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ENVIRONMENTAL LAWS: GRIST FOR THE EQUAL PROTECTION MILL

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INTRODUCTION

The environmental justice movement presents a new chapter in the nation's debate on civil rights. The central issue of the civil rights movement—the fair treatment of people of color—has now been extended to include the fair treatment of people of color in the distribution of environmental benefits and burdens.[1] The emergence of the environmental justice movement has prompted the traditional civil rights and environmental movements to confront each other's traditions, expectations, aspirations, and modes of action. While the term "environmental justice" suggests a happy union of the objectives of each movement, the reality is more complex. The historical tension between the civil rights and environmental movements has left the civil-rights-based environmental justice movement with an unsurprising skepticism of environmental laws.[2]

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1. The environmental justice movement has also encompassed the question of whether low-income communities receive a fair distribution of environmental benefits and burdens. Nonetheless, as a historical matter, the movement arose out of the concerns and traditions of the civil rights movement. *See* Robert D. Bullard, *Introduction* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 7, 9 (Robert D. Bullard ed., 1993) [hereinafter VOICES FROM THE GRASSROOTS]; Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* VOICES FROM THE GRASSROOTS, *supra*, at 22, 24-38 [hereinafter Bullard, *Anatomy of Environmental Racism*]; Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN J.L. & PUB. POL'Y 69, 74 (1991); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 12 (1995).

2. The history of the mainstream environmental movement began around the turn of the century, when the movement was primarily concerned with preservation and conservation. *See* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 634 (1992). *See generally* ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT (1993). During the first half of this century, these mainstream environmental groups had little interaction with social planners and reformers addressing urban ills. *See id.* at 6-8. This image of the "environmentalist" as more concerned with the preservation of nature than the public health has endured and contributes to the unease between the environmental and civil rights movements.

In the late 1960s and 1970s, the "second wave" of the environmental movement turned its attention to pollution control. *See* Cole, *supra*, at 633. Beginning in 1970, the second wave successfully advocated the passage of the broad range of environmental laws we know today, including such statutes as the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994 & Supp. II 1996), the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1994 & Supp. II 1996), the Clean Water Act, 33 U.S.C. §§ 1251-1287 (1994 & Supp. II 1996), and the Comprehensive

This article intends to transcend that skepticism. Under the right circumstances, environmental laws can serve the pursuit of justice by providing information relevant to a claim that a government decision maker's siting of an undesirable land use in a minority neighborhood violated the federal Equal Protection Clause.[3] In our age of facially neutral actions and rhetoric,[4] the inquiry into discriminatory purpose almost inevitably requires an analysis of circumstantial evidence.[5] That analysis thrives on facts—facts about the distribution of harms, about the history of prior decisions, about the history of the decision-making process, and about compliance or noncompliance with governing criteria and procedures.[6] By requiring decision makers to assemble and consider a wide range of information about proposed projects, by

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Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1994 & Supp. II 1996) (popularly known as Superfund). *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 105 (2d ed. 1996). Although these laws addressed many of the public health issues of concern to all, civil rights leaders were concerned that such concentrated attention to environmental problems might divert attention away from pressing poverty and civil rights issues. *See* GOTTLIEB, *supra,* at 254; Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection,* 87 NW. U. L. REV. 787, 789 (1993). The environmental movement has also been linked with population control and anti-immigration efforts, both of which have been perceived of as inherently racist by civil rights groups. *See* GOTTLIEB, *supra,* at 255-60. Thus, as civil rights and environmental issues converged with the environmental justice movement, environmental justice activists approached environmental laws (and the self-described environmental movement) with caution.

3. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment applies to discriminatory actions taken by the states. The Fifth Amendment's statement that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V, has been interpreted to require application of equal protection standards to federal actions. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). The same equal protection analysis applies under both clauses. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

4. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action,* 49 STAN. L. REV. 1111, 1135-36, 1141-43 (1997) (observing that judicial prohibition of de jure discrimination has led decision makers to employ race-neutral language that may obscure discriminatory purpose); *infra* notes 69, 72 and accompanying text (discussing likelihood that discriminatory purposes are masked behind racially neutral justifications).

5. *Cf.* Washington v. Davis, 426 U.S. 229, 242 (1976) (recognizing that discriminatory purpose may not be explicit and that it "may often be inferred from the totality of the relevant facts").

6. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977) (identifying types of evidence probative of discriminatory intent); *infra* notes 76-125 and accompanying text (describing and explaining the *Arlington Heights* test).

making decision-making proceedings and explanations more transparent, and by establishing benchmarks against which to measure official action, environmental laws may generate facts central to the equal protection inquiry. Where environmental laws reveal facts that call into question the rationality and legitimacy of a particular decision, an inference of discrimination may arise. Far from detracting or impeding the pursuit of justice, environmental laws thus have the capacity to play a much more important role in debates about justice than is acknowledged in the environmental justice literature.

A survey of the law review literature discussing environmental justice reveals the nature of the environmental justice movement's skepticism of environmental laws. To some extent, environmental laws and environmentalists are seen as a cause of the environmental problems experienced by minority communities. When it comes to the siting of undesirable land uses, environmentalists' "Not in My Backyard" ("NIMBY") attitudes have led, according to some commentators, to a de facto "Place in Blacks' Backyards" ("PIBBY") attitude.[7] The environmental justice literature also suggests that modern environmental laws and policies have failed to distribute the burdens and benefits of environmental protection equitably.[8]

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7. *See* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 4-5 (1990); *see also* Michael B. Gerrard, *The Victims of NIMBY?*, 21 FORDHAM URB. L.J. 495, 495-96 (1994) (describing PIBBY argument and its adherents). *But see* Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 85-87 (1996) (referring to study suggesting that PIBBY argument oversimplifies siting dynamic); Gerrard, *supra*, at 514-16 (arguing that there is little evidence of PIBBY in connection with the siting of waste disposal facilities). Environmental laws are used by these environmentalists to prevent or delay development in their communities without regard for the potential PIBBY consequences of their actions. *See* Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 271-72 & nn.247-50 (1997).

Communities claiming environmental discrimination are likewise crying "NIMBY." Although a NIMBY claim is generally rooted in self-interest, an allegation of discrimination raises broader questions about the integrity of decision-making processes and is, accordingly, a matter of general, not just particular, concern. *See infra* notes 55-58 and accompanying text.

8. Environmental policy-making has generally focused on ambient levels of pollution without considering the actual distribution of environmental benefits and burdens. *See* Lazarus, *supra* note 2, at 814-16. While improving conditions overall, some environmental laws may nonetheless result in unfair concentrations of pollution. Professor Richard Lazarus has demonstrated this phenomenon in the hazardous waste cleanup context. The remediation of contaminated property under federal and state environmental laws frequently involves the transfer of

Furthermore, the literature points to some evidence of unequal environmental enforcement patterns.[9]

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contaminants to a hazardous waste facility. Although that result is more environmentally sound than leaving the contaminants in an uncontrolled location, it nonetheless concentrates contaminants in certain areas. The benefits of the program go to those near the formerly uncontrolled contaminated site. The policy may, however, increase the burden for those living near the hazardous waste site in which the contaminants are deposited. *See* Richard J. Lazarus, *The Meaning and Promotion of Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1, 3-4 (1994). Since some studies have indicated that the nation's relatively few hazardous waste sites are disproportionately located in low-income and minority areas, *see infra* note 29 (citing studies of demographics associated with hazardous waste sites), this relocation of contaminants may concentrate the waste near low-income and minority neighborhoods. The environmental laws could thus improve environmental conditions generally but make environmental conditions in certain minority areas worse.

Market-based mechanisms for transferring pollution rights could also create environmental "hot spots." Under market-based trading schemes, facilities that reduce their pollution by more than the amount required by law are permitted to obtain "credit" for their additional reductions. *See* Robert W. Hahn & Gordon L. Hester, *Marketable Permits, Lessons for Theory and Practice*, 16 ECOLOGY L.Q. 361, 369 (1989). These credits are, in essence, rights to pollute. Companies obtaining credits can sell them to other facilities that may be unable or prefer not to reduce their pollution to required levels. *See id.* Thus, if Company A were required to reduce pollution of a chemical to 10 tons per year but in fact reduced its pollution to five tons per year, the company could obtain five tons per year of credit. If Company B could not reduce its pollution level to 10 tons per year, it could buy credits, or "rights to pollute," worth five tons per year from Company A and pollute 15 tons. Together, the companies would pollute 20 tons per year, achieving the same pollution reduction as would have occurred if both facilities had reduced their respective pollution to 10 tons per year. Environmental justice concerns might arise as a consequence of particular trading patterns. If facilities in nonminority areas were able to reduce pollution more than required and generate pollution credits, then the pollution in those areas would be considerably improved. If the resulting pollution credits were transferred to facilities in minority areas, then the trading scheme could decrease environmental quality in the minority hot spots. An ostensibly evenhanded system thus has the potential to create unfair distributional disparities in environmental quality. *See* Gauna, *supra* note 1, at 72; Lazarus, *supra* note 2, at 848-49.

Another manner in which environmental laws may have distributional consequences arises in connection with the "grandfather" clauses contained in many environmental laws. These grandfather clauses often create exceptions from new environmental requirements for existing facilities, many of which are located in minority or low-income areas. Residents in areas with grandfathered facilities are deprived of the environmental benefits that were to have resulted from the environmental legislation. *See* Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and Their Role in Environmental Inequity*, 45 CATH. U. L. REV. 131 (1995).

9. *See* Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHNS J. LEGAL COMMENT. 625 (1994); Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Laws*, NAT'L L.J., Sept. 21, 1992, at S1. Where government resources have been insufficient for

That said, writers in the environmental justice movement have acknowledged that environmental laws can play a limited role in communities' struggles for environmental justice. Environmental laws provide a legal remedy for many violations of environmental norms.[10] Where environmental review provisions are triggered, environmental laws provide for public input that may result in better environmental outcomes.[11]

Despite these acknowledgments of the legal significance of environmental laws, some of those in the environmental justice movement nonetheless express concern that the use of environmental laws will place control in the hands of legal and scientific experts, thus depriving communities of meaningful participation.[12] Furthermore, some express concern that focusing on environmental laws obscures the more important issue: the fairness of the policy, siting, enforcement, or other decision in question.[13]

This article acknowledges the perceptions of environmental laws revealed in the environmental justice literature without passing judgment on their validity.[14] Notwithstanding the

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enforcement of all environmental violations, wealthy environmentalists are able to bring enforcement actions on their own under the citizen suit provisions included in many of the nation's pollution control laws. *See* Gauna, *supra* note 1, at 43-44 & n.152. Low-income and minority communities rarely have the resources to bring such actions. *See id.* The literature thus suggests that environmental laws may be better enforced in areas that are wealthy and politically strong and less well in areas that are low-income or, like many minority communities, lacking in political clout.

10. *See* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 526-30 (1994); Michael B. Gerrard, *The Role of Existing Environmental Laws in the Environmental Justice Movement*, 9 ST. JOHN'S J. LEGAL COMMENT. 555 (1994); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 446-50 (1994).

11. *See* Cole, *supra* note 10, at 527-30; Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 750-53 (1993). The National Environmental Policy Act ("NEPA") requires federal agency decision makers to allow for public input in connection with major federal agency actions having significant environmental effects. *See* 42 U.S.C. § 4332(C) (1994). Many states have passed similar environmental review statutes. *See* Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565 (1997).

12. *See* Cole, *supra* note 2, at 647-49; Gauna, *supra* note 1, at 22 n.73, 60 n.218; Marc R. Poirier, *Environmental Justice/Racism/Equity: Can We Talk?*, 96 W. VA. L. REV. 1083, 1101 (1994); Torres, *supra* note 10, at 450-51. A number of these authors do acknowledge, however, that if environmental litigation is conducted with attention to issues of community involvement and control, the litigation will not necessarily have negative consequences. *See* Cole, *supra* note 2, at 661-73; Gauna, *supra* note 1, at 39-40; Poirier, *supra*, at 1101-04.

13. *See* Cole, *supra* note 2, at 647-49; Torres, *supra* note 10, at 450-51.

14. The role of environmental laws in causing or contributing to environmental

negative roles that environmental laws might have played in contributing to perceived environmental injustices, the purpose of this article is to demonstrate how environmental laws can play a positive role in a community's ability to achieve "justice" in response to a discriminatory decision to site an undesirable land use. Under certain circumstances, environmental laws can provide information that calls into question the legitimacy of a siting decision. That information can then play an important role in the political debates associated with the siting decision.[15] Moreover, as this article demonstrates, in some cases environmental laws might reveal the kinds of evidence of discrimination necessary to prove a violation of the Equal Protection Clause. Recognizing the role of environmental laws in achieving the just treatment envisioned by the Equal Protection Clause not only opens a strategic door for litigants, but also provides a source of common ground for the environmental and civil rights movements.

Part I of this article describes the context in which equal protection claims may arise by illuminating the nature of the environmental justice movement, the forms of justice it seeks to achieve, and the types of strategies that have been suggested to remedy perceived injustice. Part I explains the two types of justice sought by environmental justice advocates: justice in the distribution of environmental benefits and burdens ("distributional justice"), and justice in the decision-making processes by which such benefits and burdens are allocated ("political justice").[16] A wide array of strategies have been developed to seek and ensure both forms of justice. Since current

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injustice has received and continues to receive scientific and scholarly attention. *See* Kaswan, *supra* note 7, at 268-75 (describing environmental justice literature's assessment of environmental laws).

15. I have explored elsewhere the role of environmental laws in the political context. *See id.* In a political debate about the fairness of a siting decision, a community that believes it is being treated unfairly is attempting to demonstrate that unfairness to the decision makers and to the broader community. Their challenge is aided if the community can show that the decision does not "make sense." Environmental laws may provide information that demonstrates a decision's irrationality. A decision that does not make sense—that appears to be based upon pretextual justifications—suggests the possibility of an improper motive such as discrimination. Thus, environmental laws could play an important role in political as well as legal debates about justice.

16. In many instances environmental justice activists are seeking both distributive and political justice. *See infra* note 92.

interpretations of the Equal Protection Clause limit its application to claims based on intentional discrimination in the decision-making process and do not provide a remedy for distributional disparities in the absence of such discrimination,[17] the Clause provides a potential remedy only for those cases presenting, at a minimum, a claim for political justice.

Part II reviews current equal protection doctrine, focusing on the types of evidence identified by the United States Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[18] as probative of invidious discrimination. These factors include: (1) disparate impact; (2) historical background to the decision; (3) history of the decision-making process; (4) departures from normal substantive factors or procedures; and (5) the legislative or administrative history.[19] *Arlington Heights* and its progeny reveal that, while the evidentiary hurdles to winning an equal protection challenge are indeed formidable, they are, in certain cases, surmountable. Part II then analyzes the limited case law attempting to demonstrate a violation of the Equal Protection Clause in the environmental justice context. Although none of the cases succeeded on their merits, they reveal important lessons about what would be necessary to bring a successful challenge. Part II concludes with a realistic assessment of the kinds of information that would be relevant to proving an environmental justice claim under the Equal Protection Clause. That assessment makes clear that facts—both historical and current—are central to proving a claim of discrimination.

Part III explores how, under the right circumstances, environmental laws can generate the types of facts crucial to an equal protection argument. Environmental laws establish substantive and procedural benchmarks against which official action can be measured. Many laws also require the collection of information about a wide range of impacts that may be associated with a proposed action, and they provide a lens into the decision-making process that allows citizens to learn more about the

17. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring a showing of discriminatory intent and observing that "racially disproportionate impact," standing alone, would not constitute a violation of the Equal Protection Clause).

18. 429 U.S. 252 (1977).

19. *See id.* at 266-68.

nature and basis of siting decisions than they could in the absence of environmental laws.

Part III further demonstrates how these features of environmental laws provide the types of factual information identified in *Arlington Heights* as relevant to proving discriminatory purpose through direct and circumstantial evidence. For example, an environmental review process might generate socioeconomic and environmental information about a targeted community that would then provide the factual basis for showing a decision maker's pattern or practice of causing disparate impacts. Similarly, an environmental review statute may require the decision maker to develop a record of the decision-making process, which may make it easier for a community to demonstrate irregularities in the decision-making process that render it suspect. Or a decision maker's decision to ignore the substantive standards or procedural steps established by an environmental statute might provide compelling circumstantial evidence of discriminatory treatment. Thus, under the right circumstances, environmental laws may generate the information, or access to information, that is probative of a violation of the Equal Protection Clause. Rather than detracting from the central issue of justice, environmental laws can serve justice by illuminating discriminatory decision making.

I. THE ENVIRONMENTAL JUSTICE MOVEMENT

A. Introduction

The environmental justice movement became a recognized phenomenon in the early 1980s when national attention was drawn to the siting of a hazardous waste landfill neighboring an African American community in North Carolina.[20] Faced with the siting of a polychlorinated biphenyl ("PCB") landfill, the community organized nonviolent demonstrations that culminated in over 500 arrests.[21] That incident prompted numerous studies

20. *See* Benjamin F. Chavis, Jr., *Foreword* to VOICES FROM THE GRASSROOTS, *supra* note 1, at 3, 4; Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 268-69 (1994); Gauna, *supra* note 1, at 9.

21. *See* Gauna, *supra* note 1, at 9.

concerning the distribution of environmental hazards.[22] At the local level, concerned residents of minority communities found in the movement a new rallying cry to describe their perception of being a "dumping ground" for society's undesirable land uses. Federal and state environmental agencies began expressing newfound concern for the distributional implications of environmental laws in general and their own actions in particular.[23]

Many different types of claims arise under the banner of "environmental justice." The scope of "environmental" problems relevant to the movement includes not only pollution-related hazards, but also the placement of undesirable land uses like prisons and the distribution of environmental amenities like parks.[24] As explained further below, the scope of the movement's conception of "justice" generally encompasses two related but

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22. *See, e.g.*, COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) (reviewing demographics associated with hazardous waste sites nationwide); U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) (analyzing demographics associated with hazardous waste sites located in the Environmental Protection Agency's Region IV).

23. In 1990, the Environmental Protection Agency ("EPA") formed the Environmental Equity Workgroup to study environmental justice. *See* Gauna, *supra* note 1, at 13. In 1992, the Workgroup published a report assessing the evidence for disproportionate distribution of environmental risks. *See* OFFICE OF POLICY PLANNING AND EVALUATION, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992). The EPA has also established a national Office of Environmental Justice to coordinate the agency's environmental justice efforts. *See* Olga L. Moya, *Adopting an Environmental Justice Ethic*, 5 DICK. J. ENVTL. L. & POL'Y 215, 246-51 (1996). In 1994 the Clinton Administration issued an executive order directing federal agencies to address environmental justice issues. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). The EPA, the lead agency for implementing the executive order, has undertaken a wide range of activities to bring environmental justice concerns into federal policy-making. For a recent summary of these activities, see OFFICE OF ENVTL. JUSTICE, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL JUSTICE 1996 ANNUAL REPORT: WORKING TOWARD SOLUTIONS (1997). For a review of state and regional environmental justice initiatives, see Moya, *supra*, at 251-54.

24. *See* Robert D. Bullard, *Environmental Justice for All*, *in* UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 3, 11 (Robert D. Bullard ed., 1994).

distinguishable forms: distributional justice[25] and political justice.[26]

B. Distributional Justice

Questions of distributional justice are frequently raised in connection with the geographical distribution of undesirable land uses, be they hazardous waste landfills serving the entire nation or local jails and hospitals. Although not without controversy,[27] numerous studies have been undertaken to determine whether minority or low-income neighborhoods are subject to disproportionate levels[28] of undesirable land uses or conditions.[29]

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25. *See* Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1028-55 (1993); Kaswan, *supra* note 7, at 231-33.

26. *See* Been, *supra* note 25, at 1060-68; Kaswan, *supra* note 7, at 233-39.

27. Although many of the studies have found a correlation between race and undesirable land uses, the studies' methodologies and their conclusions have been quite controversial. Some contend that flaws in at least some of these studies render their conclusions about the disproportionate distribution of undesirable land uses questionable. *See, e.g.*, Blais, *supra* note 7, at 85-87; Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121, 133-38 (1997). *Cf.* Blais, *supra* note 7, at 80 (suggesting that, to the extent that there are disproportionate burdens, the distribution may be perceived as desirable from the community's standpoint).

Others acknowledge that disproportionate burdens exist but question whether they were caused by discriminatory treatment. *See, e.g.*, Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); Been, *supra* note 25, at 1014-15; Richard A. Samp, *Fairness for Sale in the Marketplace*, 9 ST. JOHN'S J. LEGAL COMMENT. 503 (1994).

In other words, some contend that the environmental justice movement has failed to raise credible claims of distributional injustice, while others acknowledge distributional injustice but are hesitant to conclude that it is caused by political injustice.

28. The data analysis presents significant definitional problems. The results of studies on distributional disparities depend to a significant degree on how key terms, such as minority "neighborhood" or "community," are defined. *See* Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is How We Measure*, 21 FORDHAM URB. L.J. 633 (1994); John J. Fahsbender, Note, *An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context*, 5 N.Y.U. ENVTL. L.J. 120 (1996). Moreover, the recognition that the distribution of burdens can be disproportionate and unjust does not indicate what distribution would be "proportionate" or "just." Is strict equality required for justice? How should one burden be measured in comparison with another? *See* Been, *supra* note 25, at 1028-55 (discussing and critiquing various conceptions of distributional justice). Where decisions about siting facilities turn on many factors, to what extent should the objective of "equality" trump other factors that may be of crucial importance in the siting of the facility? *See* Sebastian C. Pugliese III, Comment,

Questions of distributive justice are also raised in connection with a number of other factors that can affect the impact or nature of existing land uses. If the government enforces environmental laws less frequently against violators in low-income or minority communities and more frequently against violators in other communities, then that enforcement pattern might create or exacerbate differences in exposure to pollution.[30] Such disparities could also arise if wealthier communities were more likely to initiate private citizen suits to enforce environmental laws than lower-income communities.[31] In the case of abandoned contamination sites, distributional disparities could arise if the government chose to remediate more quickly or more fully in some neighborhoods than in others.[32]

A number of proposals have been made to prevent the occurrence or exacerbation of distributional inequities. In February 1994, the Clinton Administration issued Executive Order 12,898, which requires all federal agencies to assess their impact on minority and low-income populations and to address, "as appropriate," any disproportionate consequences for these

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Environmental Justice: Lowering Barriers to Participation, 1995 WIS. L. REV. 1177, 1179-81, 1199-1200 (1995) (arguing that goals such as environmental protection and economic development may be more important than distributional fairness in determining optimal siting decisions).

The lack of clear guideposts and the persistence of definitional disputes present significant challenges in assessing questions of environmental justice. But these difficulties do not mean that the pursuit of distributional justice is fruitless. Instead, it reveals that the inquiry will be more complex and the outcome more contested than might appear at first blush.

Distributional studies may show disparate impacts relevant to an equal protection claim. The extent to which such evidence of disparate impacts is probative of discriminatory intent is a complex issue discussed below. *See infra* notes 211-29 and accompanying text.

29. For studies pertaining to the distribution of hazardous or undesirable facilities or sites, see *supra* note 22, and Been, *supra* note 25, at 1012 (discussing studies in New Jersey, Louisiana, Detroit, Los Angeles, and Saint Louis). For studies pertaining to exposure to hazardous conditions, see RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE (Bunyan I. Bryant & Paul Mohai eds., 1992), and Cole, *supra* note 2, at 625 n.17 (discussing studies regarding the correlation between race and exposure to air pollution, lead poisoning, pesticides, and occupational hazards).

30. *See* Kuehn, *supra* note 9 (discussing distributional justice implications of environmental enforcement decisions).

31. *See* Gauna, *supra* note 1 (discussing distributional justice implications associated with the use of private citizen suits).

32. *See* Lavelle & Coyle, *supra* note 9 (discussing distributional justice implications associated with the remediation of contaminated sites).

populations.[33] Congress has also considered several legislative proposals to limit the siting of hazardous facilities in areas already having a high concentration of such uses.[34] To date, none of these bills have been enacted.

Where a disproportionate burden has been identified, the environmental justice movement has focused on using or creating remedies that are triggered by evidence of disparate impacts. Existing authority includes Environmental Protection Agency ("EPA") regulations implementing Title VI of the Civil Rights Act of 1964.[35] The regulations prohibit federally funded programs from causing a disparate impact on minorities.[36] A controversial

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33. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). The presidential memorandum accompanying the executive order notes that existing federal laws already contain mechanisms that could and should be used to address environmental justice concerns. *See* Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 14, 1994). In connection with the analysis of the social, economic, and health consequences of major federal actions, the National Environmental Policy Act provides a vehicle for assessing the impact of federal actions on low-income and minority communities. *See id.* The memorandum also notes that Title VI of the Civil Rights Act of 1964 requires that all federal agencies ensure that programs receiving federal funds do not directly or indirectly discriminate on the basis of race, color, or national origin. *See id.*

34. The Environmental Justice Act of 1993, H.R. 2105, 103d Cong. (1993), would have required the assessment of relative environmental burdens around the nation and would have led to the designation of 100 areas as "Environmental High Impact Areas." *See* Been, *supra* note 25, at 1069-70; Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 471 (1994). Based on health risks, the law could have prevented the siting of additional hazardous facilities in these areas. *See* Been, *supra* note 25, at 1069-70. The Environmental Equal Rights Act of 1993, H.R. 1924, 103d Cong. (1993), would have focused on identifying "environmentally disadvantaged" minority or low-income areas and then prohibited the siting of solid waste or hazardous waste facilities in those communities. *See* Been, *supra* note 25, at 1083-84; Bullard, *supra*, at 471.

35. 42 U.S.C. § 2000d (1994).

36. *See* 40 C.F.R. § 7.35(b) (1997) (prohibiting a recipient of federal funding from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex"); *see also* Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 936-37 (3d Cir. 1997) (listing cases holding that Title VI regulations prohibit actions causing a discriminatory impact), *cert. granted*, 118 S. Ct. 2296 (1998), *cert. dismissed*, No. 97-1620, 1998 U.S. LEXIS 4604 (Aug. 17, 1998). Many commentators have also discussed the use of Title VI regulations to challenge disparate impacts. *See* Cole, *supra* note 10, at 531-34; Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285 (1995); Lazarus, *supra* note 2, at 834-39; James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994). The general applicability of Title VI to environmental decision making was highlighted in the memorandum accompanying President Clinton's executive order. *See* Memorandum on

1998 EPA guidance document addressing enforcement proceedings under Title VI suggests that state and other environmental permitting agencies may violate Title VI by approving permits for facilities having a disproportionate impact on minorities.[37] Somewhat more speculatively, some commentators have explored the possibility of legal claims arising under Title VIII of the Civil Rights Act of 1968,[38] which prohibits actions having a discriminatory impact in the housing context.[39]

Other commentators suggest the creation of additional remedies for decisions that result in a disparate impact on minority communities. One proposal suggests the creation of a disparate impact test in connection with the siting of hazardous facilities.[40] Still others have suggested that federal and state equal protection clauses be expanded to prohibit not just those actions motivated by discriminatory intent, but all state actions causing disparate impacts.[41]

Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 14, 1994).

37. *See* U.S. ENVTL. PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998). The guidance suggests that under some circumstances permitting decisions approving environmentally undesirable facilities in minority neighborhoods could be considered a violation of Title VI. *See id.* For a sampling of commentary on the controversy, see *Chamber Seeks Minority Business Support in Feud on EPA Environmental Justice Policy*, 67 U.S.L.W. 2041 (July 21, 1998); *EPA Defends Release of Interim Policy on Processing of Civil Rights Complaints*, 66 U.S.L.W. 2737 (June 2, 1998); *Western Governors' Association Joins Calls for EPA to Withdraw Civil Rights Guidance*, 29 Env't Rep. (BNA) 570 (July 10, 1998); Editorial, *EPA Bungling Leaves "Environmental Justice" Elusive*, USA TODAY, July 20, 1998, at A14; Donna Porstner, *Chambers Align to Fight Against "Environmental Justice" Policy*, WASH. TIMES (D.C.), July 20, 1998, at D17.

38. 42 U.S.C. §§ 3601-3631 (1994 & Supp. II 1996).

39. *See* Alice L. Brown & Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act)*, 14 VA. ENVTL. L.J. 741 (1995); Cole, *supra* note 10, at 534-37; Lazarus, *supra* note 2, at 839-42.

40. *See* Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 294-97 (1992) (advocating a disparate impact test but expressing skepticism as to its political viability); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV 394, 421-24 (1991).

41. *See* Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 225-31 (1994); Leslie Ann Coleman, Comment, *It's the Thought that Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L.J. 447, 481-84 (1993); *infra* note 71 (discussing proposals for a more impact-based test).

The equal protection clauses in some state constitutions have been interpreted to prohibit decisions having disparate impacts as well as those motivated by discriminatory intent. Environmental justice advocates have suggested bringing

C. *Political Justice*

While claims for political justice are somewhat more ephemeral than claims for distributional justice, they are no less important to many of those involved in environmental justice disputes.[42] Political justice centers on the fairness of the decision-making processes by which decisions with environmental consequences are made. The touchstone for political justice is that decision makers treat all citizens with "equal concern and respect."[43] Understood in its political sense, this form of justice looks at the fairness of the decision-making process rather than the fairness of its outcome.[44] For example, a decision to place an undesirable land use in a low-income or minority community because the decision makers weigh that community's interests as less important than other communities' interests fails to treat the low-income or minority community with equal concern and respect. That decision not only subjects the community to an unwanted land use, but, as or more importantly, it imposes a "stigmatic injury" by reflecting the lack of respect for and the lower status of the group so treated.[45]

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disparate impact cases under these state constitutional provisions. *See* Kary L. Moss, *Race and Poverty Data as a Tool in the Struggle for Environmental Justice*, POVERTY AND RACE, May-June 1996, at 1, 3-4 (describing state equal protection clause litigation in Michigan); Reich, *supra* note 40, at 302-05 (identifying state equal protection clauses under which disparate impact tests have been applied).

42. There is, of course, frequently a strong relationship between political and distributive justice. *See* Kaswan, *supra* note 7, at 239-40.

43. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977); *see also* Been, *supra* note 25, at 1063-64 (quoting DWORKIN, *supra*, at 273). Professor Dworkin notes that the expression "equal concern and respect" refers to two forms of justice: the "right to equal treatment" in the sense of equal distribution (what I call distributional justice) and the "right to treatment as an equal" (what I call political justice). DWORKIN, *supra*, at 273. My use of the expression "equal concern and respect," like Professor Been's, will refer to political rather than distributive justice.

44. Attention to the process rather than the outcome does not mean that the outcome is irrelevant. Nonetheless, the two present different types of justice. Professor Dworkin believes that the "right to treatment as an equal" is more fundamental than the "right to equal treatment." DWORKIN, *supra* note 43, at 273. In other words, he believes that political justice is more fundamental than distributive justice. Although recognizing the need to distinguish between the two forms of justice, this article does not attempt to attach greater importance to one form or the other.

45. *See* R. George Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 ARIZ. ST. L.J. 777, 784-87, 792 (1991) (discussing the "stigmatic injury" associated with siting disputes and noting that such injuries "may reflect a lack of respect and may tend to undermine the bases of the self-respect of

The issue of political justice arises in numerous contexts. The most obvious is in connection with the siting of undesirable land uses. The question of political justice also arises in connection with environmental policy-making. Legislators and administrators often must choose among competing policies and interests. To the extent that such decisions are made in order to favor certain groups and not others, a question of political justice is raised.[46]

The extent of political injustice is difficult to determine because decision makers rarely announce that their decisions are designed to serve one community's interests over another's. The question of whether a particular decision was made in a discriminatory fashion is therefore likely to be highly contested.[47] The prevalence of political injustice—or justice—is equally contested at a more general level. For example, much controversy has surrounded the issue of whether studies showing distributional disparities—that is, distributional injustice—reveal anything about the manner in which minority communities have been treated—that is, about political injustice.[48] Due to the complexity of the siting process and the likelihood of demographic changes over time, present distributional inequities cannot always be traced to, or be presumed to be caused by, unfair

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the adversely affected community"); *cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349-55 (1987) (discussing the "stigma theory" used as a basis for determining whether a government action violates the Equal Protection Clause).

46. Assuming that not all environmental problems can be addressed, not all violations of law can be enforced, and that not all contaminated sites can be remediated immediately or fully, the question of which environmental problems decision makers choose to address, enforce, or remediate could raise issues of political justice. *See* Kuehn, *supra* note 9; Lavelle & Coyle, *supra* note 9.

47. *See infra* notes 69, 72 (discussing the frequent absence of explicitly intentional discrimination). However, the environmental justice movement has a "poster child" for political injustice. A consulting firm hired to help the California Waste Management Board assess political issues associated with the siting of waste incineration facilities noted that middle- and high-income communities were better able to finance political opposition. As a result, the report recommended that the agency not site facilities where middle- or upper-income communities were "within the one-mile and five-mile radius of the proposed site." Bullard, *Anatomy of Environmental Racism*, *supra* note 1, at 18 (quoting CERRELL ASSOCS., INC., CALIFORNIA WASTE MANAGEMENT BD., POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING 43 (1984)). The report thus suggests that, should the siting agency follow its recommendation, it might make siting decisions based on the wealth of neighboring communities. That approach would not treat the lower-income community with equal concern and respect.

48. *See, e.g.*, Lazarus, *supra* note 2, at 806-07.

treatment.[49] Similarly, the complexity of government enforcement and remediation decisions makes assessing their fairness difficult. Nonetheless, the sense of political injustice—of persistent unfair treatment—permeates the environmental justice movement.

One approach to achieving political justice is to improve decision-making processes so that they are less likely to result in the unfair treatment of low-income and minority communities. Environmental justice advocates have urged government agencies and environmental groups to increase the representation of minorities in decision-making positions in the hope that greater representation will lead to fairer decision making.[50] Another

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49. The fundamental difficulty in inferring discriminatory treatment from the current demographics associated with undesirable land uses is that the current demographic patterns may have arisen well after (and possibly as a consequence of) earlier siting decisions. *See* Been, *supra* note 27; Samp, *supra* note 27, at 504-05. In other words, at the time an undesirable use is sited, the demographics could be white or minority, rich or poor. As a result of the undesirable use, property values could go down and the desirability of the neighborhood could change. Wealthier residents with the resources to do so might move elsewhere. White residents may be more likely to leave because they do not face the housing discrimination that might make it more difficult for minority residents to leave. *See* Bullard, *Anatomy of Environmental Racism*, *supra* note 1, at 21; Charles P. Lord, *Environmental Justice Law and the Challenges Facing Urban Communities*, 14 VA. ENVTL. L.J. 721, 728 (1995). The "white flight" may thus leave the community with a higher proportion of minorities than were present at the time the undesirable land use was sited. Moreover, lower property values might in turn attract other undesirable land uses as well as lower-income residents. *See* Rachel D. Godsil & James S. Freeman, *Jobs, Trees, and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25, 27-28 (1994). Furthermore, some communities may welcome undesirable land uses because of the jobs or tax base they might provide. Such facility siting would benefit, not discriminate against, the affected community. *See* Blais, *supra* note 7, at 100-15. Thus, a currently disproportionate burden is not necessarily a consequence of prior discriminatory treatment in the siting process.

As the above analysis reveals, distributional injustice may not always be causally related to political injustice in siting decisions. The distributional injustice may, however, be causally related to other forms of political injustice, such as housing and employment discrimination. If that is the case, then directing attention to supposed political injustice in the siting process will do little to address either the practical reality of a distributional injustice or the other forms of political injustice creating the disparity. *See* Vicki Been, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 7 (1997) (observing that if market factors rather than siting decisions lead to distributional disparities, then changes in the siting process will fail to address the true cause of the identified disparities).

50. *See, e.g.*, Lazarus, *supra* note 2, at 850-52. This solution follows from environmental justice analysts' observations that the lack of minority representation in decision-making positions is one of the causes of environmental injustice. *See*

approach to preventing political injustice is to improve public participation in the decision-making process.[51] Executive Order 12,898, which requires federal agencies to develop public participation procedures to ensure the input of those affected by agency decisions, adopts this approach.[52]

Once a community believes that an unfair decision is being or has been made, it then faces the daunting task of demonstrating the political injustice. That task is difficult for several reasons. First, explicit discrimination is rare.[53] As a result, a community that believes it has been unfairly treated will have to rely on circumstantial evidence. Since a minority community making a valid claim is, by definition, a community that is not being treated with equal concern and respect, the community's political arguments to decision makers are not likely to fall upon sympathetic ears. In some circumstances, the charge of racism itself may be viewed as an aggressive act. In such instances, the tables could turn and the decision makers accused of racism could be considered the "victims."[54] Furthermore, in the siting context, a community's opposition may be viewed as simply another manifestation of the ubiquitous NIMBY phenomenon.

Gauna, *supra* note 1, at 11-13 & nn.38-42 (describing environmental decision makers and organizations as out of touch with the needs of minority and low-income communities); Lazarus, *supra* note 2, at 812-15.

51. *See* Foster, *supra* note 11, at 746-50 (arguing that enhanced participation in environmental decision making could help avoid discriminatory decision making); Torres, *supra* note 10, at 451-56 (describing the importance of citizen participation in administrative decision-making processes to improving environmental equity).

52. *See* Exec. Order No. 12,898, § 1-103(a), 59 Fed. Reg. 7629, 7630 (1994) (requiring agencies to list "planning and public participation processes . . . that should be revised to . . . ensure greater public participation"); *id.* § 5-5 (suggesting public participation strategies); *see also* Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 279 (Feb. 11, 1994) (stating that the executive order is intended "to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment").

53. *See infra* notes 65, 69, 72 and accompanying text (explaining that instances of explicit and de jure discrimination are now unusual).

54. Professor Alan Brownstein has stated that "one must assume that aspersions of bigotry will produce at least as substantial and negative a reaction as accusations of any other invidious motive." Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 61 (1988). Speaking more broadly, and evaluating the rhetoric of recent Supreme Court equal protection cases, David Kairys has observed that "[t]he Court has reversed the social roles that shaped the history of American racism: whites have become the presumed victims and African Americans the presumed racists." David Kairys, *Unexplainable on Grounds Other than Race*, 45 AM. U. L. REV. 729, 737 (1996).

The burdened community may be accused of hiding its self-interested claim of NIMBY behind a smokescreen of assertions of discriminatory treatment. However, as I have argued elsewhere, almost all communities faced with an undesirable land use will oppose it.[55] The question therefore is not whether the community is expressing NIMBY, since it generally is.[56] The question is whether the community's claim of NIMBY is combined with a legitimate claim for fairness. Although a pure NIMBY claim may be dismissable as self-interested,[57] the question of fairness implicates the workings of the political process and thus presents a matter of general concern.[58]

How can a community that believes it has been treated unfairly demonstrate that injustice? The effort is important both in the political forum, where the community's long-term status and dignity are at stake, and in the legal forum, where the community may wish to challenge the decision. I have discussed this question in connection with the political forum elsewhere.[59] In the legal world, the usual method for challenging the unfairness of a siting decision would be to bring a claim of discriminatory treatment under the Equal Protection Clause[60] or,

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55. *See* Kaswan, *supra* note 7, at 255, 281-82.

56. Some commentators in the environmental justice movement observe that communities opposed to the siting of undesirable facilities in their neighborhoods are not self-interested because they do not believe that the facilities in question should be sited near anyone. They are arguing for "NIABY"—"Not in Anybody's Back Yard"—rather than NIMBY. *See, e.g.*, Chavis, *supra* note 20, at 5; Foster, *supra* note 11, at 748-49. NIABY may be a plausible position in some cases. However, some land uses are necessary notwithstanding their undesirability. Such facilities as hospitals, correctional facilities, and homes for the homeless are all important and must be placed somewhere, notwithstanding the fact that most residents will argue against placement in their backyards. Sometimes NIMBY *will* mean NIMBY, not NIABY.

57. *See* Orlando E. Delogu, *"NIMBY" Is a National Environmental Problem*, 35 S.D. L. REV. 198 (1990). In contrast, Michael Gerrard has argued that in some instances communities' NIMBY claims have had positive results. Repeated local opposition to hazardous waste disposal facilities may have been a factor in the reduction of hazardous waste produced by the chemical industry. *See* Gerrard, *supra* note 7, at 517-20.

58. That a claim for fairness is raised does not mean that the decision necessarily resulted from unfairness. The fairness of the political process is, however, a question more deserving of public debate than a particular community's self-interested NIMBY response to an undesirable land use.

59. *See* Kaswan, *supra* note 7.

60. Some have argued that such claims are virtually nonexistent. *See* Blais, *supra* note 7, at 81. That assertion seems questionable in light of the frequent concerns about racism prevalent in the literature on environmental justice.

to the extent applicable, under Title VI or Title VIII.[61] Meeting the stiff evidentiary requirements for proving a violation may not be possible in many cases that appear to involve unfair treatment, but under certain factual conditions the Equal Protection Clause may provide a remedy for discriminatory decisions. The remainder of this article discusses the requirements for proving a claim under the Equal Protection Clause and the ways in which environmental laws may provide the factual evidence necessary to meet those requirements.

II. EQUAL PROTECTION AND ENVIRONMENTAL JUSTICE

This Part analyzes the *Arlington Heights* test for proving a violation of the Equal Protection Clause and then analyzes the application of that test in several environmental justice cases. Although the plaintiffs in these cases were unsuccessful, a careful analysis reveals the kinds of data that might be more likely to support a successful environmental justice claim. Part III then turns to consider how environmental laws—often considered antithetical to the pursuit of justice—may provide the factual information relevant to the equal protection inquiry. The purpose of this article is not to create the false hope that the Equal Protection Clause will always protect minority communities from the undesirable land uses to which they feel unfairly subjected. Rather, its purpose is to provide a hard look at equal protection doctrine and then to explore a positive interrelationship between civil rights and environmental laws that has heretofore received little attention.

A. Introduction

The Equal Protection Clause of the Fourteenth Amendment provides in part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[62] Read literally, the Equal Protection Clause resonates with political justice: government is admonished to treat all citizens equally;[63]

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61. Titles VI and VIII address discriminatory treatment as well as disparate impact. *See supra* notes 35-39 and accompanying text.

62. U.S. CONST. amend. XIV, § 1; *see supra* note 3.

63. In explaining the equality guaranteed by the Equal Protection Clause, Professor Laurence Tribe states that the Clause establishes "the *right to treatment*

government is not to favor some at the expense of others, or to discriminate against some to the benefit of others. But the promise of the Equal Protection Clause has faded as the Supreme Court has steadily increased the evidentiary hurdles that must be surmounted before a decision maker will be found to have violated the Clause.[64] As far below the hopes of the civil rights movement as the Equal Protection Clause may have fallen, however, it has not lost all meaning. Its viability in a particular case must rest upon a detailed and careful analysis of the requirements of the law and an honest assessment of whether the facts of the case—however compelling they may seem—offer the type of evidence the courts find probative of discriminatory intent for the type of case under review.

Facially discriminatory laws and actions have become rare in today's race-conscious society.[65] It is inconceivable that a government body would declare that all landfills shall be sited in minority neighborhoods. Instead, equal protection claims in the environmental justice context are likely to allege that a governmental decision that is facially neutral is nonetheless discriminatory. The current understanding of when a facially neutral decision or action can be considered discriminatory was established in 1975 in *Washington v. Davis*.[66] Stating that the

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as an equal . . . with regard to all interests and requires government to treat each individual with equal regard as a person." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1437-38 (2d ed. 1988). Professor Tribe refers here to Professor Dworkin's distinction between the "right to treatment as an equal," which I have characterized as political justice, and the "right to equal treatment," which I have characterized as distributive justice. *See id.* at 1437 (citing Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 10-11 (1977)); *see also supra* note 16 and accompanying text (explaining and distinguishing distributive and political justice). Professor Tribe states further that "[w]hen the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the laws." TRIBE, *supra*, at 1515.

64. The limited nature of remedies for discrimination has prompted some scholars to conclude that the law legitimizes racial subordination by "creat[ing] an illusion that active racism is under control, so that covert bigotry and socioeconomic disparities may be ignored." Reich, *supra* note 40, at 284.

65. *See* Siegel, *supra* note 4, at 1135-36 (observing that the Supreme Court's scrutiny of legislative purpose has "created incentives for legislators to explain their policy choices in terms that cannot be . . . impugned [as racially discriminatory]"); *id.* at 1141-43 (observing that once heightened scrutiny was applied to de jure discrimination, "regulatory bodies responded by abandoning the use of race- and most forms of gender-specific criteria").

66. 426 U.S. 229 (1976).

"central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race,"[67] the Court held that a plaintiff must prove that the defendant acted with discriminatory intent.[68] The Equal Protection Clause thus provides a potential remedy for claims for political justice.[69] The Court observed that a "racially

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67. *Id.* at 239.

68. *See id.* The Court's decision halted lower courts' emerging tendency to find violations of the Equal Protection Clause based on disparate impact alone. *See id.* at 244-45; Siegel, *supra* note 4, at 1133-34. The Court's focus on discriminatory motive stands in contrast to the Court's and scholars' previous reluctance to inquire into legislative motives. *See* Siegel, *supra* note 4, at 1132-34; *see also* Brownstein, *supra* note 54 (discussing the dichotomy between equal protection cases' motive inquiry and the absence of motive inquiry in other constitutional contexts and suggesting a more principled framework for determining when motive inquiry is and is not advisable).

The *Davis* Court feared adoption of a disparate effects test in part due to the consequences it could have for many "tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U.S. at 248.

69. According to some commentators, the Equal Protection Clause provides only a "potential" remedy for political injustice because, in practice, the Court's discriminatory intent standard fails to encompass all instances of unfair treatment of minorities. Conscious racism may be difficult to prove because of the likelihood that such racism is hidden behind what appear to be race-neutral justifications. *See* Lawrence, *supra* note 45, at 319 (describing this critique); Siegel, *supra* note 4, at 1135-36, 1141-43. Professor Charles Lawrence has argued that the demonstration of "discriminatory intent" required by *Davis* captures only the tip of the iceberg of true discrimination because the overt discrimination of the postslavery era has been sublimated into unconscious predispositions that are rarely expressed or manifested explicitly enough to meet the *Davis* test. *See* Lawrence, *supra* note 45; *see also* Siegel, *supra* note 4, at 1136-38; Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 938-54, 963-67 (1993). *But see* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1084-85 (1998) (suggesting that in certain types of cases the Supreme Court has been willing to infer discrimination from circumstantial evidence that may result from unconscious as well as conscious racism); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 338 n.272 (1997) (suggesting that an inference of discrimination based on circumstantial evidence does not require knowledge or awareness of discrimination and could therefore capture unconscious as well as conscious discrimination). According to some commentators, the difficulty of proving discriminatory intent means that many instances of discrimination are not remediable through the Equal Protection Clause. *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1160-61 & nn.67-71 (1991).

Professors Eisenberg and Johnson have observed that a relatively small number of cases claiming discriminatory intent have been brought since the *Davis* decision, notwithstanding widespread sociological data indicating the continued presence of conscious or unconscious racism. *See id.* at 1168-71 (discussing district and appellate opinions published from 1976 to 1988). They conclude that "[i]f there is significant

disproportionate impact," standing alone, is generally insufficient to demonstrate a violation.[70] Consequently, although alleviating the impact of a governmental decision may be the motivation for an equal protection challenge, and although the distribution of undesirable land uses may be a relevant factor in determining whether a governmental decision was motivated by discriminatory intent, the Equal Protection Clause does not provide a remedy for claims based solely on distributive justice.[71]

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governmental race discrimination in the society, constitutional litigation is not directly redressing much of it." *Id.* at 1171.

In light of the difficulty of ascertaining discriminatory intent, some authors have suggested that the presence of disparate impacts should play a stronger role in resolving equal protection cases. *See, e.g.*, Siegel, *supra* note 4, at 1144-46 (suggesting that giving disparate impacts resulting from government programs more weight in equal protection analysis would require state actors "to acknowledge and justify their role in perpetuating forms of race and gender stratification"); Boyle, *supra*, at 979-83 (proposing a form of "intermediate scrutiny" for alleged discrimination that would use the presence or foreseeability of disparate impacts as a starting point for determining whether minorities received fair treatment). Another approach would be to shift the burden of proof to the defendant once a disparate impact is identified, on the assumption that the defendant is in a better position than the plaintiff to provide evidence regarding intent. *See* Coleman, *supra* note 41, at 473-75. For a summary of articles suggesting various modifications to discriminatory purpose doctrine, see Siegel, *supra* note 4, at 1144 n.157.

70. *Davis*, 426 U.S. at 239.

71. *See* TRIBE, *supra* note 63, at 1437-38 (noting that the Equal Protection Clause does not necessarily guarantee the *"right to equal treatment"* but that it does protect the *"right to treatment as an equal"*).

Professor Alan Freeman provides a theoretical basis for considering distributive as well as political justice in his contention that the Equal Protection Clause was intended to address real-world impacts on minorities, not just the moral status of the alleged wrongdoer. In his words, the Clause should be interpreted from the "victim" perspective rather than the "perpetrator" perspective. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). As one author has stated, the Clause was intended "to improve the condition of blacks, not to punish racists." Boyle, *supra* note 69, at 964; *see also* Lawrence, *supra* note 45, at 319-20 (indicating that the intent requirement fails to acknowledge that the "facts of racial inequality are the real problem" (quoting Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978))); Reich, *supra* note 40, at 287-88, 290-94; *cf.* Coleman, *supra* note 41, at 475-84 (arguing that the Equal Protection Clause should adopt an effects test to remedy distributive inequalities because many siting decisions are not motivated by discrimination). *But see* Selmi, *supra* note 69, at 335-38 (suggesting that use of a disparate impact test would not change the outcome of equal protection cases because the courts would remain skeptical that racism is the cause of discriminatory impacts and would therefore readily accept any plausible alternative explanation that is proffered).

Professor Tribe suggests the adoption of an "anti-subjugation" principle to guide interpretation of the Equal Protection Clause. Although he does not endorse the adoption of "disparate impact as a *per se* rule," TRIBE, *supra* note 63, at 1520, he

The Supreme Court did, however, recognize that since government actors rarely announce their intent to discriminate, discriminatory intent may not be explicit.[72] The justifications presented by government actors may, in some instances, be pretexts for discriminatory conduct.[73] The *Davis* Court thus recognized the possibility of discrimination notwithstanding the absence of explicit intent[74] and stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[75] The relevant facts can provide circumstantial evidence in the likely event that there is no direct evidence of discriminatory purpose.

B. Equal Protection Doctrine

1. The *Arlington Heights* Test

The Supreme Court addressed the question of what types of facts are relevant to inferring discriminatory intent in the 1976 case of *Village of Arlington Heights v. Metropolitan Housing*

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argues that the principle of anti-subjugation would be "more concerned with the burdens government action imposes on suspect groups than with what prejudices lurk in the hearts and minds of government actors." *Id.* at 1515-16. He states that "[t]he burden on those who are subjugated is none the lighter because it is imposed inadvertently. Granted, even a dog can tell the difference between being kicked and being tripped over. But if one is first dragged toward the boot and then stumbled over often enough, the pains and bruises become indistinguishable from those inflicted by kicking: the effect is the same . . . ." *Id.* at 1519.

For a discussion of the use of disparate impacts (focusing on distributive justice) as a factor in proving discriminatory intent (focusing on political justice), see *infra* notes 92-111 and accompanying text.

72. *See Davis*, 426 U.S. at 241. In the context of land use decisions, where "the challenged ordinance can be connected to either a legitimate purpose or an invidious one or both, the available records may often (and not surprisingly) disclose only the constitutionally acceptable goal. . . . A wide variety of alternative rationalizations will be offered to justify the decision on non-invidious grounds." Brownstein, *supra* note 54, at 44-45; *see also id.* at 59 (describing the likelihood that illicit motives may be concealed or disguised). Professor Brownstein goes on to say, however, that evidence of discriminatory motive is not always as difficult to find as might be expected. *See id.* at 45.

73. *See, e.g.*, Navajo Nation v. New Mexico, 975 F.2d 741, 744 (10th Cir. 1992) (upholding the district court's finding that government justifications for disparate cuts in funding to Navajo Nation were pretextual).

74. *See* 426 U.S. at 241; *see also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

75. 426 U.S. at 242.

Development Corp.[76] In *Arlington Heights*, a real estate developer sought to build multifamily racially integrated affordable housing in Arlington Heights, a largely white community.[77] Since the lot in question was zoned for single-family residences, the developer requested a change in the zoning to multifamily housing.[78] The Village of Arlington Heights's Board of Trustees denied the request for rezoning.[79] The developer and an individual minority plaintiff sued, alleging that the denial of the request to rezone was racially discriminatory.

Apparently lacking an explicit discriminatory purpose,[80] the Court analyzed the types of direct and circumstantial evidence that might be probative of discriminatory purpose. In so doing, the Court identified the following five factors as potentially probative of intentional discrimination: (1) disparate impact; (2) historical background to the decision; (3) history of the decision-making process; (4) departures from normal substantive factors or procedures; and (5) legislative or administrative history.[81] The Court made clear that its five-factor test was not "exhaustive."[82] Nevertheless, courts have continued to use the five-factor test to determine whether direct and circumstantial evidence reveal that a facially neutral decision is discriminatory.[83] Although some

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76. 429 U.S. 252 (1977).

77. *See id.* at 254-55.

78. *See id.* at 254.

79. *See id.* at 258. The denial of the request for rezoning was not, on its face, discriminatory.

80. *See id.* at 268-69.

81. *See id.* at 266-68.

82. *Id.* at 268.

83. *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 117 S. Ct. 1491 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (employing the *Arlington Heights* test to determine whether a city ordinance controlling animal slaughter discriminated against those following the Santeria faith).

A review of the district and circuit court case law applying the *Davis* and *Arlington Heights* tests between 1976 and 1988 reveals the repeated use of these factors. *See* Eisenberg & Johnson, *supra* note 69, at 1179-80 (listing the factors commonly analyzed); *id.* at 1187-89 (analyzing the importance of these factors in determining probability of success). Eisenberg and Johnson's research revealed that two additional factors appear to play a significant role in the outcome of the cases: the foreseeability of disparate impacts and the extent to which the decision appears to perpetuate past discrimination. *See id.* at 1187. They note that "the roles of the 'foreseeability' and 'perpetuate discrimination' factors are puzzling . . . . Neither . . . are included in the *Arlington Heights* list of factors probative of discriminatory intent, a list that is authoritative for, and binding on, the lower

commentators have argued that the application of the test has been inconsistent, the test nonetheless provides the framework that is likely to be invoked in an equal protection challenge to the siting of an undesirable land use.[84]

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courts." *Id.* at 1189. However, these factors could be linked to the existing *Arlington Heights* factors. The "foreseeability" of disparate impacts may affect the degree to which a court will infer discriminatory intent from the presence of discriminatory impacts, which is an acknowledged factor. *See infra* notes 100-11 and accompanying text (discussing role of foreseeability of disparate impacts). Similarly, the extent to which a decision appears to "perpetuate past discrimination" could be seen as a subset of the historical context of the decision, also an acknowledged factor. *See infra* notes 113-15 (discussing historical context).

84. Professor Sheila Foster has argued that, notwithstanding the Court's consistent reference to *Davis* and *Arlington Heights* as the appropriate framework for resolving equal protection cases, an analysis of how the test is applied to facially neutral actions or statutes reveals significant variations in the test as applied. *See* Foster, *supra* note 69. Professor Foster argues that the nature of the required intent and the Court's willingness to infer a discriminatory purpose based upon circumstantial evidence vary depending upon the institutional nature of the defendant and the decision being made (for example, legislature, low-level administrator, or jury) and the substantive nature of the interest at stake (for example, voting rights, housing, or fair trial). *See id.* at 1084-97 (regarding the nature of the intent requirement); *id.* at 1121-43 (regarding the relationship between differing intent requirements and explanatory factors). Thus, although there have been exceptions, Professor Foster states that seemingly incoherent applications of the Equal Protection Clause can be explained by both the substantive interests at stake and by the concerns about democratic processes and institutional competence that have historically motivated the Court's relative willingness to uphold or reject decisions made by the executive and legislative branches. *See id.* at 1072, 1121-22; *cf.* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (arguing that the nature of the substantive right at issue is the primary variable in explaining apparently inconsistent applications of the Equal Protection Clause).

Under Professor Foster's framework, decisions about the siting of environmentally undesirable land uses would fall squarely into the *Arlington Heights* framework since they involve onetime administrative or legislative decisions with social and economic, rather than political, implications. The substantive right at stake, involving quality of life rather than political or liberty interests, leans toward relative judicial deference. *See* Foster, *supra* note 69, at 1097-1100 (explaining and partially concurring in the substance-based explanation of the Court's varying interpretations). Since the decision is a onetime decision, however, and likely made by a low-level administrator, the decision does not raise the concerns about democratic invalidation and institutional competence that might otherwise lead to judicial restraint. *See id.* at 1128-31. With substantive factors leading toward judicial restraint and institutional factors leading toward judicial interference, the environmental justice cases appear to fall in the middle of the spectrum of judicial willingness to infer discrimination from circumstantial evidence. Professor Foster argues that this middle range, where circumstantial, context-based information may be sufficient to infer an impermissible general discriminatory intent, is best represented by a relatively straightforward application of *Arlington Heights* and its five factors. *See id.* at 1089-93.

In the usual case, the plaintiffs challenging a decision bear the burden of proving that the decision maker was motivated by a discriminatory purpose.[85] The plaintiffs are required to provide the types of direct and circumstantial evidence contemplated by *Arlington Heights*. The plaintiffs do not, however, have to prove that discrimination was the sole or even the primary purpose of the challenged decision.[86] The Court recognized that many factors—some legitimate and others not—could motivate a given decision.[87] Accordingly, the Court concluded that a decision would violate the Equal Protection Clause if "a discriminatory purpose [had] been *a* motivating factor in the decision."[88] Thus, in the facility-siting context, plaintiffs might provide sufficient direct and circumstantial evidence to prove that discriminatory purpose played a role in the siting decision. If the court finds that the siting decision was motivated by additional factors, such as cost or geologic suitability, these additional motivations would not automatically take the decision maker "off-the-hook" for its discriminatory purpose.

Although discrimination does not have to be the sole or primary purpose of the decision in question, it does have to have played a role in affecting the outcome of the decision. The case is not over once the plaintiffs prove the presence of a discriminatory purpose. At that point, the burden of proof shifts to the decision maker who must prove "that the same decision would have resulted even had the impermissible purpose not been considered."[89] If the decision maker can prove that its decision would have been the same notwithstanding the discriminatory purpose, then the equal protection claim fails despite the presence of discriminatory purpose.[90] Thus, if a decision maker in the facility siting context could prove that neutral criteria like

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85. *See Arlington Heights*, 429 U.S. at 270 (referring to the plaintiffs' "burden of proving that discriminatory purpose was a motivating factor").

86. *See id.* at 265.

87. *See id.*

88. *Id.* at 265-66 (emphasis added). In *Hunter v. Underwood*, 471 U.S. 222, 232 (1985), the Court held that the fact that a state statute disenfranchising persons convicted of certain types of crimes was adopted to discriminate against poor whites as well as blacks did "not render nugatory the purpose to discriminate against all blacks."

89. *Arlington Heights*, 429 U.S. at 271 n.21.

90. *See id.* Since the *Arlington Heights* Court held that the plaintiffs had failed to make the threshold showing of discriminatory purpose, the burden did not shift in that case. *See id.*

the cost or geologic suitability of the site would have dictated its selection, notwithstanding the discriminatory purpose, then the plaintiffs would be denied relief.[91] But if many other sites of suitable cost and geologic suitability had also been available, then the defendant would likely fail to prove that it would have made the same decision notwithstanding the discriminatory purpose.

As the foregoing discussion makes clear, the specific facts of each case are central to establishing an equal protection claim. The first type of circumstantial evidence relevant to inferring discriminatory purpose under the *Arlington Heights* test is disparate impact. Disparate impact is one of the key issues prompting communities' concerns about the siting of undesirable land uses.[92] For example, a community concerned about the siting of a landfill in its neighborhood might argue that the siting decision is part of a pattern of siting such facilities in minority neighborhoods and imposing inequitable environmental burdens upon them.[93] The siting decision could therefore reflect a pattern of disparate impact that could be considered probative of discrimination.[94] The *Arlington Heights* Court indicated that if the facts demonstrate that the action has caused a "clear pattern [of disparate impact], unexplainable on grounds other than race,"[95] then disparate impact alone may be sufficient to infer a

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91. The question of whether criteria such as land costs are truly "neutral," rather than inherently discriminatory, is a subject of debate. Professor Jill Evans argues that such criteria are based on historical patterns of discrimination and should themselves be considered discriminatory. *See* Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. (forthcoming Winter 1998). Professor Evans observes, however, that the decision-making body could rebut a presumption of discrimination established by the cost criterion if it could prove that "cost consistently drives or overrides other factors in overall decisionmaking." *Id.*

92. The importance of disparate impact to communities concerned about siting decisions demonstrates the frequent linkage between the desires for both political and distributive justice. Concerns about disparate impact resonate with distributional justice. As discussed further below, however, the Equal Protection Clause considers the impact—the distributive justice issue—only to the extent that it can be considered probative of discriminatory intent—the political justice issue.

93. *See, e.g.*, R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (11th Cir. 1992) (alleging that the county's decision to site solid waste landfill in a predominantly minority area imposed a disparate impact in light of the concentration of waste facilities in that neighborhood).

94. *See, e.g., id.* at 1149 (finding that the county's landfill siting decision had a disparate impact on black residents). *See also infra*, notes 211-29 and accompanying text (discussing the types of data on disparate impact that would be probative of discrimination in a siting dispute).

95. *Arlington Heights*, 429 U.S. at 266.

discriminatory purpose.[96] In the usual case, however, the Court anticipated that the impact would be explainable on grounds

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96. *See id.*; *see also* Washington v. Davis, 426 U.S. 229, 242 (observing that "discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds"). In support of this proposition, the *Arlington Heights* Court cites *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Guinn v. United States*, 238 U.S. 347 (1915), *Lane v. Wilson*, 307 U.S. 268 (1939), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), all of which presented circumstances that suggested that the disparate impacts of the government action could find no explanation other than discrimination. In their study of lower court opinions employing the *Arlington Heights* factors between 1976 and 1988, Professors Eisenberg and Johnson found that "the presence of a clear pattern [of disparate impact] unexplainable on any grounds other than race" was one of the "most frequent and most significant indicators of plaintiff success." Eisenberg & Johnson, *supra* note 69, at 1187.

Some courts have found evidence of disparate impacts sufficient to establish discriminatory intent in cases involving the unequal provision of municipal services. *See* Ammons v. Dade City, 783 F.2d 982, 985 n.8 (11th Cir. 1986) (finding disparate impact evidence that the city spent 90% of street resurfacing funds in white neighborhoods and only 10% in black neighborhoods sufficient to demonstrate intentional discrimination); Dowell v. City of Apopka, 698 F.2d 1181, 1186 (11th Cir. 1983) ("The magnitude of the disparity, evidencing a systemic pattern of municipal expenditures in all areas of town except the black community, is explicable only on racial grounds."); Baker v. City of Kissimmee, 645 F. Supp. 571, 586 (M.D. Fla. 1986) (concluding that differences in services provided to black and white neighborhoods were sufficient to infer discrimination); *see also* Torres, *supra* note 10, at 442-45 (discussing *Dowell* and *Baker*); Godsil, *supra* note 40, at 417-18 (discussing cases).

Evidence of disparate impact may play an especially important role in cases challenging the constitution of juries. In *Castaneda v. Partida*, 430 U.S. 482, 495-96 (1977), decided shortly after *Arlington Heights*, the Court found that jury selection procedures resulted in a significant underrepresentation of Mexican Americans on grand juries. That showing of discriminatory impact "shifted the burden of proof to the State to dispel the inference of intentional discrimination." *Id.* at 497-98. Since the State failed to provide any evidence to dispel the inference, *see id.* at 498-99, the Court held that the grand jury selection procedures violated equal protection. *See id.* at 501. That the Court was willing to find a violation of the Equal Protection Clause based on a disparate impact unexplainable on grounds other than race is consistent with the standard approach established in *Arlington Heights*. *Arlington Heights* itself noted that, in jury selection cases, a lesser showing of disparate impact may be sufficient to demonstrate an impact unexplainable on grounds other than race. *See* 429 U.S. at 266 n.13. What may be unique to jury cases, however, is the shifting of the burden of proof to the defendant once a finding of discriminatory impact is made. *See also* Batson v. Kentucky, 476 U.S. 79, 94, 96-97 (1986) (stating that once a plaintiff has made out a *prima facie* case by showing that peremptory challenges excluded members of his race, the burden of proof shifts to the State, which must provide a neutral explanation). In the standard case, the burden of proof remains with the plaintiff until the plaintiff has proven discriminatory purpose; only then does it shift to the decision-making body to prove that it would have made the same decision notwithstanding the discriminatory purpose. *See Arlington Heights*, 429 U.S. at 270 n.21; *see also supra* notes 89-91 and accompanying text.

other than race,[97] and that in such instances the disproportionate impact would not be dispositive.[98] The presence of disparate impact would nonetheless remain a relevant factor in determining whether, given the totality of the circumstances, one could infer a discriminatory purpose.[99]

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97. As explained *supra*, notes 86-88 and accompanying text, the presence of "grounds other than race" to explain the disparate impact does not release the decision maker from responsibility. Non-racial grounds for a decision are to be expected since many decisions are motivated by multiple justifications. *See Arlington Heights*, 429 U.S. at 265. The decision maker will be liable so long as the discriminatory purpose was *a* motivating factor, even if it was not *the sole* motivating factor. *See id.* at 265-66.

98. *See Arlington Heights*, 429 U.S. at 266. In *Arlington Heights*, for example, the Court noted that "[t]he impact of the Village's decision does arguably bear more heavily on racial minorities." *Id.* at 269. The Court observed that minorities represented a significant percentage of the Chicago area population that would be eligible for the proposed housing. *See id.* Nonetheless, the Court did not appear to consider the discriminatory impact of the Village's decision sufficient to establish discriminatory intent.

99. *See id.* at 266; *see also Davis*, 426 U.S. at 242 (observing that whether a law "bears more heavily on one race than another" may be a "relevant fact[]" with respect to inferring a discriminatory purpose).

Disparate impacts have been considered probative, though not independently dispositive, in a number of cases. For example, in *Reno v. Bossier Parish School Board*, 117 S. Ct. 1491, 1503 (1997), the Court remanded a challenge under the Voting Rights Act to the district court because the Court suspected that the district court had failed to consider the relevance of the impact of the redistricting plan in question in its assessment of whether the plan had a discriminatory purpose. In *Hunter v. Underwood*, 471 U.S. 222, 227 (1985), the Court accepted the court of appeals's implicit suggestion that "the evidence of discriminatory impact [was] indisputable." And in *Rogers v. Lodge*, 458 U.S. 613, 624 (1982), the Court observed that the fact that no blacks had ever been elected under a county's at-large voting system was "insufficient" in itself to prove intentional discrimination, but was nonetheless "important evidence of purposeful exclusion."

Considering lower court decisions, the court in *People Who Care v. Rockford Board of Education* found that, over time, the school district in question had created many programs that imposed significant burdens on minority students and much lighter burdens on "majority" students. 851 F. Supp. 905, 933 (N.D. Ill. 1994), *aff'd in part, rev'd in part*, 111 F.3d 528 (7th Cir. 1997) (affirming finding of discriminatory purpose but reversing on remedies). In many cases, the court rejected the school district's purported non-racial explanation and found that the disparate burden created an inference of discrimination.

In *Navajo Nation v. New Mexico*, 975 F.2d 741, 743 (10th Cir. 1992), the Court of Appeals for the Tenth Circuit found that the State's mechanism for cutting health care budget costs had "immediate, direct, and predictable consequences affecting the Navajos alone." The State had cut allocations to the Navajos but had not cut similar allocations serving non-Navajo recipients. The court considered this information relevant to its finding of purposeful discrimination. *See id.*

In *United States v. Texas*, 628 F. Supp. 304, 306 (E.D. Tex. 1985), the court granted the plaintiffs' request for a preliminary injunction based in part on its finding that a state program conditioning entry into teacher education programs on

Three years after *Arlington Heights*, in *Personnel Administrator v. Feeney*,[100] the Court held that the foreseeability of a disparate impact would not be sufficient, on its own terms, to prove intentional discrimination. *Feeney* involved a challenge to a Massachusetts statute that gave veterans a significant advantage in seeking state employment.[101] The foreseeable consequence of the statute was that it would disadvantage female job applicants, since fewer women are veterans than men.[102] The Court acknowledged that in certain criminal and civil law contexts, there is a presumption "that a person intends the natural and foreseeable consequences of his voluntary actions."[103]

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passing a skills test "had a massively adverse impact on Black and Hispanic education students" since these groups had a much lower pass rate than whites.

In *Angell v. Zinsser*, 473 F. Supp. 488, 497-98 (D. Conn. 1979), a district court found that a town's decision to withdraw its application for community development funds appeared to "have a racially discriminatory impact" by preventing direct efforts to foster integration and by decreasing funding for the rehabilitation of low-income housing that would have increased housing opportunities for minorities. Based on this and other evidence in the record, the court granted the plaintiffs' request for a preliminary injunction requiring the town to reinstate its application for funding. *See id.* at 500; *see also* Doe v. Edgar, No. 88 C 579, 1989 U.S. Dist. LEXIS 9498, at *4-6 (N.D. Ill. Aug. 4, 1989) (denying defendant State's motion for summary judgment based on evidence that a state law requiring social security numbers as a precondition to obtaining a drivers license has a disparate impact on undocumented aliens who cannot obtain social security numbers and that discriminatory purpose could possibly be inferred from the disparate impact).

Similarly, in *NAACP v. City of Mansfield*, 866 F.2d 162, 170-72 (6th Cir. 1989), the Court of Appeals for the Sixth Circuit affirmed a district court's grant of a preliminary injunction in a 42 U.S.C. § 1981 action based, in part, on the district court's finding of a "disparate racial impact" arising from tests used to determine firefighter eligibility and upon the disproportionate absence of blacks in the fire department as compared with the percentage of blacks in the area population.

100. 442 U.S. 256 (1979).

101. *See id.* at 259.

102. *See id.*

103. *Id.* at 278. Professor Jill Evans argues that the Court should adopt the tort-based standard for determining intent. *See* Evans, *supra* note 91. Where the plaintiffs can demonstrate that disparate impacts were "substantially certain" and did, in fact, occur, Professor Evans argues for a presumption of invidious purpose that would shift the burden of proof to the decision maker. *See id.* The decision maker could then rebut the presumption by proving that the decision was justified by neutral selection criteria. *See id.* By implication, if the decision maker were unable to meet its burden to prove that the site selection was based on neutral criteria, the plaintiffs would win.

An approach that bases "intent" on substantially certain impact would allow plaintiffs to make their *prima facie* case and shift the burden of proof to the defendant more quickly than under standard equal protection doctrine. Under standard doctrine, foreseeable impact is relevant to, but not equated with, intent unless the decision cannot be explained on grounds other than race. Therefore, in

The Court rejected that interpretation of intent, however, and held that "'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of the consequences."[104] Under *Feeney*, to prove a violation of the Equal Protection Clause, a plaintiff must show "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[105] If, as in *Feeney*, a court determines that a decision was made in spite of, rather than because of, a discriminatory impact, then the foreseeability of that impact would not be considered tantamount to intent.[106] In the landfill siting context, for example, geologic suitability might be an essential consideration for landfill safety. If the only geologically suitable land within a reasonable geographic area were in a minority community, one could expect a pattern of siting decisions that predictably and foreseeably sited landfills in that community. Nonetheless, a court might find that that disparate impact occurred "in spite of" rather than "because of" the minority presence.[107]

Although the foreseeability of discriminatory impact is not dispositive, it is relevant to the question of discriminatory purpose.[108] The *Feeney* Court made clear that it was not suggesting "that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent."[109] Where the disparate impact is an inevitable consequence of the decision, "a strong inference that

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the traditional case, the burden will shift only when the plaintiff has been able to prove discriminatory purpose through evidence in addition to impact. *See supra* notes 85-91 and accompanying text (discussing burdens of proof).

104. *Feeney*, 442 U.S. at 279.

105. *Id.*

106. *See also* Wayte v. United States, 470 U.S. 598, 610 (1985) (stating that the government's awareness that its prosecution policy would result in greater enforcement against a certain group does not necessarily prove that the government's prosecution occurred "because of" that group's activities).

107. I say "might" rather than "will" because a court could find the decision maker's failure to consider alternatives that do not rely on geologic suitability, such as incineration, probative of discriminatory purpose.

108. For the view that foreseeable consequences should play a greater role in assessing intent, see Evans, *supra* note 91 (suggesting "that the appropriate inquiry is not just whether adverse consequences are foreseeable, creating an inference merely 'probative' to the question of discriminatory intent, but whether the disadvantaging or deprivation of a minority community is 'substantially certain'" enough to create a presumption, rather than a potentially probative inference, of discriminatory purpose).

109. *Feeney*, 442 U.S. at 279 n.25.

the adverse effects were desired can reasonably be drawn."[110] In the landfill siting context, for example, the disparate impact of siting another landfill in a minority community already burdened by many other landfills or other undesirable land uses is likely to be quite obvious. The foreseeability of the impact of the decision on that community would be relevant to, though not dispositive of, discriminatory purpose.[111]

Disparate impact is not, however, necessary to an equal protection claim. *Arlington Heights* stated that "[a] single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of [a pattern of discriminatory actions] in the making of other comparable decisions."[112] An action could thus be considered discriminatory even if it did not result in a disparate impact or was not part of a pattern or practice creating disparate impacts. In the landfill siting context, for example, a decision to site a landfill in a rural minority community that had not been subject to other landfills or undesirable land uses might still have been motivated by a discriminatory purpose, notwithstanding the lack of a discriminatory pattern of impacts. Where there is no evidence of disparate impact, other forms of direct or circumstantial evidence would be necessary to prove intentional discrimination.

One such type of circumstantial evidence is the second factor suggested by the *Arlington Heights* Court—the "historical background."[113] This factor looks to the historical context,

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110. *Id.*; *see also* Reno v. Bossier Parish Sch. Bd., 117 S. Ct. 1491, 1502 ("The impact of official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions."); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979) (stating that the district court was correct in concluding that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose" and upholding the district court's finding that discriminatory intent could be inferred from segregated schools); United States v. Texas, 628 F. Supp. 304, 316-17 (E.D. Tex. 1985) (discussing the foreseeability of disparate impact of a skills test as probative of discriminatory intent); *see also* Eisenberg & Johnson, *supra* note 69, at 1187, 1189 (discussing the importance of foreseeability of discriminatory impacts to findings of discriminatory purpose).

111. *See Feeney*, 442 U.S. at 279 n.25.

112. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977).

113. *Id.* at 267. In *Arlington Heights*, the Court observed that the village's decision was consistent with the history of land use in the town because the area had been zoned for single-family use since 1959, the year of the town's adoption of its first zoning map. *See id.* at 269. The Court also noted that the zoning law provided for multifamily housing in "buffer zones" between residential and nonresidential uses.

including prior decisions, which, when taken together with the action in question, evidence a pattern of discriminatory decision making. Discriminatory purpose may be suggested if the historical background "reveals a series of official actions taken for invidious purposes."[114] If, for example, a municipality had

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See id. at 258. The lot at issue was not located in a buffer zone and therefore did not qualify to be zoned for multifamily housing under the policy. Although plaintiffs had argued that the "policy had not been consistently applied and was being invoked with a strictness here that could only demonstrate some other underlying motive," *id.* at 269, the Court concluded that "[t]he Village . . . has applied the policy too consistently for us to infer discriminatory purpose." *Id.* at 270.

114. *Id.* at 267. In *Rogers v. Lodge*, 458 U.S. 613 (1982), for example, the Court, in determining whether a county's at-large voting system was maintained to dilute black voting power, reviewed and accepted the district court's finding that discrimination could be inferred from the county's long history of discrimination against blacks.

Historical information about past discrimination has also proven relevant in lower court cases. In *People Who Care v. Rockford Board of Education*, for example, the district court, asked to determine if a school district's reorganization plan discriminated against minorities in violation of the Equal Protection Clause, considered the district's practices during the preceding 40 years. 851 F. Supp. 905, 932-33 (N.D. Ill. 1994), *aff'd in part, rev'd in part*, 111 F.3d 528 (7th Cir. 1997) (affirming finding of discriminatory purpose but reversing on remedies). The court held that the extensive evidence of direct and indirect measures taken to segregate the schools, *see id.* at 916-17, the failure to hire minorities, *see id.* at 924-25, the imposition of disparate logistical burdens placed on minority and "majority" students, *see id.* at 925-26, and efforts to minimize the number of representatives from minority areas on the school board, *see id.* at 926-28, presented historical practices that created an inference that the school district's actions were motivated by a discriminatory purpose.

Another example of the use of historical background in an equal protection case is *Angell v. Zinsser*, 473 F. Supp. 488, 498 (D. Conn. 1979), in which the court noted the "racially limited housing opportunities in Manchester" as a relevant historical backdrop to the town's decision not to apply for community development grants that would help minorities and increase integration.

The use and importance of background information is also demonstrated in *Jenkins v. Missouri*, 904 F.2d 415 (8th Cir. 1990), where Judge Gibson, in his concurrence, explained the court's reversal of the district court's grant of summary judgment to defendant school districts based, in part, on background information. Judge Gibson noted that other, nonparty schools had been much more successful at integrating than the defendant school, which had not admitted any black students notwithstanding a court order to develop a voluntary program to facilitate integration. *See id.* at 422-23 (Gibson, J., concurring); *see also* Mody v. City of Hoboken, 758 F. Supp. 1027, 1032 (D.N.J. 1991) (refusing to grant defendant police department's motion for summary judgment in case against police department for failure to protect citizen of Indian descent from fatal attack due to evidence in the record that the police department had a practice of failing to apprehend suspects involved in attacks against those of Indian descent), *aff'd*, 959 F.2d 461 (3d Cir. 1992).

In *United States v. Texas*, the court took a broad view of the relevant historical background. 628 F. Supp. at 315. In assessing whether the State discriminated in

selected a landfill site in a minority neighborhood, the municipal decision maker's past discriminatory practices might be relevant to imputing discriminatory intent in the decision at hand.[115]

As with disparate impact, the historical background element is probative of, but not necessary to, a finding of purposeful discrimination.[116] The particular action under consideration could be found to be discriminatory even if prior decisions were not.

While the second factor looks to the historical context in which a decision is being made, *Arlington Heights*'s third factor focuses on the history of the contested decision itself.[117] If the decision-making body took steps that appear suspect, one may be able to infer discriminatory intent from the suspicious course of events. As the Court suggested in *Arlington Heights*, if a city had rezoned property from multifamily use to single-family use in order to prohibit the development of multifamily housing designed to foster integration, that rezoning might suggest a suspicious step in the decision-making process and might provide evidence from which one could infer an intent to discriminate.[118]

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requiring that students pass a skills test to qualify for education classes, a test that had a disparate impact on minorities, the court observed that "[t]he historical background of this decision is one of repeated and recent instances of intentional segregation, particularly in areas of South Texas where there is a substantial Mexican-American population." *Id.* at 315.

Cf. Stewart v. Rutgers, 120 F.3d 426, 428 (3d Cir. 1997) (explaining, in a tenure denial case, the history of the university department's failure to grant tenure to any internal black candidates).

115. The question of *whose* past practices would be probative of discriminatory intent is a complex issue. Does one consider the municipality's actions in general? The specific agency's past decisions? The decisions made by prior administrators in the same agency? *See infra* notes 234-38 and accompanying text.

116. *See Arlington Heights*, 429 U.S. at 266 n.14.

117. *See id.* at 267.

118. *See id.* The Court provided several examples where the history of the decision-making process was indicative of discrimination. *See id.* at 267 n.16. In *Progress Development Corp. v. Mitchell*, 286 F.2d 222 (7th Cir. 1961), the defendant town had condemned the plaintiff's land for a park in order to prevent the construction of an integrated housing development. In *Kennedy Park Homes Ass'n. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), the defendant town had rezoned the land in question for parkland upon learning of the intent to develop it for low-income housing.

In contrast, the defendant town in *Arlington Heights* refused a request to rezone an area from single-family use to multifamily use to accommodate the proposed integrated housing. *See* 429 U.S. at 254. Plaintiffs contended that this history of the decision-making process provided evidence of discriminatory purpose. *See id.* at 254-58. The Court found that the town's refusal to rezone to permit the integrated

Similarly, if a town had historically rezoned properties in white areas from industrial to residential in response to industry siting efforts, but then, against the wishes of the affected community, rezoned land in a minority area from residential to industrial to accommodate industry siting efforts, that historical pattern might be probative of discrimination.

The fourth *Arlington Heights* factor looks to whether a decision represents a departure from the substantive factors or procedures purportedly applicable to the decision.[119] If a government actor had been bound by substantive legal requirements or had established substantive criteria for its decision but then made a decision contrary to those requirements or criteria, that departure from substantive factors could present evidence of discrimination.[120] For example, if a decision maker

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housing was not probative of discrimination. *See id.* at 267. The Court thus suggested that rezoning to avoid integration provides more evidence of discrimination than the failure to rezone to permit integration.

The relevance of this factor is demonstrated in *Angell*, where the court observed that, in response to political opposition expressed by town citizens, town leaders had voted to reverse their initial decision to apply for community development funds that would have helped minorities and increased integration. *See* 473 F. Supp. at 498. The factor was also important in *United States v. Texas*, where the court stressed the failure of the State to respond to those who argued that requiring a skills test as a prerequisite to letting students enter teacher training classes would have a discriminatory impact on minorities. The court deemed relevant the State's failure to address the disparate impact in the first place and its failure to take any steps to ameliorate the expected disparate impact. *See* 628 F. Supp. at 315-18. *Cf.* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540-42 (1993) (finding that the sequence of events preceding city official's decision to pass an ordinance regulating the slaughter of animals suggested that the ordinance discriminated against those of the Santeria faith).

119. *See Arlington Heights*, 429 U.S. at 267. In *Arlington Heights*, the Court concluded that "[t]he rezoning request progressed according to the usual procedures." *Id.* at 269.

120. The role of this factor is demonstrated in *Navajo Nation v. New Mexico*, where the Court of Appeals for the Tenth Circuit upheld the district court's finding that "the funding reduction [for health care services] occurred . . . without considering the normal substantive criteria." 975 F.2d 741, 744 (10th Cir. 1992) (quoting Appellant's Appendix at 70). The district court had concluded that "[c]onsideration of the usual factors" would have resulted in a much smaller reduction in funding for the Navajo Nation. *Id.* (quoting Appellant's Appendix at 70).

In *People Who Care v. Rockford Board of Education*, the court found that the school district in question had applied standards for tracking students inconsistently. 851 F. Supp. 905 (N.D. Ill. 1994), *aff'd in part, rev'd in part*, 111 F.3d 528 (7th Cir. 1997). Minority students with high scores were frequently placed in low tracks, while white students with low scores were frequently placed in high tracks. *See id.* at 914. The violation of the district's own substantive criteria for tracking was considered probative of an unlawful intent to use the tracking system

had determined that proximity to the served population was one

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to segregate students on the basis of race. *See id.* at 912-14.

In *Stewart v. Rutgers*, 120 F.3d 426 (3d Cir. 1997), the court held that the record contained evidence that a tenure review committee did not accurately characterize the substantive merit of an applicant and that that evidence was sufficient to withstand the school's motion for summary judgment. The record showed that a grievance committee review of the candidate's initial rejection had found the tenure committee's decision not to grant tenure "arbitrary and capricious" because it did not accurately acknowledge the generally positive reports on scholarship the candidate had received from outside reviewers. *See id.* at 433.

In *Jenkins v. Missouri*, 904 F.2d 415 (8th Cir. 1990), Judge Gibson, in his concurrence, explained that the issue of racial discrimination could not be dismissed through a motion for summary judgment in part because the record contained evidence of violations of substantive criteria that might be probative of discriminatory intent. In evaluating the largely white school districts' stated processes for accepting and rejecting black transfer students, he noted one plaintiffs group's argument, supported in the record, that "the district strictly adhered to its nonresident policy to reject the black children while at the same time violating its policies in order to accept the predominantly white special education children." *Id.* at 423 (Gibson, J., concurring). With respect to another school district, Judge Gibson observed that the "district's shifting rationale [for denying admittance to black students] and its failure to follow its own expressed policy both implicate[d] principles in *Arlington Heights* and could create an inference of discriminatory motive." *Id.* at 424. With respect to a third school district, Judge Gibson observed that the district had imposed conditions on the black students that were not imposed on white students seeking admission. *See id.* The conditions imposed on prospective black students raised questions about whether the substantive criteria themselves evidenced discriminatory intent. The conditions included requirements that the students reimburse the school district for the district's litigation expenses and agreements by attorneys not to represent the students in future litigation. *See id.* at 423-24.

In *Angell*, the court was asked to evaluate town officials' decision to withdraw an application for community development funds. The town withdrew the application after a town referendum against the application passed by a 3-1 ratio. *See* 473 F. Supp. at 492. The justification for the decision did not rest on the expected substantive criteria: "the financial needs of the town." *Id.* at 499. Instead, it appeared that "the decision to withdraw the application would not have been taken but for the majoritarian expression of their consituency for racial exclusivity." *Id.* The court observed that "[e]lected officials cannot excuse their racially discriminatory actions by pointing to a popular mandate to so act." *Id.*

In *Hollingsworth v. Wagoner*, No. 90-6783, 1990 U.S. App. LEXIS 20824, at *1-2 (4th Cir. Nov. 30, 1990), the court partially reversed the district court's grant of summary judgment to a defendant prison official. The court identified evidence in the record that the prison official's treatment of a prisoner had violated prison policies and that the official had behaved in an apparently arbitrary fashion. *See id.* at *3-7. The court found that these deviations, along with allegations of racist statements, "could allow a factfinder to infer that the job assignments and changes were at least partially motivated by a racially discriminatory purpose." *Id.* at *7.

Cf. NAACP v. Mansfield, 866 F.2d 162, 171 (10th Cir. 1989) (noting, in a 42 U.S.C. § 1981 action, that white applicants were "inexplicably included on the eligibility list" for a fire department even though they had not taken the required agility test).

of the key criteria for a landfill site, and the decision-making body then selected a site in a minority neighborhood far outside the recommended range, notwithstanding the presence of acceptable sites within that range, this divergence from an explicit and important substantive criteria might raise an inference of discriminatory purpose.[121]

Similarly, if a government actor normally followed one procedure, but instead used another procedure to the detriment of protected groups, an inference of discrimination could arise.[122] Thus if a decision maker normally holds public hearings in connection with the siting of public facilities, but failed to hold the expected hearing in connection with the siting of a landfill in a minority community, that failure to follow customary procedural steps could be considered probative of discriminatory purpose.[123]

Arlington Heights's fifth factor looks to legislative history, if the government action is legislative, and to administrative history, if the government action is administrative.[124] Such

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121. If a decision-making body diverged from a substantive legal requirement then the aggrieved community could challenge the decision for having violated that substantive criterion as well as for having violated equal protection.

122. The role of this factor is demonstrated by the following cases. In *Navajo Nation*, the Tenth Circuit upheld and found probative the district court's finding that "the funding reduction [for health care services] occurred outside the normal procedural process." 975 F.2d at 744. In *Mody v. City of Hoboken*, 758 F. Supp. 1027 (D.N.J. 1991), *aff'd*, 959 F.2d 461 (3d Cir. 1992), the court refused to grant the defendant police department's motion for summary judgment in a case alleging that the police department had discriminated against those of Indian descent by failing to protect them. The refusal was based, in part, on evidence in the record that police officials had not followed proper procedures in apprehending those suspected of earlier attacks on Indians. *See id.* at 1032. In *Angell*, the United States District Court for the District of Connecticut stated that town officials' "decision to withdraw the application [for community development funds to help minorities and encourage integration] two weeks after its submission and after months of staff work and community hearings is patently a marked departure from normal procedural sequences." 473 F. Supp. at 498.

123. If a decision-making body diverged from a legally required procedure, then the aggrieved community could challenge the decision for having violated that procedural requirement as well as for having violated the Equal Protection Clause.

124. *See Arlington Heights*, 429 U.S. at 268. This factor could be viewed as a subset of the third factor, which focuses more broadly on the decision-making process. In *Arlington Heights*, the Court reviewed the official minutes of village deliberations and observed that almost all of the comments made by village officials focused on zoning factors such as the implications of multi- versus single-family homes. *See id.* at 270. Hearing records did indicate that some village residents, who opposed the rezoning proposal, had discriminatory motives. *See id.* at 269. However, the district court had found, and the Court appeared to agree, that evidence of the

history might include contemporaneous statements by decision makers, meeting minutes, and reports made in connection with a decision, including both official and public comments.[125] Discriminatory statements by decision makers might provide direct evidence of intent, while statements made by the public or others without decision-making power might provide circumstantial evidence. In the landfill siting context, for example, the legislative history might include statements about the importance of "protecting" certain white neighborhoods from undesirable land uses while, at the same time, implying that it is less important to protect similar minority neighborhoods. If the only distinguishing feature between the neighborhoods to be protected and the neighborhoods not needing protection were their nonminority or minority status, that legislative history might be probative of intentional discrimination.

2. Is the Equal Protection Clause a Lost Cause?

While the foregoing elaboration of the *Arlington Heights* test may imply that the Equal Protection Clause can provide a ready remedy for discrimination based largely upon circumstantial evidence, many commentators, reviewing the case and its progeny, have concluded that the test imposes a prohibitively high evidentiary burden on individuals or communities who believe that they have been unjustly treated.[126] Certain Supreme

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residents' discriminatory motives did not prove that the village, in denying the rezoning request, had shared the residents' discriminatory intent. *See id.*

125. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 228-29 (11th Cir. 1985) (finding evidence that legislators enacted a law disenfranchising those convicted of certain crimes in order to disenfranchise blacks); *cf.* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 541-42 (1993) (inferring discriminatory intent from discriminatory comments made by city officials and others with respect to those of the Santeria faith in a First Amendment religious discrimination suit applying the *Arlington Heights* factors). In their study of lower court decisions employing the *Arlington Heights* factors from 1976 through 1988, Professors Eisenberg and Johnson have observed that one of the most frequent and significant indicators of plaintiff success is evidence of discriminatory "statements by members of the decisionmaking body." Eisenberg & Johnson, *supra* note 69, at 1187.

126. *See, e.g.*, TRIBE, *supra* note 63, at 1509 (stating that "the standards for finding [the intentionally discriminating 'bad actor'] are tough indeed"); Reich, *supra* note 40, at 291. One author has described the "purposeful discrimination rule" as "a near impenetrable brick wall." Kairys, *supra* note 54, at 731. He argues that the occasions in which the Supreme Court has found a violation of the Equal Protection Clause since *Davis* "are extremely rare and are based primarily on other, overriding concerns." *Id.* at 731; *see also* Donald E. Lively & Stephen Plass, *Equal Protection:*

Court cases indicate that the Court has been relatively unwilling to infer purposeful discrimination notwithstanding fairly strong circumstantial evidence of discriminatory intent.[127] Lower courts

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The Jurisprudence of Denial and Evasion, 40 AM. U. L. REV. 1307, 1341-43 (1991) (arguing that the *Arlington Heights* factors for demonstrating circumstantial evidence of wrongful purpose have "in operation . . . proved unproductive and further illustrate[] the futility of the inquiry").

127. In *Memphis v. Greene*, 451 U.S. 100 (1981), for example, the Court rejected a claim of purposeful discrimination notwithstanding significant circumstantial evidence. The case involved a black community's challenge to the City of Memphis's decision to grant a white community's request to close off a road connecting it with the black community. *See id.* at 103. The district court had found for the City of Memphis but was reversed by the court of appeals. *See id.* at 105-06. The Supreme Court painstakingly evaluated whether the record supported the appellate court's reversal of the district court, and concluded that it did not. *See id.* at 110-19. The dissenting opinion, written by Justice Marshall and joined by Justices Brennan and Blackmun, strongly criticized the majority's evaluation of the facts. The dissent argued that the decision would cause a disproportionate impact because the inconvenience would fall more heavily on blacks. *See id.* at 138-39 (Marshall, J., dissenting). The dissent also criticized the majority's minimization of the extent of inconvenience that would be caused and the effect of the closing on the property values in the black community. *See id.* at 138-40 (regarding inconvenience); *id.* at 145-47 (regarding effect on property values). The background information about the decision-making process indicated that the street closing was promoted as a mechanism for limiting "undesirable traffic" through the white community, which was understood to refer to blacks' use of the street. *See id.* at 140-42. In addition, the dissent observed that the City of Memphis had failed to follow normal procedures for road closings. *See id.* at 142-43. Moreover, the dissent observed that the road closing should be understood in light of the evidence regarding the City of Memphis's long history of racial segregation. *See id.* at 143-44. Commentators have used *Memphis v. Greene* as an example of the Court's unwillingness to infer discrimination based upon circumstantial evidence. *See, e.g.*, Kairys, *supra* note 54, at 732-34; Selmi, *supra* note 69, at 306-09.

Another Supreme Court case demonstrating the difficulty of proving intentional discrimination is *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, plaintiffs had presented statistical evidence that application of the State's death penalty statute varied significantly by the race of the victim and, to some extent, by the race of the defendant. *See id.* at 286-87. The issue before the Court was whether one could infer discriminatory intent based upon this evidence of disparate impact. Justice Powell, writing for the majority, held that the statistical evidence about disparities in application generally did not prove discrimination against the individual defendant. *See id.* at 292-97. Moreover, the Court concluded that the State's continued application of the death penalty statute in light of evidence of discriminatory impact did not demonstrate that the State had acted because of (rather than in spite of) the disparate impact. *See id.* at 297-99. In dissent, Justice Blackmun argued that the defendant's evidence as to the disparaties in the application of the State's death penalty statute was sufficient to create a *prima facie* case of discrimination that was not rebutted by the State's evidence. *See id.* at 351-61 (Blackmun, J., dissenting). According to the dissent, "McCleskey has demonstrated a clear pattern of differential treatment according to race that is 'unexplainable on grounds other than race.'" *Id.* at 361; *see also* Foster, *supra* note

have also appeared to disregard what some would consider significant evidence of discriminatory purpose.[128] Moreover, some

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69, at 1126, 1144-61 (arguing that the Court's unwillingness to find death penalty statute unconstitutional as applied was inconsistent with prior cases and failed to generate greater equality in the criminal justice system); Lively & Plass, *supra* note 126, at 1335 (using *McCleskey* to demonstrate the Court's unwillingness to recognize persistent racism); Selmi, *supra* note 69, at 320-23 (using *McCleskey* to demonstrate Court's unwillingness to infer discriminatory purpose based on considerable circumstantial evidence). It is interesting to note that Justice Powell, the fifth vote and author of the 5-4 decision, has since indicated that he believes the case was wrongly decided. *See* Mark A. Graber, *Judicial Recantation*, 45 SYRACUSE L. REV. 807, 807 (1994); E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 679 n.156 (1996).

In *Hernandez v. New York*, 500 U.S. 352 (1991), the Supreme Court upheld a district court's finding that a prosecutor's use of peremptory challenges to reject Spanish-speaking potential jurors was not motivated by a discriminatory purpose notwithstanding the differential impact on potential Hispanic jurors that would result. The Court accepted the district court's finding that the prosecutor was motivated by the legitimate concern that non-English-speaking jurors would be skeptical of the official translation upon which they would have to rely. *See id.* at 361-71. It is worth noting, however, that the Supreme Court took great pains to make clear that it would reverse the district court's findings only if the findings could be proven "clearly erroneous." *See id.* at 364-70. Since the prosecutor's race-neutral explanation was plausible and the district court was in the best position to evaluate the prosecutor's credibility, the Court chose to uphold the district court's findings. *See id.* at 369-79. Had the district court inferred discriminatory purpose, the Supreme Court might well have upheld that decision.

128. One well-publicized example is *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994), in which the Court of Appeals of the Eighth Circuit reversed the district court's finding of discrimination in the federal sentencing guidelines. Congress had created a 100-1 ratio in the penalties for crack and powder cocaine. The district court had observed that the sentencing disparity had a highly disproportionate impact, since over 92% of those convicted of crack cocaine offenses were African American while a similar percentage of those convicted of powder cocaine were white. *See id.* at 711. The Eighth Circuit concluded that, notwithstanding the disparate impact, neither Congress nor the federal sentencing commission implementing the crack statute had been motivated by a racially discriminatory motive. *See id.* at 712.

Several other lower court cases reveal an unwillingness to infer discriminatory intent notwithstanding what appears to be fairly compelling circumstantial evidence. In *Smith & Lee Associates v. Taylor*, 102 F.3d 781 (6th Cir. 1996), for example, the district court had found, based on several factors including past discriminatory statements by local officials, that the defendant city's refusal to rezone to accommodate a home for the elderly handicapped was discriminatory. Nonetheless, the Court of Appeals for the Sixth Circuit rejected the district court's finding of discriminatory purpose. *See id.* at 790-94. Another example is *Soto v. Carrasquillo*, 878 F. Supp. 324 (D.P.R. 1995), in which the plaintiffs had alleged that the police department's failure to follow proper procedures and to pursue domestic violence cases vigorously discriminated on the basis of gender. The plaintiffs presented significant testimony demonstrating the police department's reluctance to pursue domestic violence cases. *See id.* at 329-31. The district court nevertheless refused to infer purposeful discrimination and granted the defendant police department's motion for summary judgment. *See id.* at 332. Because the analysis is so fact

commentators suggest that the high evidentiary burden established by *Arlington Heights* and the judicial reluctance to infer discrimination have deterred plaintiffs from bringing potentially worthy cases.[129]

Professor Michael Selmi has argued that the Court's reluctance to infer discrimination is not a function of the *Arlington Heights* test itself, but is a consequence of the Court's underlying beliefs about the prevalence of racial discrimination. Supreme Court opinions stating and explaining the *Arlington Heights* test express sensitivity to the possibility of hidden and subtle racism and the importance of circumstantial evidence to inferring such hidden discriminatory purposes.[130] Nonetheless, Professor Selmi observes that the Court has been very hesitant to infer discrimination.[131] The problem is particularly acute where direct evidence is lacking and the only evidence available is circumstantial—a likely circumstance in today's race-conscious society.[132] Since circumstantial evidence is by its nature indirect, Professor Selmi argues that the probative value of circumstantial evidence rests upon the Court's willingness to infer that race could be the unspoken explanation for the decision in question.[133] That willingness to infer rests, in turn, upon the Court's views about the prevalence of racial discrimination. He states:

> [T]he Court creates structures for proving discrimination through the use of circumstantial evidence . . . which in reality turn out to be exceedingly difficult to meet. The primary

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specific, it remains difficult to assess whether these courts minimized relevant evidence or whether, instead, the facts were insufficiently probative of discrimination.

129. *See* Eisenberg & Johnson, *supra* note 69, at 1166-71 (observing that the volume of equal protection challenges appears to be smaller than the number of cases that would be necessary to address the full extent of existing purposeful discrimination).

130. *See* Selmi, *supra* note 69, at 284-85.

131. *See id.*

132. *See supra* note 69 and accompanying text (explaining that direct evidence of discrimination is unlikely).

133. *See* Selmi, *supra* note 69, at 284-85. In cases involving enough decisions to be statistically significant, however, statistical analyses may be able to evaluate the relative probability of various possible explanations for the outcome in question. *See* Foster, *supra* note 69, at 1137-41 (discussing the role of statistics in evaluating the probability of racial discrimination as an explanatory factor in jury composition in *Castaneda v. Partida*, 430 U.S. 482 (1977)); *id.* at 1152-54 (discussing the role of statistics in evaluating the probability of racial discrimination as an explanatory factor in applying the death penalty in *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

> reason . . . is that the Court is unwilling to accept the necessary implication of its proof structure: that discrimination remains a vital explanation for . . . social and political decisions. Without that presumption, the proof structures become empty formalities that provide little evidentiary guidance, and discrimination becomes . . . a possible but by no means expected or convincing explanation.[134]

Professor Selmi's argument suggests that the *Arlington Heights* test, and the Equal Protection Clause more generally, is as strong as the courts want to make it. His argument also suggests that it is not simply the Supreme Court's perception that matters. In the fact-based inquiries that drive equal protection cases, the viewpoints of judges and juries are crucial.

The Equal Protection Clause does not and will not, in the foreseeable future, include the pure "effects" test that some commentators and advocates desire.[135] But, where there is circumstantial evidence that a given decision was motivated by factors other than those articulated by the defendant decision makers, the outcome will rest upon the facts, the ability of advocates to meet their burden of proving that racism provides the missing explanatory link, and the proclivities of the court.

As difficult as it may be to prove a violation of the Equal Protection Clause, it is also important to remember that not every plaintiff bringing an equal protection challenge has been unsuccessful. The Supreme Court has, on occasion, found that a facially neutral statute or decision violated the Equal Protection Clause.[136] Likewise, lower courts have, on occasion, found that

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134. Selmi, *supra* note 69, at 332.

135. *See supra* note 71 (describing advocates of disparate impact test).

136. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986) (finding that the use of peremptory challenges to exclude certain potential jurors can raise the inference that the challenge was impermissibly motivated by the potential juror's race); Hunter v. Underwood, 471 U.S. 222 (1985) (finding that a facially neutral state statute disenfranchising those convicted of certain crimes was motivated by the discriminatory purpose of keeping blacks from voting); Rogers v. Lodge, 458 U.S. 613 (1982) (upholding district court's finding that a county's at-large voting system was administered and maintained for the illicit purpose of diluting black voting power); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (finding that the Board of Education policies maintaining and exacerbating school segregation were motivated by discriminatory purpose); Castaneda v. Partida, 430 U.S. 482 (1977) (finding that facially neutral grand jury selection process discriminated against Mexican Americans); *cf.* Reno v. Bossier Parish Sch. Bd., 117 S. Ct. 1491 (1997) (remanding, in Voting Rights Act case, challenge to voting scheme due to concern that district

race-neutral statutes or decisions violated the Clause.[137] Studies of lower court opinions from 1976 to 1988 reveal that, although direct evidence of discrimination, such as discriminatory statements by decision makers, is an important indicator of success, cases based on circumstantial evidence have also been successful in some instances.[138]

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court did not adequately use the *Arlington Heights* factors in its consideration of circumstantial evidence); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (finding, based on *Arlington Heights* analysis, that facially neutral city ordinance discriminated against religion in violation of the First Amendment's Free Exercise Clause).

137. Evaluating cases decided from 1976 through 1988, Professors Eisenberg and Johnson have concluded that the success rate for equal protection challenges is approximately 40%. *See* Eisenberg & Johnson, *supra* note 69, at 1172-76. Although further studies of the period after 1988 have not been undertaken, the caselaw reveals at least some successful equal protection cases. *See, e.g.*, Navajo Nation v. New Mexico, 975 F.2d 741 (10th Cir. 1992) (affirming district court's finding of discriminatory intent in health care budget cuts disproportionately affecting Native Americans); People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905 (N.D. Ill. 1994) (holding that school district's allegedly neutral actions discriminated against minorities and perpetuated and exacerbated school segregation), *aff'd in part, rev'd in part*, 111 F.3d 528 (7th Cir. 1997) (affirming finding of discriminatory purpose but reversing on several proposed remedies); *see also* Stewart v. Rutgers, 120 F.3d 426 (3d Cir. 1997) (reversing the district court's grant of summary judgment to the defendant university due to presence of circumstantial evidence that the university had discriminated in denying a black female candidate's tenure application); Navarro v. Block, 72 F.3d 712 (9th Cir. 1995) (reversing district court's grant of summary judgment to defendants due to presence of issues of fact as to whether police department's different treatment of domestic abuse 911 calls violated equal protection); Hollingsworth v. Wagoner, No. 90-6783, 1990 U.S. App. LEXIS 20824 (4th Cir. Nov. 30, 1990) (reversing district court's grant of summary judgment to defendant prison official with respect to allegation of discriminatory job assignments in light of circumstantial evidence in the record from which discrimination could be inferred); Mody v. City of Hoboken, 758 F. Supp. 1027 (D.N.J. 1991) (refusing to grant summary judgment to defendant police department based on plaintiff's circumstantial evidence that, by failing to apprehend those suspected of attacking citizens of Indian descent, the police department had failed to provide Indian citizens with equal protection against violent attacks), *aff'd*, 959 F.2d 461 (3d Cir. 1992); *cf.* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (inferring that city officials acted with discriminatory intent against those practicing the Santeria religion when they passed a city ordinance controlling animal slaughter); Jenkins v. Missouri, 904 F.2d 415, 421-24 (8th Cir. 1990) (Gibson, J., concurring) (explaining why district court's grant of summary judgment to defendants was inappropriate in light of significant circumstantial evidence of intentional discrimination); NAACP v. Mansfield, 866 F.2d 162, 170-71 (6th Cir. 1989) (affirming district court's finding, in motion for preliminary injunction, that plaintiffs had demonstrated a substantial likelihood of success in proving discrimination in fire department hiring practices under 42 U.S.C. § 1981 due to statistically significant disparities in testing outcomes and in past hiring practices as well as evidence of procedural irregularities in determining eligible applicants).

138. *See* Eisenberg & Johnson, *supra* note 69, at 1187. The types of

The Equal Protection Clause does not provide an "easy fix" to perceived racism. At the same time, it is not a useless exercise where considerable evidence of discriminatory purpose—direct or circumstantial—is present and where the parties are willing to trust a court to make the appropriate inference. Although every equal protection case turns on its own facts, certain general guidelines for environmental siting cases can be made. The next section analyzes several equal protection cases brought in the environmental siting context. The following section then integrates the general analysis of this section with the specific analysis revealed by the environmental cases to articulate a clearer understanding of what kinds of facts would be relevant to an equal protection challenge to the siting of an undesirable land use.

C. Environmental Justice Equal Protection Case Law

To date, the environmental justice movement's use of the Equal Protection Clause as a mechanism for remedying political injustice has not been promising. The four published decisions considering equal protection claims challenging local governmental siting decisions have held that the plaintiffs failed to prove intentional discrimination.[139] The literature on

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circumstantial evidence most likely to be successful were a clear pattern of disparate impacts unexplainable on grounds other than race, the foreseeability of the disparate impact, and the extent to which the action appeared to perpetuate past discrimination. *See id.*; *see also supra* notes 136-37 (listing successful equal protection challenges, many of which were based upon circumstantial evidence).

139. Three of the cases involved challenges to local government decisions siting solid waste landfills. *See* R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986). A fourth case, *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523 (11th Cir. 1986), involved a challenge to the siting of an industrial plant and associated road relocation.

Another published opinion, *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996), also addressed equal protection claims in connection with siting a landfill, but did not analyze the claims in detail. Plaintiffs had sued the county, which selected the site in question, as well as a state environmental agency, which approved a permit for the development of the site. With respect to the claim against the county for selecting the site, the court did not address the merits because it affirmed the district court's finding that the claim was time-barred. *See id.* at 562-64. With respect to the case against the State, the court found that the State's issuance of the permit had not

environmental justice frequently refers to the pattern of failure and, for the most part, concludes that the Equal Protection Clause will not provide a remedy for perceived political injustice.[140] Although the environmental cases confirm that the

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violated the Equal Protection Clause because the state agency had played no role in selecting the site, because the State was conceivably unaware of the demographics associated with the site, and because the plaintiffs' counsel had conceded at oral argument that they did not have any evidence that the State had violated the Equal Protection Clause. *See id.* at 564-65. As a result, the court did not conduct a full analysis of the equal protection issues presented in the case.

Other cases have been adversely decided in unpublished opinions. *See, e.g.*, Laramore v. Illinois Sports Facilities Auth., No. 89 C 1067, 1996 WL 153672 (N.D. Ill. Apr. 1, 1996). Plaintiffs were residents of an African American neighborhood slated for the construction of a new stadium for the Chicago White Sox. *See id.* at *1. Construction of the stadium would have resulted in the destruction of 175 homes, housing about 475 individuals, as well as a number of businesses. *See id.* at *2, *6. The siting process was long, involved, and politically charged. *See id.* at *2-6. The court concluded that the siting decision did have a discriminatory impact, but that that factor did not, in and of itself, demonstrate discriminatory intent because it was explainable on non-racial grounds: the practical, economic, and political feasibility of the site in comparison with the city's other options. *See id.* at *9-10. Turning to the historical backdrop to the decision, the court concluded that the recent history of black leadership in Chicago and the participation of black leaders in the siting decision demonstrated the absence of an historical pattern of racial discrimination. *See id.* at *11-13. The court then reviewed the entire decision-making process to determine whether the defendants had violated any substantive or procedural norms or whether the process as a whole presented any other irregularities from which racial discrimination could be inferred. *See id.* at *13-19. As a general matter, the court noted that the stadium siting process was so unusual that there was no "normal" procedure against which to evaluate it. *See id.* at *13. Nonetheless, the court evaluated each of the steps of the process identified by the plaintiffs as potentially discriminatory and determined that each was motivated by non-racial factors rather than discrimination. *See id.* at *13-19. Finally, looking to the legislative history of the decision, the court concluded that the record contained evidence of concern for, not bias against, the impacted community. *See id.* at *20-21.

Although the defendants' motion for summary judgment was granted in this case, the result was not a foregone conclusion. The court had refused to grant the defendants' earlier motion to dismiss because the evidence presented by the plaintiffs suggested that an inference of unlawful discrimination could be found. *See* Laramore v. Illinois Sports Facilities Auth., 722 F. Supp. 443 (N.D. Ill. 1989).

140. The literature refers to and analyzes *Bean*, *East Bibb Twiggs*, and *R.I.S.E.* *See, e.g.*, Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 353-58 (1993); Cole, *supra* note 10, at 539-40; Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 518-33 (1992); Crawford, *supra* note 20, at 279-90; Fisher, *supra* note 36, at 303-06; Lazarus, *supra* note 2, at 829-33; Sebastian C. Pugliese III, *Environmental Justice: Lowering Barriers to Participation*, 1995 WIS. L. REV. 1177, 1182-90; Reich, *supra* note 40, at 290-95; Saleem, *supra* note 41, at 224-25; Torres, *supra* note 10, at 437-45; Coleman, *supra* note 41, at 463-71; Godsil, *supra* note 40, at 411-16. *Terry Properties* has not received attention in the law review literature.

evidentiary burden for proving intentional discrimination is high and the willingness of courts to infer discrimination is low, the constitutional remedy should not be dismissed out of hand. The environmental justice cases provide important insight into issues that future litigants must confront when considering an equal protection challenge to a siting decision. Furthermore, the cases make clear that outcomes are so highly fact and context specific that generalizations about the successes or failures of equal protection challenges cannot be resolved without looking at the facts of a particular case.

1. The Equal Protection Cases

The first case to address whether a siting decision violated a community's right to equal protection of the laws was *Bean v. Southwestern Waste Management Corp.*[141] Decided in 1979, the case preceded the more widespread attention to the issue of environmental justice that developed in the early 1980s.[142] In *Bean*, the plaintiffs, residents of the East Houston-Dyersdale Road neighborhood outside of Houston, alleged that the Texas Department of Health ("TDH") had discriminated against them by issuing a permit for the development of a solid waste landfill within their community,[143] which had a seventy percent minority population.[144]

The plaintiffs looked to the *Arlington Heights* factors to prove their case by circumstantial evidence of discriminatory purpose. They argued that the disparate impact of the decision was traceable to racial discrimination. The plaintiffs presented evidence of the disparate distribution of solid waste sites in their area and in Houston as a whole,[145] and suggested that the disparate distribution demonstrated that "TDH's approval of the

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141. 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986). The case was brought pursuant to 42 U.S.C. § 1983 (1994). Section 1983 establishes a private cause of action for citizens who believe that their constitutional rights have been violated. The attorney filing the suit was Linda McKeever Bullard, the wife of Robert Bullard, a sociologist who has become one of the leading voices in the environmental justice movement. *See* BULLARD, *supra* note 7, at 44.

142. *See supra* note 20 and accompanying text (describing the history of the environmental justice movement).

143. *See* 482 F. Supp. at 674-75.

144. *See id.* at 678.

145. *See id.* at 677-79.

permit was part of a pattern or practice . . . of discriminating in the placement of solid waste sites"[146] and that its approval was discriminatory "in the context of the historical placement of solid waste sites and the events surrounding the application."[147] Based on the evidence presented, the court rejected the plaintiffs' contention that TDH had subjected their community and other minority communities in Houston to a disproportionate number of solid waste facilities. The basis for the court's rejection of the plaintiffs' data was largely technical: the plaintiffs focused on the level of impact within the "target" area associated with their neighborhood or within each quadrant of the city.[148] The court, however, evaluated the impact by looking at the distribution of solid waste facilities by census tract.[149] By changing the unit of analysis, the court found that the distribution of solid waste facilities did not fall disproportionately on minority communities.[150] Thus, to translate into the language of *Arlington Heights*, the plaintiffs failed to show a disparate impact, much less a disparate impact traceable to a discriminatory purpose.

The court then considered the nonstatistical evidence the plaintiffs had presented to show that the historical background to the decision suggested discriminatory intent. The plaintiffs had shown that the site, 1700 feet from an un-air-conditioned local high school and close to a residential neighborhood, had earlier been denied a landfill permit. At that time, the high school was predominantly white. Since that time, the high school had become predominantly black. The plaintiffs appear to have argued that TDH's shift in position was attributable to the shift in the high school's demographics and that the later permit approval was therefore discriminatory.[151] The court concluded

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146. *Id.* at 677.

147. *Id.* at 678.

148. *See id.* at 677-78 (discussing the plaintiffs' studies showing disparate impact on the target area); *id.* at 678-79 (discussing the plaintiffs' study showing disparate impact by municipal quadrants).

149. *See id.* at 677-79 (responding to each of the plaintiffs' assertions by considering census tract data). In the one instance when plaintiffs did present evidence of disparate impact in terms of census tracts, the court found the data inaccurate. *See id.* at 679.

150. The court defined an area as "minority" if it had a greater concentration of minorities than their percentage of the overall population. *See id.* at 679. Since Houston's minority population was 39.3%, any area having a concentration of minorities greater than 39.3% was considered to be a minority area. *See id.*

151. *See id.* at 679.

that siting the landfill so close to a high school—especially an un-air-conditioned high school—did not make sense and that TDH's approval of the permit "was both unfortunate and insensitive."[152] However, the court did not believe that the historical evidence as presented was sufficient to infer purposeful racial discrimination.[153]

The court's opinion did not, however, close the door on the plaintiffs' case. The evidence before the court was relatively minimal because the decision was rendered in connection with a motion for a preliminary injunction. Although the court was unwilling to conclude that the plaintiffs had demonstrated a likelihood of success on the merits based on the evidence presented, the court did indicate that additional evidence adduced through discovery might provide the needed evidentiary base.[154] With respect to the plaintiffs' showing of disparate impact, the court appeared willing to forego using census tracts as its basis for analysis if the plaintiffs could show that either a smaller or larger unit of analysis would be more appropriate in determining the scope of a landfill's effects.[155] In addition, with respect to the nonstatistical evidence of discrimination, the court made clear that it did "not know how, why, and by whom the East Houston-Dryersdale Road location was selected."[156] The court noted that proof of discrimination depended upon a fuller understanding of the siting process. If a number of alternative and appropriate sites were considered, and the decision makers then chose this site, the court observed that it would have "tremendous implications for the search for discriminatory intent."[157] The court thus implied that if it could be shown that other sites were as or more suitable, then the "insensitive and illogical" decision to approve the permit might be attributable to discrimination.[158]

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152. *Id.* at 680.

153. *See id.* at 679-80.

154. *See id.* at 680.

155. *See id.* If a smaller unit of analysis were appropriate, then the court would analyze the demographics associated with that unit. *See id.* Evidence that a landfill was next to a minority neighborhood within an otherwise Anglo census tract would then have more weight than an evaluation solely on the basis of census tracts. *See id.* Similarly, if the scope of impact were shown to be greater than a census tract, then a unit of analysis larger than a census tract, such as the "target area" presented by plaintiffs, would be appropriate. *See id.*

156. *Id.*

157. *Id.*

158. *See id.* at 681.

If, however, the evidence of the siting process indicated that this site was one of very few sites that were suitable, then "the placement of sites in those areas [would] become[] a lot less suspicious, even if large numbers of minorities live there."[159] Although the *Bean* case represents a "loss" for challenging a siting decision on equal protection grounds, the court made clear that an equal protection argument could be viable with sufficient facts and analysis.[160]

The next case squarely presenting an equal protection claim in connection with the siting of an undesirable land use was *Terry Properties, Inc. v. Standard Oil Co.*[161] Rudolph and Roy Terry, African American developers of a black residential community known as the Hillcrest Community, alleged that city officials in Roanoke, Alabama ("City") had engaged in racial discrimination by arranging for the development of a carpet-backing manufacturing facility next to their community.[162] They also alleged discrimination in the City's decision to reroute a road to accommodate the facility, the result of which was to increase the distance between the community and the rest of Roanoke.[163]

Although the appellate court did not formally use the *Arlington Heights* framework, the court's analysis of circumstantial evidence reflects the same considerations. The Terrys' primary argument was that Roanoke's violation of substantive and procedural requirements and norms was probative of discriminatory intent.[164] The court rejected the factual predicate to the plaintiffs' assertion. The substantive violations complained of—including the lack of a buffer zone between the industrial plant and the residential neighborhood, the absence of a building permit, and industrial construction in a residential zone—were not violations peculiar to this project. Instead, the court observed that the standards were frequently

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159. *See id.* at 680.

160. When the case finally went to trial in 1984, the plaintiffs were unsuccessful. *See* Crawford, *supra* note 20, at 285 n.78 (describing the recollections of the Bullards, who represented plaintiffs in the proceedings).

Notwithstanding the plaintiffs' legal failure, their political organizing prompted reforms of the decision-making process that were likely to promote consideration of environmental justice issues in future landfill siting proceedings. *See* BULLARD, *supra* note 7, at 44-45.

161. 799 F.2d 1523 (11th Cir. 1986).

162. See *id.* at 1525-27.

163. *See id.* at 1528.

164. *See id.* at 1534.

violated and, moreover, were violations from which the Terrys themselves had benefitted on other projects.[165] As the court stated, "evidence that laws are equally enforced (or not enforced) does not support a finding of discriminatory intent."[166] In other words, violations are probative only if they show deviation from an otherwise normal pattern of behavior.

The court also found no evidence of violations of procedural requirements. In response to the Terrys' claim that the City had engaged in illegal "secret" meetings, the court noted that the meetings were open to the public as required by law, and that the City had been under no legal obligation to provide notice of the meetings.[167] The court did acknowledge that the failure to inform the Terrys of the meetings was "not insignificant" in light of their clear interest in the matter. In the end, however, the court stated that it could not infer discriminatory intent from "the mere fact that the Terrys were not notified of some meetings that were otherwise open according to law."[168] Legal compliance aside, the Terrys also argued more broadly that discrimination could be inferred from the exclusion of blacks from the decision-making process.[169] The court reviewed black participation, including that of the Terrys, at key meetings and concluded that blacks had been present at a number of key meetings and, with some hesitation, that the record did not reveal intentional exclusion.[170]

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165. *See id.* The Terrys also had an industrial facility in an area that was zoned for residential use. *See id.* at 1530-31, 1534. In addition, they had not been required to have a buffer zone between their industrial facility and neighboring communities and they had not been required to obtain a building permit in building the facility. *See id.*

In this analysis of the issue, the court assumed that the buffer zone and building permit problems constituted violations of law. Earlier in the opinion, however, the court implied that no violations of law had occurred. The court indicated that it was Roanoke's "policy and practice" *not* to require buffer zones between industrial developments and neighboring residential areas. *See id.* at 1530. The court also noted that "Roanoke had no building inspector and did not issue [building] permits." *Id.* at 1531. In either case the Terrys' claim failed. In one instance, there were no violations of law. In the alternative, if there were violations, they were consistent with general practice and thus not indicative of any discriminatory deviation from the norm.

166. *Id.* at 1534.

167. *See id.* at 1534-35.

168. *Id.* at 1535.

169. *See id.* at 1534.

170. *See id.* at 1534-35. The court implicitly indicated that black participation was not all that it could be. In its recitation of the facts, the court observed that the volunteer "Ad Hoc Committee" organized to facilitate siting the facility consisted

With respect to the decision-making process as a whole, the court observed that no other suitable site for the project was available within the area.[171] The court also rejected assertions that the siting criteria used by the industry in question demonstrated racial animus.[172] Although the court described the climate of racial tension that formed the backdrop to the decision in question,[173] it did not assess whether that climate might have played a role in the pattern of communication and decision making that evolved.[174] That omission, combined with the court's

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solely of white Roanoke officials and white representatives of various industrial development groups. *See id.* at 1527. City officials explained that they had not invited the Terrys to participate "because they had not previously volunteered to assist in actual industry recruitment." *Id.* The court later commented that "[i]t does not appear that blacks were encouraged to participate; nor were the concerns and ideas of black community members solicited by those white men who took it upon themselves to oversee the recruiting of [the company]." *Id.* at 1535. The court concluded that "neither the Terrys, in particular, nor black persons, in general, were wholly excluded from the discussion." *Id.* That phrasing suggests that some exclusion occurred. As or more troubling, the court appears to be implying that only total exclusion will lead to an inference of discrimination. Nothing in *Arlington Heights* suggests such a restrictive view.

171. *See id.*

172. *See id.* at 1535-36. The company, as a general matter, sought to locate in areas that were 35% minority or less, allegedly because its goal was to hire in proportion to the minority presence in the area population. The company had explained that it had difficulty meeting its affirmative action goals if the minority presence was over 35%. *See id.* at 1527, 1535-36. Although this consideration would seem to lead to siting facilities in nonminority areas, and thus appears irrelevant where a minority area is in fact selected, it could be seen as indicative of racial animus. One could argue that the company's position reflected a prejudiced belief that it could not find sufficient qualified minority applicants to reflect their percentage in the community where the communities were more than 35% minority. The court did not, however, take this approach, instead concluding that it could not "infer from its commitment to hire blacks in proportion to their numbers in the community that [the company] makes major business decisions primarily to harm blacks." *Id.* at 1536. Even if the court had found such animus, it is not clear what relevance the private company's animus would have had to the equal protection claim against the city.

173. *See id.* at 1526-27.

174. The court's failure to address this issue, a part of the historical background to the decision deemed relevant under *Arlington Heights*'s second factor, is a weak point in its analysis. The court's skepticism of the Terrys' claim may be explained in part by implicit doubt about the sincerity of their claims. The Terrys challenged both the siting decision and the decision to reroute the road as racially discriminatory. But, as the court's description of the facts of the case reveals, the Terrys had welcomed the siting of the facility near Hillcrest Community. In a news release, the Terrys had stated that "[w]e at HILLCREST are especially happy because the industry has chosen the area that we have tried to develop into a very nice place in which to live and work." *Id.* at 1529. The Terrys' primary complaint thus appeared to be the rerouting of the road. However, the court's analysis of their

implicit uneasiness with the City's failure to actively include blacks in the decision-making process, raises a question as to whether the court was overly reluctant to infer discriminatory intent. At a minimum, however, the case demonstrates the relatively detailed analysis of the siting process prompted by an equal protection claim.

The next case raising an equal protection claim in the environmental justice context was *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*,[175] decided in 1989. Plaintiffs alleged that the Macon-Bibb County Planning & Zoning Commission ("Commission") had approved an application to site a private landfill in their minority community in violation of the Equal Protection Clause.[176]

The court followed the five-factor *Arlington Heights* test. The court dismissed the plaintiffs' assertion of discriminatory impact by noting that the only other landfill approved by the Commission was located in a white census tract.[177] Although the court acknowledged that both of these census tracts (and their landfills) fell within the same county district and that the district was seventy percent black, the court found that this evidence was insufficient "to establish a clear pattern of racially motivated decisions."[178]

The court next looked to the history of the Commission's prior decisions. Since the only other Commission-approved landfill was located in a census tract with a majority of white residents, the court concluded that the Commission's prior landfill siting decisions did not reveal a history of discrimination.[179] In addition,

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claims primarily addressed the claim of discriminatory siting. Although the court did not raise the issue in its analysis, its skepticism about the Terrys' claim of discrimination in siting may have inappropriately generated skepticism about their assertion of racism in the City's decision to reroute the road.

175. 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

176. *See id.* at 881.

177. *See id.* at 884. The court noted that the siting of any individual undesirable land use must by necessity impact some groups more than others. *See id.* Thus, siting a landfill in a black community will impact that community more than others. In assessing the discriminatory impact of a single siting decision, the court assumed that the question is whether, looking at the pattern of decisions over time, there is evidence that the defendant has made decisions that, taken cumulatively, have a disparate impact. *See id.* at 884-85. *See infra* notes 211-15.

178. *Id.* at 885.

179. *See id.* at 885.

the court observed that the Commission did not initiate the siting process for private landfills and that it therefore could not be held responsible for the locations selected by the permit applicants.[180] The court also rejected evidence that the Commission's past treatment of zoning change requests suggested discriminatory practices.[181] In response to the plaintiffs' evidence of a long history of siting undesirable land uses in black neighborhoods, the court noted that many of the siting decisions were made by agencies other than the Commission, and concluded that such evidence "shed[] little if any light upon the alleged discriminatory intent of the Commission."[182]

Turning to the third *Arlington Heights* factor, the court found no persuasive evidence that the sequence of events associated with the Commission's approval of the landfill application revealed a discriminatory purpose.[183] With respect to the fourth *Arlington Heights* factor, the court found no evidence that the Commission had violated any procedural or substantive requirements.[184]

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180. *See id.* According to one commentator, the fact that government agencies may be able to escape responsibility for siting decisions by arguing that key locational decisions are made by private, not state, actors presents a significant hurdle for using the Equal Protection Clause in the environmental justice context. *See* Crawford, *supra* note 20, at 286. However, to the extent that state actors retain the authority to approve or disapprove private applications, their decisions are subject to the requirements of the Equal Protection Clause. If certain types of applications are always approved in African American neighborhoods but never approved in white neighborhoods, that might present historical information probative of intent. In *East Bibb Twiggs*, for example, one could argue that the court should have analyzed whether the Commission's past approval and denial of applications could be correlated with race.

181. *See East Bibb Twiggs*, 706 F. Supp. at 885. The court does not describe the evidence in sufficient detail to allow for an independent assessment of the court's conclusion. Although the court noted that the Commission had responded to public opposition to zoning changes in some but not all instances, the court also noted that the evidence did not reveal anything about the Commission's motivation. *See id.* The court did not indicate whether the Commission's responses could be correlated to the demographic characteristics of the communities opposing the various zoning changes.

182. *Id.*

183. *See id.* at 885-86.

184. *See id.* at 886. The proposed site had received approval from the Georgia Environmental Protection Division. *See id.* at 882. The landfill proponents also testified that the landfill proposal "met all of the existing state, city, county and planning and zoning commission requirements for the approval of a permit to operate a landfill" and that the site "had been found geologically suitable for a landfill." *Id.*

With respect to the fifth factor—the legislative history of the decision—the court considered whether the Commission's reversal of its earlier denial of an application for a landfill at the site was motivated by a discriminatory purpose. Evaluating the justifications made by each of the commissioners for their respective changes in position, the court concluded that the commissioners' respective changes of heart were explained by nondiscriminatory factors.[185] The court also observed that the Commission had expressed concern about and sensitivity to the residents opposing the landfill siting decision. In a public hearing on the permit application, residents of the affected area had "questioned whether [they] were subject to the same considerations afforded residents in other areas of the city and county when decisions of this nature were made."[186] During the hearing, the Commission chairperson responded directly to these allegations, stating that "to the best of [his] knowledge there is not [sic] manipulations . . . a foot [sic]."[187] While it is difficult to determine whether the court's presentation and assessment of the evidence were fair,[188] at a minimum *East Bibb Twiggs,* like *Terry Properties*, demonstrates the intensive scrutiny of the facts involved in an equal protection inquiry.

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185. *See id.* at 886-87. Each of the commissioners explained their respective changes in position on the record. *See id.* at 883 n.4. The court evaluated their statements, which indicated that the commissioners had revised their assessment of the site's impact on the neighborhood as a consequence of actual site visits and had alleviated some of the neighborhood's concerns by including various conditions in connection with their approval of the developer's application. *See id.* at 886-87.

186. *Id.* at 883. In other words, the residents raised an issue of political justice: the belief that they were not being treated with the same degree of concern and respect as other residents.

187. *Id.* The Commission chairperson stated, in response to the residents' concerns, that he was "interested in [their] comments about manipulations and information may have been passed subrosa in some way. I'm interested in that because I think government and ultimately democracy functions on the legitimacy of its purpose and if people don't have faith in their institutions, the system won't work." *Id.* The court appears to have concluded that these statements suggested that the Commission was not engaging in decision making that could be considered unjust in the sense of political justice.

188. The difficulty stems, in part, from the absence of information that could be relevant, *see supra* notes 180-81. In general, without directly witnessing or participating in the events described, it is difficult to assess the relative "objectivity" of the court in its selection and portrayal of the facts.

In *R.I.S.E., Inc. v. Kay*,[189] decided by the United States District Court in the Eastern District of Virginia in 1991, the plaintiffs argued that the County Board of Supervisors's ("County") decision to site a new solid-waste landfill in the "Piedmont Tract," located in a predominantly black area, violated the Equal Protection Clause.[190] In evaluating disparate impact, the first of the *Arlington Heights* factors, the court found that, although the County was fifty percent white and fifty percent black, its three existing landfills were sited in areas that were ninety percent to one hundred percent black.[191] Within a half-mile radius of the proposed Piedmont Tract landfill, sixty-four percent of the residents were black and thirty-six percent were white.[192] The stretch of road that would be most affected by traffic to and from the proposed landfill was populated by twenty-one black families and five white families.[193] The court therefore concluded that the County's landfill siting decision "had a disproportionate impact on black residents."[194]

The court observed that the racially disproportionate impact of the siting decision was "an important starting point" for inferring discriminatory purpose, but that impact alone was insufficient to prove intent.[195] The court then assessed the historical background—the second *Arlington Heights* factor. The court observed that, prior to the County's decision to site the Piedmont Tract landfill, the County had actively intervened to close the "King Land landfill," a private landfill located in a predominantly white area.[196] The plaintiffs had apparently argued that the County's efforts to close the King Land landfill (the only landfill located in a white area) while continuing to site the County's other landfills in black areas evidenced discriminatory intent. The court found that "the King Land landfill was an environmental disaster"[197] and concluded that

189. 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992).

190. *See id.*

191. *See id.* at 1148.

192. *See id.*

193. *See id.*

194. *Id.* at 1149.

195. *See id.* The court stated that "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups." *Id.* at 1150.

196. *See id.* at 1148-49.

197. *Id.* at 1149.

"[t]he Board's opposition to the King Land landfill and its approval of the proposed landfill was based not on the racial composition of the respective neighborhoods in which the landfills are located, but on the relative environmental suitability of the sites."[198]

The court then looked to the third *Arlington Heights* factor—the sequence of events leading to the landfill siting decision. Although not discussed expressly by the court, these facts also relate to *Arlington Heights*'s fourth factor in that they address the County's compliance with the requisite procedural and substantive requirements. The court concluded that the "administrative steps taken by the Board of Supervisors [in connection with the landfill acquisition and approval process] reveals [sic] nothing unusual or suspicious."[199] The court noted that the Piedmont Tract area had already been identified, tested, and found to be environmentally suitable by a private corporation considering a joint venture with the County.[200] The court concluded that it was reasonable for the financially strapped County to select a site that had already been tested and found environmentally suitable.[201] Furthermore, the court observed that the County had responded to the community's concerns by establishing a citizen advisory committee, investigating one of the four alternative sites proposed by the community,[202] and exploring mechanisms to minimize the impact of the landfill.[203]

The court's conclusion that there was nothing unusual or suspicious about the siting process does, however, appear

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198. *Id.* at 1150. The court did not provide any information on the relative environmental suitability of the other existing landfill sites that were located in minority areas. *See* Reich, *supra* note 40, at 294 n.125. The court therefore failed to explore whether concerns expressed about landfills in minority areas received the same solicitous treatment.

199. *R.I.S.E.*, 768 F. Supp. at 1149-50.

200. *See id.* at 1146, 1150.

201. *See id.* at 1150.

202. The court noted that a community leader had proposed four alternative sites and that, at the Board's request, the community leader had narrowed the alternatives to one site located in an area that was 85% black. *See id.* at 1148. A site inspection revealed that the site was not environmentally suitable. *See id.* The court did not explain why the list of four was reduced to one, whether the other three might have been more suitable, or the demographics associated with the other three sites. On appeal, the plaintiffs argued that the Planning Board had failed to consider the alternative sites. *See* Collin, *supra* note 140, at 533 (quoting Appellant's Brief at 15).

203. *See R.I.S.E.*, 768 F. Supp. at 1148, 1150.

somewhat glib. The court did not even mention the need to rezone the property from agricultural to industrial use,[204] a factor considered relevant under *Arlington Heights*.[205] The court's failure to analyze the rezoning issue is troubling in light of evidence that the rezoning was legally suspect.[206]

Notwithstanding evidence in the record suggesting some decision makers' discriminatory views, the court made no mention of *Arlington Heights*'s fifth factor—legislative history as revealed by such facts as statements by decision makers.[207] Ultimately, the court concluded that the plaintiffs had failed to provide sufficient evidence to infer intentional discrimination. The little relevance accorded to the acknowledged discriminatory impact and the absence of key information suggest that the court was reluctant to make the inference.

It is not surprising that many in the environmental justice movement find the case law discouraging.[208] In some instances, the cases fail to explore what would appear to be key factual

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204. *See id.* at 1148 (describing zoning change); *id.* at 1149-50 (presenting conclusions of law, which do not contain any references to the need for a zoning change).

205. *See supra* note 118 (indicating that, under *Arlington Heights*, certain zoning changes may be probative of discriminatory intent).

206. Citing the plaintiffs' brief appealing the court's decision, Professor Robert Collin describes the ways in which the Planning Commission failed to analyze several of the factors relevant to a zoning change request, including the impact of the landfill on property values, and the "requirement that industrial uses involve 'minimal hazards and not create a significant amount of smoke, noise, odor, dust, or other public nuisance.'" Collin, *supra* note 140, at 533 (quoting Appellant's Brief at 13). Earlier in the litigation, the district court had denied the defendant's motion for summary judgment, finding, *inter alia*, that "departures from normal procedures in gaining approval for the landfill suggest that the decision to locate the landfill in a predominantly black community may have been motivated by discriminatory intent." R.I.S.E., Inc. v. Kay, 768 F. Supp. 1141, 1144 (E.D. Va. 1991) (prior opinion denying defendant's motion for summary judgment).

207. Professor Collin has observed that, according to the plaintiffs' appellate brief, the record revealed direct evidence of racial animus. *See* Collin, *supra* note 140, at 532. The plaintiffs' appellate brief indicates that the County Administrator, after hearing the concerns about the landfill expressed by two African American ministers, told another party that the ministers "should be given a one-way ticket back to Africa." *Id.* (quoting Appellant's Brief at 7). Another white member of the supervisors referred to the "niggers'" opposition to the landfill. *Id.* (quoting Appellant's Brief at 7). Even if the trial court did not find the evidence persuasive, its absence in the discussion is nonetheless disturbing. The case was affirmed on appeal. *See* 977 F.2d 573 (4th Cir. 1992).

208. *See supra* note 140 (describing articles discussing the environmental equal protection case law and concluding that it is unlikely to provide a remedy).

issues.[209] To some extent, the cases also appear to present circumstances from which reasonable people could defensibly infer discriminatory intent.[210] As mere readers of the courts' opinions, however, we must be cautious about concluding whether the courts' decisions, based on the totality of the evidence, were reasonable or unreasonable. Notwithstanding the unique circumstances presented in every case, the environmental justice case law provides important insights into the types of facts that could be relevant to proving intentional discrimination in the siting of undesirable land uses.

2. Lessons from the Case Law

The first type of evidence considered probative of discrimination under *Arlington Heights*—disparate impact—presents many of the most difficult issues litigants in environmental siting cases will confront. The cases indicate that, at least in some circumstances, an individual decision, standing alone, cannot be said to have a disparate impact.[211] Disparate impact analysis is considered relevant to inquiries about

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209. *See supra* note 181 (observing that the *East Bibb Twiggs* court did not provide sufficient facts for a reader to verify whether the Commission's past response to requests for zoning changes could be considered discriminatory); *supra* note 198 (noting that the *R.I.S.E.* court did not evaluate background information as to whether the County was more likely to attend to landfills' environmental problems in white rather than black neighborhoods); *supra* note 202 (observing that the *R.I.S.E.* court failed to evaluate why several alternative landfill sites were not evaluated); *supra* note 207 (observing that the *R.I.S.E.* court failed to discuss evidence of discriminatory statements made by decision makers).

210. *See supra* notes 151-53 and accompanying text (noting the *Bean* court's unwillingness to infer discriminatory purpose notwithstanding evidence that the siting decision was "unfortunate" and that changes in the racial makeup of a nearby school from white to black might have motivated the decision maker to reverse an earlier decision against the location); *supra* notes 167-70, 173-74 and accompanying text (discussing the *Terry Properties* court's failure to infer discriminatory purpose nothwithstanding an acknowledged background climate of racial tension and the exclusion of blacks from an *ad hoc* siting committee); *supra* notes 204-06 and accompanying text (discussing evidence that the sequence of events leading to the landfill siting decision in *R.I.S.E.* was more suspicious, and more probative of discriminatory purpose, than the court acknowledged).

211. *See* East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission, 706 F. Supp. 880, 884 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989). *But see* Laramore v. Illinois Sports Facilities Auth., No. 89 C 1067, 1996 WL 153672, at *9-10 (N.D. Ill. Apr. 1, 1996) (stating that the decision to site a stadium in an African American community rather than in a white community had a disparate impact on African Americans).

discrimination because one assumes that a decision-making body has the capacity to make a decision that is neutral and free of any such impact. Thus, for example, if employment criteria resulted in only a few black applicants (without any demonstrated basis for the criteria leading to that result), then the criteria might be considered to have a discriminatory impact. The assumption would be that the employer could have devised alternative neutral employment criteria that did not have the unnecessary discriminatory impact. In contrast, with an individual siting decision, there may not be an analogous neutral baseline.[212] Many siting decisions will necessarily impact one neighborhood more than another.[213] If the only options are to site an undesirable use in one neighborhood or another, then one could not say that siting a landfill in a white neighborhood had an improperly disparate impact on the white neighborhood because the black neighborhood was not subject to the landfill. Nor could one say that siting the landfill in a black neighborhood had an improperly disparate impact on that neighborhood because the white neighborhood was not subject to the landfill. Under these conditions, neutrality is simply not an option.[214] In considering whether a single siting decision is discriminatory, the question will often be whether the latest siting decision reveals a practice or pattern of siting decisions that, over time, has had a discriminatory impact.[215] A single siting decision could be said to

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212. To the extent that an undesirable land use could be sited so as to avoid adverse impacts on anyone, a neutral baseline could be achieved. In many instances and for many reasons, however, no such option is available.

213. *See East Bibb Twiggs*, 706 F. Supp. at 884 ("A decision to approve a landfill in any particular census tract impacts more heavily upon that census tract than upon any other.").

214. The lack of a neutral option has been identified as one of the features of siting challenges that makes them more difficult to win than other types of equal protection claims. Cases alleging that cities have discriminated in the provision of municipal services have been relatively successful, in part because plaintiffs can point to a norm of equality that is violated by evidence that the provision of services has been unequal. *See* Lazarus, *supra* note 2, at 833-34; Torres, *supra* note 10, at 444. In contrast, "the allocational norm in siting decisions always creates winners and losers." *Id.* Without equality as a baseline, it is more difficult to determine whether a single siting decision is discriminatory. *See id.*

215. *See, e.g.*, Rozar v. Mullis, 85 F.3d 556, 562 (11th Cir. 1996) (describing plaintiffs' allegation "that the county defendants deprived them of the Fourteenth Amendment guarantee of equal protection of the laws by furthering a pattern and practice of siting landfills in predominantly minority areas"); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 677 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986) (addressing plaintiffs' contention that the decision-making

have a disparate impact only when neutral options, such as siting in an unpopulated area, are available but not taken.

The cases also suggest that the source of the pattern or practice of discriminatory impacts is an important issue in equal protection litigation. Under *Arlington Heights*, the relevance of disparate impact is limited to what the impact may suggest about the intent of relevant decision makers. The identity of the "relevant" decision makers is, however, unclear. According to the *East Bibb Twiggs* court, the plaintiffs' focus on other agencies' decision making was irrelevant to the question of the Commission's discriminatory intent in its landfill siting decision.[216] The *Bean* court's assessment of this issue suggests a more complex picture. The *Bean* court concluded that data regarding solid waste sites approved by the Texas Department of Water Resources ("TDWR"), rather than by TDH, the agency responsible for the challenged decision, "is entirely irrelevant to the question of whether it was an historical policy or practice of TDH to discriminate, since TDH should not be held responsible for the commission of acts, e.g., issuance of permits by TDWR, over which it had no control."[217] The court went on to say that the data was not entirely irrelevant, however, stating that TDH's awareness of TDWR's prior approvals could be relevant to determining whether TDH "discriminated by approving the permit . . . since a state agency must not put its stamp of approval on a discriminatory practice or policy even if it did not initiate the practice or policy."[218] Litigants will therefore face some uncertainty in determining the range of actors whose decisions

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agency's decision to approve a landfill permit "was part of a pattern or practice . . . of discriminating in the placement of solid waste sites"); R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1149 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992) (finding that siting a landfill in a black area had a disparate impact on blacks in light of the pattern of landfills in black neighborhoods).

216. *See East Bibb Twiggs*, 706 F. Supp. at 885. More specifically, the court stated that "a considerable portion of plaintiffs' evidence focused upon governmental decisions made by agencies other than the planning and zoning commission, evidence which sheds little if any light upon the alleged discriminatory intent of the Commission." *Id.* The court did not make clear the nature of the evidence presented by the plaintiffs. The reference may have been to the disparate impacts resulting from other agencies' decisions or to other features suggesting that their decision making had been discriminatory.

217. *Bean*, 482 F. Supp. at 676; *see* Torres, *supra* note 10, at 441 (noting court's refusal to impute TDWR's actions to its "sister state agency" TDH).

218. *Bean*, 482 F. Supp. at 676.

causing discriminatory impacts would be relevant to determining the discriminatory intent of the decision-making agency.

The fact that disparate impacts are primarily relevant for what they may suggest about intent creates another wrinkle in the assessment of disparate impact data. For evidence of discriminatory impact to be used to infer discriminatory intent, plaintiffs would have to show that the minority areas where facilities are now located were minority areas when the facilities were initially sited.[219] If they were not minority areas at the time of siting, then the earlier siting decisions did not cause a disparate impact when they were made and would not be probative of the decision makers' intent to discriminate.[220] Although current distributional disparities may be sufficient to demonstrate distributional injustice, they may not be probative of the political injustice at the heart of the Equal Protection Clause.

If the evidence does show that prior siting decisions had a disparate impact when they were made, that evidence could be probative of discriminatory intent. By establishing demographic patterns at the time of prior siting decisions, a plaintiff could also demonstrate the foreseeability of the disparate impacts created by those decisions. Although not dispositive of discriminatory intent,[221] the foreseeability of the impact has been a relatively important factor in successful equal protection challenges.[222]

The environmental justice cases reveal another crucial issue in determining discriminatory impact: how should discriminatory impact be measured? Definitional problems are significant. How does one define a "minority" community?[223] Is a community a

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219. *See id.* at 677 (observing that determining whether a pattern or practice of discrimination is present from the placement of solid waste sites requires focusing "on the sites which [the agency] has approved and determin[ing] the minority population of the areas in which the sites were located *on the day that the sites opened*" (emphasis added)); Crawford, *supra* note 20, at 283 (discussing the *Bean* court's reference to the need to analyze demographics at the time of siting).

220. *See supra* note 49 and accompanying text (describing ways in which existing demographics may not be indicative of demographics at time of siting decisions and may therefore be irrelevant in determining motives for siting decisions).

221. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979); *supra* notes 100-11 and accompanying text (discussing *Feeney* and the role of foreseeable disparate impacts in inferring discrimination).

222. *See* Eisenberg & Johnson, *supra* note 69, at 1187; *supra* note 110 (discussing role of "foreseeability" factor in equal protection cases).

223. *See* Crawford, *supra* note 20, at 283 & nn.68-69 (discussing uncertainty

minority community when more than fifty percent of the residents are minority? Or is the character of the community defined in comparison with the average minority population in the broader geographic region? In *Bean*, for example, the court defined a "minority" census tract as one having a percentage minority population higher than the percentage of minorities in the Houston area and an "Anglo census tract" as one having a percentage of Anglos higher than the percentage of Anglos found in the Houston area.[224] An analysis defining minority and nonminority communities by which populations are in the majority would have led to a very different assessment.[225]

In addition, in order to determine whether a community is subject to a disproportionate burden relative to other communities, one must define the geographic boundaries of the relevant community. There is no absolute answer as to whether a community should be defined by zip code, census tract, or the subjective understandings of residents.[226] The question of how community boundaries are defined for disparate impact purposes may also vary by the circumstances of the particular case, since the key issue in discussing "impact" is the extent of the area affected by an undesirable land use.[227] The consequences for the

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regarding definition of "minority" community).

224. *See Bean*, 482 F. Supp. at 679. Since the minority population in Houston at the time of the suit was 39.3% and the Anglo population was 60.7%, the court accepted "a definition of 'minority census tracts' as those with more than 39.3% minority population and Anglo census tracts as those with more than 60.7% Anglo population." *Id.*

225. Under the *Bean* approach, a census tract with a 40% minority population would be considered a minority census tract. If a 50% minority population were the threshold, then that census tract would not be considered a minority census tract. Since the location of sites in minority census tracts is critical to disparate impact analysis, the definitional questions are crucial.

226. *See* Fisher, *supra* note 36, at 322-24 (discussing importance of and mechanisms for defining relevant unit for purposes of demonstrating "disparity" in impact); Zimmerman, *supra* note 28 (discussing differing ways in which communities could be defined for purposes of measuring distributional fairness); Fahsbender, *supra* note 28 (discussing differing ways in which communities could be defined for purposes of measuring distributional fairness); *see also* Chase, *supra* note 140, at 358 (suggesting that demographic data more particularlized than census tract or zip code areas may provide better evidence of patterns of discrimination); Torres, *supra* note 10, at 444 (observing disagreement as to how to define pool of persons affected by solid wastes sites). Professor Torres argues that such uncertainties about statistical data make equal protection claims challenging siting decisions particularly difficult. *See id.*

227. *See* Godsil, *supra* note 40, at 413 (suggesting, with respect to landfills, that impacts should be evaluated with reference to "the population of the area *physically*

disparate impact analysis can be enormous. As the district court in *Bean* queried:

> How large an area does a solid waste site affect? If it affects an area a great deal smaller than that of a census tract, it becomes particularly important to know where in each census tract the site is located. If it affects an area larger than that of a census tract, then a target area analysis becomes much more persuasive.[228]

The *Bean* court observed that if the site's effect was smaller than a census tract, and if most sites in white census tracts were located near black communities within the tract, then "the outcome of this case would be quite different."[229]

Notwithstanding the myriad complexities of conducting disparate impact analysis in the siting context, proof of discriminatory impact is not impossible. The *Bean* court's acknowledgment that additional information might reveal discriminatory impact and the *R.I.S.E.* court's conclusion that plaintiffs had demonstrated disparate impact suggest the viability of disparate impact analysis as one source of evidence from which purposeful discrimination may be inferred.

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affected by the siting: the area in which residents suffer the smell, the traffic, the sight, the lowered land values, and the potentially polluted groundwater resulting from the facility" (emphasis added)).

228. *Bean*, 482 F. Supp. at 680.

229. *Id.*; *see also id.* at 677 (stating in response to one set of data that "[i]t may be that more particularized data would show that even those sites approved in predominantly Anglo census tracts were actually located in minority neighborhoods"); *id.* at 678 (stating in response to data regarding minority population in a relatively large "target area" that "[w]ithout some proof that the sites affect an area much larger than the census tract in which they are in, it is very hard to conclude that the placing of a site in the target area evidences purposeful racial discrimination").

The question of how to measure the relevant community was critical in *East Bibb Twiggs* as well. In that case, the court also relied on census tract data, this time to assess the placement of the county's two landfills. Since one landfill was located in a black census tract and another in a white census tract, the court concluded that the demographic data did not reveal a pattern of disparate impacts. *See* East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission, 706 F. Supp. 880, 884-85 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989). The court rejected the plaintiffs' selection of a larger unit of analysis, the County Commission District. *See id.* at 885. Analyzed by district, both of the landfills were located in one district which was 70% black. *See id.* The presence or absence of a pattern thus depends to a large extent on the unit of analysis. *See* Godsil, *supra* note 40, at 413 (discussing importance of unit of analysis as demonstrated by *East Bibb Twiggs*).

The historical backdrop to the decision—the second type of relevant evidence identified by the *Arlington Heights* Court—also presents several issues that an environmental justice litigator should anticipate. Most of the courts deciding the environmental justice cases considered the historical background, and each of them decided that that background did not provide a basis for inferring discriminatory intent.[230] As a general matter, since the history of race relations and the relevance of that history to the decision-making body are issues that are inherently case specific, these courts' interpretations of their case histories do not provide clear lessons for other cases with differing histories. The cases show that *these courts* were unwilling to infer discrimination, not that the historical background can never be probative of discrimination.[231] Moreover, we cannot know how the courts would have ruled had the courts not found nondiscriminatory bases for the various historical actions discussed.

The difficulty of making generalizations from the courts' considerations of historical background is compounded when the cases fail to present all of the relevant factual information. In *East Bibb Twiggs*, for example, it is difficult to interpret the court's discussion of the history of the Commission's actions because the opinion does not provide sufficient factual information to evaluate the court's assessment of the agency's decision-making history.[232] The same is true in *Terry Properties*, where the court identified a background of racial tension but did not explore the potential relevance of that background to the decision-making process.[233]

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230. *See supra* notes 151-53 and accompanying text (discussing the *Bean* court's consideration of history of landfill applications at proposed site); *supra* notes 179-82 and accompanying text (discussing the *East Bibb Twiggs* court's consideration of Commission's prior landfill siting decisions and Commission's responses to zoning change requests); *supra* notes 196-98 and accompanying text (discussing the *R.I.S.E.* court's consideration of other County landfill decisions); *see also supra* note 139 (discussing the *Laramore* court's consideration of historical background to stadium siting decision). The *Terry Properties* court mentioned but did not discuss the historical background, a troubling omission. *See supra* notes 173-74 and accompanying text.

231. *See supra* note 114 (discussing cases in which historical background was relevant to finding of discriminatory purpose).

232. *See supra* notes 180-82 and accompanying text (discussing court's analysis of Commission's prior decisions and absence of key information).

233. *See supra* note 174 (discussing court's failure to consider relevance of racial tension).

Just as it is unclear whose acts must be considered in evaluating disparate impacts, it is unclear whose acts must be considered in evaluating the historical context. *East Bibb Twiggs* suggests that the relevant history concerns only the decision-making history of the decision-making agency.[234] Under this approach, the history of other decision-making agencies that have affected a community is not relevant to the potential intent of the challenged agency.[235] That approach must be contrasted with the *Bean* court's more ambiguous conclusion that, although evidence of other agency actions is not directly relevant, the actions of other agencies might be relevant if they demonstrate that the deciding agency placed its "stamp of approval" on the discriminatory legacy of other agencies.[236] Some equal protection cases outside the environmental justice context have taken an even broader view of the relevant historical background, considering the overall racial climate in preceding decades.[237]

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234. *See East Bibb Twiggs*, 706 F. Supp. at 885 (discounting plaintiffs' evidence regarding decisions that were not made by the Commission). That said, in many cases there may still be a dispute as to who constitutes the "decision maker." For example, if a state environmental agency were challenged for discrimination in its permitting decisions, would the relevant decision-making body be the environmental agency as a whole or the department responsible for the permitting decision?

235. Scholars have strongly criticized the *East Bibb Twiggs* court's narrowing of the historical inquiry to the agency making the challenged decision. According to Professor Robert Collin, the court's interpretation would result in few successful equal protection challenges and "evidence[] a fundamental misunderstanding of how local governments can perpetuate patterns of institutional racism." Collin, *supra* note 140, at 527. Attorney Rachel Godsil has observed that, since many of the agencies responsible for siting undesirable land uses such as hazardous waste sites are newly created, a history of that agency's discriminatory actions would be difficult to show, notwithstanding a state or municipality's history of "invidious . . . racism and segregation." Godsil, *supra* note 40, at 413. Professor Colin Crawford similarly notes the adverse consequences of limiting the relevant history to the specific agency in question. *See* Crawford, *supra* note 20, at 287. He further explores how that approach would play out under the facts of the *R.I.S.E.* case, where the zoning ordinance and commission in question had been quite recently established. The historical evidence would be unduly narrow if the court were unable to consider the prior "zoning-like decisions" made by other government actors. *Id.* at 287 n.91.

236. Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 676 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986); *see* Reich, *supra* note 40, at 292 (noting *Bean*'s "liberal construction of the *Arlington Heights* 'historical background' factor").

237. *See* Godsil, *supra* note 40, at 419 (observing that three courts addressing discrimination in the provision of municipal services, *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185-86 (11th Cir. 1983), *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986), and *Ammons v. Dade City*, 594 F. Supp. 1274, 1303 (M.D. Fla. 1984), all looked to the general history of discrimination within the relevant

The scope of relevant history may depend to some extent on the nature of the decision-making agency and its relationship to other decision makers.[238]

The environmental justice cases demonstrate the considerable importance of *Arlington Heights*'s third prong—the history of the decision-making process associated with the challenged decision. This factor was considered in all four cases.[239] In particular, the *Bean* court observed that evidence regarding the history and nature of the siting process "has tremendous implications for the search for discriminatory intent."[240] The *R.I.S.E.* court was apparently influenced by its

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municipalities); Torres, *supra* note 10, at 443 (discussing *Baker* and suggesting that the court looked to general evidence of discrimination rather than simply the actions of the challenged agency).

One unpublished opinion in the environmental justice context also took a broad view of the relevant history. *See* Laramore v. Illinois Sports Facilities Auth., No. 89 C 1067, 1996 WL 153672, at *11 (N.D. Ill. Apr. 1, 1996). In *Laramore*, the court considered the plaintiffs' assertion that they had been subject to a long postwar history of discrimination by city officials and "local government agencies." *Id.* The court did not dispute the general nature of the inquiry; instead, the court rejected the claim on the merits. *See id.* The court concluded that notwithstanding the possibility of historic discrimination, the presence of African Americans in government during Chicago's recent history "discredits the claim of a continuing conspiracy," particularly because many of the African American leaders supported the siting decision. *Id.* at *11-13.

See also Rogers v. Lodge, 458 U.S. 613, 624-26 (1982) (considering the long history of county discrimination against blacks as relevant to inferring that the county's maintenance of an at-large voting system was motivated by a discriminatory purpose). *But see* Mobile v. Bolden, 446 U.S. 55, 74 (1980) (rejecting evidence of past official discrimination as relevant to allegation of discrimination in creation of at-large voting system since "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful").

238. Since the cases taking a broad view of the relevant history involve the provision of municipal services, *see supra* note 237, it may be that the courts have considered the history of racism by the municipality generally indicative of how municipal services would be provided. The analogy could also be made in many environmental justice cases, however, since decisions about the location of undesirable land uses may similarly be influenced by the general racial climate prevailing in the geographic area of concern.

239. *See supra* note 152 and accompanying text (discussing the *Bean* court's assessment of decision-making process); *supra* notes 167-74 and accompanying text (discussing the *Terry Properties* court's assessment of decision-making process); *supra* note 183 and accompanying text (discussing the *East Bibb Twiggs* court's assessment of decision-making process); *supra* notes 199-203 and accompanying text (discussing the *R.I.S.E.* court's assessment of decision-making process). To some extent, this category overlaps with the other *Arlington Heights* factors.

240. *Bean*, 482 F. Supp. at 680; *see supra* notes 156-59 and accompanying text. The court suggested the types of information that would be necessary to evaluate the decision-making process, such as the criteria used by the agency, the number and

perception that the agency had been responsive to community concerns about unfair treatment and had incorporated community participation into the siting process.[241] Because an analysis of the history of a siting decision is so fact and court specific, it is difficult to make generalizations about how courts will interpret this type of evidence.

None of the four cases found any departures from the substantive standards or procedural steps normally associated with the actions in question.[242] Although the violation of a substantive or procedural standard would not alone prove intentional discrimination, the absence of violations might have deterred the courts from inferring discriminatory intent.[243]

The fifth factor, which looks to the legislative and administrative history associated with the siting decisions, is closely related to the third factor, which looks to the history of the decision-making process. Since this fifth factor focuses specifically on such evidence as statements by decision makers, it is the factor most likely to reveal direct as well as circumstantial evidence of discrimination. Where direct evidence

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nature of potential alternative locations, the method of choosing among the alternative locations, and the relative weight of various factors in the decision-making process. *See Bean*, 482 F. Supp. at 680. Although that evidence was lacking in *Bean*, which involved a motion for a preliminary injunction, the court emphasized the importance of the information to later resolution of the dispute. *See id.*

Plaintiffs had presented evidence that a prior application for the same site was denied when the neighborhood was white and then later approved when the neighborhood had become black. *See supra* note 151 and accompanying text. The court's reluctance to view this evidence as at least probative of discrimination does suggest the court's reluctance to impute discriminatory purpose. Had the plaintiffs had the additional evidence the court thought relevant, however, it is possible that this aspect of the history might have been viewed differently.

241. *See supra* note 202 and accompanying text. The thoroughness and credibility of the court's assessment of the siting process has, however, been sharply contested. *See supra* note 205 (describing plaintiffs' characterization of irregularities in the siting process that were not addressed by the court); *supra* note 198 (observing that facts relevant to the process were not provided by the district court's opinion).

242. As discussed above, the *R.I.S.E.* court may have failed to address procedural and substantive irregularities alleged by the plaintiffs. *See supra* note 206 and accompanying text.

243. One commentator has suggested that regulatory compliance plays a very strong role in government decision making about the siting of undesirable land uses. *See* Pugliese, *supra* note 28, at 1188 (discussing importance of regulatory compliance in shaping the Commission's decision in *East Bibb Twiggs*). If regulatory compliance is particularly important to decision makers, then a decision to site a facility in the absence of regulatory compliance—whether substantive or procedural—might be viewed as especially probative of invidious motives.

of decision makers' racial animus is present, the inference of discriminatory purpose may be stronger than in cases presenting only circumstantial evidence of discrimination.[244]

While the Equal Protection Clause may not provide a remedy for all cases that appear to present unfairness, a wholesale abandonment of the equal protection approach is premature. The inquiry is highly fact specific. An outcome in one case based on one set of facts is not dispositive of another case based on another set of facts. Moreover, the impact of the facts may turn on the credibility of the witnesses and the sensitivity of the individual judge or jury. Keeping a realistic appraisal of the possibilities firmly in mind, a community that believes it has not been accorded equal concern and respect must evaluate the facts associated with its specific contention to determine the likelihood of overcoming the evidentiary burdens imposed under the Equal Protection Clause.

III. ENVIRONMENTAL LAWS: GRIST FOR THE EQUAL PROTECTION MILL

Essential to an equal protection claim are the facts—facts about disparate impacts, about historical circumstances, about decision-making processes, about the rules and procedures guiding decisions, and about what decision makers have said and done in making their decisions. Where environmental laws apply to the decision in question, as is frequently the case in the siting of an undesirable land use, they have the potential to generate and reveal many relevant facts. Under the right circumstances, the environmental laws can thus provide the "grist" for the equal protection mill.

Some environmental provisions establish substantive standards, some establish procedural requirements, some generate extensive information about a particular site, and others require project proponents to generate information about alternatives to the proposed project. Each of these attributes may

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244. *See supra* note 125 (explaining results of study indicating that discriminatory statements by decision makers are a strong indicator of success in an equal protection action). Since the *R.I.S.E.* court failed to discuss alleged discriminatory statements and the role, if any, they might have played in influencing the decision, it is difficult to predict how a court more thoroughly assessing the evidence might rule. *See supra* note 207 (discussing court's failure to discuss alleged discriminatory statements).

lead to information that is relevant, if not dispositive, under *Arlington Heights*'s five-factor test. The information may reveal disparate impacts, unusual and suspicious proceedings, inconsistencies with established procedures and criteria, or violations of requirements, all of which could be probative of discriminatory intent. Although there is no guarantee that the application of environmental laws will reveal such irregularities, the laws do provide access into decision-making processes that could facilitate the revelation of invidious discrimination if it exists.

Whether in connection with an equal protection claim or as part of a political effort to reveal unfair treatment, communities who believe they are being unfairly burdened by a siting decision have no doubt recognized the role of the information they gain through environmental proceedings to their broader claim for justice. In light of the frequent skepticism of environmental law permeating the relations between the civil rights and environmental movements,[245] the remainder of this article attempts to strengthen the relationship by making the connections explicit.

A. Overview of Environmental Laws

1. Laws Establishing Substantive Standards

Many environmental laws establish substantive standards for the siting of particular types of land uses. For example, a state environmental law governing the siting of solid waste facilities might establish location standards specifying that the facility must be a certain distance away from sources of water, parks, or residences.[246] In addition, decision makers responsible for siting undesirable facilities often develop project-specific criteria by which to evaluate potential sites. Such criteria may include environmental factors such as traffic impacts, impacts on water supplies, and the like.[247] Although not required by law, such internally created standards nonetheless establish the

245. *See* Kaswan, *supra* note 7, at 256-75, 277-78.

246. *See, e.g.*, Commercial Hazardous Waste Management Facility Siting Act, W. VA. CODE §§ 22-C-5 to -C-6 (1994 & Supp. 1998); *see infra* note 322.

247. Such criteria could also include nonenvironmental factors, such as proximity to transportation networks or other services.

substantive criteria by which decision makers ostensibly make their land use decisions.

2. Laws Establishing Procedural Requirements

Environmental laws also frequently establish procedural requirements for siting various types of facilities. The National Environmental Policy Act ("NEPA")[248] requires the preparation of an Environmental Impact Statement ("EIS") in connection with any major federal action having significant effects on the environment,[249] including projects receiving federal funding or requiring federal permits.[250] NEPA's implementing regulations in turn establish numerous requirements in connection with the environmental review process.[251] Once a federal agency determines that a proposed project is likely to have significant environmental impacts requiring the preparation of an EIS, the responsible agency must provide notice that an EIS will be prepared,[252] allow public input into the scope of the EIS,[253] and make a Draft EIS available for comment by the public[254] and other potentially concerned agencies.[255] In its Final EIS, the responsible agency must then respond to the comments received from the public and from other agencies.[256] Once a final decision is made, the agency must issue a "Record of Decision" ("ROD") explaining its choice.[257]

Although the NEPA requirements apply only to actions involving the federal government, many states have adopted similar environmental review statutes applicable to state projects.[258] Some of these state statutes impose environmental

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248. 42 U.S.C. §§ 4321-4370d (1994 & Supp. II 1996).

249. *See id.* § 4332(2)(C) (1994).

250. *See* 40 C.F.R. § 1508.18(a) (1997) (defining a "major federal action" as "including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies").

251. *See id.* §§ 1501-1508.

252. *See id.* § 1501.7(a)(1).

253. *See id.*

254. *See id.* § 1502.9.

255. *See id.* § 1503.

256. *See id.* §§ 1502.9, 1503.4.

257. *See id.* § 1505.2(a)-(c).

258. *See* Johnson, *supra* note 11; Reich, *supra* note 40, at 305-15 (identifying and discussing State Environmental Policy Acts ("SEPAs")).

review requirements on private projects as well.[259] These environmental review statutes are generally triggered by the presence of any type of significant environmental impact, regardless of the type of project at issue.

Other federal, state, and local laws establish procedural requirements in connection with permitting specific types of projects or pollution sources. For example, the federal Clean Air Act[260] requires states to establish air pollution permitting programs that provide "public notice, including offering an opportunity for public comment and a hearing."[261] Under the Resource Conservation and Recovery Act,[262] applicants for permits to operate transportation, storage, and disposal facilities for hazardous waste must likewise comply with public notice and meeting requirements in connection with permit issuance.[263]

3. Laws Generating Information About the Selected Site

The environmental review statutes described above not only establish particular procedural requirements, they also generate a great deal of information about the site and the siting process under consideration.[264] Under NEPA, the EIS must discuss the purpose and need for the proposed action,[265] as well as the environment to be affected by the action and the consequences of the proposed project to that environment.[266] The environmental consequences that must be considered include "ecological . . . aesthetic, historic, cultural, economic, social, or health [effects],

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259. States imposing environmental review requirements on private as well as public entities include Hawaii, Massachusetts, and Michigan. *See* HAW. REV. STAT. § 343-5 (1993 & Supp. 1998); MASS. REGS. CODE tit. 301, § 11.01 (1987); MICH. COMP. LAWS ANN. § 691.1204 (West 1987). North Carolina does not require environmental review for private projects but it does give local governments the authority to require review of private projects within the local jurisdiction. *See* N.C. GEN. STAT. § 113A-9(1) (1997).

260. 42 U.S.C. §§ 7401-7642 (1994 & Supp. II 1996).

261. *Id.* § 7661a(b)(6) (1994).

262. 42 U.S.C. §§ 6901-6986 (1994 & Supp. II 1996) (codified as Solid Waste Disposal Act).

263. *See* 40 C.F.R. §§ 124, 270 (1997).

264. *See* Johnson, *supra* note 11, at 576-78. State environmental review statutes generate as much or more information than that generated by the federal NEPA process. *See* Reich, *supra* note 40, at 305-13.

265. *See* 40 C.F.R. § 1502.13 (1997).

266. *See id.* §§ 1502.14-.15.

whether direct, indirect, or cumulative."[267] NEPA thus requires agencies to gather information about the socioeconomic and cultural impacts that are frequently at the heart of communities' concerns about the siting of undesirable land uses.[268] More specifically, as interpreted by the Clinton Administration, the above-mentioned environmental effects include consideration of demographic impacts. Executive Order 12,898, issued in 1994, requires federal agencies to consider the impact of federal operations and decisions on minority and low-income communities.[269] In a memorandum accompanying the executive order, the President made clear that "[e]ach federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, *including effects on minority communities and low income communities*, when such analysis is required by . . . NEPA."[270] Some state-level environmental review statutes similarly require consideration of socioeconomic impacts.[271]

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267. *See id.* § 1508.8.

268. *See* Johnson, *supra* note 11, at 579-88; Heather E. Ross, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY J. ENVTL. L. 353, 357-60 (1994). Notwithstanding the fact that an EIS must consider a proposed project's socioeconomic effects, these effects will not be considered unless they are a consequence of a physically manifested federal action. *See* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) (holding that NEPA applies only when a project's potential consequences have a close nexus to the physical environment); Reich, *supra* note 40, at 298-99. A policy decision not having physical consequences would not trigger the assessment of socioeconomic effects. However, siting decisions in the environmental justice context are, by definition, physical, thus triggering NEPA's consideration of socioeconomic effects.

269. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994); *see also supra* note 33 and accompanying text.

270. Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 14, 1994) (emphasis added); *see also* Johnson, *supra* note 11, at 579-80 & n.74.

271. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-1b(b) (West 1995) (requiring state environmental impact evaluations of proposed state actions to analyze "the short term and long term economic, social and environmental costs . . . of the proposed action"); HAW. REV. STAT. § 343-2 (1993) (defining actions that have a "[s]ignificant effect" as "actions that . . . adversely affect the economic or social welfare"); MINN. STAT. ANN. § 116D.04 (West 1997) (requiring EISs to "analyze those economic, employment and sociological effects that cannot be avoided should the action be implemented").

In some states, the requirement to consider the socioeconomic implications of proposed actions is manifested in state regulations. *See, e.g.*, MASS. REGS. CODE tit. 301, § 11.07(6)(g) (1987) (requiring environmental impact report to analyze the "physical, biological, chemical, economic, and social conditions of the Project site, its immediate surroundings, and the region" in order to provide a baseline for the

The Draft EIS is not the only source of information resulting from the environmental review process. All of the comments from the public and from other agencies having jurisdiction over or an interest in the proposed project must be made available to the public.[272] Furthermore, the agency must respond to these comments in the Final EIS and the ROD. The agency will thus have to articulate its reasoning and its justifications for its choice. Although the agency's response to comments will, in all likelihood, support the agency's choice, the community is nonetheless provided with considerable information. That information may reveal that the agency's purported justification for its decision is more of a *post hoc* rationalization than a legitimate characterization of the basis for the decision.[273]

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assessment of impacts identified in the scope); N.C. ADMIN. CODE tit. 1, r.25.0603 (Aug. 1997) (requiring an EIS's analysis of alternatives to the project to consider "the social and economic impacts of each alternative"). *See also* Reich, *supra* note 40, at 311-13 (discussing state statutes and regulations requiring consideration of socioeconomic effects in environmental review documents).

272. *See, e.g.*, 40 C.F.R. § 1506.6 (1997) (specifying procedures by which the agency ensures public involvement and requiring the agency to make copies of all EISs, comments, and underlying documents available to the public pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1994)). Many state environmental review statutes require that the information generated in the environmental review process be made public through the environmental review statute or through state-level equivalents of the federal Freedom of Information Act. *See, e.g.*, California Environmental Quality Act of 1970, CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1996 & Supp. 1998) (providing for public comments on Draft Environmental Impact Reports); Public Records Act of 1968, CAL. GOV'T CODE §§ 6250-6268 (West 1995) (freedom of information law modeled after federal FOIA); Connecticut Environmental Policy Act, CONN. GEN. STAT. ANN. § 22a-1d (West 1995 & Supp. 1998) (providing for public participation in connection with environmental impact evaluations); CONN. GEN. STAT. ANN. §§ 1-18a to 1-21a (West 1995 & Supp. 1998) (Connecticut freedom of information law).

273. *But see* Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 85 (1996) (arguing that a "'black box' . . . surrounds the actual decision as far as the public is concerned"). Agencies may engage in *post hoc* rationalizations notwithstanding the Council on Environmental Quality's NEPA regulations, which admonish that "[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g) (1997).

4. Laws Generating Information About Alternative Sites

Some environmental laws require that information be collected not only about the selected site, but about alternatives to the selected site. NEPA, as well as a number of its state equivalents, require that the project proponent or agency completing the EIS evaluate alternatives to the proposed project.[274] The Council on Environmental Quality regulations implementing NEPA describe the alternatives analysis as "the heart of the environmental impact statement."[275] To facilitate comparison between the proposed site and alternatives, the analysis must consider all of the significant environmental impacts of each alternative.[276] Once a final decision has been made, the ROD must explain why the agency chose the selected alternative and why the other alternatives were rejected.[277]

An alternatives analysis is also required to obtain a wetlands permit. Where the construction of a new facility would require protected wetlands to be filled in to create dry land, section 404 of the Clean Water Act and its implementing regulations prohibit the fill unless the project proponent can meet stringent requirements, including the requirement that the proponent demonstrate the absence of a non-wetland alternative location for

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274. *See* 42 U.S.C. § 4332(C)(iii) (1994). State equivalent statutes and regulations requiring an alternatives analysis include: California Environmental Quality Act, CAL PUB. RES. CODE §§ 21100-21108 (West 1996 & Supp. 1998); CAL. CODE REGS. tit 14, §§ 15130, 15132; (1997); Connecticut Environmental Policy Act, CONN. GEN. STAT. ANN. § 22a-1b (West 1995); District of Columbia Environmental Policy Act, D.C. CODE ANN. § 6-983 (1995); Maryland Environmental Policy Act, MD. CODE ANN., NAT. RES. I. §§ 1-301 to -305 (1997); Massachusetts Environmental Policy Act, MASS. REGS. CODE tit. 301, § 11.26 (1987); Minnesota Environmental Policy Act, MINN. STAT. ANN. § 116D.04 (West 1997); MINN. R. 4410.2000-.2300 (1997); Montana Environmental Policy Act, MONT. CODE ANN. § 75-1-201 (1997); MONT. ADMIN. R. 16.2.626(2) (1997); New York State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 1997); North Carolina Environmental Policy Act, N.C. GEN. STAT. § 113A-4 (1997); N.C. ADMIN. CODE tit. 1, r. 25.0502 (Aug. 1997); Puerto Rico Environmental Act, P.R. LAWS ANN. tit. 12, § 1124(c) (1994); Virginia Department of Environmental Quality Act, VA. CODE ANN. §§ 10.1-1188 to -1192 (Michie 1997); Washington State Environmental Policy Act, WASH. REV. CODE § 43.21C.030(2)(c) (1998); Wisconsin Environmental Policy Act, WIS. STAT. § 1.11(2)(c)1-6 (1992).

275. 40 C.F.R. § 1502.14 (1997).

276. *See id.*

277. *See id.* § 1505.2.

the proposed project.[278] Pursuant to section 404's implementing regulations, a permit will not be granted "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[279] If the land use for which the permit is sought is not dependent upon water,[280] then the implementing regulations create a presumption that an alternative to the proposed activity exists.[281] A project applicant for a permit in connection with a land use that is not dependent upon water must therefore prove a negative—the absence of a practicable alternative. That effort will require the collection and presentation of extensive information about why all alternative sites were not suitable.

The alternatives analysis presented in an EIS under NEPA or in an application for a permit to fill wetlands will undoubtedly characterize the selected site as the best site and the alternatives as impracticable.[282] Nonetheless, the process as a whole reveals considerable information about the site and about alternatives that would otherwise be extraordinarily difficult, if not impossible, for a community to obtain.

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278. *See* 33 U.S.C. § 1344 (1994) (establishing permit requirement for discharges of fill material); *id.* § 1311 (prohibiting discharges unless in compliance with section 1344, among other sections); 40 C.F.R. § 230.10 (1997) (establishing alternatives requirement as a condition for a permit to fill wetlands). The Clean Water Act's reference to the wetlands permit requirement is cryptic at best; the contours of the regulatory program are established by the implementing regulations published in the Code of Federal Regulations.

279. 40 C.F.R. § 230.10(a) (1997). An alternative is considered "practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2). An alternative site will be considered practicable even if the permit applicant does not currently own the site, so long as it could be reasonably "obtained, utilized, expanded, or managed [so as] to fulfill the basic purpose of the proposed activity." *Id.*

280. For example, a boating dock is a water-dependent use that might require some filling of wetlands, whereas a hospital would not be a water-dependent use.

281. *See* 40 C.F.R. § 230.10(a)(3) (1997).

282. *Cf. supra* note 273 and accompanying text (suggesting that EISs may sometimes fail to provide candid explanations).

B. *Environmental Laws and the* Arlington Heights *Factors*

The siting decisions of concern to the environmental justice movement will not by their own terms be racially discriminatory. Most communities who believe they have been unfairly treated will have to consider evidence—direct and circumstantial—that might suggest discrimination as a motive. As discussed above, *Arlington Heights* suggested five factors that may be probative of discrimination: (1) the disparate impact of the decision; (2) the historical context; (3) the history of the decision-making process in question; (4) departures from substantive or procedural criteria; and (5) the legislative or administrative history of the decision, as applicable.[283] This section evaluates how, in some cases, environmental laws could provide factual information relevant to each of these factors. To the extent that an environmental analysis reveals evidence of irregularities in the decision-making process, the data may support an inference of discriminatory intent.[284]

1. Factor One: Disparate Impact

Environmental review statutes can, under the right circumstances, provide explicit evidence of discriminatory impact. The regulations implementing NEPA require consideration of socioeconomic and cultural impacts,[285] and the presidential memorandum accompanying Executive Order 12,898 makes clear that these terms require consideration of the proposed project's "effects on minority . . . and low income communities."[286] Many state environmental review statutes likewise require the

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283. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977); *see also supra* notes 76-125 and accompanying text (discussing *Arlington Heights*'s five factors).

284. Once a decision is demonstrably suspicious, the inference of discriminatory motive is not automatic. The decision may have been motivated by an improper purpose other than discrimination, such as an effort to make a profit from the decision or to benefit friends or family. *Cf.* Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508 (1993) (holding, in Title VII disparate treatment case, that finding that employer's rationale for adverse employment decision is a pretext does not mean that the decision was per se discriminatory).

285. *See supra* notes 267-69 and accompanying text.

286. Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 14, 1994); *see also* text accompanying note 270.

consideration of socioeconomic effects in connection with state actions[287] and, in some cases, in connection with private actions.[288]

Although the impact of a single decision is unlikely to be sufficient to demonstrate disparate impact,[289] the requirement that cumulative impacts be considered may provide key evidence of disparate impact. A "cumulative impact" is defined as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[290] By requiring an assessment of existing impacts in addition to the impacts of the proposed project, the cumulative impact review could provide a mechanism for determining whether the decision maker has engaged in a pattern or practice of burdening a particular community with a disproportionate share of undesirable land uses.

For example, if a county were to propose a landfill in a neighborhood that the county had targeted for landfills in the past, the presence of the prior landfills would be revealed through an analysis of the cumulative impacts of the proposed decision. In evaluating cumulative impacts, the environmental review might also identify other existing sources of the type of environmental impacts that would be caused by the proposed landfill. If, for example, the landfill were likely to cause unpleasant odors, the review might identify other sources of bad odors that the county administration had likewise sited in the community, such as bus depots. Moreover, if the environmental review process required the evaluation of alternative sites for the landfill,[291] the evaluation of the other sites might reveal that the landfill would have had much less of a cumulative impact on the other locations than it would have on the site selected. Alternatively, the analysis of other possible sites might reveal a

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287. *See supra* note 271 and accompanying text; *see also* Ross, *supra* note 268, at 369.

288. *See supra* note 259 (discussing state statutes requiring private project proponents to conduct environmental reviews).

289. *See supra* notes 211-15 and accompanying text (explaining that the impact of a single siting decision cannot generally be considered "disparate," but that a single decision, seen in light of other impacts, may be indicative of a pattern or practice of imposing disparate impacts).

290. 40 C.F.R. § 1508.7 (1997).

291. *See supra* notes 274-82 and accompanying text (describing alternatives analyses).

pervasive pattern of siting undesirable land uses in other minority areas. All told, the disparate impact of the county's various siting decisions as revealed through the cumulative impact analysis might suggest a discriminatory pattern or practice of decision making.

The data on disparate impacts provided by cumulative impact analysis does, however, have the potential to be both over- and underinclusive of the data relevant to an equal protection inquiry. The extent of its overinclusiveness would depend upon whether a court focused solely on the impacts caused by the decision-making agency, as in the *East Bibb Twiggs* case,[292] or instead focused more broadly on whether the decision-making agency is adding its stamp of approval to an existing pattern of discriminatory decisions, as in the *Bean* case.[293] If only the impacts caused by a specific decision maker were relevant, then the data would be more overinclusive than if the impacts caused by a broader set of decision makers were relevant. The extent of the data's overinclusiveness would also be affected by the extent to which existing demographic conditions were present when the previous undesirable land uses were sited.[294] If the same demographics were present, then the disparate impacts caused by prior decisions and identified in a cumulative impact analysis could be indicative of the decision maker's discriminatory intent. If the demographic disparities arose after the siting decisions, then these disparate impacts would not be relevant for the purpose of inferring that the initial siting decisions were motivated by discriminatory intent.

The data could be underinclusive because it would not necessarily reveal patterns of decision making that affected minority areas not considered in the environmental review process. The environmental review provisions are likely to assess the impacts on the area around the proposed project and potential alternative sites. However, the data is unlikely to reveal the impacts of the agency's decisions on areas not affected by the project in question. A full analysis of an agency's pattern or practice of discriminatory siting would require an assessment of the impacts of decisions outside of the areas directly affected by the action evaluated in the environmental review process. Thus,

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292. *See supra* note 216 and accompanying text.
293. *See supra* notes 217-18 and accompanying text.
294. *See supra* notes 219-22 and accompanying text.

discriminatory impact like that acknowledged in the *R.I.S.E.* case, in which the siting decisions demonstrated a pattern of siting in different minority areas, would not necessarily be revealed through the environmental review process associated with a particular land use.[295]

Environmental review statutes may assist a community in obtaining relevant information, but they do not provide a ready-made answer to the questions of whether there is a disparate impact and, if so, whether that impact is traceable to the discriminatory motives of the decision makers. The fact that data on disparate impacts provided through an environmental review could be over- or underinclusive does not, however, make the relevant information any less valuable.

2. Factor Two: The Historical Context

Under *Arlington Heights*'s second factor, a decision-making body's prior decisions are relevant to an assessment of the likelihood that an individual decision is discriminatory. Environmental laws provide extensive public information about prior decisions, including EISs written to comply with NEPA or its state equivalents, alternatives analyses prepared in connection with wetland permit applications, or the comments made by the public or by government agencies in all of these documents.[296] That information can be used to discern the decision-making body's prior patterns of decision making, at least with respect to land use decisions requiring compliance with such environmental laws.

A review of the documents may show that the decision-making body has consistently turned down proposals for siting undesirable land uses in white neighborhoods due to their environmental consequences, while consistently approving them in minority areas despite similar environmental consequences. For example, residents of a minority community concerned about a decision maker's planned siting of a landfill in their neighborhood might review the public environmental review documents filed in connection with applications for other landfills or other types of undesirable land uses. These documents may

295. *See supra* note 191 and accompanying text.
296. *See supra* notes 264-73.

reveal that the decision maker had a history of rejecting sites in white areas due to concerns based on wetlands, environmental contamination, traffic, effects on property values, and other factors. The record with respect to minority areas might reveal a pattern of approving sites in minority areas notwithstanding many of the same environmental problems which stymied projects in white areas. That history of differences in treatment might be probative of discriminatory intent in the current siting dispute.

In *Rozar v. Mullis*,[297] which involved an equal protection challenge to a county's siting of a landfill in a minority area, the plaintiffs had argued that the county's prior siting history was probative of discriminatory intent. The plaintiffs had observed that the county had rejected another site because of protests by white residents. The plaintiffs had further argued that the site in their neighborhood had come under consideration "despite the presence of certain unsuitable land characteristics which had led other proposed sites to be rejected."[298] Similarly, in *East Bibb Twiggs*, the minority plaintiffs opposing the landfill site had argued that the Commission had responded differently to requests made by white and minority citizens. The court rejected the claim without discussing the evidence for and against the argument.[299] Nonetheless, both *Rozar* and *East Bibb Twiggs* demonstrate the importance of the information about prior land use decisions that environmental documents could provide. Where differences based on race can be ascertained, that information may be probative of discriminatory intent in the siting decision at issue.

3. Factor Three: The Decision-Making Process

The third *Arlington Heights* factor looks to the specific history of the decision in question. The absence of information about the decision-making process has been identified as one of the most serious impediments to proving discriminatory intent in

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297. 85 F.3d 556 (11th Cir. 1996); *see supra* note 139 (discussing *Rozar*).

298. 85 F.3d at 562. The case against the county was not adjudicated because the court concluded that it was time-barred. *See id.* at 562-64.

299. *See* East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission, 706 F. Supp. 880, 885 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

environmental justice cases.[300] Where environmental review statutes are implicated, they provide a mechanism for generating extensive information about the decision-making process from its formative stages to the final decision.

The Council on Environmental Quality's regulations implementing NEPA stress that the NEPA process is designed to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[301] Where an EIS must be prepared, the first stage of the process involves "scoping" the issues to be addressed. The NEPA regulations state that "[t]here shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action."[302] As soon as an agency decides to complete an EIS, and prior to its initiation of the scoping process, the agency must publish a "notice of intent" to complete an EIS in the Federal Register.[303] In the notice of intent, the agency must "describe the proposed action and possible alternatives" and "[d]escribe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held."[304] The EIS process thus requires the accumulation and analysis of information from relatively early on in the decision-making process. Many state equivalents provide for similar scrutiny.[305]

Once the scoping process is complete, the agency prepares its Draft EIS and obtains the comments of other agencies and members of the public. The agency must respond to these comments by conducting further inquiries as necessary and must

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300. *See, e.g.*, Boyle, *supra* note 69, at 964-65.

301. 40 C.F.R. § 1500.1(b) (1997). The regulations further state that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time." *Id.* § 1501.2.

302. *Id.* § 1501.7.

303. *See id.* Pursuant to 40 C.F.R. § 1506.6 (1997), the regulations' "public involvement" section, the notice should be publicized in a manner likely to reach the affected community. *See infra* note 347 and accompanying text (discussing mechanisms for ensuring that notice is provided to affected communities so as to enhance public involvement).

304. 40 C.F.R. § 1508.22 (1997); *see also id.* § 1501.7 (requiring notice of intent in connection with scoping process).

305. *See, e.g.*, CAL. PUB. RES. CODE § 21080.4 (West 1996) (referring to scoping process); HAW. REV. STAT. § 343-5(b) (Supp. 1997) (requiring the preparation of an environmental assessment at the earliest practicable time); WIS. STAT. ANN. § 23.40 (West 1998) (following NEPA guidelines requiring the application of environmental review early in the planning process).

then either modify the proposed project or explain, in its Final EIS, why the agency did not believe further inquiry or modification was necessary.[306] Parsing through the agency's analysis and the manner in which it responds to comments may reveal a great deal about the decision-making process. If the agency received repeated comments on a particular issue but provided only a cursory response that failed to address the comments adequately, that evidence could be important in assessing the legitimacy of the siting process.

The Final EIS must include not only the full analysis undertaken and the agency's response to comments, but copies of all the comments received.[307] That requirement allows a community concerned about the way an agency is pursuing a project the opportunity to assess whether the agency has in fact responded to all comments received. For example, a review of the comments may reveal that the agency failed to respond to comments indicating that it had underestimated the level of certain environmental impacts associated with a project. Access to others' comments could also allow a community with limited expertise to take advantage of the insights of those who have more expertise. If an environmental group had submitted comments in opposition to a landfill slated for a wetland in a minority neighborhood, the residents of the neighborhood would be able to make use of the environmental group's expertise as expressed in the comments. If the comments in the record indicate that the project is environmentally unsound, that could assist a community's effort to demonstrate that the siting process was driven by unspoken factors, such as racism.

The alternatives analysis required under environmental review statutes like NEPA and in connection with wetland permits similarly provide extensive information on the siting process as a whole. Alternatives analysis generally requires the project proponent to describe all the alternative sites in some detail, including an assessment of the environmental implications of placing the facility at an alternative location.[308] Upon making

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306. *See* 40 C.F.R. § 1503.4 (1997).

307. *See id.* § 1503.4(b) ("All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.").

308. *See supra* notes 274-82 and accompanying text (describing environmental law provisions requiring alternatives analyses).

its final decision, the agency must not only justify its selection of the site in question, but also must explain why it did not choose one of the alternatives.[309] If the Final EIS appears to disregard or downplay important evidence about the selected site and to overemphasize relatively less significant factors in connection with a rejected alternative, that disparity could provide evidence that the true motives behind the decision are invidious.

In selecting a site for a landfill, for example, the alternatives analysis may reveal that other sites under consideration have fewer or less significant environmental impacts than the selected site. If an EIS downplayed or disregarded significant geological concerns about whether the selected site would leak hazardous materials, but rejected other sites due to factors that would appear to be less significant, such as "local opposition," then the alternatives analysis would provide information suggesting irregularities in the decision-making process. An indication that local opposition was the basis for rejecting alternatives would be particularly suspicious since the very presence of the equal protection case would suggest that the target community opposed the landfill as well.[310] Responding to the concerns of some citizens while ignoring those of others would deny those ignored the "equal protection" of the laws.[311]

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309. As discussed above, the justification is particularly important where a wetland permit is required, since a permit for a land use that is not water-dependant must overcome the presumption of a practicable alternative site. *See supra* notes 278-81 and accompanying text. If a community could show that another site would be practicable (even if less desirable than the selected site), then the community would have evidence that "something fishy" is afoot in the selection of the site at issue.

310. Other questionable bases for rejecting alternative sites could include the alternative site's effect on property values or the desire for open space in connection with the alternative locations. Since the effect on property values is likely to be greater in a wealthy neighborhood than a low-income neighborhood, this factor might by definition discriminate against poor neighborhoods, who are disproportionately minority. The desire for open space is also a suspicious justification because it is likely that those near the selected site would likewise prefer open space to the landfill in question.

311. In *R.I.S.E., Inc. v. Kay*, the district court, in denying the defendant's initial motion for summary judgment, stated that the evidence "provided by the plaintiffs of . . . the contrast between official responsiveness to white resistance to landfill development and apparent nonresponsiveness to the concerns of black residents," compiled with other circumstantial evidence, "suggests that the decision to locate the landfill in a predominantly black community may have been motivated by discriminatory intent." 768 F. Supp. 1141, 1143-44 (E.D. Va. 1991) (opinion denying defendant's motion for summary judgment). Although the court later found for the defendants in the trial on the merits, the earlier decision demonstrates that if

The importance of information about alternative sites has been stressed in a number of environmental equal protection cases. The *Bean* court emphasized the importance of information about alternatives in deciding equal protection claims brought in the siting context. The court indicated that the number and nature of potential alternative locations, as well as the method for choosing among them, was key in evaluating invidious intent.[312] The requisite information was lacking in *Bean*, a decision made in the context of a request for a preliminary injunction.[313]

Similarly, in *Laramore v. Illinois Sports Facilities Authority*,[314] an unpublished opinion concerning the siting of a sports stadium, the court noted that if the plaintiffs had been able to show that alternative sites were more cost effective or more easily developable than the selected site, "that evidence might provide a basis for inferring that the decision to locate the stadium . . . was motivated by an improper purpose."[315] Lacking such evidence, the court concluded that there were no other feasible sites.[316] One of the troubling omissions in the *R.I.S.E.* case was the court's failure to provide information about why the siting agency had not considered alternatives to the proposed landfill location.[317]

4. Factor Four: Departures from Substantive or Procedural Criteria

The fourth *Arlington Heights* factor considers the extent to which the decision-making agency has departed from the substantive criteria or procedural rules applicable to the decision. Environmental laws frequently provide both substantive and procedural benchmarks against which to measure agencies' actions. Environmental laws are likely to be very useful in

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plaintiffs can support their case with sufficient evidence of differing treatment of neighborhoods at alternative sites, that evidence would be probative of discriminatory intent.

312. *See* Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986).

313. *See id.*

314. No. 89 C 1067, 1996 WL 153672 (N.D. Ill. Apr. 1, 1996).

315. *Id.* at *17.

316. *See id.* at *14-17.

317. *See supra* note 202 (discussing lack of information about alternative sites).

providing facts relevant to this prong of the *Arlington Heights* test.

Although federal environmental laws establish the regulatory framework governing many environmentally significant projects, they rarely specify fixed substantive siting criteria.[318] Such criteria tend to be developed instead at the state or local level.[319] In the context of siting waste disposal facilities for municipal or hazardous waste, many states have established regulations specifying substantive siting criteria. West Virginia, for example, prohibits solid waste facilities from being sited within three hundred feet of surface water;[320] within one thousand feet of highway rights-of-way and public parks, unless adequately screened;[321] within five or ten thousand feet of an airport runway, depending upon the type of aircraft used;[322] within five hundred feet of an occupied dwelling, unless permission from the owner is obtained;[323] and within twelve hundred feet of a public or private water supply well.[324] If, for example, an agency selects a site that is two hundred (instead of five hundred) feet away from an occupied dwelling without owner approval, or one hundred (instead of three hundred) feet away from surface water, the violation may indicate a siting process that is not proceeding in a proper fashion.[325] The argument for inferring discrimination

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318. Statutes like the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1994 & Supp. II 1996), the Clean Water Act, 33 U.S.C. §§ 1251-1287 (1994 & Supp. II 1996), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6986 (1994 & Supp. II 1996), and their implementing regulations establish permitting and enforcement schemes for facilities involving, respectively, air pollution, water pollution, and hazardous waste. Although they do establish a permitting process for new facilities that may indirectly circumscribe the areas where development can occur, they generally do not specify detailed substantive rules regarding where permitted facilities should be sited. For example, the only specific substantive rule regarding the siting of facilities which treat, store, or dispose of hazardous waste is that they "must not be located within 61 meters (200 feet) of a fault which has had displacement in Holocene time." 40 C.F.R. § 264.18(a)(1) (1997).

319. *See* Boyle, *supra* note 69, at 971-73; Delogu, *supra* note 57, at 202 & n.15.

320. *See* W. VA. CODE STATE. R. tit. 33, § 3.2.a.1 (1996).

321. *See id.* § 3.2.e.

322. *See id.* § 3.2.g.1.

323. *See id.* § 3.2.h.1.

324. *See id.* § 3.2.i.1.

325. The community would also have a legal basis for challenging the siting decision. That challenge, although important to the community's effort to protect itself from the facility, would not directly implicate the question of political justice raised by a claim under the Equal Protection Clause. *See supra* note 121 and accompanying text.

would be particularly strong if alternative sites meeting the criteria are located in nonminority areas. In that instance, the evidence would raise the question as to why the decision maker had chosen a site that violated applicable criteria when lawful alternatives were available.

Environmental laws also establish many procedural requirements, the violation of which could be evidence of discrimination. NEPA has been interpreted to impose procedural rather than substantive requirements.[326] As outlined above, a federal agency proposing an action must undertake certain steps to determine whether or not it must complete an EIS,[327] contact "cooperating agencies" having jurisdiction over or expertise in connection with the planned action,[328] publish its notice of intent to complete an EIS,[329] and prepare a Draft EIS including the elements required by NEPA and its implementing regulations.[330] The agency must then circulate the Draft EIS to federal, state, and local agencies with jurisdiction over or expertise related to environmental impacts identified in the EIS,[331] invite comments from these agencies and affirmatively solicit comments from "persons or organizations who may be interested or affected,"[332] respond to the comments in its Final EIS,[333] and complete a record of decision explaining its selection of the proposed action and its rejection of alternatives to that action.[334] NEPA's state-law equivalents similarly establish numerous procedural requirements.[335] Other environmental laws, such as the Clean Air Act and the Resource Conservation and Recovery Act, also establish procedural requirements in connection with federal and federally approved state permitting.[336] Moreover, state laws

326. *See, e.g.*, Strycker's Bay Neighborhood Council, Inc. v. Karlan, 444 U.S. 223, 227 (1980) (holding that NEPA imposes a procedural, not substantive, mandate).

327. *See* 40 C.F.R. § 1501.4 (1997).

328. *See id.* § 1501.6.

329. *See id.* § 1501.7.

330. *See id.* §§ 1502.1-.25.

331. *See id.* § 1502.19.

332. *See id.* § 1503.1.

333. *See id.* § 1503.4.

334. *See id.* § 1505.2.

335. *See, e.g.*, CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1996 & Supp. 1998); CONN. GEN. STAT. § 22a-1a to -1h (1995 & Supp. 1998); D.C. CODE ANN. § 6-981 to -990.1 (1995 & Supp. 1998).

336. *See supra* notes 260-62 and accompanying text.

frequently establish their own procedural requirements in connection with permitting.[337]

If, for example, an agency fails to involve other interested agencies or fails to provide proper notice to the public, then that failure could be evidence that the agency is attempting to avoid input that might challenge the wisdom of the decision. Such evasion of procedural requirements may indicate an effort to impose a misguided facility on a particular community, and may therefore provide circumstantial evidence of a discriminatory motive.[338]

The violation of substantive criteria and procedural norms may indicate discrimination even if the substantive criteria or procedural norms are not legally required. As indicated above, in addition to substantive criteria required by law, agencies and private entities frequently develop project-specific substantive criteria in connection with a contemplated project.[339] In siting a solid waste landfill, for example, a municipality might determine that it wants the facility to be located within a specified radius of municipal boundaries, close to major transportation routes, and in an area of low traffic congestion. If the municipality conducts a search for a site meeting these criteria (in addition to those required by law), identifies two sites meeting the informal criteria located in white neighborhoods, and then chooses to site the facility at a location in a minority neighborhood that does not meet these informal criteria, that deviation from the substantive criteria could indicate invidious discrimination. Similarly, if the municipality rejects sites for failing to meet the informal criteria in white areas but then chooses to site the facility in a minority neighborhood that also fails to meet the criteria, the question of why the criteria were determinative in white areas but not in minority areas would arise.[340]

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337. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 6, § 361.7 (1996).

338. As with the violation of substantive criteria, a violation of procedural requirements would also provide a basis for a legal challenge to the siting process. That challenge would not, however, directly implicate the political justice issues raised by a claim under the Equal Protection Clause. *See supra* note 123 and accompanying text.

339. *See supra* note 247 and accompanying text.

340. In *Rozar v. Mullis*, 85 F.3d 556, 563 (11th Cir. 1996), plaintiffs argued that the county's decision to site a landfill in their minority neighborhood had "been influenced by impermissible racial considerations, rather than by the objective criteria (for example, useable acreage or wetlands) that were applied in rejecting other fairly comparable sites." Since the court determined that the claim was time-

The consistent failure of the environmental justice equal protection cases brought to date may be partly attributable to the courts' findings, under the facts of those cases, that substantive and procedural requirements and norms were followed. Had proximity to a high school been forbidden in *Bean*, the violation of that requirement might have been illegal as well as "unfortunate and insensitive."[341] As such, the court might have found the admittedly objectionable locational decision more probative of discrimination. The *Terry* court refused to find violations of substantive standards dispositive because a lack of enforcement was the norm rather than the exception, and therefore revealed little about the defendant's potentially invidious motives.[342] Although conceding that the procedures were not all they could be in terms of obtaining minority participation, the *Terry* court concluded that no procedural requirements were formally violated.[343] In *East Bibb Twiggs* and *R.I.S.E.*, the courts concluded that all procedural and substantive requirements had been met.[344] The conclusions made by the courts are open to dispute.[345] But once reached, the findings of substantive and procedural regularity operated against an inference of discriminatory intent. Where substantive and procedural deviations are more manifest, they may constitute an important basis for inferring discriminatory intent.[346]

Deviation from informal procedures could also be relevant to the equal protection inquiry. In addition to establishing numerous procedural requirements, NEPA's implementing

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barred, the merits of the claim were not addressed by the court. *See id.* at 563.

341. *See supra* notes 151-53 and accompanying text.

342. *See supra* notes 164-66 and accompanying text.

343. *See supra* notes 167-70 and accompanying text.

344. *See supra* note 184 and accompanying text (describing *East Bibb Twiggs)*; *supra* note 199 (describing *R.I.S.E.*).

345. In *Bean*, for example, the court could have found more significance in the decision to site the landfill so near a school even if that proximity were not legally prohibited. One would expect distance from incompatible land uses to be an important substantive criterion whatever the legal requirements. *See also supra* note 170 (describing the *Terry Properties* court's failure to seriously consider evidence that informal procedures had failed to include minority participation); *supra* notes 204-06 (describing the *R.I.S.E.* court's failure to address possible evidence of procedural irregularities).

346. *See supra* note 120 (describing equal protection cases where violations of substantive norms contributed to a potential inference of discriminatory intent); *supra* note 122 (describing equal protection cases where violations of procedural norms contributed to a potential inference of discriminatory intent).

regulations suggest procedures an agency could employ at its discretion. For example, for "an action with effects primarily of local concern," NEPA suggests that mechanisms for providing notice of NEPA-related proceedings "may include . . . [p]ublication in local newspapers . . . [n]otice to potentially interested community organizations . . . [and p]ublication in newsletters that may be expected to reach potentially interested persons."[347] If an agency regularly provides notice in this manner but suddenly fails to do so in connection with environmental review of an action located in a minority area, that deviation could provide circumstantial evidence of discrimination. Similarly, NEPA's implementing regulations do not require public hearings. They instead state that an agency should "[h]old or sponsor public hearings or public meetings whenever appropriate."[348] If an agency regularly holds public hearings for the type of action at issue, but chooses not to do so when the action is slated for a minority area, that deviation from procedural norms could present evidence of discrimination.

Because environmental laws provide so many formal and informal procedural and substantive benchmarks by which to measure the propriety of official action, they provide an excellent source of information on the legitimacy of governmental decision making. Although not every breach of procedure or substance is necessarily explainable by a discriminatory purpose, the violation of relevant criteria provides an important starting point for questioning a decision maker's true motives.

5. Factor Five: Legislative and Administrative History

Environmental laws provide a decision-making structure that is likely to lead to the creation of visible legislative and administrative history. That history will reveal the comments and intentions of the decision makers, the public's comments, the interaction among interested agencies, and the decision makers' explanations for their decision. Under NEPA, for example, the Draft EIS will present the agency's or decision-making body's

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347. 40 C.F.R. § 1506.6(b)(3) (1997).

348. *Id.* § 1506.6(c). Factors to consider in deciding whether to hold a hearing include "[s]ubstantial environmental controversy" or "substantial interest" in a hearing. *Id.*

interpretation of how the proposed action will proceed and why it was selected.[349] Public hearings, if held, will collect the views of the public and other agencies.[350] Written comments will appear in the legislative or administrative history of the decision.[351] The Final EIS will indicate how the agency responded to the comments it received.[352] At the end of the process, the ROD must explain why the proposed action was selected instead of others.[353] Similarly, environmental permitting procedures, whether for wetlands or for other types of facilities, involve numerous steps that provide for public input and involve agency explanations of their actions.[354]

The more public forums provided in the decision-making process, the more likely it is that decision makers or others will make explicit statements that reveal invidious intent if it exists. Such direct evidence is likely to be a significant factor in inferring discriminatory intent.[355] In addition, public hearings and written comments may provide evidence about the racial climate, which may provide further insight into whether decision makers were responding improperly to a community's racist sentiments. Although the presence of such public sentiments does not necessarily impugn the motives of the decision-making body,[356] it may be relevant in light of the circumstances as a whole.[357]

Even where the legislative or administrative history does not reveal direct evidence of discrimination, *Arlington Heights* clearly contemplated that the legislative and administrative history could provide telling clues. By providing a "paper trail," many environmental laws make the decision-making process significantly more transparent than it would have been without

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349. *See id.* § 1502.13.

350. *See id.* § 1506.6(c).

351. *See id.* § 1503.4(b).

352. *See id.* § 1503.4.

353. *See id.* § 1505.2.

354. *See supra* notes 260-63, 278-81 and accompanying text.

355. Evidence of a discriminatory statement by a member of a decision-making body is one of the strongest predictors of success in a suit brought under the Equal Protection Clause. *See* Eisenberg & Johnson, *supra* note 69, at 1187.

356. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 269 (1977) (affirming district court's conclusion that discriminatory statements made by the public at public hearings did not prove that the defendant zoning board had been motivated by discrimination).

357. *See, e.g.*, Angell v. Zinsser, 473 F. Supp. 488, 499 (D. Conn. 1979) (finding that town officials had wrongfully withdrawn their application for community development funds in response to community's discriminatory opposition).

the environmental requirements. That transparency facilitates the process of collecting direct and circumstantial evidence of invidious discrimination.

6. The Limits of Environmental Laws

That environmental laws could play a positive role in a community's effort to show that a siting decision violated the Equal Protection Clause does not mean that environmental laws provide the ready answer in all, or even many, specific cases. Environmental laws may not be applicable to every siting decision. Where they are not applicable, their information and norm-generating features will not be available.

Even where environmental laws are applicable, there is no guarantee that they will reveal probative evidence. The application of environmental laws may suggest that all is in order. The environmental information collected may not reveal evidence of disparate impacts caused by the decision maker, the public records stemming from environmental reviews associated with prior decisions may not reveal an historic pattern of discrimination, the sequence of events associated with the decision-making process may not reveal any irregularities, the selected site may comply with all of the legal and informal norms established by relevant environmental laws, and hearing minutes and other records may fail to reveal discriminatory administrative or legislative history. Full environmental compliance and a sterling record does not, however, necessarily mean that the community was fairly treated. There may have been numerous other locations that were equally environmentally suitable; environmental laws cannot necessarily answer the key question of why the decision makers selected the site in the minority community.

Conversely, the application of environmental laws may reveal irregularities, but the irregularities may not be traceable to a discriminatory purpose. The selected site may fail to comply with established environmental requirements or with the criteria adopted by the decision-making body, or public participation may have been inappropriately constrained and the sequence of events may appear highly irregular. Although such circumstantial evidence could be considered probative of discrimination, the record might reveal that the decision was based upon another type of improper motive. For example, the decision makers may

have selected an inappropriate site to benefit a particular friend or to reward a particular company. The irregularity of the proceedings could thus be traceable to a motive other than discrimination. Although that might provide the basis for a claim that the decision was arbitrary and capricious, it would not support a claim under the Equal Protection Clause.

Finally, notwithstanding the potential value of environmental laws, the insights they reveal may sometimes be inaccessible to communities lacking the time, financial resources, and scientific expertise to evaluate them.[358] Although this problem certainly exists, its dimensions should not be exaggerated. Environmental review statutes open up the decision-making process in ways that do not necessarily require expertise. The opportunity to observe how an agency is making its decision could provide the critical information, not just specific scientific analyses. Agencies must explain their actions at each stage of the decision-making process, and community members can submit comments and participate, regardless of their scientific credentials. Nor is expertise necessarily required to review environmental documents.[359] The conclusions of the studies may reveal all that is necessary. For example, an environmental review document may show that the proposed action has more significant environmental problems than a rejected alternative. While that assessment may require expertise in some instances, it will be more readily apparent in others. Moreover, as the environmental justice movement attains momentum, many minority communities are developing their own environmental expertise.[360]

To the extent that environmental expertise does present an ongoing concern, environmental justice advocates have encouraged mainstream environmental groups to provide

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358. *See, e.g.*, Austin & Schill, *supra* note 1, at 71 (observing that minority communities frequently lack access to technical expertise); Johnson, *supra* note 11, at 600-01 (observing that communities might need scientific experts to assist them in assessing technical environmental review documents).

359. *See* 40 C.F.R. § 1502.8 (1997) (requiring EISs to "be written in plain language . . . so that decisionmakers and the public can readily understand them").

360. *See, e.g.*, Poirier, *supra* note 12, at 1102 n.67 (noting that sociologist Dr. Robert Bullard has observed that "thousands of minority community residents have been involved in grassroots environmental struggles and now have the equivalent of expert knowledge that could be shared with others").

technical assistance to communities in need.[361] Although a lack of expertise may, in some instances, prevent communities from realizing the contribution environmental laws can make in assessing the justice of the decision at issue, the environmental justice movement is, overall, better off with the laws than without them.

CONCLUSION

The first step toward eliminating discrimination is recognizing its existence. The pursuit of political justice in the environmental context provides a forum in which the larger question of racial subordination is raised. If discrimination in a siting decision can be demonstrated, then decision makers will be held accountable to all of those they serve. By increasing accountability, the affected community may be one step closer to creating the circumstances required for true equality of treatment.

Communities who believe a siting decision failed to treat them with the same concern and respect given to other communities may hope to challenge the decision as a violation of the Equal Protection Clause. This article reveals that that path is difficult, but not hopeless. If the community hopes for legal victory,[362] it must be willing to look the evidence in the eye and determine whether it meets the high hurdles established by *Arlington Heights* and its progeny. This article attempts to provide a realistic assessment of what those hurdles are likely to mean in the context of siting undesirable land uses.

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361. *See, e.g.*, Lazarus, *supra* note 2, at 850 (suggesting that mainstream environmental groups lend technical assistance to local communities); Kaswan, *supra* note 7, at 298 (reviewing advocates' suggestions for providing expertise to local communities).

362. A community may choose to bring an equal protection case to create a symbolic and unifying rallying cry even if the evidence is unlikely to be sufficient as a matter of law. *See* Cole, *supra* note 10, at 541-44. The risk, however, is that if the evidence is insufficient and the legal case lost, it may convey the wrong message. The public may not be aware of the extent of the evidentiary hurdles. Even if the "truth" were with the community, the public is likely to conclude that the legal claim failed because the community was treated fairly. In these circumstances, the evidence gained through environmental laws and otherwise would best be used in political debates about the fairness of the decision, rather than in the high stakes all-or-nothing world of equal protection jurisprudence. *See generally* Kaswan, *supra* note 7.

To the extent that environmental laws can generate information that reveals—even circumstantially—the presence of discriminatory intent, environmental laws can serve the pursuit of justice. By articulating the role of environmental laws in the vindication of constitutional rights, this article intends not only to provide practical insights, but to transcend the historical tensions between the environmental and civil rights movements.