abated in the industrial North. Industrial society used segregation instead of slavery to keep blacks at an inferior socioeconomic level.<sup>51</sup> Once the centers of economic production were factories and not plantations, whites no longer needed blacks to live near their residences. Blacks only had to live near the factories. Thus, whites designed the Black Codes, and later Jim Crow laws, to implement their desire to keep distance from blacks.<sup>52</sup>

As the black labor force grew and the multinational corporation replaced the business entrepreneur as the central force in American economic society, white hegemony realized that overt segregation jeopardized the economic and political stability of society.<sup>53</sup> The creation of a freed black work force had in turn created a black consumer

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49. See *id.* at 192. For example, black labor allowed businessmen to keep the salaries of unionized white workers down, since they could be brought in any time the unions held a strike. Earl Conrad, *Jim Crow America* 32 (Duell, Sloan and Pearce, 1947).

50. Kovel, *White Racism* at 197. Black laborers in the workforce typically were the last to be hired and first to be fired. Further, blacks usually earned lower wages than whites, performed the most onerous tasks, served as tools of management to break strikes and have been general scapegoats for all the problems that frustrated white laborers. *Id.* See also August Meier and Elliott Rudwick, *Attitudes of Negro Leaders Toward the American Labor Movement From the Civil War to World War I* in Julie Jacobson, ed., *The Negro and the American Labor Movement* 45-48 (Anchor Books, 1968) (noting that labor unions in the late 1800s had exclusionary policies which prevented blacks from working in many skilled labor positions); Herbert G. Gutman, *The Negro and the United Mine Workers of America* in Julie Jacobson, ed., *The Negro and the American Labor Movement* 59 (Anchor Books, 1968) (noting that blacks were imported into southeast Ohio in 1874 and 1875 to break a strike by white miners, and that this caused great tension between black and white miners).

51. Kovel, *White Racism* at 207. For a more complete discussion of how industrialization encouraged the shift from dominative to aversive racism, see *id.* at 187-199. See also C. Vann Woodward, *The Strange Career of Jim Crow* 19-24 (Oxford, 1955) (noting the experience of a black newspaperman from Boston who travelled around the South by train in 1885 and found that Boston was much more segregated than any of the Southern states he visited).

52. The Jim Crow laws segregated residential areas, school districts, restaurants, public bathrooms, transportation, and the like. Woodward, *The Strange Career of Jim Crow* at 81-87. See Roy L. Brooks, *Rethinking the American Race Problem* 71 (California, 1990). Many of these overt segregative laws have disappeared; however, Brooks notes that current racial housing patterns have not changed significantly since the era of Jim Crow laws, even though most blacks would prefer to live in integrated communities. *Id.*

53. See Kovel, *White Racism* at 216 (saying that "the Industrial State . . . seeks to perfect itself and to remove the threats posed by racial turmoil" and that "[t]he State . . . wishes for itself nothing so much as that the people within it be perfectly interchangeable nonentities who can do its differentiated work, buy its differentiated products, and create as little fuss as possible in the process"); Bell, 93 Harv. L. Rev. at 525 (cited in note 42) (saying that some Southern whites realized that segregation was a barrier to economic profit).

pool. To attract black consumers to the market, the market had to appear free of racism.<sup>54</sup> Once again inspired by a desire for economic gain, whites legally prohibited overt segregatory actions.<sup>55</sup> The reason for these prohibitions were that racist intent had become inefficient, much like slavery. Actions by government and market-suppliers must be race-neutral on their face, lest they cause political strife and discourage black participation in the market, both of which run counter to the goals of society.<sup>56</sup>

The appearance of nonracism is not the same as true nonracism. The rules limiting blacks' mobility from one caste level to another did not disappear; they merely became much less detectable. Unwritten, segregative real estate practices<sup>57</sup> and state constitutional amendments that mandated referendum votes on whether a low-income housing project can be sited in a community<sup>58</sup> are examples of the forms of institutional racism that replaced the Jim Crow laws. These new constructs mask aversive intent behind race-neutral reasoning. This reasoning suggests that no discrimination takes place at all, and that any detrimental effect on blacks is accidental.<sup>59</sup> These structures are protected by a legal regime that refuses to remedy racism absent some evidence of discriminatory intent.

### III. EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment was proposed to Congress in 1866 and added to the Constitution in 1868. The Fourteenth Amendment was designed to help blacks make the

54. Kovel calls this phenomenon "metaracism." See Kovel, *White Racism* at 211 (cited in note 14). He describes it as "the illusion of non-racism co-existing with the continuation of racism's work." *Id.* at 217. He says that a telltale sign of metaracism in a society is that "the hand of the modern State reduces people to its own ends" and "finds it expedient—not ethical, but useful—to eliminate race distinctions in the process." *Id.* at 216. See also Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 375-77 (1992); Jones, *The Concept of Racism and Its Changing Reality* at 33-34 (cited in note 42) (saying that "[e]nergy has shifted from excluding all members of the [minority] class by legislative, judicial, or executive decree, to including select members of the class in accordance with specific criteria which preserve the essential character of the in-group").

55. See generally Bell, 93 Harv. L. Rev. at 523-25 (saying that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites"); Norval D. Glenn, *The Role of White Resistance and Facilitation in the Negro Struggle for Equality*, in Sethard Fisher, ed., *Power and the Black Community: A Reader on Racial Subordination in the United States* 414 (Random House, 1970) (saying that self-interest, more than moral values, is the prime force motivating whites to effect antidiscrimination public policy).

56. Kovel, *White Racism* at 216-18.

57. See discussion in note 180.

58. See, for example, *James v. Valtierra*, 402 U.S. 137 (1971).

59. Today's housing discrimination techniques are more subtle in that they are sophisticated, unconscious, institutionalized, and accompanied by nonracial factors. See Brooks, *Rethinking the American Race Problem* at 73 (cited in note 52).

transition from slavery to independence and to thwart the Southern states' Black Codes.<sup>60</sup>

In creating a constitutional protection for blacks from postbellum oppression, the drafters used open-ended language—the Clause itself contains no internal constraints to limit its application. Despite this language, a review of the legislative history of the Amendment and the social welfare acts passed immediately after the Civil War shows that Congress's predominant intent was to help blacks make the transition from slavery to independence, not to mandate equal treatment for everyone.<sup>61</sup> In fact, one legislator who supported the Amendment distinguished the plight of impoverished whites from that of impoverished blacks: “[Whites'] civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which [for blacks] necessitates governmental protection.”<sup>62</sup> There were no statements in the congressional record, from either supporters or opponents, indicating that any legislators thought the Equal Protection Clause would cover whites as well as blacks.<sup>63</sup>

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60. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985). The Black Codes, enacted after the abolition of slavery, effectively prohibited blacks from virtually all occupations except servitude, denied them judicial relief against whites, and prevented them from owning real property. See *Slaughter-House Cases*, 83 U.S. 36, 70 (1873); Geoffrey R. Stone, et al., *Constitutional Law* 445-47 (Little, Brown, 1986). These Codes were designed to circumvent the Thirteenth Amendment's anti-slavery provisions and other Reconstruction measures. See Stone, et al., *Constitutional Law* at 445.

61. See Schnapper, 71 Va. L. Rev. at 756-88 (reprinting various legislators' statements regarding the Fourteenth Amendment and Reconstruction social welfare programs). Congressmen opposing the Fourteenth Amendment and welfare programs such as the Freedmen's Bureau Acts argued that these enactments tipped the equality balance too far in favor of blacks. Proponents agreed that the equality mandated by the statute was one-sided, but argued that whites had to rectify the evils they had visited upon blacks for so many years. See *id.* From this, it seems that both sides agreed on the meaning of equality and the proponents triumphed without compromise, leading Schnapper to conclude that “equality” was only intended with respect to blacks. *Id.* at 785, 789. See also *Palmer v. Thompson*, 403 U.S. 217, 220 (1971) (saying that “[t]here can be no doubt that a major purpose of this amendment was to safeguard Negroes against discriminatory state laws—state laws that fail to give Negroes protection equal to that afforded white people”). But see William D. Guthrie, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States* 24-25 (Da Capo, 1898) (reprinting the 1882 statement of Roscoe Conkling, one of the Amendment's drafters, that at the time the Amendment was ratified, “individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating state and local taxes,” and arguing that this evidences that the Amendment was not intended to only benefit blacks). Conkling's statements are fairly weak evidence of the drafters' intent, however, since they were made 14 years after the Amendment was passed and do not allege that the drafters were influenced by these interest groups.

62. Cong. Globe, 39th Cong., 1st Sess. app. at 75 (1866) (statement of Rep. Phelps), reprinted in Schnapper, 71 Va. L. Rev. at 768.

63. Given the language of the Clause, and the fact that the drafters doubtlessly had racist beliefs themselves, some have inferred that the drafters did not intend the Clause to confer any substantive rights upon blacks either. See, for example, Raoul Berger, *Government by Judiciary* 10, 55-60, 91 (Harvard, 1977) (arguing that the drafters' racism prevents a construction of the



While the legislative history suggests that the drafters may have predicted the affirmative action debate, they did not fare so well in fashioning a standard for determining which cases warranted equal protection review. This task was left to the courts.

### A. *Two Models of Equal Protection Analysis*

The courts have employed two major models for applying the Equal Protection Clause: the intent standard, and the effects test. The intent standard examines whether the legislators, in passing the discriminatory measures, primarily intended to disadvantage a minority group.<sup>64</sup> The effects test focuses on whether the law in question actually had a disparate impact on a minority group.

The theory underlying the intent standard is that volition is a necessary element of racial discrimination.<sup>65</sup> The Supreme Court has stated that the intent standard protects legitimate state legislation that only incidentally has adverse effects upon minorities. The standard avoids opening the courthouse doors to equal protection challenges based solely on evidence that a state act has detrimentally affected a minority.<sup>66</sup> One scholar has noted that this standard also reflects a concern that the Fourteenth Amendment should be constrained so as not to regulate truly private matters.<sup>67</sup>

Because the intent standard requires plaintiffs to prove discriminatory intent, equal protection claims are difficult to win.<sup>68</sup> For a plaintiff

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Fourteenth Amendment that would confer blacks with the right to vote). But see John Hart Ely, *Democracy and Distrust* 200-01 n.70 (Harvard, 1980) (stating that Berger's argument lacks "any attempt whatsoever to account for the fact that the Fifteenth Amendment, explicitly granting blacks the vote, was proposed and ratified *only two years later*"). Professor Ely notes that the two amendments were supported by the same legislators. *Id.*

64. See *Washington v. Davis*, 426 U.S. 229, 239-242 (1976) (noting that legislative purpose to discriminate must be present to satisfy the intent requirement).

65. See, for example, James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach From the Voting Rights Act*, 69 Va. L. Rev. 633, 643 (1983). Professor Blumstein argues that because racial discrimination is the act of treating similarly situated individuals differently on account of their race, volition must be an essential element of racial discrimination. *Id.* at 643-44 (stating that "a finding of unconstitutional discrimination therefore rests on a finding of intent").

66. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) (saying that "it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality").

67. See Charles L. Black, Jr., *Foreward: "State Action," Equal Protection, and California's Proposition 13*, 81 Harv. L. Rev. 69, 100 (1967).

68. See John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L. J. 1205, 1274-75, 1279, 1283 (1970). When the defendant is an institution of municipal or local government, the burden of proving intent can be almost impossible to meet. See, for example, Brooks, *Rethinking the American Race Problem* at 84-85 (cited in note 52) (discussing the incredible evidentiary burden that the intent test places on plaintiffs bringing land-use cases).

to challenge a law successfully under the intent standard, she must prove that the lawmakers intended the legislation to disadvantage her group,<sup>69</sup> and that the legislation harmed her specifically. This first burden is particularly difficult to meet: legislators rarely will include racist reasoning in the public record, and the plaintiff is unlikely to have access to other evidentiary sources.<sup>70</sup>

The theory behind the effects test, by contrast, is that the Fourteenth Amendment safeguards against laws that unnecessarily disadvantage blacks. The effects test only requires the plaintiff to show that the law had a disparate impact upon members of her minority group; it ignores the intent of the legislators. This approach defines racism to include all acts that have a substantially deleterious effect on blacks, regardless of whether the actor intended such an effect.<sup>71</sup>

If a plaintiff meets the burden of proof required by the governing equal protection model, a court will then apply "strict scrutiny" to the legislation. Under strict scrutiny, the government must show that it has a compelling interest in keeping the legislation and that the legislation's ends are narrowly tailored to fit its means; otherwise, the court will strike it down.<sup>72</sup> In practice, the application of strict scrutiny virtually assures the doom of the legislative act;<sup>73</sup> the few government interests that have proved compelling in the past are national security in time of war,<sup>74</sup> and the federal government's acts to remedy past discrimination.<sup>75</sup>

69. Such evidence could be found in the specific sequence of events preceding the challenged decision, the historical background of the decision, legislative history, or even in the impact of the decision if a clear pattern of discrimination appears that cannot otherwise be explained. *Arlington Heights*, 429 U.S. at 266-68. The decisionmakers themselves usually will not be available for plaintiffs to call as witnesses, however, because of legislative privilege. *Id.* at 268; *Tenney v. Brandhove*, 341 U.S. 367 (1951).

70. See note 69. See also *United States v. Texas Educ. Agency (Austin II)*, 532 F.2d 380 (5th Cir. 1976), in which the court of appeals noted:

[I]t is difficult—and often futile—to obtain direct evidence of [an] official's intentions. Rather than announce his intention of violating antidiscrimination laws, it is far more likely that the state official "will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive—for we deal with an area in which 'subtleties of conduct . . . play no small part.'"

*Id.* at 388 (citations omitted).

71. *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971). See also *Toxic Wastes and Race in the United States* ix-x (United Church of Christ Commission for Racial Justice, 1987).

72. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

73. *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1059 (5th Cir. 1984) (saying a suspect classification "will almost never be based on legitimate governmental reasons" and thus would not survive strict scrutiny).

74. *Korematsu v. United States*, 323 U.S. 214 (1944).

75. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S. Ct. 2997 (1990). Because the federal government mandated the FCC set up a licensing program that favored minorities, a so-called

If the plaintiff is unable to meet the requisite burden, the legislation only receives "rational basis" scrutiny, which means that the law survives unless the court cannot conceive of a reason behind it.<sup>76</sup> Accordingly, whether plaintiffs will succeed with their equal protection claim turns on whether they can meet the evidentiary burden.<sup>77</sup> Unfortunately, the burden to prove discriminatory intent in cases involving aversive racism is nearly insurmountable because of the nature of aversive racism. Thus, an intent standard assures that only the most obvious cases of racial discrimination receive a judicial remedy.

The Equal Protection Clause itself does not suggest which approach the courts should adopt.<sup>78</sup> In all probability, this is because the Clause was drafted at a time when social and legal disincentives to expressing racist motivations were emerging for the first time.<sup>79</sup> The only clue available is that the drafters intended to help blacks by remedying the effects of racial discrimination.<sup>80</sup> The proper approach to equal protection law, accordingly, should be the one that incorporates current understandings about racial discrimination.

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"benign race-conscious measure," the Court accorded deference to the program. 110 S. Ct. at 3007-08.

76. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). See *James v. Valtierra*, 402 U.S. 137, 141-43 (1971) (holding that a public housing referendum was not designed to disadvantage a suspect class, and that the legislature was advancing democratic decisionmaking by making public housing a referendum issue). But see *Cleburne Living Ctr.*, 473 U.S. at 450 (holding that no rational basis existed for a zoning law prohibiting construction of a facility for the mentally handicapped). Compare *Harris v. McRae*, 448 U.S. 297, 341, 346 (1980) (Marshall dissenting) (saying that legislation designed for the purpose of discouraging individuals from exercising a fundamental right—in this case, the right not to procreate—would not meet even the rational basis test).

Professor Ely argues that rational basis is an inappropriate test to apply to true cases of racial discrimination because statistics can be used to rationalize discriminatory acts. Ely, *Democracy and Distrust* at 31 (cited in note 63). For example, he says that apartheid is a rational means of avoiding racial strife, and that job discrimination is rational given the statistics that whites generally are better educated than blacks. *Id.* Professor Ely favors a stricter standard of review in all cases involving racial discrimination by the state. *Id.*

For a discussion of what the Court has found to be illegitimate government purposes under the rational basis test, see D. Don Welch, *Legitimate Government Purposes and the State's Enforcement of Morality*, \_\_\_ U. Ill. L. Rev. \_\_\_ (forthcoming 1993).

77. See Brooks, *Rethinking the American Race Problem* at 52 (cited in note 52) (calling the Supreme Court's equal protection analysis "outcome-determinative").

78. See Ely, *Democracy and Distrust* at 32 (saying the key to which inequalities are tolerable under the Clause is not to be found in its text or the words of its writers).

79. See Schnapper, 71 Va. L. Rev. at 754-83 (cited in note 60) (describing the Reconstruction legislation enacted to assist blacks).

80. See *id.* at 784-88. See also Ely, *Democracy and Distrust* at 98 (saying that the Clause's express concern with equality supports an inference that it recognizes the need for real access to process).

### B. Judicial Interpretation of the Clause

In the early years of interpreting the Equal Protection Clause, the Court said that the Clause provided for across-the-board equal treatment of whites and blacks under the law,<sup>81</sup> which included eradicating the institutional enslavement of blacks in substance as well as in form.<sup>82</sup> The notion of "equal treatment," however, has changed over the years. For example, in the earlier equal protection cases, the Court held that equal treatment under the law did not require racial integration,<sup>83</sup> thereby sanctioning a "separate but equal" approach. In 1938, the Court held that integration was required if the state did not provide blacks with a facility that it provided for whites.<sup>84</sup> In 1950, the Court held that a black admitted to a white facility had to be treated exactly the same as the whites.<sup>85</sup> This progression of cases culminated in *Brown v. Board of Education of Topeka* ("*Brown I*").<sup>86</sup>

In *Brown I*, the Court held that the "separate but equal" approach was per se invalid in public education because segregation in public schools was inherently unequal and violated the Equal Protection Clause.<sup>87</sup> The Court cited no direct legal authority for its holding, only contemporary psychological studies that showed segregated schools stigmatized black students.<sup>88</sup> The opinion also rejected attempts to "turn the clock back" to reconstruct the purpose of the Fourteenth Amendment, saying that public education had to be examined in light of current psychological knowledge to determine whether plaintiffs were deprived of equal protection of the laws.<sup>89</sup>

After *Brown I*, the Court borrowed from both the effects and intent models to construct variations of a cost-benefit balancing test: if defendant's action looked like it was racially motivated, the Court focused

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81. In *Plessy v. Ferguson*, the Court stated: "The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law . . ." 163 U.S. 537, 554 (1896), overruled by *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

82. For purposes of this Note, the discussion of equal protection law is limited to situations where a suspect class can be defined according to race or ethnicity, and a given state action has the effect of treating whites more favorably than the suspect class.

83. See, for example, *Plessy*, 163 U.S. at 550-51.

84. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349-50 (1938).

85. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641-42 (1950).

86. 347 U.S. 483 (1954).

87. *Id.* at 495.

88. *Id.* at 494 & n.11. Some of the justices may have felt comfortable relying on psychological, rather than legal, bases for their decision because of their strong feelings that segregation was illegitimate. See Stephen L. Wasby, Anthony A. D'Amato and Rosemary Metrailler, *Desegregation from Brown to Alexander* 89 (Southern Ill. Univ., 1977). For example, in conference after reargument, Chief Justice Earl Warren told the other justices that they had to prohibit segregation, regardless of precedents, because segregation was wholly based on the pretense of "the inherent inferiority of the colored race." *Id.* (quoting Chief Justice Earl Warren).

89. 347 U.S. at 494.

on effects and did not inquire into actual intent;<sup>90</sup> if the Court could not clearly discern racial motivations, it applied the intent test.<sup>91</sup> In social cognitivist terms, the Court required intent when plaintiffs alleged aversive racism, but not when plaintiffs alleged dominative racism.

In cases challenging Southern discriminatory practices the Court did not require plaintiffs to show discriminatory intent, probably because the Court already was convinced that Southern states were acting from racist motivations. For example, in *Swann v. Charlotte-Mecklenberg Board of Education*,<sup>92</sup> the Court approved the limited use of mathematical ratios by the district court to determine whether a North Carolina school district's desegregation plan was inadequate.<sup>93</sup> The *Swann* Court did not require discriminatory intent; it merely assumed that racism was at work. The Court did not inquire into whether the challenged desegregation plan was intentionally designed to maintain separation of black and white students, nor did it examine whether other factors supported the school board's plan. Instead, the *Swann* Court noted that North Carolina had a long history of deliberate discrimination against blacks, enforced through a segregative school system.<sup>94</sup> Accordingly, the Court stated that the lower court correctly evaluated the desegregation plan by examining its effectiveness.<sup>95</sup> Racist intent was presumed.

Similarly, in *Palmer v. Thompson*,<sup>96</sup> the Court applied an effects test to a Mississippi city's decision to close its public swimming pools rather than integrate them as required by a court decree. Unlike *Swann*, however, the Court found no discriminatory effect because the pool closings affected whites as well as blacks, thus disadvantaging both races equally.<sup>97</sup> While the dissent viewed the pool closings as an expres-

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90. See Stone, et al., *Constitutional Law* 481 (cited in note 60) (saying that "[t]o avoid endless litigation with school boards operating in bad faith, the Court moved toward result-oriented, bright-line remedies").

91. See, for example, *Washington v. Davis*, 426 U.S. 229 (1976).

92. 402 U.S. 1 (1971).

93. *Id.* at 25.

94. *Id.* at 5-6 (asserting that "[t]his case and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race") (footnotes omitted).

95. *Id.* at 25 (saying that "a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness"). See also *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (saying the Court should examine "historical context" and "ultimate effect" of zoning laws challenged on equal protection grounds).

96. 403 U.S. 217 (1971), overruled by *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

97. *Id.* at 220. The Court also noted that the city showed that integrated pools would lose money. *Id.* at 226.

sion of official racial segregative policy,<sup>98</sup> the *Palmer* majority stated that evidence of the city's intent to frustrate the court decree was irrelevant, in part because intent was easy to mask and difficult to ascertain.<sup>99</sup>

In post-*Brown I* cases involving more complex allegations of racial discrimination, especially school desegregation cases, the Court focused on whether the areas involved had intended to exclude blacks from their schools.<sup>100</sup> Many of these cases challenged segregatory school districting in the North and West, where the history of discrimination was less apparent.<sup>101</sup> Other cases involved suburban school districts that refused to participate in the desegregation of urban schools.<sup>102</sup> In these cases, the Court stated that a school district should not have to participate in another district's desegregation plan unless it had substantially caused the alleged discrimination in that other district or the district borders had been deliberately drawn on the basis of race.<sup>103</sup> Even though the desegregation plan would be ineffective without including nearby suburbs,<sup>104</sup> the Court did not want to impose interdistrict relief

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98. *Id.* at 240-41 (White dissenting). The dissent saw the pool closings as "nothing more or less than a most effective expression of official policy that Negroes and whites must not be permitted to mingle together when using the services provided by the city." *Id.* at 241. As one scholar notes, the closing of swimming pools in the face of desegregation was particularly poignant since those pools were the public facilities where bodily contact between the races was most likely to occur. George Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 Cal. L. Rev. 1384, 1402 (1971).

99. 403 U.S. at 224-25 (saying that "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment" and that if a court struck a law purely for the bad motives of its supporters "it would presumably be valid as soon as the . . . relevant governing body repassed it for different reasons").

100. See, for example, *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974); *Washington v. Davis*, 426 U.S. 229, 239 (1976). But see *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

101. See *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (*Dayton I*).

The importance of the history of discrimination can be attributed to political factors. Following *Brown I* and *Cooper v. Aaron*, 358 U.S. 1 (1958), the Court had a great deal of political support for allowing district judges wide latitude to fashion desegregation requirements for Southern school districts. When it came time to apply *Brown* to other parts of the country, however, "the collapse of political support was inevitable." Stone, et al., *Constitutional Law* at 481 (cited in note 60). This may explain why the Court developed the intent inquiry for equal protection cases not arising in the South. Compare the Southern *Palmer v. Thompson*, 403 U.S. at 224 (saying that "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment") with the Midwestern *Dayton I*, 433 U.S. at 413 (stating that "the finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board").

102. See, for example, *Milliken*, 418 U.S. at 744 (saying that "[o]ur prior [school desegregation] holdings have been confined to violations and remedies within a single school district").

103. *Id.* at 744-45.

104. *Id.* at 784 (Marshall dissenting).

where the affected districts did not violate the Constitution.<sup>105</sup> In effect, the Court was looking for dominative racism. Accordingly, these suits troubled the Court because the defendant communities did not display the traits of dominative racism commonly associated with racial discrimination.

Further evidence that the intent requirement evolved to ensure that the Equal Protection Clause only prohibited dominative racism can be found in the eventual shift of the burden of proof from defendants to plaintiffs. In *Keyes v. School District No. 1, Denver, Colo.*,<sup>106</sup> one of the first cases to challenge a city school board's system-wide segregation, the Court placed the ultimate burden of proof on defendants. Only one area of schools in the district was segregated by law; therefore, the plaintiffs had to show an intent to segregate the whole system.<sup>107</sup> Nevertheless, the Court held that plaintiffs had shifted the burden of proof on the intent issue to defendants by bringing evidence of segregation in a few schools in the system.<sup>108</sup> The defendant then had to prove that segregative intent was not a factor behind its actions.<sup>109</sup> The *Keyes* Court emphasized that the defendant could not meet this burden merely by offering a racially neutral basis for its action; the defendant either had to prove an absence of discriminatory intent or that there was no causation connecting the school district's actions and the segregation.<sup>110</sup>

While the lack of historical discrimination in Denver warranted a requirement that some showing of intent be made, other factors were present that convinced the Court that racism was at work. A district court already had found that the Denver school board had deliberately segregated schools in the Park Hill section of the city.<sup>111</sup> Nonetheless, the district court did not extend its finding or its desegregation order to

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105. *Id.* at 744-45. Note that the Court was not compelled to reach this conclusion because Michigan's school districts were state agencies. *Kies v. Lowrey*, 131 Mich. 639, 644 (1902) (stating that Michigan school districts were state agencies). Accordingly, the Detroit school district's act of imposing segregation imputed to the entire state, making a more statewide remedy like interdistrict desegregation appropriate. See *Milliken*, 418 U.S. at 771-72 (White dissenting). See also *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (saying that political subdivisions of states were never regarded to be sovereign entities, but were rather designed to assist the state in carrying out state functions).

106. 413 U.S. 189 (1973).

107. *Id.* at 207.

108. *Id.* The Court applied the evidentiary principle that "the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." *Id.* (quoting John Henry Wigmore, 2 *Evidence* 200 (Little, Brown, 3d ed. 1940)).

109. 413 U.S. at 208, 210.

110. *Id.* at 210.

111. 313 F. Supp. 61, 66-68 (D. Colo. 1970).

other areas within the school board's control largely because the segregative actions taken in those areas preceded the *Brown v. Board of Education* decision.<sup>112</sup> The Supreme Court rejected this reasoning, indicating that the "remoteness of time" of the segregative act was irrelevant.<sup>113</sup> Accordingly, even though *Keyes* involved a Western city, the Court felt comfortable applying a modified effects test.

In later cases in which no circumstances indicated dominative racist characteristics, the Court placed the ultimate burden of proof of intent on the plaintiffs. In *Washington v. Davis*,<sup>114</sup> two black police officers challenged the District of Columbia's use of a written civil service examination intended to determine whether individuals should be hired or promoted by the police department. The officers claimed that the test was discriminatory because blacks failed four times as often as whites. They also argued that the Court should apply the disparate impact test announced in *Griggs v. Duke Power Co.*,<sup>115</sup> a Title VII case. The district court found in favor of the police department,<sup>116</sup> but the D.C. Circuit reversed under *Griggs*, saying that discriminatory intent was irrelevant given the disparate impact that the examination had on blacks.<sup>117</sup> The Supreme Court reversed the D.C. Circuit.<sup>118</sup> It held that while disparate impact sometimes can establish a prima facie case for discriminatory intent, such effect is not sufficient to warrant judicial interference with a facially neutral state law.<sup>119</sup>

The next year, the Supreme Court gave more shape to the amorphous *Washington* decision in *Arlington Heights v. Metropolitan Housing Development Corp.*<sup>120</sup> In *Arlington Heights*, the plaintiff developers had applied to rezone an area from single- to multi-family dwelling classification so that it could build housing units for low- and middle-income tenants.<sup>121</sup> The village denied the rezoning request, and the plaintiffs challenged this decision under the Equal Protection Clause. The Court upheld the village's denial of rezoning because the plaintiffs failed to prove discriminatory intent. The Court fleshed out the intent requirement by listing a number of evidentiary factors that

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112. *Id.* at 69-70.

113. *Keyes*, 413 U.S. at 210.

114. 426 U.S. 229 (1976).

115. 401 U.S. 424 (1971).

116. 348 F. Supp. 15 (D.D.C. 1972).

117. 512 F.2d 956 (D.C. Cir. 1975).

118. 426 U.S. at 238.

119. *Id.* at 239. *Washington* was the first case to state that discriminatory intent was a necessary aspect of an equal protection violation. Samuel Issacharoff, Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 Yale L. J. 328, 328 (1982).

120. 429 U.S. 252 (1977).

121. *Id.* at 254.



future plaintiffs could use to show intent: disproportionate impact against one race; a clear pattern of discriminatory effect; invidious racism in the historical background of the decision; any evidence in the legislative history behind the state act; and any departures from the normal decisionmaking process.<sup>122</sup>

After *Washington* and *Arlington Heights*, the Court continued to espouse the intent standard, but demonstrated more concern with whether it found evidence of dominative racism than pure intent. In cases in which racism seemed obvious yet evidence of intent was thin, the Court showed a willingness to soften substantially the test's requirements. For example, in *Castaneda v. Partida*,<sup>123</sup> a Mexican-American challenged a county grand jury selection process under the Equal Protection Clause for gross underrepresentation of Mexican-Americans.<sup>124</sup> The *Castaneda* Court said that *Washington* and *Arlington Heights* had recognized that facially neutral legislation is not valid under the Equal Protection Clause if it is the result of a clear pattern of discrimination, especially if that pattern cannot be justified on grounds other than race.<sup>125</sup> The Court concluded from this determination that the plaintiffs could establish a prima facie case of discriminatory intent merely by showing disparate impact in both the present case and in society at large.<sup>126</sup> In other words, the *Castaneda* Court prescribed an effects test because it felt comfortable that racial discrimination was at work.

Some federal appellate courts initially resisted rigid application of the intent standard as laid out in *Washington* and *Arlington Heights*. In *United States v. Texas Education Agency* ("*Austin II*"),<sup>127</sup> the Fifth Circuit held that the plaintiffs adequately demonstrated intent by showing that the racially discriminatory effect of the school board's acts were reasonably foreseeable.<sup>128</sup> Given the wide gap between foreseeability (knowledge the act would disparately affect blacks) and intent (pur-

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122. *Id.* at 266-67.

123. 430 U.S. 482 (1977).

124. *Id.* at 485-87. The grand jury had indicted the plaintiff for burglary with intent to rape. *Id.* at 485.

125. *Id.* at 493.

126. *Id.* at 493-94.

127. 564 F.2d 162 (5th Cir. 1977).

128. *Id.* at 167-68. See also *Hart v. Community School Bd. of Educ., N.Y. School Dist. No. 21*, 512 F.2d 37, 50-51 (2d Cir. 1975). In *Austin II*, the Fifth Circuit effectively turned the intent test on its head. For example, it stated that "the most probative evidence of intent will be objective evidence of what actually happened rather than describing the subjective state of mind of the actor," and that "normally the actor is presumed to have intended the natural consequences of his deeds." 564 F.2d at 168.

pose that the act would disparately affect blacks),<sup>129</sup> it seems the Fifth Circuit was actually applying a modified effects test.

Similarly, in *Dayton Board of Education v. Brinkman*,<sup>130</sup> the Sixth Circuit avoided application of a true intent standard. The court of appeals agreed with the district court that the cumulative total of racially imbalanced schools in the Dayton system was sufficient to constitute a system-wide equal protection violation.<sup>131</sup> The Supreme Court granted certiorari, vacated both decisions, and remanded to the district court for additional factfinding in consideration of *Washington* and *Arlington Heights*.<sup>132</sup> The Court found the "cumulative violations" test too vague and the Sixth Circuit's statements about remedy too broad.<sup>133</sup> Although the district court, on remand, found that the plaintiffs had failed to show discriminatory purpose,<sup>134</sup> the Sixth Circuit reversed, inferring intent from the fact that the extensive system-wide segregation in the district was originally set up as an overt policy and never remedied.<sup>135</sup> The second time, the Supreme Court affirmed the Sixth Circuit's decision.<sup>136</sup>

Pinpointing exactly what motivated the Court to choose the intent standard is difficult. The *Washington* Court said the disproportionate impact standard would have a "far reaching" effect on "a whole range" of legislation.<sup>137</sup> This reasoning is particularly unpersuasive because precedent dictated a restrained application of the disparate impact test.<sup>138</sup> The Court also has expressed concern that only those who intentionally violate the Equal Protection Clause should have to participate in the remedy,<sup>139</sup> treating these violations as if they were criminal.<sup>140</sup>

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129. See, for example, Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and Its Processes* 224 (Little, Brown, 5th ed. 1989).

[A]ction is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. It is meaningful to think of the actor's attitude as different if he is simply aware that his conduct is of the required nature or that the prohibited result is practically certain to follow from his conduct.

Id.

130. 503 F.2d 684 (6th Cir. 1974).

131. Id. at 693. The appellate court also decided that the district court's remedy was not broad enough given the scope of Dayton's violation. Id. at 704.

132. 433 U.S. 406, 419 (1977).

133. Id. at 413, 417.

134. 446 F. Supp. 1232 (S.D. Ohio 1977).

135. 583 F.2d 243, 247-48 (6th Cir. 1978).

136. 443 U.S. 526 (1977).

137. 426 U.S. at 248.

138. See Robert G. Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. Ill. L. Forum 961, 990 (noting the application of the effects test in Title VIII housing discrimination cases).

139. See, for example, *Milliken*, 418 U.S. at 744; *Dayton Bd. of Educ.*, 433 U.S. at 420.

140. In both criminal and equal protection law, the defendant must have a culpable state of mind before the court will "punish" him for a bad act. See generally Pamela S. Karlan, Note,

Given the current psychological evidence that shows race discrimination also operates on an unconscious level, this concern for intent also lacks basis.<sup>141</sup>

Some critics argue that the Court's decisions demonstrate a concern that an economic class of whites will have to make sacrifices in order to accommodate the black liberty in question.<sup>142</sup> These critics also accuse the Court of refusing to redress racial issues until after they have snowballed to a point that could threaten the system.<sup>143</sup> Other commentators argue that the Court is concerned that a slow and costly equal protection suit could have potentially harmful repercussions upon a defendant community, such as rising land costs, changes in the community's demographic make-up, delays in local public improvement projects, and burdensome litigation costs.<sup>144</sup>

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*Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 Yale L. J. 111 (1983).

141. See Part II.A., B.

142. See Derrick A. Bell, Jr., *Race, Racism and American Law* § 7.11 at 443 (Little, Brown, 2d ed. 1980).

In the absence of overt racial discrimination of a character that shocks the public conscience, the Fourteenth Amendment, standing alone, will not authorize judicial relief providing an effective remedy for blacks where the remedy sought threatens the superior societal status of middle and upper-class whites. It follows that the availability of Fourteenth Amendment protection in racial cases is not actually determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Rather, racial remedies are the outward manifestations of unspoken and perhaps unconscious judicial conclusions that the remedies, if granted, will secure or advance societal interests deemed important by the upper classes.

Id.

143. See Kovel, *White Racism* at 221 (cited in note 14). Kovel describes the American pattern of discriminatory reform as follows:

[A] wrong is spotted (when it becomes threatening); efforts are made to redress it; and these efforts lead to a reduction of the threat, a rationalization of the basic power-generating structures, an easing—indeed a further purification—of the white conscience; and either the neglect of the black victim, or the infliction upon him of a new variety of indignity.

Id. at 220-21. See also Bell, *Race, Racism and American Law* at 231. Professor Bell states that ever since the law began to attempt to prevent the government from depriving blacks of their basic rights, courts have only been able to intervene in certain cases. He observes:

At some infinitely variable point—sometimes in matters of little moment, at others when the need for protection is critical to the maintenance of dignity, poverty, or even life itself—the legal provisions designed and enacted to protect black rights become suddenly, and without notice, inoperable.

Id.

144. See Henry McGee, *Urban Renewal in the Crucible of Judicial Review*, 56 Va. L. Rev. 826, 878 (1970). Some of these negative repercussions were borne out in the ten years of litigation over the issue of whether low-rent public housing in Chicago should continue to be placed exclusively in black ghettos. *Hills v. Gautreaux*, 425 U.S. 284 (1976). After three years of litigation in the trial court, the district judge ordered the Chicago Housing Authority to site the next 700 public housing dwellings in white neighborhoods, and 75% of all public housing in white neighborhoods thereafter. *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736, 738-39 (N.D. Ill.

### C. *The Flaws Inherent in the Intent Standard*

Whatever the reason behind the Court's adoption of the intent standard, it is a flawed measure of racial discrimination and should be discarded.<sup>145</sup> The intent standard is flawed in many levels. First, it demonstrates a misunderstanding of the causes and manifestations of racial discrimination. Proponents of the intent test believe that racists are evil and that race-based decisions are made on a conscious level.<sup>146</sup> These beliefs lead them to conclude that aversive racism does not exist, or alternatively, that if it does exist, it is not within the ambit of the Equal Protection Clause. They look into the actor's state of mind to determine whether racial discrimination took place. Similar to the requirements of criminal law, the intent-based approach requires a showing of a culpable mens rea before an equal protection violation will be found.<sup>147</sup>

Social cognitivists have shown, however, that racist tendencies are a natural by-product of a child's development of a sense of identity.<sup>148</sup> They have also shown that racist tendencies may operate on a preconscious level, motivating individuals to act in a racially discriminatory manner without being aware that they are doing so.<sup>149</sup> Such aversive racism is no less harmful to blacks than dominative racism, and it

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1969). During the next three years, municipal authorities refused to approve new public housing construction. Bell, *Race, Racism and American Law* § 8.13.1 at 558 (cited in note 142). The district court then removed the power of approval from the Chicago municipal authorities, ordering site proposals to be sent directly to the Department of Housing and Urban Development for approval. 342 F. Supp. 827, 830-31 (1972), aff'd, 480 F.2d 210 (7th Cir. 1973).

While the plaintiffs eventually prevailed in the courtroom, Professor Bell notes that this victory did not necessarily affect much: by 1979 very few public housing projects had been constructed in Chicago. Bell, *Race, Racism and American Law* § 8.13.2 at 560.

145. In the past, the Supreme Court has abandoned constitutional tests when modern scientific knowledge shows them to be outdated. In the equal protection context, the Court discarded the "separate but equal" doctrine because of psychological data that segregation stigmatized black children. See *Brown I*, 347 U.S. at 494 & n.11. See also notes 86-90 and accompanying text. Similarly, the Court has relied on medical evidence concerning the viability of a fetus to develop its trimester framework for abortions in *Roe v. Wade*, 410 U.S. 113 (1973), and later used more current medical evidence to dismantle this framework, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2798 (1992) (noting that medical advances had pushed viability to an earlier point in the pregnancy period).

146. See, for example, Blumstein, 69 Va. L. Rev. 643, 644 n.55 (cited in note 65) (saying that volition is an essential element of racism, and describing racism as "opprobrious" and "contumelious"). See also Torres, 63 U. Colo. L. Rev. at 839 (cited in note 14) (stating that "racism has been and should be a term of special opprobrium," and warning that "[w]e risk having the term lose its condemnatory force by using it too often or inappropriately"). See also Kovel, *White Racism* at 55 (cited in note 14) (saying that only "dominative racism . . . includes what we ordinarily think of as the racially prejudiced person").

147. See Karlan, Note, 93 Yale L. J. at 122-26 (cited in note 140).

148. See text accompanying notes 14-21.

149. See text accompanying notes 22-25.

therefore deserves recognition under equal protection analysis. While aversive racism may be less morally reprehensible than dominative racism, this alone should not preclude an equal protection remedy because the goal of the Equal Protection Clause is to improve the condition of blacks, not to punish racists.

Beyond these fundamental shortcomings, systemic factors prevent the intent test from detecting racism. The intent test can only work if governmental decisionmaking bodies follow strict articulation and recording procedures, always clearly stating a specific purpose for the decision.<sup>150</sup> The necessary recordation may be partially satisfied at the federal level, where legislative debates, congressional committee reports and agency rulemaking deliberations are made public.<sup>151</sup> On the state and local levels, however, articulation and recording requirements are less stringent.<sup>152</sup> Where the action is taken by a state or local government, or pursuant to authority granted by state or local governments, there may not even be a full legislative record for plaintiffs to search for

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150. See Ely, *Democracy and Distrust* at 127 (cited in note 63). Note that no judicially imposed incentive for legislatures to include intent in the record exists. If the Court finds no evidence of legislative intent, it almost always will presume legitimacy if it can imagine a permissible purpose for the action. *Id.* at 126-27 n.\*. Compare Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) (arguing that the court should consider only articulated legislative purposes).

151. The record requirements are only partially satisfied on the federal level because many aspects of federal administrative rulemaking are not recorded, such as pressures from the Office of Management and Budget (OMB). See *National Grain & Feed Ass'n v. OSHA*, 858 F.2d 1019, 1031 & n.22 (5th Cir. 1988), vac'd in part on other grounds, 866 F.2d 717 (5th Cir. 1989) (describing evidence that OMB had coerced the agency to change its regulatory standard behind the scenes as "colorful," but holding that a challenge to the promulgated rule must "stand or fall on the basis of the record before the agency, not on the basis of some 'secret record' of OMB's"). Other unrecorded influences on decisionmaking are political favor-trading discussions and White House intervention. See *Sierra Club v. Costle*, 657 F.2d 298, 352, 353 (D.C. Cir. 1981) (holding that unless expressly forbidden by Congress, the President may meet with agency administrators during or after the public notice-and-comment period, and that such meetings need not be noted or summarized in the public record).

Even if plaintiffs could gain access to the nonpublic record behind an agency rule, the courts have held such evidence insufficient to support a rule challenge. See *National Grain & Feed*, 858 F.2d at 1031. Compare *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (saying that plaintiff's evidence that OMB coerced OSHA to delete a toxic substance short-term exposure limit provision from the final regulation sent to the *Federal Register* raised "difficult constitutional questions," but deciding the case in favor of plaintiffs based on a lack of support for the deletion in the administrative record).

152. State legislatures often do not record their decisionmaking sessions as thoroughly as does the United States Congress. See Thomas A. Woxland, *Researching Legal History*, cited in William N. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 909, 912 (West, 1988). Additionally, any records that are kept often will be physically inaccessible, and may not be indexed as comprehensively as federal legislative materials. *Id.* For a list of sources of legislative history for each state, see Mary L. Fisber, *Guide to State Legislative and Administrative Materials* (Littleton, 4th ed. 1988).

evidence of discriminatory intent.<sup>153</sup> Even if a legislative record exists, whether that record would expose a discriminatory purpose is questionable.<sup>154</sup> More than likely, any such record would reflect alternative rationales for the decision that do not directly implicate race.<sup>155</sup> If there are racist reasons behind a particular action, they probably will not show up in the record, as the decisionmakers may not be aware of them or may be prudent enough not to make these reasons. In either case, the record will likely reflect only neutral purposes.<sup>156</sup> Legislative decisions may be made for reasons that do not appear in the record at all.<sup>157</sup>

Another misguided belief behind the intent standard is that a legislature cannot discriminate against a minority if members of that minority are part of the decisionmaking process.<sup>158</sup> This belief is not

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153. The courts have faced the problem of an empty record most acutely in the context of equal protection challenges to schemes adopted by referendum, usually involving public housing projects, that have a disparate impact upon a minority. See, for example, *James v. Valtierra*, 402 U.S. 137 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969). Since decisionmaking by referendum allows the populace to vote on the issue without stating their underlying reasons, there is no record upon which plaintiffs can bring suit. In such cases, courts have required plaintiffs to present evidence that the referendum provision rested on race-based distinctions. See *Valtierra*, 402 U.S. at 141; *Hunter*, 393 U.S. at 391. This seems to require plaintiffs to prove that the legislature delegated the issue to the constituency because it knew that the referendum would produce the desired discriminatory effect.

154. For a review of the textualist criticisms of relying on legislative history to interpret statutes, see Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1299-1310 (1990).

155. These rationales may be compared to the aversive racist's unconscious concealment of irrational racist tendencies behind thoughts and desires with more rational appeal. See the discussion at text accompanying notes 30-32. See, for example, Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 585 n.193 (1977) (saying that in the land-use context "virtually any land-use decision will satisfy minimal scrutiny because it will be rationally related to a legitimate typically environmental, objective").

156. See Ely, *Democracy and Distrust* at 128 n.\* (cited in note 63) (stating that "it is a rare motivation that is so crassly political that it cannot itself be characterized . . . as laudable"); Brooks, *Rethinking the American Race Problem* at 87 (cited in note 52) (saying that would-be discriminators or segregationists can infer from the intent test "that, in the final analysis, housing discrimination and segregation are permissible as long as true motives are kept private and everything is done with a smile").

157. Ely, *Democracy and Distrust* at 127 (saying that in group deliberations, "people often vote for measures for reasons sufficient to themselves even though no one else has put those reasons on the record").

The possibility of a secret record becomes a greater concern when the issue before a legislature involves a well-organized, politically connected interest group on one side and a relatively unorganized and unconnected group on the other side. In these cases, a politician will have strong incentives to favor the organized group because it is more likely than the unorganized group to respond politically. Public choice theorists would call this an ideal "rent-seeking" situation. See Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 232 (1986); Zeppos, 76 Va. L. Rev. at 1304 (cited in note 154). For an example, see the discussion in Part V.B.

158. See Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 37 (Harper & Row, 1970). For example, in August 1991, a district court in Virginia dismissed a black group's efforts to enjoin the siting of a regional landfill in a predominantly black neighborhood. *R.I.S.E.*,

misguided in principle, but in actuality.<sup>159</sup> While the lack of political representation may create incentives for legislators to discriminate against a minority, the presence of minority representatives alone does not guarantee discrimination-free decisionmaking. Representatives of minorities may develop unconscious racist tendencies against their own group.<sup>160</sup> As Justice Marshall stated in his concurrence in *Castaneda v. Partida*,<sup>161</sup> minority group members in power often dissociate themselves from the minority in an attempt to become more like members of the dominant group.<sup>162</sup> Therefore, instead of using their power to fight discrimination, minority representatives may adopt negative attitudes toward less powerful members of their own group that are similar to the attitudes of the dominant group.<sup>163</sup>

*Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991). The planned landfill would receive refuse from counties within a 150-mile radius of the site. The court, which held that no equal protection violation took place, made note of the fact that two of the five decisionmakers were black and both voted in favor of the siting proposal. *Id.* at 1146, 1148.

159. Ely, *Democracy and Distrust* at 135 (cited in note 63) (stating that "the duty of representation that lies at the core of our system requires more than a voice and a vote").

160. This can be explained by reference to the social dominance theory. Blacks who achieve material or political success experience frustration because their movement into higher-status caste groups is hindered by their skin color. They notice that whites who achieve the same degree of success encounter less resistance, on both institutional and individual levels, to their upward movement. The successful blacks unconsciously try to shed the restriction on their movement by dissociating themselves from their black culture and assimilating to the white hegemonic culture. This phenomenon causes successful blacks to treat other blacks with the same hegemonic superiority complex that they have experienced from whites. See discussion and sources cited in Part II.B. Alternatively it can be explained as a reaction among successful blacks to affirmative action. See discussion in note 163.

161. 430 U.S. 482 (1977).

162. *Id.* at 504 (Marshall concurring).

163. *Id.* See generally Harry Edwards, *Black Students* (Free Press, 1970). Edwards argues that successful blacks have refrained from championing the cause of their race because they "often [feel] insecure about and protective of their newly won liberation from the shackles of abject poverty or traditional welfarism." *Id.* at 8. He also says that these blacks suspect, "not without some justification," that the success which they enjoy is made possible by the tolerance of whites as much as by their own hard work. *Id.* Therefore, he continues, middle-class blacks develop feelings of superiority toward lower-class blacks, yet feel inferior to whites. *Id.* But see Bell, *Race, Racism, and American Law* at 245 n.9, 249 (cited in note 142). In 1980, Professor Bell argued that Marshall's suggestion in *Castaneda* was still valid, but that his sources are outdated. Bell suggested that modern blacks are more likely to see discrimination as the product of white racism rather than black inferiority, which would cause a greater likelihood that black jurors would identify with black defendants. *Id.*

While blacks may no longer see themselves as inferior, blacks still may tend to dissociate themselves from their race when in a position of authority. Professor Bell has stated recently that the belief that strict racial equality is the solution to racial discrimination has perpetuated black disempowerment. Bell, *Racial Realism*, 24 Conn. L. Rev. at 363 (cited in note 54). This belief has given rise to a movement of political conservatism among successful blacks who "may feel diminished by the notion that they got where they are because of affirmative action. . . . [Black conservatives] are really trying to affirm that their status is the result of a fair fight." Julianne Malveaux, *Why Are the Black Conservatives All Men?*, Ms. 60, 60-61 (Mar./Apr. 1991), cited in Bell, 24 Conn. L. Rev. at 370 n.22. See also Jones, *The Concept of Racism and Its Changing Reality* at 31

Additionally, black representatives who are technically involved in the process may be excluded from the real decisionmaking.<sup>164</sup> Nominal participation by blacks in the decisionmaking process does not necessarily protect blacks from racial discrimination. Only when blacks have good faith representation and access to all parts of the decisionmaking process can one conclude with certainty that the process did not discriminate against them.<sup>165</sup>

#### IV. ENVIRONMENTAL DISCRIMINATION AND ITS CAUSES

Environmental discrimination, or environmental racism, describes the nationwide phenomenon that minority neighborhoods bear a disproportionately large environmental burden compared to whites and the exclusion of minorities from the environmental decisionmaking process.<sup>166</sup> This correlation between minority neighborhoods and hazardous waste sites is particularly disturbing since such sites may pose serious dangers to nearby residents.<sup>167</sup>

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(cited in note 42) (noting that affirmative action programs have the consequence of perpetuating the notion that minorities are less qualified than whites). Bell offers Supreme Court Justice Clarence Thomas as an example of a black conservative. Bell, 24 Conn. L. Rev. at 370.

164. See, for example, the discussion of the California Waste Management Board and South Central Los Angeles in Part V.B.

165. Ely, *Democracy and Distrust* at 98 (cited in note 63).

166. See generally *Toxic Wastes and Race* (cited in note 71)

167. See *Siting Non-Radioactive Hazardous Waste Management Facilities: An Overview 6* (Keystone Center, Sept. 1980) (saying that "[e]ven with the best standards, technology, management, and enforcement, each hazardous waste management site will have some residual risk"), quoted in David Morell and Christopher Magorian, *Siting Hazardous Waste Facilities: Local Opposition and the Myth of Preemption* at 62 (Ballinger, 1982). See, for example, Jane Kay, *Minorities Bear the Brunt of Pollution*, San Francisco Chronicle A1, A12 (April 6, 1991) (reporting that the California zip code which receives more hazardous chemical releases than any other in the state is 59% black and 38% Latino). For in-depth description of the health hazards that toxic wastes can cause, see Staff of Senate Comm. on Environmental and Public Works, 96th Cong., 2d Sess., *Health Effects of Toxic Pollution* (Comm. Print, 1980) (describing physical health hazards); Michael R. Greenberg and Richard F. Anderson, *Hazardous Waste Sites: The Credibility Gap* 88-99 (Center for Urban Policy Research, 1984) (same); Dennis Peck, ed., *Psychosocial Effects of Hazardous Toxic Waste Disposal on Communities* 81 (Thomas, 1989) (describing mental health hazards).

Toxins from an environmental hazard can escape into the atmosphere, dissolve into human bodies upon contact, contaminate land, cause fires and explosions, or seep into local ground water. Albert L. Weaver, *Techniques for Hazardous Chemical and Waste Spill Control* at III-1 to III-4 (Weaver, 1982). People can be directly exposed to a toxin, or indirectly by ingesting contaminated fish, meat, or vegetation. For example, after Olin Chemical Company shut down its DDT manufacturing plant in northern Alabama, authorities discovered that the substance had leached into Indian Creek, where many of the residents of the black community of Triana fished for sustenance. The United States Army tested fish from the Creek and found DDT in levels that were 100 times in excess the safe exposure amount; the Tennessee Valley Authority found even higher levels in fish taken from the Triana residents' freezers. Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* 19-20 (Westview, 1990).



A substantial amount of evidence shows that environmental discrimination is a national phenomenon.<sup>168</sup> In 1987, the United Church of Christ Commission for Social Justice conducted a nationwide demographic study to determine the percentage of blacks living near hazardous and uncontrolled toxic waste facilities.<sup>169</sup> The Commission's study found that three out of five American blacks and Latinos lived in communities with uncontrolled toxic waste sites<sup>170</sup> and that four times as many minorities lived in areas with uncontrolled toxic waste sites than

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For black and minority neighborhoods, these health risks are exacerbated by the fact that American minorities generally have lower health status than American whites. See generally [1 Executive Summary] U.S. Department of Health and Human Services, *Report of the Secretary's Task Force on Black and Minority Health* (1985).

Additionally, when community residents perceive that racism is behind a siting decision, that perception itself may have its own harmful effect. See C.A. Armistead, et al., *Relationship of Racial Stressors to Blood Pressure Responses and Anger Expressions in Black College Students*, 8 *Health Psych.* 541 (1989) (explaining experiment results that showed exposure to racism caused high rates of hypertension among blacks). Armistead's study further showed that exposure to nonracist negative situations had no such effect on blacks, indicating that racism causes unique injury and stress. See generally Deborah A. Byrne and Gary Kiger, *The Effect of Prejudice-Reduction Simulation on Attitude Change*, 20 *J. Applied Soc. Psych.* 341, 354 (1990) (noting that participants in discrimination-simulation workshops experience a great deal of stress throughout the experiment).

Finally, environmental hazards cause property values near the site to decrease, adding insult to injury. See Greenberg and Anderson, *Hazardous Waste Sites* at 99-101; Lawrence S. Bacow and James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 *Harv. Envir. L. Rev.* 265, 268 (1982).

168. Of ten studies that compared race and income in terms of their significance regarding the location of environmental hazards in this country, seven concluded that race was more significant. Paul Mohai and Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 *U. Colo. L. Rev.* 921, 926, Table 1 (1992). The six most recent of these studies all found race was more significant. *Id.* Further, all three of the above studies that examined national, as opposed to state or city, data, concluded in favor of race. *Id.*

169. See *Toxic Wastes and Race* (cited in note 71). The United States General Accounting Office (GAO) conducted the first attempt to study environmental racism. U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with the Racial and Socio-Economic Status of Surrounding Communities* (GAO/RCED-83-168, June 1983). The GAO concentrated on four communities in the Southeastern United States that were near hazardous waste landfills. The GAO found that blacks were the majority population in three of the four communities studied.

In 1987, the United Church of Christ Commission for Racial Justice issued *Toxic Wastes and Race*, which consisted of two demographic studies. The first dealt with off-site commercial hazardous waste facilities, which store wastes from third parties. *Toxic Wastes and Race* at xii; the second looked at uncontrolled toxic waste sites, which are closed, abandoned, and considered by EPA to pose a substantial threat to health and the environment. *Id.* at 3.

170. *Id.* at 13. For example, in Memphis, Tennessee, which has the greatest number of such waste sites in the country (173), blacks make up 43.3% of the population in the metropolitan area. *Id.* at 19, Table 2. In Atlanta, Georgia, where there are 90 such sites, blacks make up 46.6% of the metropolitan area's population. *Id.* These figures are particularly staggering in light of the fact that blacks only comprised 11.7% of the population when the *Toxic Wastes and Race* study was conducted. *Id.* at 19, Table 2.

lived in areas without such sites.<sup>171</sup> With respect to commercial hazardous waste facilities, the study found minorities were five times more likely to live in communities with such facilities than in communities without them.<sup>172</sup> The state of California has three waste facilities that will accept nearly any kind of toxic waste; all three facilities are located in predominantly Latino and black communities.<sup>173</sup>

Large cities, with their relatively high minority populations,<sup>174</sup> are common places to find environmental racism at work. For example, in Houston, Texas, seven of eight city-operated waste incinerators and all five city landfills are located in predominantly black areas;<sup>175</sup> in Detroit, Michigan, a 1990 study showed that forty-four percent of the residents living within a mile of a commercial hazardous waste facility were black, while only fifteen percent of those living more than one and a half miles away were black.<sup>176</sup>

Like segregation and disfranchisement, state-sanctioned acts of environmental discrimination cause harm to blacks in order to benefit whites.<sup>177</sup> Yet because instances of environmental discrimination generally fall into the aversive and institutional categories of racism, the traditional features of racial discrimination are hard to pinpoint. For example, the decision to locate a hazardous waste facility in a predomi-

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171. See *id.* at 16. The study defines minorities as blacks, Latinos, Asians/Pacific Islanders, and American Indians. *Id.* at xiv.

In Fort Lauderdale, Florida, 97% of the black population lives near an uncontrolled toxic waste facility. In contrast, only 45.7% of the city's white population lives near such a facility. Similarly, in Flint, Michigan, 95.3% of the black population, as opposed to 44% of the white population, live near uncontrolled waste facilities. *Id.* at 20, Table 3.

172. *Id.* at 16. Los Angeles County, California, for example, has 14 active commercial sites within its borders, and 46.7% of its population consists of minorities. *Id.*, Table B-9, at 48. In the parts of Los Angeles that actually contain the sites, the minority populations are generally much higher. For example, the Lugo and Hazard areas of the county, which contain one site each, have minority populations in excess of 95%. *Id.* Nine of the remaining facilities are located in areas with minority populations ranging from 58.9% to 79%. *Id.*

Another example, not noted in *Toxic Wastes and Race*, is Richmond, California, where half of the population of 100,000 is black. Richmond hosts 350 industrial facilities that handle hazardous chemicals. These facilities emit 210 known toxic substances into the air, water and ground. Dick Russell, *Environmental Racism*, 11 *Amicus J.* 22, 25 (Natural Resources Def. Council, Spring 1989) (recounting information from a February 1989 report by Citizens for a Better Environment).

173. Luke W. Cole, Correspondence, *Remedies for Environmental Racism: A View From the Field*, 90 *Mich. L. Rev.* 1991, 1992 (1992).

174. *Toxic Wastes and Race* at 18 (noting that 60% of black Americans live in inner cities).

175. Bullard, *Dumping in Dixie* at 50-54 (cited in note 167).

176. Paul Mohai and Bunyan Bryant, *Environmental Inequities and the Inner City* (oral presentation), delivered at the Sixth Annual Technological Literacy Conference of the National Ass'n for Science, Technology & Society (1991), cited in Rachel D. Godsil, *Remedying Environmental Racism*, 90 *Mich. L. Rev.* 394, 395 n.9 (1991).

177. See Bacow and Milkey, 6 *Harv. Envir. L. Rev.* at 268 (stating that "[t]he social costs associated with hazardous waste facilities fall most heavily on those who live nearby[;] the dispersed benefits . . . accrue to the entire region served by the facility").

nantly black neighborhood often will affect some whites as well. Accordingly, the disproportionate number of environmental hazards near black and minority neighborhoods does not, by itself, establish racial discrimination. To determine whether racism is truly the cause of this phenomenon, it is necessary to understand the social and political factors that allow the phenomenon to occur. These factors include the concentration and isolation of minorities in particular neighborhoods, the nature of state waste facility siting processes, and the amount of real political representation that minorities have in siting decisions.

#### A. Racially Segregated Neighborhoods

Blacks and minorities have limited options when it comes to choosing a home.<sup>178</sup> Lower-income minorities can only afford to live in housing projects, which virtually prevents them from leaving the inner cities: these projects are almost always constructed in inner cities because of suburban zoning restrictions and political pressures.<sup>179</sup> Blacks with greater economic power still are limited by private market restrictions on their choice of neighborhood. For example, many real estate dealers will not show black customers houses for sale in wealthy white neighborhoods.<sup>180</sup> Excluding minorities from white neighborhoods keeps land values high.

Not only are blacks and minorities concentrated in certain neighborhoods, but these neighborhoods may be isolated from nearby white communities by other factors. In many areas, highway construction pro-

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178. Blacks and minorities are limited in their housing choices by racial discrimination more than by economics. Nancy A. Dutton and Douglas S. Massey, *Residential Segregation of Blacks, Hispanics and Asians by Socioeconomic Status and Generation*, 69 Soc. Sci. Q. 797 (1988) (noting U.S. Census Bureau data that showed racial segregation was just as significant when controlling for other factors such as income, education, and occupation status levels, and concluding that race limited blacks mobility more than income). See Perry, 125 U. Pa. L. Rev. at 581 (cited in note 155) (saying that "poverty makes it difficult to escape racially isolated neighborhoods, and racial isolation makes it difficult to escape poverty").

179. While the Supreme Court has struck down racially restrictive covenants, *Shelley v. Kraemer*, 334 U.S. 1 (1948), it has upheld the powers of suburban communities to prohibit low-income housing projects in their neighborhoods via referendum. See, for example, *James v. Valtierra*, 402 U.S. 137, 141 (1971) (holding that a state constitutional amendment mandating that public bodies get the approval of a majority of voters before building a low-rent housing project in their community did not rest on racial distinctions and thus did not violate the Equal Protection Clause). See also *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986).

180. See Department of Housing and Urban Development, *Fair Housing Enforcement Demonstration* (U.S. Dept. of Housing and Urban Development, Office of Policy and Research, 1983) 23-28, 37-44. HUD tested rental markets in various United States cities for racial discrimination. HUD would send out independently two groups of apartment seekers, one white and one minority, to inquire about rental opportunities at certain complexes. The experiments showed that whites were much more likely to be invited to see a model unit, while blacks often were told no vacancies were available. See also Bell, *Race, Racism, and American Law* § 8.1 at 475 (cited in note 142).

grams have placed higher physical barriers between these neighborhoods and the rest of the city.<sup>181</sup> Also, school desegregation plans in the 1970s did not require suburban school districts to participate in the desegregation of predominantly black urban school systems,<sup>182</sup> further preventing urban blacks from making their way into the suburbs.<sup>183</sup> Since more poor blacks than poor whites live in lower-income, inner-city neighborhoods,<sup>184</sup> the isolation of these neighborhoods generally affects blacks more adversely than whites. Further, lower-income whites living in economically varied areas benefit from the greater political influence that the middle class in those neighborhoods possess.<sup>185</sup> Political clout does not trickle down to the strictly lower-income areas, however, making these neighborhoods even more vulnerable to the political system.

### B. *The Environmental Hazard Siting Process*

The siting processes in place in most areas further allow for environmental discrimination to occur. Since the federal government hardly regulates the siting of environmental hazards, state and local governments retain a great deal of flexibility in structuring their siting decisionmaking processes. States accordingly can set up processes that exclude blacks from the decisionmaking and deny affected residents complete information about the health effects the facility will have

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181. Bullard, *Dumping in Dixie* 7 (cited in note 167); Larry Ford and Ernest Griffin, *The Ghettoization of Paradise*, *Geographical Rev.* 69, 140-58 (April 1979).

182. See, for example, *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (striking down a plan for interdistrict desegregation because the outlying suburban districts did not cause the segregative effects in the urban district).

183. Professor Bell has said that *Milliken* "allayed middle-class fears that the school bus would become the Trojan Horse of their suburban Troys." Bell, *Race, Racism, and American Law* at 399 (cited in note 142).

184. Recent census figures show that 70.9% of poor urban blacks are concentrated in poverty areas, while only 40% of poor urban whites live in those areas. U.S. Dep't of Commerce Bureau of Census, Series P-60, No. 171, *Poverty in the United States: 1988 and 1989* at 4 (1991). The Census Bureau defines "poverty areas" as census tracts with poverty rates of 20% or more. *Id.* at 4 n.4. Furthermore, 54.8% of all urban blacks lived in poverty areas, compared to only 16.7% of urban whites. *Id.* at 4-5.

185. See William J. Kruvant, *People, Energy and Pollution*, in Dorothy K. Newman and Dawn Day, eds., *The American Energy Consumer* 166 (Ballinger, 1975). Kruvant argues:

[D]isadvantaged people are largely victims of middle- and upper-class pollution because they usually live closest to the sources of pollution—power plants, industrial installations, and in central cities where vehicle traffic is heaviest. . . . Discrimination created the situation, and those with wealth and influence have the political power to keep polluting facilities away from their homes.

*Id.* See also Godsil, 90 Mich. L. Rev. at 399 (cited in note 176).

upon their neighborhoods.<sup>186</sup> These procedural disadvantages create situations that facilitate racially discriminatory decisionmaking.

A look at various states' hazardous waste facility site decisionmaking processes illustrates how the environmental hazard siting process can engender discriminatory results. Until the mid-1970s, the federal government did not regulate the disposal of hazardous wastes at all.<sup>187</sup> In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) to regulate newly generated solid and hazardous wastes.<sup>188</sup> RCRA delegates to the states the responsibility for locating solid and hazardous waste sites and authorizes them to initiate their own hazardous waste programs.<sup>189</sup> For existing sites, RCRA mandates that the state conduct compliance inspections for commercial facilities every two years,<sup>190</sup> and for government-operated facilities annually.<sup>191</sup> The results of these inspections are to become part of the public record.<sup>192</sup> RCRA, however, offers very little procedural guidance as to how the states should make their placement decisions in the first place. It merely states a policy objective—to minimize threats to health and the environment.<sup>193</sup> This policy objective is tempered by an EPA rule that does

186. Unless affected minorities are included meaningfully in the decisionmaking process, the decisionmakers likely will underevaluate the health concerns at stake, possibly because minority lives are not considered as valuable as white lives. See discussion at notes 14-27. For example, in 1982, North Carolina decided to build a landfill to hold more than 30,000 gallons of polychlorinated biphenyls, a dangerous toxin, in a community which was 84% black. Bullard, *Dumping in Dixie* at 36-37 (cited in note 167). The state made this decision despite EPA discouragement and scientific data indicating that the water table in the area was too shallow to host the landfill safely. *Id.* While less risky storage methods, such as incineration and on-site neutralization, were available to dispose of the toxins, the landfill was chosen because it was the least expensive. *Id.* at 38 (citing oral remarks of EPA official William Sanjour). See Nicholas Freudenberg, *Citizen Action for Environmental Health: Report on a Survey of Community Organizations*, 74 *Am. J. Public Health* 444 (1984). In a survey of 110 community groups, 88% said that they perceived obstacles to obtaining health information about environmental problems; 45% stated the government agencies caused these obstacles. *Id.* at 444-48.

187. The absence of regulation until the mid-1970s created an economic disincentive for waste disposers to consider any factors beyond cost in their disposal decisions. See Greenberg and Anderson, *Hazardous Waste Sites* at 36 (cited in note 167). Up until the late 1970s, 80% to 90% of hazardous waste was disposed without adequate health and environmental precautions. *Id.* at 31. While Congress had enacted the Solid Waste Disposal Act in 1965, this Act merely declared that improper waste disposal created a hazard to public health. Solid Waste Disposal Act § 202(a)(4), Pub. L. No. 89-272, 79 Stat. 997 (1965).

188. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992 (1992)).

189. 42 U.S.C. § 6926(b).

190. *Id.* § 6927(e).

191. *Id.* § 6927(c),(d).

192. *Id.* § 6927(b)(1).

193. *Id.* § 6902(b) (declaring a national policy that waste storage and disposal should "minimize the present and future threat to human health and the environment").

not allow the states to set up prohibitively restrictive standards.<sup>194</sup> Subject only to these guidelines, states and local communities are virtually free to approach waste facility siting any way they choose.

One of the most common site approval methods is the "super review" model, which provides that the permit applicant may choose a potential site for the facility.<sup>195</sup> The applicant then submits a site proposal, along with relevant environmental data, to a state agency for environmental impact review.<sup>196</sup> If the proposal passes agency muster, the agency sends it to a panel of scientists and land-use experts. The panel usually includes some representatives from the affected community.<sup>197</sup> The local input is designed to promote informed community discussion and minimize reactionary opposition, which can stall a siting at the expense of expediency.<sup>198</sup> Nevertheless, organized opposition can block a siting proposal in the super review model. Accordingly, applicants have incentives to seek out minority neighborhoods because they have less clout.<sup>199</sup>

A similar site approval approach, the "site designation" model, invests a state agency instead of developers with the responsibility to develop a list of possible sites.<sup>200</sup> Placing discretion in the hands of a state agency does not remove the potential for discrimination, however, because agency officials also have incentives to choose communities that cannot mount effective opposition.<sup>201</sup> For example, many regulators'

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194. See 40 C.F.R. § 271.4(b) (1992).

195. The super review model is used primarily in Eastern and Midwestern states. See, for example, Conn. Gen. Stat. Ann. § 22a-119 (West 1988 & Supp. 1992); 38 Me. Rev. Stat. Ann. § 1319-R(3) (West Supp. 1992); N.C. Gen. Stat. § 143B-285.13 (1992); N.Y. Envtl. Conserv. Law § 27-1105 (McKinney Supp. 1993); Ind. Code Ann. § 13-7-8.6-3 (Burns 1990); Kan. Stat. Ann. § 65-3433 (1992); Mich. Comp. Laws Ann. § 299.517 (West 1984 & Supp. 1992); Ohio Rev. Code Ann. § 3734.05(C) (Baldwin 1992); Wis. Stat. Ann. § 144.44(2) (West 1989 & Supp. 1992).

196. See Bram D.E. Canter, *Hazardous Waste Disposal and the New State Siting Programs*, 14 Nat. Resources Law 421, 438 (1982); Godsil, 90 Mich. L. Rev. at 403-05 (cited in note 176).

197. Canter, 14 Nat. Resources Law at 449; Godsil, 90 Mich. L. Rev. at 404.

198. Canter, 14 Nat. Resources Law at 449-52; Godsil, 90 Mich. L. Rev. at 404-05. Godsil points out that the super review model also includes a state preemption provision, which allows the state to override local political and statutory opposition to a siting. *Id.* at 404. This does not render the local opposition powerless, however. It still can litigate, lobby state government, or intimidate the developers with demonstrations and negative publicity. *Id.* at 405.

Two states with super review-type models do not allow for state preemption. See Cal. Health & Safety Code § 25147 (West 1992); Fla. Stat. Ann. § 403.723(2) (West 1986). This approach condones "NIMBY," or "Not In My Back Yard," opposition. Godsil, 90 Mich. L. Rev. at 407.

199. See the discussion in Part IV.C.

200. See Md. Nat. Res. Code Ann. §§ 3-701 to 3-710 (1989 & Supp. 1992); Minn. Stat. Ann. § 115A.09 (West 1987 & Supp. 1993).

201. See the discussion of the trash incinerator proposed for South Central Los Angeles in Part V.B. See also Theresa Moore, *Minority Groups Rally to Protest EPA 'Bias,'* San Francisco Chronicle A14 (Aug. 1, 1991). An environmental justice organization alleged that the regional San Francisco EPA office had ignored the adverse effect toxic substances have had upon health in minority neighborhoods. *Id.* The group pointed to high rates of cancer found among teenage

post-agency career opportunities depend on the connections they make while in office.<sup>202</sup> Since the most advantageous connections will be individuals with power and privilege, an agency official would be acting against her own self-interests by pursuing unpopular policies against these individuals. Also, since an agency often does not have the resources to conduct its own independent investigations, it often will have to rely on information supplied by wealthy interest groups.<sup>203</sup> This reliance generates a situation where government essentially adopts the priorities of the wealthy, even though these often will not reflect the priorities of the whole constituency.<sup>204</sup> Thus, the site designation model allows the politically connected to capture the agency and convince it to choose less influential neighborhoods to host waste facilities.

A third site approval model requires that the host community be compensated financially.<sup>205</sup> The theory behind this approach is that compensation will decrease the amount of local opposition to the facility by paying the community for bearing the environmental burden.<sup>206</sup>

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Navajos living near uranium spills, high levels of lead poisoning among inner-city black children, and birth defects in children born to Latino farmworkers that are exposed to pesticides. *Id.*

202. For an example on the federal level, former EPA head William K. Reilly was nominated to the board of directors of DuPont Co. less than two months after leaving office. *Business Briefs*, *Houston Chronicle* 5 (March 18, 1993) (noting that DuPont has been called "the nation's biggest producer of toxic wastes"). For a state-level example, John J. Farrell, former member of Connecticut's Commission on Hospitals and Health Care, left his administrative post to become an adviser for KPMG Peat Marwick to help develop a state-side health care facilities plan for the hospitals commission. Craig W. Baggott, *Attempt to Suppress Ethics Panel's Finding Backfires*, *Hartford Courant* C7 (March 9, 1993). Farrell is currently before an ethics commission for violating the state's revolving door prohibition against former state agency officials working for a private employer on agency-related matters within one year of leaving the agency. *Id.* Compare Norman J. Ornstein and Shirley Elder, *Interest Groups, Lobbying and Policymaking* 60 (Congressional Quarterly, 1978) (noting that congressional lobbyists are often former legislators, and that they are particularly influential because of the personal friendships they developed with the existing legislators during their common service); *id.* at 82 (saying that "[t]o maximize access and to enhance their 'inside' contacts, interest groups will employ former members of Congress, former staff aides, or old 'Washington hands'").

203. See Macey, 86 *Colum. L. Rev.* at 251 (cited in note 157) (noting that "special interest groups often control the flow of information to lawmakers" and that legislators may rely on this information and "pass statutes that [they believe] are unambiguously in the public interest, but . . . in fact are riddled with incidental benefits to interest groups"); Donald Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 *Colum. L. Rev.* 562, 577 (1992). While this information-gathering technique may suffice when interested groups from both sides of the issue participate, it necessarily biases the decisionmakers when only one party to the debate has access.

204. *Id.* (saying that "the orderly administration of programs sometimes can disintegrate into a regulatory bazaar, with legislators and administrative managers responding to whichever combinations of political, beneficiary-group, and media pressures make the most noise," leading the agency to "strain at the gnat while ignoring the camel"). *Id.*

205. See, for example, Ga. Code Ann. § 12-8-39 (Michie 1992); Mass Gen. Laws Ann. ch. 21D § 12 (West 1992); Ohio Rev. Code Ann. § 3734.25 (Baldwin 1989); R.I. Gen. Laws § 23-19.77 (1989).

206. Godsil, 90 *Mich. L. Rev.* at 407 (cited in note 176).

While this solution may have economic appeal if it generated an efficient result—that is, if the community were compensated enough so that it was at least indifferent to hosting the facility<sup>207</sup>—the compensation model rarely achieves efficiency. Compensation statutes are not designed to pay the host communities enough to compensate them fully, as they do not account for the health costs that the facilities may create for nearby residents.<sup>208</sup>

Some compensation models permit a community to accept or reject an offer. This does not necessarily solve the problem for minority communities, however: willingness to accept payment is not an accurate measure of preferences of people with different levels of wealth.<sup>209</sup> Communities with depressed economies are more easily persuaded to accept a facility proposal that promises to provide badly needed employment and economic development to the area.<sup>210</sup> This economic reality is not

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207. See, for example, R. H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960). Professor Coase argued that competing parties with adverse interests in a single resource would negotiate an efficient result, provided there was perfect competition. *Id.* at 6. Of course, if the costs of hosting the facility were greater than the benefits derived by the developer, the parties would not reach an agreement. In this case, the developer should increase the charges imposed on the individuals who ultimately benefit from the hazard, such as those communities who ship their waste to the facility.

Even if an efficient result were reached, moral issues may still linger. The compensation model presumes that it is not unjust for the wealthy to pay the lower class to shoulder all the health and safety risks associated with hazardous waste disposal. Some scholars have criticized this presumption as amoral. See, for example, Herman Leonard and Richard Zeckhauser, *Cost-Benefit Analysis Applied to Risks: Its Philosophy and Legitimacy*, in Douglas MacLean, ed., *Values at Risk* 31, 42-43 (Rowman & Allanheld, 1986), stating:

Few important social decisions cannot and should not be informed by cost-benefit analysis.

But we would not promote cost-benefit analysis as the final arbiter of social decisions. Some issues are of such great social concern that no analysis can override them.

See also Bullard, *Dumping in Dixie* at 91 (cited in note 167).

208. See, for example, Conn. Gen. Stat. Ann. § 22a-132 (West Supp. 1992) (determining compensation by looking at gross receipts or volume of wastes processed at the facility, not by examining health risks); Ga. Code Ann. § 12-8-39 (Michie 1992) (authorizing host community to tax facility developers for compensation, not mentioning health costs); Ohio Rev. Code Ann. § 3734.25 (Baldwin 1989) (requiring state agency to make incentive payments to the host community, not mentioning health costs).

209. Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. Legal Stud. 225, 247 (1991); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 Stan. L. Rev. 387, 401-03 (1981).

210. See *Toxic Wastes and Race* at 7 (cited in note 71). A common strategy for developers is to coax the support of low-income communities with promises that the facility will bring jobs and economic revitalization to the depressed neighborhood. See Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economic of Place*, 82 Am. J. Sociology 320 (1976) (discussing generally economic growth proposals to disadvantaged communities). Political and industrial leaders can attract minority leaders “by flashing dollar signs” and deemphasizing the potential long-term health impacts on the target community. Kelly M. Colquette and Elizabeth A.H. Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 Tul. Envir. L. J. 153, 174 (1991). The mere use of risk-assessment analyses, cost assessments, and best available technology data by developers in a negotiating scenario “serves to intimidate, confuse, and over-



by itself unfair, provided that the developer informs the community of the health and safety risks that would accompany the facility. Frequently, however, the community's residents do not discover the health risks involved until the facility has been built, at which point they have little bargaining power.

Several factors contribute to a community's lack of health information. First, there is a lack of scientific data about the health and environmental effects of exposure to many substances.<sup>211</sup> Second, the developer often will be the only party with access to health information. Even if the information is public, many less-educated people might not know where to look to get the information.<sup>212</sup> Third, no objective monitoring of the negotiation process occurs.<sup>213</sup> The last two factors are aggravated by the fact that blacks do not receive much assistance from environmental organizations in learning the relevant facts behind a siting decision.<sup>214</sup>

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whelm" the community residents. Bullard, *Dumping in Dixie* at 107 (cited in note 167). This makes the bargaining process even more uneven.

211. See Robert V. Percival, et al., *Environmental Regulation: Law, Science and Policy* 427-34 (Little, Brown 1992) (reprinting Conservation Foundation, *State of the Environment: A View Toward the Nineties* 136 (1987)). William F. Pedersen, Jr., *The Future of Federal Solid Waste Regulation*, 16 Colum. J. Envir. L. 109, 120 (1991).

212. Community activists have reported that acquiring health information is difficult. *Toxic Wastes and Race* at 7 (cited in note 71) (reporting results of survey of 110 community groups indicating that 88% perceived obstacles to obtaining relevant information and 45% claimed that governmental agencies obstructed them in their quest for information). While measures such as the public access provisions of the Emergency Planning and Community Right-to-Know Act, Pub. L. No. 99-499, Title III, § 323, 100 Stat. 1750 (1986) (codified at 42 U.S.C. § 11044 (Supp. 1992)), make some information available, the Act is not very helpful in the case of environmental discrimination because it does not require entities to predict how much they will pollute at a proposed facility site. See 42 U.S.C. §§ 11021-23. Thus, concerned residents would not get information about the type or amount of the facility's pollution through these provisions until after the facility was built.

213. See Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. Envir. Aff. L. Rev. 437, 448 (1988) (saying a negotiation and compensation scheme has not worked in Massachusetts in part because of a failure to provide for substantive review of facility proposals).

214. The environmentalist movement in this country historically has involved upper-middle-class whites and has concentrated on the preservation of wildlife and wilderness areas. See Bullard, *Dumping in Dixie* at 1, 11 (cited in note 167). Black activists, for their part, generally have been more concerned with immediate racial problems such as employment discrimination. *Toxic Wastes and Race* at 6 (cited in note 71); Bullard, *Dumping in Dixie* at 4 (noting that black student activists and university faculty members have not responded to racism in the environmental context). See also Renee Loth, *Bringing Earth Day Back Down to Earth: Grass-Roots Activists Tweak 'Elitist' Brethren*, Boston Globe A33 (April 21, 1991) (stating that in 1990 the ten largest environmental organizations had a total of 137 board members, only five of whom were minorities); *A Place at the Table: A Sierra Roundtable on Race, Justice, and the Environment*, Sierra 51 (May/June 1993) (discussing actions taken and future plans to increase diversity in environmental group membership and leadership).

Once the facility has been built, the facility owners can use any employment or economic benefits that the facility does provide for the area as leverage if residents begin to voice safety concerns.<sup>215</sup> If workers in the facility approach the owners about improving health conditions, the facility owners may threaten salary cutbacks and plant closings to pay for the improvements, posing layoffs as a necessary consequence of health and safety reforms.<sup>216</sup> Layoff threats are particularly frightening to unskilled black workers: the large supply of replacement labor and limited ability to find alternative employment make present employment a precious commodity.<sup>217</sup> While a community facing such a Hobson's choice could complain to the state, severe cuts in federal funding to state hazardous waste enforcement programs render state assistance virtually ineffective.<sup>218</sup> Once the facility is in place, residents of these communities often conclude that the facility hurt them more than it helped.<sup>219</sup>

### C. *The Lack of Real Representation for Minorities*

Another problem inherent in environmental hazard siting processes is the imbalance of political power in favor of more privileged white communities. Privileged communities are better able to advance their interests because they have more money, superior information and better access to resources and legislative decisionmakers than the dis-

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215. That is not to imply that these facilities always bring economic benefits to the host community. For example, the town of Institute, West Virginia, whose population in 1980 was more than 90% black. Bullard, *Dumping in Dixie* at 81 (cited in note 167). The Union Carbide chemical plant in Institute hired less than 10% of its workers from the local community. *Id.* The blacks who were hired by Union Carbide only received low-paying jobs. *Id.* The plant contributed little else to the community. For example, Institute received no tax payments from the plant because Institute was unincorporated. *Id.* Interestingly, when county officials held an incorporation election for Institute, the officials drew the town limits so that the plant would not be within the borders, as requested by Union Carbide, thus preventing the town from collecting property taxes from Union Carbide. *Id.*

216. Richard Kazis and Richard L. Grossman, *Fear at Work: Job Blackmail, Labor, and the Environment* 37 (Pilgrim, 1982); Elizabeth Martinez, *When People of Color Are Endangered Species*, *Z Magazine* 61, 62 (April 1991) (quoting Mike Guerrero and Louis Head of the South West Organizing Project).

217. Bullard, *Dumping in Dixie* at 12 (cited in note 167).

218. U.S. General Accounting Office, *Assessment of EPA's Hazardous Waste Enforcement Strategy* (GAO/RCED-85-166, September 1985). The Office reported that 25 states lost 63.5% of their federal funding for hazardous waste enforcement programs. *Id.*

219. See Bullard, *Dumping in Dixie* at 92, Table 4.5. In a 1988 survey of black residents in five neighborhoods with dangerous environmental facilities (Emelle, Alabama; West Dallas, Texas; Alsen, Louisiana; Houston's Northwood Manor, Texas; Institute, West Virginia), only 30% of those surveyed agreed that the benefits the community derived from the facility far outweighed the negatives. *Id.*

empowered group.<sup>220</sup> This greater access stems in part from the promise of votes and campaign contributions that a well-organized, wealthy community can offer.<sup>221</sup> Also, through a combination of manipulating the information and emphasizing the prospect of reelection, a well-heeled interest group can usually demonstrate that the concentrated benefits it reaps from a particular decision outweigh the dispersed detriment that the disempowered group would suffer.<sup>222</sup> The more powerful group may also provide selected information to the targeted disempowered group in order to convince them that the detrimental impact will be minimal and that the targeted group will realize benefits as well.

A relatively unorganized, unconnected neighborhood, in contrast, would find it difficult to avail itself of these resources and maneuvers, and accordingly does not have equal potential to mount effective resistance to a siting proposal.<sup>223</sup> Since the environmental hazard needs to

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220. Michael T. Hayes, *Lobbyists and Legislators: A Theory of Political Markets* 60 (Rutgers, 1981); Regina Austin and Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 *Kansas J. L. & Pub. Pol'y* 69, 70-71 (1991) (saying that "[p]olluters know that communities comprised of low-income and working class people with no more than a high school education are not as effective at marshalling opposition as communities of middle or upper income people," and that these communities are hampered by limited time and money resources, a lack of technical, medical, legal, political, and media access, and "cultural and ideological indifference or hostility to environmental issues"); Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 *Am. Econ. Rev.* 659 (1972) (describing a statistical model that demonstrated that high information costs produce discrimination). See generally Dorceta E. Taylor, *Blacks and the Environment: Toward an Explanation of the Concern and Action Gap Between Blacks and Whites*, 22 *Env't. and Behavior* 175 (1989).

221. Austin and Schill, 1 *Kansas J. L. & Pub. Pol'y* at 70.

222. Hayes, *Lobbyists and Legislators* at 58-59 (noting that organized interest groups have a superior capacity to threaten legislators' chances of reelection because they claim to be able to deliver blocs of voters, and that legislators often fail to distinguish their constituencies' desires from the wants of interest groups). The public at large is a prime example of the unorganized group. See Deborah Jones Merritt, *The Guaranty Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1, 4 & n.18 (1988) (noting that "federal . . . administrators may be more responsive to special interest groups and lobbyists than to the majority's will" because the majority is so diffuse). The public often bears the burdens imposed by special interest legislation. See Macey, 86 *Colum. L. Rev.* at 232-33 & n.47 (cited in note 157) (noting that legislators have incentives to focus on legislation that benefits well-organized special interest groups at the expense of the general public, especially legislation that appears to advance public purposes but in fact serves special interests).

This public choice model also applies to environmental hazard siting decisions, where organized, well-informed, resource-rich, politically connected neighborhood groups benefit from sitings of facilities in unorganized, uninformed, resource-lacking, politically powerless areas. See the discussion of process defects in Part IV.B.

223. See Morell and Magorian, *Siting Hazardous Waste Facilities* at 64, 66, 89 (cited in note 167) (stating that the effectiveness of local opposition depends on the underlying social and economic cohesiveness of the community). To mount an effective campaign against a siting proposal, a neighborhood must invest a great deal of time, money, and political influence, and must have access to the media, meeting places, public and private records, technical experts and researchers.

be placed somewhere, the decisionmaking often will choose minority neighborhoods because the chances of upsetting powerful groups who can generate unfavorable press and jeopardize reelection hopes are greatly reduced. In fact, privileged neighborhoods likely would not have to wield their political influence at all: decisionmakers often will choose minority neighborhoods on the basis of the generally accurate perception that those residents are politically powerless, uneducated and lacking in financial resources.<sup>224</sup>

## V. THE SOLUTION: INTERMEDIATE-LEVEL SCRUTINY FOR ALL STATE ACTIONS WITH A SIGNIFICANT DISPARATE IMPACT ON SUSPECT CLASSES

### A. *The Focus of an Intermediate-Level Scrutiny Standard*

Blacks and other disadvantaged groups have little recourse against aversive, institutional racism under current equal protection law because of the intent standard.<sup>225</sup> In equal protection cases alleging environmental discrimination, the courts uniformly have ruled in favor of the defendants because the plaintiffs could not prove the requisite intent.<sup>226</sup> This result is particularly unfortunate because the challenged siting decisions in these cases contained significant evidence of racial discrimination that was not properly considered<sup>227</sup> and because victims of environmental discrimination have no alternative legal remedy available.<sup>228</sup>

Colquette and Robertson, 5 Tul. Envir. L. J. at 168 (cited in note 210). This necessarily implies that the neighborhood must have strong economic, educational and political clout.

224. See, for example, Senate Select Committee Hearing on Equal Educational Opportunity, Part 5; De Facto Segregation and Housing Discrimination 2966 (Sept. 1, 1970) (comments of Anthony Downs) (stating that many whites associate blacks and Latinos with lower-class economic status).

225. Godsil, 90 Mich. L. Rev. at 408 (cited in note 176); Cole, 90 Mich. L. Rev. at 1992-93 (cited in note 173).

226. See, for example, *Bordeaux Action Comm. v. Metropolitan Nashville*, No. 390-0214 (M.D. Tenn. filed Mar. 12, 1990) (denying a preliminary injunction in a case alleging improper supervision of a solid waste landfill located in a predominantly black area); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991) (holding that a county's decision to place a regional waste facility in a predominantly black neighborhood was based on economic and not discriminatory grounds and thus did not violate the Equal Protection Clause); *East Bibb Twiggs Neighborhood Ass'n. v. Macon-Bibb Cty. Planning & Zoning Comm'n*, 706 F. Supp. 880, 885 (M.D. Ga. 1989), aff'd, 896 F.2d 1264 (11th Cir. 1989) (holding that defendant's decision to allow a private landfill to be built in a census tract that was more than 60% black did not violate the Equal Protection Clause because plaintiffs did not prove discriminatory intent); *Bean v. Southwestern Waste Mgmt Corp.*, 482 F. Supp. 673, 677-78 (S.D. Tex. 1979), aff'd, 782 F.2d 1038 (5th Cir. 1986) (denying a preliminary injunction for lack of evidence of discriminatory intent).

227. See, for example, *East Bibb Twiggs*, 706 F. Supp. at 882-83 (noting that the defendants originally denied the landfill permit because of the proximity to a residential area, but approved it on rehearing). See also the discussion in Part V.C.

228. Cole, 90 Mich. L. Rev. at 1992 (cited in note 173); Godsil, 90 Mich. L. Rev. at 408 (cited in note 176). Godsil suggests creating a federal statutory cause of action to serve as a remedy for

This Part suggests that the courts abandon the intent standard and apply an intermediate level of scrutiny to all legislative decisions that have a substantial disparate impact on suspect classes such as blacks.<sup>229</sup> This approach, as detailed below, would reflect the understanding that racial discrimination may be unconscious and aversive as well as conscious and dominative. The focus, therefore, would not be on whether the decisionmakers *intended* to discriminate but on whether the structure of the decisionmaking process *was likely to generate* the disparate racial outcome.

Under an intermediate-level scrutiny approach, plaintiffs first would have to demonstrate that the government act had a significant disparate impact on a suspect class.<sup>230</sup> Plaintiffs could meet this burden

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environmental discrimination. See *id.* at 421-25. There are several reasons why restructuring equal protection analysis is preferable to enacting a statute. First, the statute proposed by Godsil is limited to environmental racism. While her proposal has the advantage of legislative as opposed to judicial origin, it would not address other instances of aversive racism. Since environmental discrimination only constitutes a small part of aversive racial discrimination, this shortcoming is unacceptable. If, on the other hand, Congress expanded the statute to cover all cases of aversive racism and required that the courts apply, as this author suggests, an intermediate level scrutiny model, it would almost inevitably leave substantial gaps for the federal courts to fill with common law. See, for example, *Cort v. Ash*, 442 U.S. 66, 78 (1975) (laying out a four-part test to determine when a court may imply a private cause of action in a statute that does not expressly provide for one); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (saying that courts have the power to create federal common law with respect to rights under ERISA plans because the legislative history indicates that ERISA was meant to codify trust law). In such a case, the perceived democratic advantage of having the legislature make policy decisions disappears. At the same time, the courts are in a position to fashion exceptions to the equal protection standard when presented with circumstances that warrant them; a legislature would have to be clairvoyant to include all necessary exceptions in the original law. Furthermore, less time and money would be needed to change the equal protection analysis than would be needed if the legislative route were pursued. See Richard Neely, *How Courts Govern America* 30 (Yale, 1981). Neely explains quite bluntly:

The reason that people go to court rather than to the political process to get the law changed is that courts are much cheaper. To make an impression on politicians, except at the local level, it is necessary either to elect one's own man or to organize thousands or millions of voters; to make an impression on courts requires nothing more than a good case and the comparatively small sum of money to hire a lawyer.

*Id.* In addition, if legislative and administrative preference for privileged special interests at the hands of minorities is what drives environmental discrimination, it seems the same influences would dilute the efforts to draft a federal prohibition.

Of course, judicial reform in this area is not likely to occur overnight: recent Supreme Court decisions have been fairly unsympathetic to claims by black plaintiffs. See William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Law-making*, 45 Vand. L. Rev. 593, 640-42 (1992). Still the circuit courts have the discretion to interpret the intent standard loosely enough to accord a state action de facto intermediate-level scrutiny. See note 128.

229. See Ely, *Democracy and Distrust* at 31 (cited in note 62).

230. See *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582, 624 n.15 (1983) (Stevens dissenting). Cf. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659-60 (1989) (stating that plaintiffs bringing Title VII actions bear the ultimate burden of persuasion on the disparate racial impact issue).

by showing that the act disadvantaged an inordinately large number or percentage of class members. A putative defendant could rebut plaintiffs' argument by showing that a substantial number or percentage of nonsuspect class members also were affected. In evaluating the persuasiveness of the defendant's proof, a court should be aware that institutionalized discriminatory acts are almost necessarily overinclusive because overt discrimination is no longer legal; thus, acts motivated by institutional discrimination often will affect a sizeable number of whites as well.<sup>231</sup> Furthermore, when the evidence of impact is not conclusive, the court should examine past similar decisions by the government body to see whether other decisions had disparate racial impacts. If the plaintiffs failed to meet their burden on the disparate impact issue, the defendants would win.

If the plaintiffs can demonstrate disparate impact, the defendants then would bear the burden of proving that the affected group's interests were represented adequately in the decisionmaking process.<sup>232</sup> They may make a prima facie showing by demonstrating that representative members of the minority group were part of the decisionmaking process and that these representatives were fully informed about the detriments and risks the decision would bring to bear on class members.<sup>233</sup> The burden then would shift to plaintiffs to show that the representation was inadequate or that some other substantial process defect existed which could have undermined the effectiveness of the group's representation. Several factors can affect the adequacy of representation: the number of minority representatives who were actually decisionmakers or otherwise substantially part of the decisionmaking process; whether these representatives were chosen by the affected groups or by the decisionmakers; the amount of communication be-

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231. See notes 49-50 and accompanying text. For example, in *Palmer v. Thompson*, 403 U.S. 217 (1971), discussed in notes 96-99 and accompanying text, the city of Jackson's decision to close all public swimming pools in the face of a desegregation order arguably had no disparate impact on blacks because whites couldn't swim in the pools either. On the other hand, the pool closings likely affected the poor more than the rich, since the rich had access to private pools. See 403 U.S. at 235 (Douglas dissenting). This would entail that the closings did disparately affect blacks. Arguably the lower-class whites who were disadvantaged by the pool closings received consolation from knowing that the city was maintaining as much separation between the races as the federal government would allow. See generally George M. Fredrickson, *White Supremacy: A Comparative Study in American and South African History* 87 (Oxford, 1981) (saying that racial privilege serves as compensation for class disadvantage to lower-class whites).

232. The burden is allocated to defendants because they have better access to evidence. See notes 150-57 and accompanying text.

233. Compare *Davis v. Bandemer*, 478 U.S. 109, 139-40 (1986) (saying the Court has found equal protection violations in individual multimember district challenges where a disproportionate effect "appeared in conjunction with strong indicia of lack of political power and the denial of fair representation").

tween the affected parties and the representatives; the completeness and accuracy of information made available to those affected and their representatives; the consideration given to less intrusive alternatives; and whether these representatives had incentives that ran counter to the interests of the affected group.<sup>234</sup>

The court's finding on the representation issue would not dispose of the case, but it would determine how carefully the court should scrutinize the defendants' decision. If the court finds that the affected group had adequate representation and was not hampered by process defects, the state merely must demonstrate that a rational basis for its decision exists.<sup>235</sup> On the other hand, if the court found that the process did not adequately include participation by suspect class representatives, it should carefully scrutinize the decision to see whether defendants had considered sufficiently the interests of those affected. The court should consider the severity of the disparate impact on the affected group and weigh that impact against the extent of the inadequacy of representation and the nature of the government interest at stake. Given that the plaintiff would lack access to evidence regarding the decisionmaking process,<sup>236</sup> a court should presume that defendant's decision was discriminatory. The defendant could rebut this presumption with evidence that they considered the affected group's interests despite the representational inadequacy, or that the government interest was so high as to warrant a lack of representation.<sup>237</sup> For their part, the plaintiffs could support their case with any evidence they had showing discrimination in the decisionmaking process, as well as evidence of a history of actual discrimination by defendants.

This intermediate-level approach would allow the courts to look beyond the primitive notion of intent to examine whether the decision-making process sufficiently protected the concerns of affected minorities.<sup>238</sup> At the same time, it would not unduly limit the government; the

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234. See Part IV.C. See also Macey, 86 Colum. L. Rev. at 238 (cited in note 157) (saying that the judiciary should monitor special interest legislation to guard against legislative excess).

235. See Ely, *Democracy and Distrust* at 31 (cited in note 62) (suggesting that judges independently review laws which operate to disadvantage certain minority groups or impede the democratic process).

236. See discussion in notes 69-70, 150-57 and accompanying text.

237. See John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 579 (West, 4th ed. 1991) (saying that "[u]nder the intermediate standard of review, the classification must have a substantial relationship to an important interest of government"). This is similar to the "environmental necessity" aspect of Godsil's proposal. See Godsil, 90 Mich. L. Rev. at 424-25 (cited in note 176).

238. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938) (stating that more exacting judicial scrutiny may be required in cases involving "prejudice against discrete and insular minorities, . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"). This statement has been used to

intermediate test would merely require the government to ensure greater representation in its decisionmaking processes. Furthermore, since the courts would take into account the strength of the government interest, the intermediate-level test still would allow for efficient crisis decisionmaking when necessary.

An examination of two situations potentially involving environmental discrimination demonstrates that the intermediate-level approach is better suited for detecting racial discrimination than the intent standard. In the first case, discussed in Part IV.B., the intermediate-level scrutiny approach would result in a favorable holding for the affected residents. In the second, discussed in Part IV.C., the intermediate-level approach would find no equal protection violation, but would conduct a deeper inquiry than required by the intent standard.

### *B. South Central Los Angeles and the California Waste Management Board*

In 1984, the California Waste Management Board decided that the Los Angeles area required new trash-burning facilities to handle its waste production.<sup>239</sup> The Board hired a demographics consulting firm to determine which communities would greet the facilities with the least political resistance. The firm suggested the Board focus on "lower socioeconomic neighborhoods" or "communities that conform to some kind of economic need criteria."<sup>240</sup> Based on this recommendation, the Board planned to locate the first incinerator in South Central Los Angeles, a predominantly low-income, minority neighborhood that had the highest unemployment rate in the city.<sup>241</sup>

After deciding to locate the incinerator in South Central, the city approached Gilbert Lindsay, an aging black city councilman who represented the neighborhood. The city proposed to place ten million dollars in a community betterment fund in exchange for Lindsay's support of the project.<sup>242</sup> The betterment plan included a promise to revitalize a

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support the idea that the Equal Protection Clause empowers the judiciary to step in on behalf of minority groups that do not have sufficient protection in the state's decisionmaking bodies. See Ely, *Democracy and Distrust* 75-77 (cited in note 63), citing Paul Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. Ill. L. Forum 493, 494 (1975).

239. Dick Russell, *Environmental Racism*, 11 *Amicus J.* 22, 25 (Natural Resources Defense Council, Spring 1989).

240. *Id.* at 25-26. The firm's idea to target lower socioeconomic neighborhoods also may have rested on the idea that the firm could make the prospect of an incinerator in the neighborhood sound like beneficial economic development rather than an environmentally undesirable detriment. For further discussion on the perception that minority neighborhoods are politically weak, see the discussion at notes 223-24 and accompanying text.

241. *Id.* at 26.

242. *Id.*



local community center and name it after Lindsay's wife.<sup>243</sup> The representative supported the plan, and touted its economic benefits, but mentioned nothing about the dioxin, heavy metals, and vinyl chloride the facility would release into the local environment.<sup>244</sup>

The South Central example illustrates how an intent-oriented focus fails to address racist decisionmaking. A court applying an intent analysis would not find an equal protection violation here because the Board manifested no intent to disadvantage minorities.<sup>245</sup> Rather, the Board intended to construct a facility as quickly as possible to meet the waste disposal needs of the city. With timeliness in mind, the Board narrowed its list of potential sites to areas where the residents were not likely to delay the incinerator's construction with years of litigation and political maneuvering. The Board chose a lower-class minority neighborhood to realize its interest in time-efficiency and not to disadvantage lower-class minorities. Further, the city offered to spend ten million dollars to revitalize the depressed community in exchange for agreeing to host the incinerator, indicating that the city was concerned about the residents' interests. Therefore, plaintiffs would have difficulty obtaining relief under an intent-based equal protection analysis.

A court applying the intermediate-level scrutiny approach would begin, rather than end, its inquiry by noting that the Board chose a minority community for its disfranchisement. This fact raises suspicions that the residents' interests were not fully considered; other facts confirm these suspicions. First, the Board knew about the dioxin and vinyl chloride hazards, but attempted to conceal this knowledge from the community. The Board did not attempt to inform the community at all until after the siting proposal was finalized; even then, the Board

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243. *Id.*

244. It is unclear whether Lindsay knew any of this health information, but the Board and other city official certainly did. The Board also knew that Sweden banned these incinerators in 1984 after studies conducted near four such facilities showed high levels of dioxin present in human breast milk and local fish. *Id.* The dioxin and heavy metals present in incinerator ash have been linked to cancer, soft tissue sarcoma, learning disabilities, congenital defects, and blood, liver, and kidney disorders. Marilyn A. Fingerhut, et al., *Cancer Mortality in Workers Exposed to 2, 3, 7, 8 TetraChlorodibenzo-p-Dioxin*, 324 N. Eng. J. Med. 212 (1991); Julienne I. Adler, Comment, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 Am. U. L. Rev. 885, 888 n.21 (1991). While the causal link between dioxin and these diseases is still debated, see Jeff Bailey, *Dueling Studies—How Two Industries Created a Fresh Spin on the Dioxin Debate*, Wall St. J. A1, A4 (Feb. 20, 1992), well-publicized events like the dioxin-related evacuations of Times Beach, Missouri and Love Canal, New York at least should have warned the Board that dioxin was a potential health hazard. See Michael Gough, *Dioxin, Agent Orange: The Facts* 121-36 (Plenum, 1986) (discussing Times Beach); *Health Effects of Toxic Pollution* at 305-06 (cited in note 167) (discussing health injuries at Love Canal).

245. See *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cty. Planning & Zoning Comm'n*, 706 F. Supp. 880, 885 (M.D. Ga. 1989); *Bean v. Southwestern Waste Mgm't Corp.*, 482 F. Supp. 673, 677-78 (S.D. Tex. 1979).

only consulted an aged representative who seemingly had lost touch with the community. The Board's dealings with this representative indicate that real representation was lacking. The representative had personal motives that predisposed him to accept the proposal, and this personal benefit motivated him to disregard the residents' interests in health and safety.

The court additionally would take note of the high amounts of dioxin and vinyl chloride that the incinerator would release into the local environment, and of the fact that the Board must have known of these health risks when it selected this type of incinerator. The court would ask whether safer models were available given the Board's economic constraints. Depending on the costs of alternative disposal measures, the fact that the city was willing to spend ten million dollars on a community center in the neighborhood might indicate that economic constraints might not have been too great.

The South Central siting decision likely did not involve an intent to disadvantage minorities as much as an intent to avoid political controversy. Nevertheless, one cannot say that the minority neighborhood was only incidentally affected by the siting decision: the community was chosen because it had a high minority population. Accordingly, equal protection relief should be available in this case.

### C. R.I.S.E., Inc. v. Kay

In *R.I.S.E., Inc. v. Kay*,<sup>246</sup> residents of a small community in King and Queen County sought to enjoin the county's board of supervisors from constructing a proposed landfill near their community. The county had three existing landfills, none of which conformed to new environmental regulations imposed by the state. The board of supervisors decided that it had to close those sites and develop a new one.<sup>247</sup> Since the county did not have sufficient funding to do this by itself, it began negotiating a joint venture with Chesapeake Corporation under which Chesapeake would build the landfill for its own disposal and the county would operate it in exchange for free disposal.<sup>248</sup> Chesapeake tested the soil at a 420-acre tract of county land and found it suitable for a landfill. Chesapeake eventually decided not to pursue the joint venture, but offered the tract for sale to the county at \$1000 per acre. The county board entered a purchase option agreement with Chesapeake, rezoned it for industrial use, and agreed to lease the tract to Browning-Ferris In-

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246. 768 F. Supp. 1144 (E.D. Va. 1991).

247. *Id.* at 1146.

248. *Id.*

dustries, which would construct and operate the landfill.<sup>249</sup> Since the landfill would be near a black church and graveyard, the board instructed Browning-Ferris to leave a large buffer zone between the landfill and these areas so as to minimize interference.<sup>250</sup>

At trial, the plaintiffs produced evidence of the disproportionate racial impact the landfill would have. The total population of King and Queen County was approximately fifty percent white and fifty percent black;<sup>251</sup> however, the ratio within one-half mile of the proposed site was nearly two-thirds black to one-third white.<sup>252</sup> In addition, twenty-one black families and five white families lived along the stretch of road that would carry the extra traffic to the landfill.<sup>253</sup> The plaintiffs also showed that the county had a history of discrimination in landfill siting. The three existing landfills all were located in areas that were from 95% to 100% black.<sup>254</sup> Furthermore, in 1986, when the King Land Corporation began operating a private landfill in a predominantly white residential area, the county board of supervisors hired an attorney to challenge the operation.<sup>255</sup>

The *R.I.S.E.* court faithfully adhered to the intent standard as laid out in *Washington* and *Arlington Heights*. The district court found that the placement of landfills in the county did have a racially disproportionate impact; however, it found that the county's history of discrimination was not sufficient to show that the board's actions were motivated by discriminatory intent because the board had done nothing "unusual or suspicious."<sup>256</sup> The district court noted that the county was operating under financial constraints, that the 420-acre tract already had been found environmentally suitable for a site, and that the board listened to residents' concerns and attempted to minimize the landfill's impact on the surrounding community.<sup>257</sup> Accordingly, plaintiffs' equal protection claim was denied.

Under an intermediate-level scrutiny approach, the *R.I.S.E.* court likely would have reached the same conclusion, but it would have looked at additional factors. An intermediate-level scrutiny approach

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249. *Id.* at 1147-48.

250. *Id.* at 1147.

251. *Id.* at 1148.

252. *Id.*

253. *Id.*

254. *Id.* At least two of these areas were still predominantly black at the time the lawsuit was brought. *Id.*

255. *Id.* at 1148-49. Interestingly, this same attorney later helped the board in its negotiations with Chesapeake. *Id.* at 1146.

256. *Id.* at 1149-50. In fact, the court said "the Board appears to have balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner." *Id.* at 1150.

257. *Id.* at 1150.

would first examine whether there was in fact a substantial disproportionate racial impact. Two-thirds of those living within one-half mile of the site were black (thirty-nine people), one-third was white (twenty-two people). In light of the 50/50 racial ratio in the county as a whole,<sup>258</sup> the impact on blacks was disproportionate, but arguably not substantially so. If the court found the disproportional impact issue to be unclear, it then would look at previous landfill siting decisions by the board. In *R.I.S.E.*, the impact from those sites was dramatically disproportionate, and thus the plaintiffs could meet their burden.<sup>259</sup>

The court would then examine whether the affected blacks were fairly represented in the decisionmaking process. Two of the five members of the board of supervisors were black. These two were appointed to act as liaisons to the neighborhood and were asked to investigate alternatives to the 420-acre site. At every instance, both black representatives voted in favor of pursuing this site for the landfill.<sup>260</sup> Furthermore, the board informed the public at every step, heard the concerns of the affected community, and investigated proposed alternative sites before reaching its decision.<sup>261</sup> These factors, standing alone, weigh heavily in favor of a finding of fair representation.

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258. The racial character of the county as a whole is important for determining the disproportionate impact issue because the entire county would use, and thus benefit from, the disposal facilities constructed at the site. In order to determine whether the burdens are disproportionately distributed along racial lines, therefore, one must look to see how the benefits are distributed. For example, if the county were 20% black and 80% white, the fact that 66% percent of those affected by the landfill were black would constitute a more disproportionate impact than existed in the *R.I.S.E.* case.

Of course, if plaintiffs could show that despite the 50/50 demographic breakdown, whites derived a substantially greater benefit from the landfill than blacks. This should factor into the calculation as well. For example, if commercial establishments generated the majority of waste in the county, the landfill accepted commercial waste without charge, and most of the county's businesses were owned by whites, it would seem that a greater benefit from the landfill inures to the county's whites than blacks. This evidence would lean towards a finding of disparate impact.

259. The *R.I.S.E.* court looked at all sites in the county to determine that a disproportionate impact existed. See *R.I.S.E.*, 768 F. Supp. at 1149. It is unclear whether the court found that the instant siting decision caused a disparate impact by itself.

260. Board members Kay and Alsop, both black, pursued discussions with Chesapeake. *Id.* at 1146. Further, Alsop moved for the Board to execute the purchase option agreement with Chesapeake. *Id.* Both Alsop and Kay voted in favor of authorizing the landfill and continuing negotiations with Browning-Ferris. *Id.* at 1147. They also voted in favor of rezoning the tract from an agricultural to industrial area. *Id.* at 1148. Finally, Alsop and Kay voted in favor of leasing the tract to Browning-Ferris to construct and operate a landfill. *Id.*

261. Many of the decisions involving the site were made at public sessions, and the local media publicized the location of the proposed landfill site. *Id.* at 1147. Three members of the board attended a community meeting about the proposed site; the board held a public hearing on the landfill site, at which Browning-Ferris made a presentation about the operation of a landfill; and the board investigated an alternative site, proposed by the plaintiffs, but found it environmentally unsuitable because it was on a slope and a stream ran through the middle of it. *Id.* at 1147-48. Incidentally, the proposed alternative site was an area with an 85% black population. *Id.* at 1148.

Other facts not considered by the district court, however, deserve close investigation. Two of the three white board members were employees of the Chesapeake Corporation, which sold the land to the county,<sup>262</sup> and all three white board members had more political experience than the newly elected black members.<sup>263</sup> Further, it does not seem that the board ever considered the costs of refurbishing the existing landfill sites instead of building a new one. From a process perspective, these facts arouse suspicion. A court using an intermediate-level scrutiny approach would examine the dealings between Chesapeake and the board closely to determine whether the corporation offered any personal incentives to any of the board members, especially the Chesapeake employees, to persuade them to approve the 420-acre purchase. If such incentives were offered, even if legal under state law, the residents' interests were likely ignored in the decisionmaking process. Also, the court should examine the relative costs of revising the existing sites to conform with the new regulations and compare those to the costs of purchasing the new tract. In doing so, the court should take into account the fact that a landfill operation company such as Bronwing-Feris might agree to bear the costs of construction itself in exchange for the right to operate the landfill. Assuming these further lines of inquiry revealed no new information, however, an intermediate-level approach probably would result in a finding of no equal protection violation.

## VI. CONCLUSION

Racial discrimination is not the conscious evil that equal protection law presumes it to be. Racism is a by-product of cognitive processes that encourage stereotypes as a shortcut way of understanding new information. As such, it often operates in a person's unconscious, generating discrimination without the person consciously intending to discriminate. Often the person will not even realize she is discriminating on racial grounds. Therefore, equal protection analysis should not focus on whether the decisionmakers intended to discriminate, but whether the decisionmaking process was structured in such a way as to preordain results that disparately burden blacks.

The proposed intermediate-level scrutiny test would create the proper focus by examining the amount of actual representation that the disparately affected group had in the decisionmaking process. Ideally, the Supreme Court would adopt this approach and expressly renounce the intent standard. Barring that unlikelihood, the future of equal pro-

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262. *Id.* at 1147.

263. The black board members were chosen in a 1988 special election pursuant to a federal redistricting order. *Id.* at 1146.

tection law lays in the hands of the circuit courts, which can invoke the intent doctrine in name yet apply the deeper analysis called for in this Note. The circuit courts have stretched and manipulated the intent test before<sup>264</sup> and circumstances dictate that they should do so again.

Until now, equal protection law has recognized only the most evident manifestations of racial discrimination. It has remedied only those injuries in which evidence exists that the decisionmaker intended to harm a nonwhite because of that person's race. This intent standard may have been justified in the 1970s; however, current psychological evidence overwhelmingly indicates that intent is hardly a necessary factor in racial discrimination. The dead hands of *Washington* and *Arlington Heights* do not grasp the notion that racial discrimination may occur irrespective of discriminatory intent. Accordingly, courts should loosen the chokehold grip these cases have on equal protection law and adopt the intermediate-level standard.

*Edward Patrick Boyle\**

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264. See, for example, *Dayton Bd. of Educ. v. Brinkman*, 583 F.2d 247 (6th Cir. 1978); *United States v. Texas Educ. Agency*, 564 F.2d 162 (5th Cir. 1977). See also the discussion in note 128.

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