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SHIFTING THE BURDEN: POTENTIAL APPLICABILITY OF *BUSH V. GORE* TO HAZARDOUS WASTE FACILITY SITING

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Abstract: Since its inception in the 1980s, advocates of the environmental justice movement have attempted to remedy the disproportionate siting of hazardous waste facilities in minority neighborhoods by employing the Equal Protection Clause. These lawsuits have thus far been largely unsuccessful because of litigants' inability to prove intentional discrimination by government actors in such siting decisions. However, in the 2000 decision issued by the U.S. Supreme Court in *Bush v. Gore*, the mere potential for discriminate impact of a decision made by government actors was sufficient to trigger a strict scrutiny analysis under the Equal Protection Clause. While the decision was declared to have little precedential value outside the voting rights context, this Note examines the potential for application of this novel approach to the Equal Protection Clause in future environmental justice claims arising under the Fourteenth Amendment.

Introduction

On the morning of December 12, 2000, Americans waited in anticipation for the U.S. Supreme Court to issue its opinion in *Bush v. Gore*.[1] Under immense time pressure, the Court issued a controversial opinion specifically delineated as having no precedential value beyond the boundaries of the case.[2] The ruling, which redefined long-held precedent regarding the application of the Fourteenth Amendment's Equal Protection Clause to the U.S. Constitution, upheld the election of George W. Bush as the President of the United States.[3]

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[1] *See generally Bush v. Gore*: The Court Cases and the Commentary 253–77 (E.J. Dionne Jr. & William Kristol eds., 2001) [hereinafter Cases and Commentary] (compiling editorials and commentary written from the days leading up to the decision).

[2] *See* Bush v. Gore, 531 U.S. 98, 109 (2000).

[3] *See id.* at 145–46 (Breyer, J., dissenting) (finding that "since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial

Many constitutional scholars contend that it would be naive to expect the Supreme Court to begin applying this method of equal protection analysis—whereby proof of potentially discriminate impact of government actions is sufficient to trigger strict scrutiny—to future litigation arising under the Equal Protection Clause, because the Court has steadfastly applied a different standard for nearly twenty years.[4] However, the Court's willingness to depart from its own well-established standards in *Bush* created new hope for plaintiffs who have been unable to prevail on equal protection claims because of an inability to prove the intentional discrimination necessary to trigger strict scrutiny.[5]

The dilemma of proving intentional discrimination has been a major roadblock to the environmental justice (EJ) movement,[6] which was brought to national attention as the result of vocal opposition to hazardous waste facility siting in minority neighborhoods in the early 1980s.[7] The movement, however, could face renewed hope if EJ proponents can successfully use the *Bush* brand of Equal Protection analysis as a viable argument for burden shifting. Although many scholars and constitutional advocates believe that the *Bush* opinion was motivated more by politics than by the Constitution,[8] the constitutional system trusts the Supreme Court Justices to put aside their individual political

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review . . . I agree that, in these very special circumstances, basic principles of fairness should have counseled the adoption of a uniform standard to address the problem"); Richard A. Epstein, *Constitutional Crash Landing: No One Said It Would Be Pretty*, NAT'L REV. ONLINE, Dec. 13, 2000, *reprinted in* CASES AND COMMENTARY, *supra* note 1, at 284.

[4] *See, e.g.*, Markenzy Lapointe, Bush v. Gore*: Equal Protection Turned on Its Head, Perhaps for a Good Though Unintended Reason*, 2 WYO. L. REV. 435, 479–80 (2002).

[5] *See* Eric Foner, *Partisanship Rules*, THE NATION, Jan. 1, 2001, at 6–7, *in* CASES AND COMMENTARY, *supra* note 1, at 293 ("[B]y extending the issue of equal protection to the casting and counting of votes, the Court has opened the door to challenging our highly inequitable system of voting. . . . But *Bush* v. *Gore* may galvanize demands for genuine equality of participation in the democratic process that legislatures and a future Court may view sympathetically.").

[6] *See* Carolyn M. Mitchell, *Environmental Racism: Race as a Primary Factor in the Selection of Hazardous Waste Sites*, 12 NAT'L BLACK L.J. 176, 183 (1993) (asserting that the "burden [of proving intent] is difficult because plaintiffs often have the least access to evidence of racial bias"); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 410 (1991) (finding that "[t]he establishment of intent as the *sine qua non* of racial discrimination has created a quite onerous burden of proof for plaintiffs").

[7] *See* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 29 (3d ed. 2000); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 226 (1997).

[8] *See* Foner, *supra* note 5, at 293 (asserting that "[t]he Court, to be sure, has always been political, but rarely as blatantly as today").

beliefs for the sake of constitutional uniformity.[9] Thus, the reasoning of the *Bush* decision, though claimed to have no precedential value, cannot be held meaningless.[10] Rather, the reasoning could affect future equal protection litigation for EJ advocates.[11]

This Note focuses on the difficulty EJ advocates face when litigating racial discrimination claims related to the siting of hazardous waste facilities. Objective data illustrating the discriminatory impact of government actions supports the racially discriminatory effect of siting decisions.[12] Nevertheless, courts have continuously refused to apply a strict scrutiny analysis to siting decisions.[13] If the equal protection analysis of *Bush* becomes precedent for future racial discrimination cases, its application to EJ litigation would mirror that used by lower courts in other areas of the law over the past thirty years. Part I of this Note examines the history and evolution of the modern EJ Movement. Part II discusses the barrier EJ plaintiffs face in proving intentional discrimination by government actors in hazardous waste facility siting decisions. Part III examines the *Bush* decision in depth and draws an analytical link between *Bush* and the EJ movement. The conclusion argues that while *Bush* has yet to be directly applied outside of the voting rights context—and even has limited applicability within voting rights—its holding leaves room for a novel approach to EJ litigation and renews hope for the burden shifting potential of equal protection for EJ litigants.

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[9] *See* U.S. Const. art. III, § 2 (enabling the Court to decide only issues which "aris[e] under this Constitution")

[10] *See* Lapointe, *supra* note 4, at 480–81.

[11] *See id.*

[12] *See* U.S. Gen. Accounting Office, GAO/RCED-83-168, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities app. 1 (1983) [hereinafter GAO Report]; Commission for Racial Justice, (United Church of Christ), Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites, at xi–xv, 13 (1987), *reprinted in* Kenneth A. Manaster, Environmental Protection and Justice 167–70 (2d ed. 2000) [hereinafter UCCRJ Study].

[13] *See, e.g.*, E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 886 (M.D. Ga. 1989), *aff'd*, 888 F.2d 1573 (11th Cir. 1989); Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 679–80 (S.D. Tex. 1979). For a discussion of the holdings of these cases, and data presented, see *infra* Part III.C.

I. The Environmental Justice Movement

A. *Warren County, North Carolina*

In 1978, more than 30,000 gallons of oil laced with polychlorinated biphenyl (PCB), a toxin, were covertly dumped along a 210-mile stretch of North Carolina's roadways, contaminating the roadside soil.[14] Four years later, North Carolina Governor James B. Hunt made an executive decision to construct a PCB landfill in Warren County to bury the nearly 32,000 cubic yards of contaminated soil.[15] Warren County is one of the poorest counties of North Carolina, comprised of an eighty-four percent minority population.[16] Civil Rights activists, political leaders, and local residents came together to protest the construction of the proposed PCB landfill, bringing national attention to the race- and class-based inequities of hazardous waste facility siting, and launching the modern EJ movement.[17] More than five hundred protesters were arrested, but their efforts were not futile.[18] The protests prompted Congressman Walter E. Fauntroy—an active participant in the protests—to initiate a study of hazardous waste facility siting in the South by the U.S. General Accounting Office (GAO).[19] The study, along with its successors, have objectively demonstrated that an overwhelming percentage of hazardous waste facilities have been, and continue to be, sited in minority and low-income communities.[20] While the findings of such studies have yet to compel judicial remediation, recent developments in Equal Protection Clause jurisprudence may provide new hope.[21]

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[14] *See* Bullard, *supra* note 7, at 30. Subsequently, the owners were sent to jail for criminal dumping, but the problem of the contaminated soil persisted. *See id.*

[15] *See id.*

[16] *See id.*; Robert D. Bullard, *Environmental Blackmail in Minority Communities*, *in* Race and the Incidence of Environmental Hazards: A Time for Discourse 82, 90 (Bunyan Bryant & Paul Mohai eds., 1992) [hereinafter Race and the Incidence]; Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 Ariz. L. Rev. 1219, 1246 (1998).

[17] *See* Bullard, *supra* note 16, at 90; Valerie P. Mahoney, Note, *Environmental Justice: From Partial Victories to Complete Solutions*, 21 Cardozo L. Rev. 361, 363–64 (1999).

[18] Benjamin F. Chavis, Jr., *Foreword* to Confronting Environmental Racism: Voices from the Grassroots 3 (Robert D. Bullard ed., 1993).

[19] *See* Bullard, *supra* note 16, at 91.

[20] For a discussion of the studies and their findings, *see infra* Part II.C.

[21] *See generally* GAO Report, *supra* note 12.

B. *The Evolution of Environmental Justice*

Throughout American history, the natural environment has been a source of national pride in poetry, journalism, and political ideals.[22] Such representations of a pristine environment may reflect the reality of affluent landowners, but they turn a blind eye to the environmental hazards and poor public health conditions in disadvantaged communities.[23] Minority and low-income Americans have continually suffered the burdens of the environment's shortcomings, such as the toxic waste facility proposed in Warren County.[24] Toxic dumping and hazardous waste facilities are a result of industrial development throughout the country,[25] and while these burdens of development ought to be spread across all communities, facility siting decisions have followed the "path of least resistance," resulting in disproportionate siting in minority and low-income communities.[26]

Over the past thirty years, national attention has been brought to the distributive and political justice—or injustice—involved in environmental decisionmaking.[27] Advocates for the EJ movement argue "for an equitable distribution of the costs and benefits of maintaining a suitable environment in which to live."[28] When a decision harms a minority group that is not represented in the decisionmaking process, political justice is compromised.[29] Some scholars hypothesize that unwanted land uses, such as hazardous waste facilities, are concentrated in poor communities rather than affluent suburbs because wealthier neighborhoods are able to leverage the political and economic power

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[22] *See* William A. Shutkin, *The Concept of Environmental Justice and a Reconception of Democracy*, 14 VA. ENVTL. L.J. 579, 580–82 (1995). Shutkin points to Thomas Jefferson's belief that the fertile lands of America would be the birthplace of the nation's democratic identity, historian Frederick Jackson Turner's "frontier hypothesis," poet Walt Whitman's conception of America as a "new social order founded upon nature," and urban planner Frederick Law Olmsted's design of urban parks to "lessen the divisions caused by industrial, urban society and provide occasional relief from its rampant social strife" to make this point. *Id.*

[23] *See id.* at 583–84.

[24] *See* Kaswan, *supra* note 7, at 230.

[25] *See* BULLARD, *supra* note 7, at 3; Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection* 87 NW. U. L. REV. 787, 807–08 (1993).

[26] *See* BULLARD, *supra* note 7, at 3; Lazarus, *supra* note 25, at 807–08.

[27] *See* Kaswan, *supra* note 7, at 231–38 (discussing EJ in both its distributive and political capacities).

[28] *See* Mihaela Popescu & Oscar H. Gandy, Jr., *Whose Environmental Justice? Social Identity and Institutional Rationality*, 19 J. ENVTL. L. & LITIG. 141, 146 (2004).

[29] *See* Kaswan, *supra* note 7, at 233–38 (defining political justice as the equal representation of all citizens' interests in the decisionmaking process at the local, state, and federal level).

necessary to prevent unwanted land uses in their communities, while poor communities are comparatively powerless.[30] Public opposition is much stronger in affluent neighborhoods than in low-income neighborhoods, because residents of affluent communities are more likely to be members of local government, are more aware of the decisions affecting them, and are better able to organize resistance to locally unwanted land uses.[31] However, public opposition should not be a consideration in the decisionmaking process.[32]

Nevertheless, government and industry choose to site facilities in locations where they will meet the least amount of resistance; consequently, they target lower-income, minority communities.[33] Not only are these communities poor, with little political leverage, but they are frequently located near industry and transportation routes, which are attractive characteristics for toxic waste facility owners.[34] The result has been a disproportionate concentration of such facilities in predominantly minority communities.[35] The EJ movement emerged from the desire of constitutional rights advocates and environmentalists to remedy this inequity and ensure that environmental burdens are dispersed equally, with a blind eye to issues of race and income.[36] Injustices in environmental decisionmaking in this country are not new—when European settlers arrived in America over five hundred years ago, they displaced Native Americans, confiscated their land and redefined land use relationships.[37] The fact that EJ concerns are not new, however, does not mean that they are not redressable.[38]

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[30] *See* 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, 70–71 (1991); Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, *in* RACE AND THE INCIDENCE, *supra* note 16, at 163, 163–64, 169.

[31] *See* Mohai & Bryant, *supra* note 30, at 163–64; Austin & Schill, *supra* note 30, at 70–71.

[32] *See* Mohai & Bryant, *supra* note 30, at 163–64; Austin & Schill, *supra* note 30, at 70–71.

[33] *See* Mohai & Bryant, *supra* note 30, at 163–64.

[34] *See* Evans, *supra* note 16, at 1228. *See generally* 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, 1015–27 (1993) (discussing the cause of disproportionate siting, including immobility of poorer residents and inexpensive land values).

[35] *See* Evans, *supra* note 16, at 1228. *See generally* Been, *supra* note 34, at 1015–27.

[36] *See* Been, *supra* note 34, at 1005.

[37] *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, 221 (1994).

[38] For a discussion of lawsuits brought to remedy this situation, see *infra* Part III.

C. *Civil Rights as the Foundation for Environmental Justice*

According to Robert Bullard, the inequitable distribution of environmental burdens in certain communities cannot be explained by class alone, but is a product of "[r]acial barriers to education, employment, and housing [which] reduce mobility options available to the black underclass and the black middle class."[39] While racism has been prohibited by law, racist attitudes—both conscious and subconscious—persist.[40] These attitudes have contributed to a nonuniform, noncolor-blind distribution of hazardous waste facilities.[41] As one author states, "the evidence so compellingly suggests that the people who most often bear the dangers of living near the excreta of our acquisitive industrial society are the very same ones who have been most abused throughout our history."[42] Racial minorities have been the persistent victims of discrimination in America and today possess significantly less power in society, the marketplace, and the political sphere.[43]

While environmental inequities cannot be reduced to either economic or racial factors, subconscious racial biases have been shown through numerous studies to be linked to the perpetuation of unequal environmental quality between white communities and communities of color.[44] The protests in Warren County brought national attention to the plight of minority communities, and numerous protests, demonstrations, pickets, boycotts. and petition drives have followed during the past twenty-five years.[45] This opposition has incorporated strategies used by the Civil Rights movement of the 1950s and 1960s to bring attention to the subversive racism underlying siting decisions.[46] The protests evolved from the efforts of the same institutions, organizations, leaders and networks, which facilitated the Civil

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[39] BULLARD, *supra* note 7, at 6.

[40] Lazarus, *supra* note 25, at 807.

[41] *See* BULLARD, *supra* note 7, at 99–101; Lazarus, *supra* note 25, at 807–08.

[42] COLIN CRAWFORD, UPROAR AT DANCING RABBIT CREEK: BATTLING OVER RACE, CLASS AND THE ENVIRONMENT 367 (1996).

[43] *See* Lazarus, *supra* note 25, at 806–12; 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, 945–46 (1993).

[44] *See* Robert D. Bullard, *Introduction to* CONFRONTING ENVIRONMENTAL RACISM, *supra* note 18, at 11.

[45] *See* BULLARD, *supra* note 7, at 8; Evans, *supra* note 16, at 1245, 1247.

[46] *See* Kaswan, *supra* note 7, at 235; Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 601 (1996).

Rights movement.[47] As a result, the EJ movement has provided the basis for one of the "fastest growing areas of legal scholarship": environmental racism.[48] This concept includes "any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color."[49] The term was coined during the Warren County protests, and subsequent studies have provided objective proof of its existence.[50] These studies have found that the burden of living with hazardous waste has fallen "more heavily on poor than on well-to-do, more heavily on black and brown than on white."[51]

1. The First Investigation

Following the protests at Warren County, the GAO conducted a study entitled "Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities."[52] The GAO study examined the racial and economic makeup of the communities in which the four hazardous waste landfills in the southeastern United States were sited.[53] The study offered proof of an "irrefutable nexus between the presence of hazardous waste or industrial facilities and minority communities."[54] Census data showed that at three of the four sites, the majority of the population was African-American, and at all four sites the mean income for African-American people living near the facilities was lower than the mean income for all races combined.[55] This study was the first of its kind to examine the racial and economic situation surrounding hazardous waste facility siting,

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[47] According to Bullard, the EJ movement was organized by "[i]ndigenous black institutions, organizations, leaders, and networks . . . coming together against polluting industries and discriminatory environmental policies." BULLARD, *supra* note 7, at 5.

[48] Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267, 303 (1994); *see* Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121, 121–22 (1997).

[49] BULLARD, *supra* note 7, at 98; *see* Chavis, *supra* note 18, at 3.

[50] *See* BULLARD, *supra* note 7, at 98 ("Environmental racism is real; it is not merely an invention of wild-eyed sociologists or radical environmental justice activists."); Evans, *supra* note 16, at 1225; Saleem, *supra* note 37, at 221 (finding that the protest at Warren County "infused civil rights organizations into the environmental movement").

[51] ANDREW SZASZ, ECOPOPULISM: TOXIC WASTE AND THE MOVEMENT FOR ENVIRONMENTAL JUSTICE 106 (1994).

[52] *See* GAO REPORT, *supra* note 12; *see* Bullard, *supra* note 16, at 91.

[53] *See* GAO REPORT, *supra* note 12, at 1.

[54] Evans, *supra* note 16, at 1227.

[55] GAO REPORT, *supra* note 12, at 4.

and raised the question of whether this problem was unique to the Southeast or pervasive to the entire United States.[56]

2. Beyond the GAO Study

Following the GAO Study, in 1987 the United Church of Christ's Commission on Racial Justice ("UCCRJ") conducted a more comprehensive study, entitled "Toxic Wastes and Race in the United States," which analyzed community demographics to ascertain the relationship between race and hazardous waste facility siting nationwide.[57] According to Reverend Ben Chavis, Commission Director, the study showed that "race has been a factor in the location of commercial hazardous waste facilities in the United States"[58] This study, widely cited by EJ advocates, found that race was the predominant factor correlated to these siting decisions, surpassing socioeconomic status.[59] Some of its most conclusive findings included that: (1) three out of five African-American and Latinos live in communities with toxic waste facilities; (2) four times as many minorities live in areas with toxic waste facilities than live in areas without such sites; and (3) three out of five of the largest commercial hazardous waste facilities are located in predominantly African-American or Hispanic communities.[60] The UCCRJ study alleges that it is "virtually impossible" that this discrepancy in siting occurred by chance, and concludes that the discrepancy was created by underlying factors of distributive and political justice inextricably related to race, including inexpensive land located in minority communities. lack of local opposition, and immobility of residents due to poverty.[61]

In 1994, a compilation of studies found that these racial discrepancies continued to exist.[62] Of sixty-four studies conducted after the UCCRJ study, sixty-three documented various similar environmental disparities as a result of race or income that continued to exist.[63] Data from incongruous study, which found that there was no correlation

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[56] *See* Charles Lee, *Beyond Toxic Wastes and Race*, *in* CONFRONTING ENVIRONMENTAL RACISM. *supra* note 18, at 41, 43.

[57] Mahoney, *supra* note 17, at 368–69; *see* UCCRJ STUDY, *supra* note 12, at 167–68.

[58] UCCRJ STUDY, *supra* note 12, at 169.

[59] *See* Lazarus, *supra* note 25, at 801–02; Mahoney, *supra* note 17, at 369.

[60] *See* UCCRJ STUDY, *supra* note 12, at 168–69; Boyle, *supra* note 43, at 968–69.

[61] *See* Mohai & Bryant, *supra* note 30, at 163–64.

[62] *See* Benjamin A. Goldman et al., *Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites I*, 13–18 (1994), *in* MANASTER, *supra* note 12, at 174–79.

[63] *See id.* at 175.

between race or economic status and siting decisions, yielded results consistent with the other studies when analyzed using the methods of the other studies.[64] The most extreme data, from a 1993 study, indicated that people of color were 47% more likely than whites to live near a commercial hazardous waste facility.[65]

3. The Government's Response

The Clinton administration was the most recent government organization to take official action related to EJ.[66] The Administration made EJ "'a centerpiece of its environmental program.'"[67] In 1994, following the results of the UCCRJ study and subsequent analysis, the Administration promulgated Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,"[68] which directed federal agencies to identify and address the effects of their environmental programs and policies on minority and low-income populations.[69] President Clinton further enforced the Administration's commitment to EJ in a separate memorandum that directed every federal agency to promote enforcement of health and environmental statutes, particularly in minority and low-income areas, by developing and implementing EJ strategies.[70] The memorandum directed agencies to conduct all programs substantially affecting human health or the environment "in a manner that will not exclude populations from participation in, or denying the benefits of, or subjecting persons to discrimination because of race, color or national origin."[71]

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[64] *See id.* at 176. The incongruous study was a 1994 study by sociologists at the University of Massachusetts, Amherst, which found that there was no correlation between race or economic status and siting decisions. *Id.* The researchers did not use the entire United States as a comparison group but rather focused solely on communities that were home to commercial hazardous waste sites. *Id.* Furthermore, the study classified communities based on census tracts rather than zip codes, which created a narrower definition of community for examination purposes. *Id.* These results were consistent with all of the rest of the studies once examined through the broader, more inclusive lens. *Id.*

[65] *Id.* at 174.

[66] EPA, Environmental Justice, http://www.epa.gov/compliance/basics/ej.html (last visited Apr. 14, 2006).

[67] Kevin, *supra* note 48, at 121 (quoting G. Marc Whitehead, *Toxic Tort Litigation: Developing Issues and Their Impact on Case Preparation and Presentation*, C921 A.L.I.-A.B.A. 525, 537 (1994)).

[68] *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[69] *See* Kevin, *supra* note 48, at 128.

[70] *See id.*

[71] *Id.* at 128–29; *see* EPA, *supra* note 66.

Executive Order 12,898 fell short, however, as it did not define a method or test by which agencies could measure the disproportionate effects of their activities.[72] Although the Order was designed to bring attention to the environmental injustices in low-income and minority communities, its lack of guidance for agencies responsible for implementing amelioration programs has resulted in little response from parties interested in the EJ movement.[73] Numerous proposed pieces of legislation, including the Environmental Equal Rights Act of 1993,[74] have attempted to incorporate demographic material into site selection criteria, but none have been enacted.[75]

II. Litigating Environmental Justice Cases

Civil rights claims in EJ lawsuits can be forceful and powerful tools to educate the public and the government about occurrences of environmental injustice and environmental racism in particular.[76] High profile cases have been brought under Title VI[77] and Title VII[78] of the Civil Rights Act of 1964. In addition, almost every EJ case has alleged a violation of the Equal Protection Clause of the Fourteenth Amendment.[79] This Note focuses on how the U.S. Supreme Court's holding in *Bush v. Gore* could give new light to equal protection litigation for EJ plaintiffs.

A. *The Equal Protection Clause*

The Fourteenth Amendment provides that neither federal nor state government is permitted to "deny to any person within its jurisdiction the equal protection of the laws."[80] The purpose of this clause, as recognized by many constitutional scholars, is to secure to every American the right to freedom from intentional and arbitrary dis-

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[72] *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[73] *See* Popescu & Gandy, *supra* note 28, at 150.

[74] H.R. 1924, 103d Cong. (1993).

[75] *See* Kevin, *supra* note 48, at 130–31.

[76] *See* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 Fordham Urb. L.J. 523, 541 (1994).

[77] 42 U.S.C. §§ 2000d to 2000d-7 (2000); *see e.g.*, Peters v. Jenney, 327 F.3d 307 (4th Cir. 2003) (holding that Title VI provides for a private right of action for retaliation).

[78] 42 U.S.C. § 2000e–17; *see, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding that Title VII prohibits the entire spectrum of discrimination on the basis of sex).

[79] *See* Cole, *supra* note 76, at 538.

[80] U.S. Const. amend. XIV, § 1; *see* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that the Equal Protection Clause applies to the federal government through the Due Process Clause of the Fifth Amendment).

crimination by government actors.[81] In the context of individual rights, the Equal Protection Clause is heralded as "among the most important constitutional sources."[82] It originated in response to the emancipation of slaves after the Civil War to ensure equality and protection of the law.[83] The philosophy of the Equal Protection Clause is that all Americans—whether white or of color, rich or poor—are entitled to equal protection under U.S. law.[84]

Through the Equal Protection Clause, citizens may challenge a governmental action when that action either draws a distinction among people based on characteristics or discriminates as to the exercise of a fundamental right.[85] Challenges are brought when individuals or groups of individuals perceive that the government has been acting in a manner which demonstrates vindictiveness, unjustifiable standards, or arbitrary classifications.[86] A lawsuit alleging that a law is racially discriminatory may challenge the law as either facially discriminatory or as having a discriminatory impact or purpose.[87] Either challenge requires a strict scrutiny analysis by the reviewing court; the court will uphold the challenged law only if the government, which has the burden of proof, demonstrates that the questioned action is necessary to achieve a compelling public purpose.[88]

However, to trigger strict scrutiny the plaintiff must first provide proof of a discriminatory purpose on the part of the government in enacting the law.[89] The disproportionate impact of a governmental action—without corroborating evidence—has been held insufficient to trigger a strict scrutiny analysis throughout the past thirty years.[90] According to Justice White, writing for the majority in *Washington v. Davis*, the Court has never held "that a law or other official act, with-

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[81] *See* J. Michael McGuinness, *The Rising Tide of Equal Protection:* Willowbrook *and the New Non-Arbitrariness Standard*, 11 Geo. Mason U. Civ. Rts. L.J. 263, 265 (2001).

[82] *Id.* at 267.

[83] Lapointe, *supra* note 4, at 446; *see* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (stating that the Fourteenth Amendment's "design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it").

[84] *See* Bullard, *supra* note 7, at 7.

[85] *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 648–49 (2d ed. 2002).

[86] *See* McGuinness, *supra* note 81, at 269.

[87] *See* Chemerinsky, *supra* note 85, at 644–45.

[88] *See id.* at 645.

[89] *Id.* at 682.

[90] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that there must be proof of discriminatory purpose as well as impact to find an equal protection violation); Chemerinsky, *supra* note 85, at 682.

out regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[91] This decision differs in its discrimination analysis from the Courts' decision just five years earlier in *Griggs v. Duke Power Co.* that, at least for a Title VII claim, a reviewing court must look to results and not intent or purpose to determine whether there is evidence of discrimination.[92] The *Davis* Court found the *Griggs* decision, which examined a case brought under Title VII, was nonbinding in other racial discrimination circumstances.[93] The Court rationalized that the different application results from a fear that examining impact alone may actually be more burdensome to the poor than to the affluent, thereby having the opposite of the intended effect.[94] The Court found, therefore, that strict scrutiny is triggered *only* by the plaintiff's demonstration of intentional or purposeful discrimination.[95]

Since *Davis*, the government need not offer a racially neutral explanation for laws with a discriminatory impact.[96] Instead, the burden rests on the plaintiff to prove the discriminatory intent of government actors.[97] Professor Robert Bennett suggests that this heavy burden on plaintiffs is justified, as he believes the goal of the Equal Protection Clause is to stop discriminatory acts, not necessarily to bring about equal results.[98] However, this question is central to literature regarding the proper application of the Equal Protection Clause, and was contradicted by the Court's recent holding in *Bush v. Gore*.[99] Professor

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[91] 426 U.S. at 239.

[92] *See* 401 U.S. 424, 436 (1971).

[93] *See* Lapointe, *supra* note 4, at 453–54 (examining the application of *Davis*, as compared to *Griggs*, in subsequent cases).

[94] *See Davis*, 426 U.S. at 248.

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of 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.

Id.

[95] *See* Kevin, *supra* note 48, at 146–47.

[96] *See* Chemerinksy, *supra* note 85, at 684.

[97] *See id.* at 682.

[98] *See* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 Cal. L. Rev. 1049, 1076–77 (1979). *See generally* Bush v. Gore, 531 U.S. 98, 98, 110 (2000) (holding that strict scrutiny is triggered upon even the potentially disparate impact of a government action in the context of voting rights).

[99] *See* Chemerinsky, *supra* note 85, at 864.

Laurence Tribe argues the other side, advocating that "'the goal of the equal protection clause is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all.'"[100] This approach to equal protection analysis has been litigated in EJ lawsuits brought under the Fourteenth Amendment, and is the focus of this Note.

B. *Difficulty in Litigating Equal Protection for Environmental Justice Plaintiffs*

The standard of intent since *Davis*, where the Court placed the burden of proof on plaintiffs to prove intentional or purposeful discrimination by government actors, has been a major roadblock for plaintiffs litigating EJ cases under the Equal Protection Clause.[101] Plaintiffs have less access than government officials to documentation disclosing the intent of lawmakers in sanctioning government actions, assuming this documentation exists and accurately reflects the reasoning behind the decisions.[102] Furthermore, siting decisions regarding hazardous waste facilities can often be justified by facially neutral factors, and any documentation which plaintiffs could provide might tend to reflect these alternate justifications.[103]

In cases which have challenged the siting of a hazardous waste facility under the Equal Protection Clause, disparate distributional effects have been insufficient to meet the plaintiff's burden of proof.[104] The courts have found that reliance on concrete statistical evidence, such as the UCCRJ and GAO studies, does not suffice to prove the intent of government actors.[105] Reviewing courts, therefore, have never reached a strict scrutiny analysis; the challenged laws and actions have been perceived as constitutional without the government having to prove that the resulting discriminatory effect of an action was fundamentally necessary to achieve a compelling public purpose.[106] For EJ litigants, this barrier has been insurmountable thus far, and disparate

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[100] *Id.* at 685 (quoting Laurence H. Tribe, American Constitutional Law 1516–19 (3d ed. 1988)).

[101] *See* Mitchell, *supra* note 6, at 183; Godsil, *supra* note 6, at 410.

[102] *See* Mitchell, *supra* note 6, at 183; Boyle, *supra* note 43, at 964–65.

[103] *See* Torres, *supra* note 46, at 606; Boyle, *supra* note 43, at 965.

[104] *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 258–59 (1977); Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979).

[105] *See* Evans, *supra* note 16, at 1280.

[106] *See* Chemerinsky, *supra* note 85, at 684–85.

impacts have been allowed to continue from a constitutional standpoint.[107]

1. The Plaintiff's Burden of Proof

To prove the discriminatory intent of a governmental actor, the plaintiff must demonstrate more than that the government took a given action with knowledge that it would have discriminatory consequences.[108] While Professor Larry Simon contends that a concrete showing of significant disproportionate impact in a particular minority group ought to be enough to force the government to explain that the action was taken for reasons other than prejudice, this burden, as it currently stands, rests on the plaintiff.[109] The Supreme Court delineated several ways in which the plaintiff may prove discriminatory purpose in a leading EJ case brought under the Equal Protection Clause, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[110]

In *Arlington Heights*, the Metropolitan Housing Development Corporation ("MHDC") entered into a contract with the Clerics of St. Viator to construct racially integrated low- and moderate-income housing on the clerics' land in Arlington Heights, Illinois.[111] The contract was contingent upon the MHDC's ability to secure zoning clearances from the Village, as the development did not conform to local zoning laws that allowed only single-family residential housing.[112] To consider the MHDC's proposal, the Commission held public meetings during which the community spoke both for and against the rezoning.[113] Many of the comments focused on the reasons for which the area had been zoned single-family, though a significant number also addressed concerns about the "social issues" involved in this particular proposed project—the desirability or undesirability of introducing racially integrated low- and moderate-income housing to a predomi-

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[107] *See* Evans, *supra* note 16, at 1280.

[108] *See* Pers. Adm'r. v. Feeney, 442 U.S. 256, 279 (1979) (holding that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies 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." (citations omitted)).

[109] *See* Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 San Diego L. Rev. 1041, 1111 (1978).

[110] *See* 429 U.S. 252, 266–68 (1977).

[111] *Id.* at 255–57; *see* John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation*, 33 U. Balt. L. Rev. 153, 186 (2004).

[112] *Arlington Heights*, 429 U.S. at 255–58.

[113] *See id.* at 257.

nantly white, affluent community.[114] Despite the admission of race being a factor in the decision, the village refused to rezone the clerics' land and denied the proposal.[115] In response, the clerics brought a claim in district court under the Equal Protection Clause.[116]

The U.S. District Court for the Northern District of Illinois held that the government's decision was not motivated by discriminatory intent but rather was based on legitimate zoning purposes.[117] The Court of Appeals for the Seventh Circuit Court of Appeals subsequently reversed the district court's decision, finding that the refusal would have a disproportionate impact on minorities and failed to serve a compelling governmental interest.[118] The U.S. Supreme Court subsequently granted certiorari to determine the issue of intent.[119] In its analysis, the Court delineated several different ways in which discriminatory purpose can be proven by plaintiffs in an equal protection action, including: (1) the discriminatory effect of the action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) the departures from the normal procedural sequence; (5) the departures from the normal substantive standards; and (6) the legislative or administrative history of the decision.[120] In addition, the Court suggested that statistical proof of discrimination toward a particular group may give rise to a finding of intent.[121]

The Court went on to find that once there is proof that a decision has been motivated, even in part, by a discriminatory purpose, the burden shifts to the government—consistent with strict scrutiny—to prove that "the same decision would have resulted even had the impermissible purpose not been considered."[122] If a reviewing court is convinced that there is a discriminatory purpose, the law is treated as racially motivated and thus is invalid under the Equal Protection

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[114] *Id.*

[115] *See id.* at 254, 258–59.

[116] *See id.*

[117] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp. 208, 211 (1974).

[118] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 414–15 (1975), *rev'd*, 429 U.S. 252.

[119] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 423 U.S. 1030 (1975).

[120] *See Arlington Heights*, 429 U.S. at 266–68; Michael Daniel, *Using the Fourteenth Amendment to Improve Environmental Justice*, 30 HUM. RTS., Fall 2003, at 15, 15, *available at* http://www.abanet.org/irr/hr/fall03/tools.html.

[121] *See Arlington Heights*, 429 U.S. at 266 n.13.

[122] *See id.* at 270 n.21.

Clause.[123] Disproportionate impact may be weighed as evidence of discrimination, but impact alone, under *Arlington Heights*, is not enough to prove intent or trigger strict scrutiny.[124] Ultimately, while the Court in *Arlington Heights* acknowledged the existence of references to social issues in the history of the decision, it did not find that the evidence demonstrated that the refusal to rezone was racially motivated, and thus concurred with the District Court to deny MHDC's application.[125]

C. *Theory in Practice: The Intent Hurdle for Environmental Justice Litigants Challenging Siting of Hazardous Waste Facilities*

Despite the difficulties experienced in proving a violation of the Equal Protection Clause in *Arlington Heights*, equal protection remains "at the core of environmental justice, pulling together diverse themes of fairness in decisionmaking processes and substantive outcomes."[126] Litigating under the Equal Protection Clause has been—and continues to be—the primary method of introducing civil rights into the realm of EJ where the government is the discriminatory actor.[127] However, since the burden continues to rest on the plaintiff once the government has produced a plausible, nonracially motivated justification for its action, this hurdle has been overwhelming thus far.[128]

Plaintiffs, however. continue to file and argue equal protection claims in EJ litigation.[129] The decision to file rests on the belief that the intent standard demonstrates a misconception of the causes of racial discrimination, whereby racist decisions are assumed to be overt and made on a conscious level which can be detected by a showing of the decisionmaker's state of mind.[130] EJ advocates remain hopeful that continuing to file such lawsuits will ultimately force the Court to realize that subconscious racism is a pervasive problem in modern society.[131] The need to modernize the intent analysis by holding those

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[123] *See* CHEMERINSKY, *supra* note 85, at 690.

[124] *See* Kevin, *supra* note 48, at 147.

[125] *See Arlington Heights*, 429 U.S. at 269–71.

[126] *See* Daniel, *supra* note 120, at 15.

[127] *See* Cole, *supra* note 76, at 538.

[128] *See* Been, *supra* note 34, at 1004; Cole, *supra* note 76, at 538–41. The lawsuits have not been successful, and promise little success, because of the *Arlington Heights* requirement that plaintiffs must prove discriminatory intent. Been, *supra* note 34, at 1004.

[129] *See* Cole, *supra* note 76, at 541.

[130] *See* Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 122–26 (1983).

[131] *See* Boyle, *supra* note 43, at 963–64.

who discriminate liable regardless of intent is in line with the ultimate goal of the Equal Protection Clause: to improve minority conditions and protect all people as equal under the law.[132] In hazardous waste facility siting decisions, it should not make a difference whether government actors are intending to discriminate. Rather, the focal point of the litigation, as it was in *Bush*, should be remedying the objectively measurable discriminatory impact that these decisions have produced.

The first major EJ case challenging hazardous waste facility siting under the Equal Protection Clause was *Bean v. Southwestern Waste Management Corp.*[133] In *Bean*, residents living near a proposed site for a solid waste landfill facility argued that the selection of that particular site—located in a census tract with minorities comprising 70% of the population, rather than another equally viable site where minorities comprised only 18.4% of the surrounding population—was part of a pattern of racial discrimination by the Texas Department of Health.[134] The plaintiffs' case rested on population statistics of the sites as they existed at the time of the case, which showed that 15% of Houston's solid waste sites were located in areas with over 70% minority populations.[135] However, the reviewing court refused to consider these statistics, opting instead to look at the population statistics of the surrounding areas on the day each site opened.[136]

Looking at the facts presented in *Bean*, the court found that the plaintiffs had failed to establish the stark pattern of discrimination necessary to meet the plaintiff's burden of proof following *Arlington Heights*.[137] The decision acknowledged that statistical data concerning Houston's solid waste sites at the time may have shown a pattern of discrimination in violation of the Equal Protection Clause, but the court refused to issue a preliminary injunction to stop the construction of the landfill.[138] The court did, however, acknowledge that, "the plaintiffs have established that the decision to grant the permit was

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[132] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337–38 (1987). "Individuals learn cultural attitudes and beliefs about race very early in life, at a time when it is difficult to separate the perceptions of one's teacher (usually a parent) from one's own." *Id.*

[133] *See* 482 F. Supp. 673 (S.D. Tex. 1979).

[134] *See id.* at 677–78.

[135] *See id.* at 678.

[136] *See id.* at 677.

[137] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977); *Bean*, 482 F. Supp. at 677–78.

[138] *See Bean*, 482 F. Supp. at 680.

both unfortunate and insensitive."[139] The court questioned why the city chose to place a solid waste landfill within 1700 feet of a primarily minority-attended high school and only a slight distance from a residential neighborhood.[140] This questioning ultimately lead to a victory for the EJ movement, as the city subsequently restricted the dumping of garbage near public facilities such as schools and prohibited city-owned trucks from dumping at the landfill.[141] Furthermore, the Texas Department of Health began requiring demographic data regarding proposed landfill sites.[142] However, the facility at issue was still built in a minority census tract.[143]

Another lawsuit in which the Equal Protection Clause provided the basis for EJ litigation was *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission.*[144] In that case, community residents living near a proposed private landfill site alleged that the site selection had both a discriminatory impact and, like *Bean*, was demonstrative of the defendant's pattern of siting waste facilities in minority communities.[145] The plaintiffs in *East Bibb Twiggs* contended that the defendant's decision to site this facility in this particular neighborhood—which was roughly seventy percent minority residents—was part of a history of discrimination, as detailed in newspaper articles reporting a series of Planning and Zoning Commission decisions.[146] In addition, the plaintiffs submitted evidence of the legislative history of the decision, including statements made by commission members regarding the initial denial of another proposed site for reasons including "adjacen[cy] to a residential area" and "increased traffic and noise."[147] Although siting the facility at East Bibb Twiggs would create similar effects in the surrounding neighborhood, the proposal was approved.[148] The plaintiffs thus contended that there must have been an "individious racial purpose . . . [that] motivated the commission to reconsider its decision and to approve that use which was at

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[139] *Id.*

[140] *See id.* at 679.

[141] *See* Popescu & Gandy, *supra* note 28, at 168–70.

[142] *See id.*

[143] *See Bean*, 482 F. Supp. at 680–81; Lazarus, *supra* note 25, at 831–32.

[144] 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 888 F.2d 1573 (11th Cir. 1989). Though this case was heard by the Appellate Court, this Part relies upon the District Court opinion because it presents the facts and legal analysis in greater depth.

[145] *See id.* at 884–85.

[146] *See id.* at 885.

[147] *Id.* at 886.

[148] *See id.*

first denied."[149] However, the reviewing court failed to find these reasons indicative of intent and held that there had been no deprivation of equal protection.[150]

Despite the demonstrable historical patterns of discrimination and clearly disproportionate effects, courts continue to deny relief under the Equal Protection Clause absent a showing of intentional or purposeful discrimination.[151] Both *Bean* and *East Bibb Twiggs* demonstrate the reluctancy of courts, following *Arlington Heights*, to provide relief to plaintiffs, even though the site selections in those two cases appear facially discriminatory.[152] However, recent case developments suggest that intentional environmental discrimination is not necessarily an insurmountable hurdle when it comes to the requisite proof of intent, giving new hope to litigators that arguing for constitutional protection in environmental cases is not a lost cause.[153]

In *Miller v. City of Dallas*, residents of the Cadillac Heights area of Dallas brought a claim against the City for intentional racial discrimination in the provision of municipal services.[154] The plaintiffs alleged that lawmakers discriminated against residents of Cadillac Heights—98.5% of whom are minorities and 46% of whom live in poverty—with respect to flood protection, zoning, industrial nuisances, landfill practices, streets and drainage, and federal funding for housing and community development.[155] The plaintiffs provided historical and demographic evidence that strongly supported claims of impermissible race-based zoning, similar to the evidence presented in *Arlington Heights*, *Bean*, and *East Bibb Twiggs*.[156] For example, they presented evidence that the city refused to enforce local and state laws regarding the harmful effects of lead pollution from smelters in Cadillac Heights, yet used zoning authority to protect white residents from the same effects.[157] Ultimately, the court denied summary judgment for the defendants, finding that the plaintiffs had presented sufficient facts to

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[149] *See id.*

[150] *See East Bibb Twiggs*, 706 F. Supp. at 887.

[151] *See* Saleem, *supra* note 37, at 225.

[152] *See id.*

[153] *See* Melissa A. Hoffer, *Closing the Door on Private Enforcement of Title VI and EPA's Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After* Sandoval *and* Gonzaga, 38 New Eng. L. Rev. 971, 980 (2004).

[154] No. CIV.A 3:98-CV-2955-D, 2002 WL 230834, at *1 (N.D. Tex. Feb. 14, 2002).

[155] *See id.*

[156] *See id.* at *4–15.

[157] *See id.* at *8.

show a genuine issue for trial.[158] However, the case was never fully litigated as the result of a monetary settlement.[159]

A similar result occurred in *Calvary Pentecostal Church v. Town of Freetown*, a dispute involving discriminatory zoning and permitting decisions that plaintiffs alleged were the result of historical practices of intentional discrimination.[160] In *Calvary*, the plaintiffs were Cape Verdean residents of the Braley Road section of Freetown, Massachusetts.[161] According to the complaint, Freetown, along with many other towns in Southeastern Massachusetts, subjected minority residents to discrimination through the attempted enforcement of Jim Crow laws.[162] Cape Verdeans make up approximately 0.7% of Freetown residents, but virtually all of the Cape Verdean residents live in the Braley Road section of the town.[163] The complaint refers to discriminatory zoning decisions—such as a failure of the town to provide adequate water facilities to Braley Road, as well as a 1996 decision by the Town Zoning Board to zone Braley Road as "industrial," despite the residential character of the neighborhood.[164] In 2000, the board approved the development of an asphalt plant, a concrete plant, and an 800,000-square-foot warehouse and distribution center to be built on Braley Road.[165] Residents protested the projects, and the plans to build the warehouse were withdrawn.[166] While the board alleged that the development of Braley Road was motivated solely by the recent zoning changes, members recognized that past boards had not been sensitive to the needs of residents.[167]

The District Court hearing *Calvary* referred the issue to alternative dispute resolution, thereby indicating that the court felt there were sufficient facts to hear the case but wished to save its resources if the parties could come to a mutual resolution.[168] While they were never fully

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[158] *See id.* at *1–2 (referring to the process of summary judgment established in *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

[159] *See* Daniel, *supra* note 120, at 15.

[160] *See* Hoffer, *supra* note 153, at 982.

[161] *See id.*

[162] *See id.*

[163] *See id.*

[164] *See id.* at 982–83.

[165] *See id.* at 983.

[166] *See* Hoffer, *supra* note 153, at 983.

[167] *See id.* at 983–84.

[168] *See id.* at 983. Many states are experimenting with sending certain controversies to alternative dispute resolution because of "burgeoning court queues, rising costs of litigation, and time delays." *See* Legal Information Institute, Alternative Dispute Resolu-

litigated, both of these cases have been significant in demonstrating courts' willingness to hear constitutional challenges to environmental laws when plaintiffs have brought forth affirmative evidence of disparate impact, regardless of the government's intent.[169] Though litigating an EJ claim under the Equal Protection Clause has thus far proven difficult, there are benefits to bringing these cases.[170] Most notably, these lawsuits have brought environmental injustices—such as the disparate impact of hazardous waste facility site selection—to national attention.[171]

D. *Despite the Challenges, Bringing Cases Under the Equal Protection Clause Continues to Benefit the Environmental Justice Movement*

While litigating an EJ claim under the Equal Protection Clause has thus far proven difficult, there are numerous benefits to bringing these cases.[172] Each case pushes the courts to recognize the disparate impact of environmental decisions, which affect low-income and minority communities.[173] Furthermore, the cause gains support through publicity and education of both the judiciary and the public.[174] By bringing these lawsuits, environmental injustices such as the disparate impact of hazardous waste facility site selection and exclusionary zoning practices across the country are brought to the forefront of national attention and discussion.[175]

As Professor Gerald Torres suggests, reasons for distributional inequality may be the result of a combination of historical decision-making and market dynamics beyond racism.[176] An emphasis on racism may shift the focus of the EJ movement away from the achievement of equality in politics and distribution of negative environmental impacts, and instead "seems designed to begin a relatively fruitless search for a wrong-doer, or in other words, the bad person with evil

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TION (ADR): AN OVERVIEW, http://www.law.cornell.edu/topics/adr.html (last visited Apr. 20, 2006).

[169] *See* Hoffer, *supra* note 153, at 980.

[170] *See* Cole, *supra* note 76, at 541–44.

[171] *See id.* at 542. *See generally* Mandara Meyers, Comment, *(Un)Equal Protection for the Poor: Exclusionary Zoning and the Need for Stricter Scrutiny*, 6 U. PA. J. CONST. L. 349, 366–74 (2003) (examining the problems with exclusionary zoning across the United States and its interaction with the Equal Protection Clause).

[172] *See* Cole, *supra* note 76, at 541–44.

[173] *See* Saleem, *supra* note 37, at 227.

[174] *See* Cole, *supra* note 76, at 541–44.

[175] *See id.*

[176] *See* Torres, *supra* note 46, at 604–05, 607–08.

intent."[177] The goal of the Equal Protection Clause is to improve and guarantee equal treatment for all people, not to punish racists.[178] If real equality is to result from the EJ movement, framing existing disparities as solely the result of racism or discrimination will not be a successful avenue.[179] Alleging racism may gain publicity for instances of apparent racism, as it did in Warren County.[180] However, this type of intentional bias and purposeful discrimination need not be explicit for environmental injustice to occur.[181]

Framing environmental injustice as the result of racism is not the most effective means of bringing about equality.[182] Jumping to an accusation of racism as a motivating force for environmental policymaking is not only difficult to prove, but can alienate critical decisionmakers who may otherwise be sympathetic to the existence of disparate impacts.[183] Furthermore, it may have the opposite effect by creating sympathy for those accused of discriminating as "victims" of the so-called unsubstantiated claims.[184] Thus, putting aside a claim of racism and instead litigating on the existence of disparate effects, whether intentional or unintentional, is likely to be more palpable to a reviewing court.[185]

To bring about real change and equality, the government should be subject to strict scrutiny as soon as a plaintiff objectively proves disparate impact of a governmental action. In the recent U.S. Supreme Court decision *Bush v. Gore*, the Court did just that by basing a decision on the effect and *potentially* disparate impact of the decision, not on the intent of the actors.[186] While the specific facts of the decision differed from the EJ context, the factors which the Court considered to determine the constitutionality of the act in question are the same.[187] This decision gives new hope to EJ advocates and litigants that the Court may be willing to see the flawed burden of proof standard in its Equal Protection Clause jurisprudence.

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[177] *See id.* at 602. *See generally* UCCRJ STUDY, *supra* note 12, at 165–70.

[178] *See* Boyle, *supra* note 43, at 964.

[179] *See* Kaswan, *supra* note 7, at 280–81. "Communities who believe they have been treated unfairly must find ways to communicate their cause in a manner that stimulates the broader community to greater accountability." *Id.* at 280.

[180] *See* BULLARD, *supra* note 7, at 30–32.

[181] *See* Kevin, *supra* note 48, at 126.

[182] *See* Torres, *supra* note 46, at 603–04.

[183] *See* Kaswan, *supra* note 7, at 281.

[184] *See id.*

[185] *See id.* at 280–81.

[186] *See* Bush v. Gore, 531 U.S. 98, 106, 110 (2000).

[187] *See* Lapointe, *supra* note 4, at 474–77.

III. A Breath of Fresh Air in the Equal Protection Doctrine

EJ litigants have been stonewalled in challenging race-based decisions for hazardous waste facility siting under the Equal Protection Clause because of the burden of proving intent.[188] While this standard is daunting in many cases, there are instances in which the racial bias of a given decision is evident and proof is readily available; those claims. according to one author, "should be pursued without hesitation."[189] In light of the general societal disapproval of racism, however, racially discriminatory decisions are not likely to be overtly race-based.[190] As a result, civil rights lawyers have become frustrated and have begun to consider these types of claims "certain losers."[191] Nevertheless, there may still be hope for these types of claims given recent developments in the U.S. Supreme Court's interpretation of the Equal Protection Clause.[192]

On December 12, 2000, the Supreme Court issued an opinion in *Bush v. Gore*, which disregarded the proof of intent requirement delineated in *Arlington Heights v. Metropolitan Housing Development Corp.*[193] Instead, the opinion, written by Justice Scalia, makes a decision under equal protection by considering the rudimentary requirements of uniform rules and nonarbitrary treatment. and never addresses the plaintiff's burden of demonstrating intent.[194] While the mainstay of Equal Protection Clause claims in voting rights cases—like the racial discrimination cases from which the fundamental right to vote emanated[195]—has been the establishment of an intentional violation of equal protection by a state actor, neither the counties nor any voter ever even alleged such discrimination in *Bush*.[196] Despite a lack of proof—or even so much as an allegation—of governmental intent to discriminate, the Court found a violation of the Equal Protection

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[188] *See* Evans, *supra* note 16, at 1280. For a discussion of this hurdle, *see supra* Part II.

[189] *See* Evans, *supra* note 16, at 1287.

[190] *See* Karlan, *supra* note 130, at 124.

[191] *See* Cole, *supra* note 76, at 540–41.

[192] *See* Bush v. Gore, 531 U.S. 98, 105–09 (2000). *See generally* Virginia T. Vance, Note, *Applications for Benefits: Due Process, Equal Protection, and the Right to Be Free from Arbitrary Procedures*, 61 Wash. & Lee L. Rev. 883, 911–16 (2004) (suggesting that there may be ways to applv *Bush* outside of the election context).

[193] *See* Louis Michael Seidman, *What's So Bad About* Bush v. Gore*? An Essay on our Unsettled Election*, 47 Wayne L. Rev. 953, 973 (2001).

[194] *See Bush*, 531 U.S. at 104–05; McGuinness, *supra* note 80, at 292.

[195] *See* Lapointe, *supra* note 4, at 482; *see also infra* Part III.A.

[196] *See Bush*, 531 U.S. at 110; Lapointe, *supra* note 4, at 476.

Clause.[197] In doing so, however, the Court reverted to a prior interpretation of what triggers strict scrutiny in a racial discrimination case: the disparate impact and effects test of the early 1970s, articulated in the Court's decision in *Griggs v. Duke Power Co.*[198]

The decision in *Bush* has the potential for monumental impact in the realm of EJ litigation, as the effects and disparate impacts of hazardous waste facility siting decisions have been repeatedly proven with statistical data.[199] Proving that these effects were "nonarbitrary" may provide a new hurdle in EJ litigation, as it remains unclear what standards are constitutionally required to prove arbitrariness.[200] However, this Note focuses on how the relaxed burden of proving intent in *Bush* has the potential to make the hurdle less daunting to EJ advocates.

A. *Easily Triggered Strict Scrutiny: A Reconsideration of the Equal Protection Requirements*

In *Bush*, the Supreme Court effectively decided the 2000 United States presidential election between George W. Bush, Governor of Texas and then-Vice President Al Gore.[201] On November 7, 2000, Vice President Gore won the popular vote in the presidential election, but the outcome of the Electoral College remained uncertain, dependent entirely on election results from the State of Florida.[202] Governor Bush was declared an early winner in Florida, but Vice President Gore subsequently requested a recount in the counties of Volusia, Palm Beach, Broward and Miami-Dade.[203] The recount was permissible under Florida state law, allowing either candidate to request a recount should an election appear to be decided by less than one-half of one percent of votes counted.[204]

After numerous lawsuits regarding the proper application of Florida laws in recount procedures, Vice President Gore filed a complaint in the U.S. District Court for the District of Leon County, contesting the certification of results in the Florida election and arguing that the

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[197] *See Bush*, 531 U.S. at 110.

[198] 401 U.S. 424, 436 (1971); *see* Washington v. Davis, 426 U.S. 229, 248 (1976).

[199] For a discussion of the statistical evidence, *see supra* Part III.

[200] *See* Epstein, *supra* note 3, at 286–87.

[201] *See* CHEMERINSKY, *supra* note 85, at 860.

[202] *See id.*

[203] *See id.*

[204] FLA. STAT. ANN. § 102.141(6)(a) (2002) (calling for automatic machine recounts); *see id.* § 102.166(1) (permitting manual recounts pursuant to election protest provisions).

manual recount ought to continue until all votes were counted.[205] His arguments rested on the principles clearly delineated in *McPherson v. Blacker*,[206] in which the Court held that once the state legislature vests the right to vote for presidential electors in the people, it becomes a fundamental right whereby equal weight must be accorded to each vote.[207] Vice President Gore went on to argue that by discontinuing the manual recount, whereby each vote was counted and the intent of each voter discerned, the state was, through arbitrary and disparate treatment, valuing one person's vote over that of another.[208] While he asserted that votes were being treated differently in different counties as a result of nonuniform procedures, the complaint did not ever allege that these arbitrary procedures were the result of intentional discrimination by government actors—the traditional burden of intent requirement after *Washington v. Davis* and *Arlington Heights*.[209]

The trial court decided against Vice President Gore, who subsequently appealed.[210] On appeal, the Florida Supreme Court ordered that the manual recounts continue.[211] The U.S. Supreme Court granted certiorari and oral arguments were heard on Monday, December 11, 2000.[212] The Court issued a majority opinion stopping the manual recount less than twenty-four hours later.[213] In its opinion, the Court addressed equal protection and the importance of respecting the intent of every voter.[214] The Court did not decide whether there could be variation among counties and districts regarding the recount procedures; rather, it decided whether the implementation and effect of those procedures had sufficient constitutional safeguards.[215]

The Florida Supreme Court ordered that the intent of each voter be discerned.[216] The U.S. Supreme Court reversed, finding that the

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[205] *See* Bush v. Gore, 531 U.S. 98, 100–01 (2000).

[206] 146 U.S. 1, 35 (1892).

[207] *See id.* at 35, 38–39.

[208] *Bush*, 531 U.S. at 104–05 (relying on the principle set forth in Harper v. Virginia Board of Elections, 383 U.S. 663, 666 (1966)).

[209] *See* Michael Greve, *The Equal-Protection Card: The Worst Grounds May Be the Best*, NAT'L REV. ONLINE, Dec. 11, 2000, *reprinted in* CASES AND COMMENTARY, *supra* note 1, at 260–62; Lapointe, *supra* note 4, at 476.

[210] Gore v. Harris, No. 00-2808, 2000 WL 1770257, at *1 (Fla. Cir. Ct. Dec. 4, 2000).

[211] Gore v. Harris, 772 So. 2d 1243, 1261–62 (Fla. 2000).

[212] *See* CHEMERINSKY, *supra* note 85, at 863.

[213] *See id.* at 863–66.

[214] *See* Bush v. Gore, 531 U.S. 98, 107 (2000).

[215] *See* Jonathan K. Van Patten, *Making Sense of* Bush v. Gore, 47 S.D. L. REV. 32, 56 (2002).

[216] *See Bush*, 531 U.S. at 105.

rules—or lack thereof—being used to ensure that the intent of each voter was properly discerned across all counties were insufficient to ensure voter rights under the Equal Protection Clause.[217] The Court found that since the process for determining intent was unclear, the decisions being made were arbitrary and thus the process itself was a violation of the Equal Protection Clause, permitting unequal treatment of voters.[218] Writing for the majority, Justice Scalia declared:

> [W]e are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.[219]

Without considering the intent of the Florida government when it created these procedures, the Court found that the procedure in place was a violation of the Equal Protection Clause, "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter," finding that the lack of procedural safeguards in itself was enough to trigger strict scrutiny.[220]

The Court clearly limited the decision to the facts of *Bush*, but it is unclear whether the interpretation of the requirements of equal protection may be viable as precedent in cases outside the voting rights context.[221] Voting rights questions arising under the Equal Protection Clause are traditionally analyzed using strict scrutiny as voting has been deemed a fundamental right: the same analysis generally used by the courts in reviewing allegations of racial discrimination.[222] In order to get to the strict scrutiny test in the EJ context, *Arlington Heights* made it clear that the plaintiff must first clear the intent hurdle.[223] In *Bush*, however, it appears that the Court did not consider the government's intent; instead, it immediately applied strict scrutiny, shifting the burden to the government to prove that the standards being used

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[217] *See id.* at 106–08.
[218] *See id.* at 107.
[219] *Id.* at 109.
[220] *See id.*
[221] *See* Vance, *supra* note 192, at 914–16.
[222] *See* CHEMERINSKY, *supra* note 85, at 645.
[223] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

to conduct the vote recount were uniform and nonarbitrary, based solely on the *potentially* disparate impact of the recount procedures.[224]

Bush is contextually distinct from the hazardous waste facility siting decisions challenged under the Equal Protection Clause by EJ advocates, but its holding has the potential to change the face of EJ litigation by lessening plaintiffs' heavy burden to prove discriminatory intent of government actors.[225] The Court, in reviewing *Bush*, plainly asserted that its decision was limited to the facts of the case.[226] However, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees."[227] Time pressure cannot be used as a justification for ignoring or misapplying the fundamental guarantees and safeguards of the Equal Protection Clause.[228] In making the statement "[o]ur consideration is limited to the present circumstances," the Court attempted to foreclose the possibility of using the decision as precedent outside the facts of the particular case before it.[229] It is the duty of the Court, though, to interpret the Constitution and apply it uniformly to cases or controversies arising out of questions of law.[230] The Court is bound by the decisions it makes, and "cannot simply depart from precedent and simultaneously erase that departure as if it never happened."[231]

Opinions issued by the Court cannot be declared "constitutional" and simultaneously have no precedential value, especially when a decision departs from precedent.[232] If that were the case, the Court would lose all credibility.[233] Thus, the *Bush* analysis cannot be considered entirely inapplicable outside of the voting rights context.[234] Even if the decision stands only for the holding that the Equal Protection Clause demands assurances of equal treatment and fundamental fairness, or that people—or, in this case, votes—in similar circumstances

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[224] *See Bush*, 531 U.S. at 106.

[225] *See* Lapointe, *supra* note 4, at 481–82.

[226] *See Bush*, 531 U.S. at 109.

[227] *Id.* at 108.

[228] *See id.*

[229] *Id.* at 109; *see* Lapointe, *supra* note 4, at 479–80.

[230] *See* U.S. CONST. art. III, § 2 (stating that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").

[231] *See* Lapointe, *supra* note 4, at 480.

[232] *See id.*; Foner, *supra* note 5, at 294.

[233] *See* Lapointe, *supra* note 4, at 480.

[234] *See id.*

must be treated similarly, its holding must apply uniformly to all cases unless and until it is overturned at some future date.[235]

B. *Similarities Between Voting Rights Cases and Environmental Justice Cases*

During oral arguments in *Bush*, but prior to the decision, numerous commentaries dissected the potential implications of the decision in light of the Equal Protection Clause.[236] The authors of one commentary urged that:

> if [the decision in the case] comes down for the justices to the 14th Amendment and the promise of equal protection, one can only hope for the sake of the country that they consider how not counting all the votes mirrors too closely the habits of heart and mind that brought us slavery and segregation—the original sins of our nation that the equal protection clause sought to repair.[237]

Voting rights evolved from the very guarantees of equal protection, which EJ advocates argue are ignored in hazardous waste facility siting decisions with disparate impacts on minority communities.[238]

During the height of the Civil Rights movement, the Court in *Gomillion v. Lightfoot* made clear that any voting rights statute that had the impermissible effect of "despoil[ing]" African-American citizens of their right to vote was constitutionally impermissible.[239] In *Reynolds v. Sims*, the Court found that, consistent with the "one person, one vote" principle established in *McPherson*, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[240] Subsequently, in *Harper v. Virginia Board of Elections*, the Court found that a poll tax, though neutral on its face, had the impermissible effect of discrimination based on wealth, and the brunt of this discrimination was borne by African-American citizens.[241]

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[235] *See* Vance, *supra* note 192, at 915.

[236] *See generally* CASES AND COMMENTARY, *supra* note 1, at 253–77 (compiling commentaries from various news sources).

[237] Jesse L. Jackson & John J. Sweeney, *Let the Count Continue*, WASH. POST, Dec. 12, 2000, at A47, *reprinted in* CASES AND COMMENTARY, *supra* note 1, at 272.

[238] *See* McGuinness, *supra* note 81, at 266–67.

[239] *See* 364 U.S. 339, 347 (1960).

[240] Reynolds v. Sims 377 U.S. 533, 555 (1964); *see* McPherson v. Blacker, 146 U.S. 1, 35, 38–39 (1892).

[241] *See* 383 U.S. 663, 666 (1966).

These cases demonstrate that the Court has been unwilling to uphold laws or decisions by government actors that have a disparate impact on racial lines in the voting rights context.[242] The decision in *Bush*, however, did not bring a voting rights question into play.[243] The plaintiff did not challenge an attempt by government to prohibit or restrict any citizen's right to vote.[244] Instead, the Court's decision extended equal protection to the casting and counting of votes, and "opened the door to challenging our highly inequitable system of voting. Claims of unequal treatment by voters in poorer districts are not likely to receive a sympathetic hearing from the current majority."[245] The decision also opened the door to challenges outside of the voting rights context, giving new ammunition to plaintiffs who feel that they have been wrongfully victimized on racial lines by governmental actors.[246] The Court's willingness to shift the burden to decisionmakers to justify the disparate impact of their decisions, if applied in the EJ framework, would significantly lessen the daunting proof of intent hurdle for EJ litigants.

C. *Is the EJ Movement Just One Step Behind? Triggering Strict Scrutiny in Employment Discrimination Claims*

As early as 1974, the First Circuit Court of Appeals, in a post-*Davis* but pre-*Arlington Heights* decision, recognized the need for the courts to remedy racially disproportionate impacts without proof of discriminatory intent as a major hurdle for plaintiffs.[247] In *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, an employment discrimination case involving a Massachusetts Division of Civil Service requirement that firefighters pass a written multiple-choice test before entering the firefighting academy, the court found that parties challenging an employment test for civil servants:

> [M]ust establish its disproportionate impact by demonstrating that, for whatever reason, it is more of a hurdle for minority members than for others; once this is shown, the test's proponents acquire a burden of justification and must "prove that the disproportionate impact was simply the result of a proper

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[242] *See* Lapointe, *supra* note 4, at 482.
[243] *See* Epstein, *supra* note 3, at 285.
[244] *See id.*
[245] Foner, *supra* note 5, at 294.
[246] *See* Lapointe, *supra* note 4, at 481–82.
[247] *See* Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1019 (1st Cir. 1974).

> test demonstrating lesser ability of black and Hispanic candidates to perform the job satisfactorily."[248]

The court found that objective data of disparate impact was sufficient to shift the burden to the government to substantiate the action in question.[249] The finding required for burden shifting was even stricter than the burden shifting found sufficient twenty-five years later in *Bush*—requiring only the potential for discriminatory impact to shift the burden of proof and trigger strict scrutiny analysis.[250]

The court in *Beecher* found that census figures demonstrating the disproportionately few minority members of a fire department—as compared to minority representation in the community which the department serves—were weak when used to show the discriminatory impact of the hiring exam in question.[251] However, the figures were enough to justify a burden shifting to the government actors to justify the use of the exam.[252] While the court in *Beecher* was deciding the burden of proving intent before the *Arlington Heights* standards set by the Supreme Court, this minimal showing of discriminatory impact was sufficient to require governmental justification, and the result was never overturned.[253] However, the data set forth was significantly less concrete and objective than the statistics set forth in the GAO and UCCRJ studies.[254] While courts have been consistently unwilling to recognize objective data in EJ litigation as sufficient to overcome the plaintiff's burden of proof, relaxing the *Arlington Heights* standards would allow the use if such data to overcome this burden.[255] In *Bush*, the Court applied this relaxed standard.[256] A decree from the Supreme Court, such as that in *Bush*, that even the potential for disproportionate impact violates the Equal Protection Clause, may be

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[248] *See id.* (quoting Vulcan Society v. CSC, 490 F.2d 387, 392 (2d Cir. 1973)).

[249] *See id.*

[250] *See* Bush v. Gore, 531 U.S. 98, 106–07 (2000).

[251] *See Beecher*, 504 F.2d at 1020.

[252] *See id.*

[253] In fact, courts have continued to apply the *Beecher* doctrine as viable precedent in determining the burden of intent for employment discrimination cases. *See, e.g.*, Quinn v. City of Boston, 325 F.3d 18, 29 (1st Cir. 2003) (applying the *Beecher* doctrine in an affirmative action case involving the proportionality of hiring practices relative to general community).

[254] *See* discussion *supra* Part II.C.

[255] *See* Lapointe, *supra* note 4, at 480; Foner, *supra* note 5, at 294.

[256] *See* Lapointe, *supra* note 4, at 480; Foner, *supra* note 5, at 294.

sufficient precedent to lessen the intent hurdle for EJ litigants and trigger strict scrutiny.[257]

D. *The Potential Significance of* Bush *for Environmental Justice Litigants*

The Supreme Court, in reviewing *Arlington Heights*, was confronted by a government zoning decision whose legislative history showed clear references to "social issues" as being motivating factors.[258] However, rather than using that to trigger strict scrutiny and shift the burden of proof to government to justify the disparate impact of their decision, they found that this proof was insufficient for the plaintiff to show that the government action was intentionally discriminatory.[259] In both *Bean v. Southwestern Waste Management Corp.* and *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*, reviewing courts found again that evidence of clear patterns of discrimination by government actors was insufficient to meet the plaintiffs' burden of intent.[260] If, after *Bush*, disparate impact—as evidenced by objective data supplied to the Court—is sufficient to trigger strict scrutiny and shift the burden to the government to justify its own actions, legislative history clearly referencing "social issues" as a factor in the decisionmaking would be difficult for the government to circumvent.

The Court should hold to its words under *stare decisis*, and there the showing of proof—or even the possibility—of discriminatory impact should trigger strict scrutiny.[261] This would then place the burden on government to justify its own actions, and the potential for a different outcome for EJ litigants would be immense.[262] Requiring that the government implement standards to provide "assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied," would mean that additional safeguards would be available to EJ advocates.[263] In *Bush*, the potential for disparate impacts of varying vote counting procedures was found to be a violation

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[257] *See* Lapointe, *supra* note 4, at 480; Foner, *supra* note 5, at 294.

[258] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 257–58, 270–71 (1977).

[259] *See id.* at 270–71.

[260] *See* E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp 880, 886 (M.D. Ga. 1989), *aff'd*, 888 F.2d 1573 (11th Cir. 1989); Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 677–70 (S.D. Tex. 1979).

[261] *See* Bush v. Gore, 531 U.S. 98, 109–10 (2000).

[262] *See id.*; Evans, *supra* note 16, at 1280.

[263] *See Bush*, 531 U.S. at 109.

of the Equal Protection Clause.[264] The statistical evidence, from studies such as the UCCRJ Study and the GAO Report highlight disparate impacts that are more than merely potential.[265] In both *Miller v. City of Dallas* and *Calvary Pentecostal Church v. Town of Freetown*, reviewing courts gave credibility to this type of statistical data in their site-specific analyses, but refused to allow it to suffice as strong enough to fulfill the plaintiff's burden of proving government intent.[266] The refusal of reviewing courts to grant summary judgment in favor of the government in both cases demonstrates a recent willingness to recognize the disparate impacts presented by EJ plaintiffs.[267] The redefinition of the requirements for triggering strict scrutiny under *Bush* may be just what litigants need to legitimize remedying the disproportionate siting of hazardous waste facilities in minority neighborhoods.[268]

Conclusion

The Supreme Court's decision in *Bush v. Gore* to apply an equal protection-based strict scrutiny analysis to a governmental action based upon the *potential* for racially discriminatory impact provides new hope for EJ advocates. Cases brought under the Equal Protection Clause for discriminatory siting of hazardous waste facilities, as proven by objective data from numerous studies, have been unsuccessful because of the heavy burden of proof after *Arlington Heights v. Metropolitan Housing Development Corp.* that plaintiffs establish by affirmative, positive evidence—more than objective studies—of government's intent to discriminate in decisionmaking.

The decision in *Bush* reverts back to a standard previously announced by the Court in *Griggs Griggs v. Duke Power Co.* which considered disparate impact as sufficient to overcome the burden of proof. While the *Bush* decision was made under immense time pressure, and was self-declared to have no precedential value, it is in line with a general tendency of reviewing courts to depart from the strict standard in *Arlington Heights*. Thus, while the decision may claim to have no precedential value, it provides new insight for EJ advocates seeking to

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[264] *See id*. at 109–10.

[265] *See* GAO Report, *supra* note 12; UCCRJ Study, *supra* note 12. For a discussion of the findings of these studies, see *supra* Part II.

[266] *See* Miller v. City of Dallas, No. CIV.A 3:98-CV-2955-D, 2002 WL 230834, at *8–9 (N.D. Tex. Feb. 14, 2002); Hoffer, *supra* note 153, at 982–83; *supra* Part II.C.

[267] *See Miller*, No. CIV.A 3:98–CV–29550D, 2002 WL 230834, at *8–9 (N.D. Tex. Feb. 14, 2002): Hoffer, *supra* note 153, at 984.

[268] *See* Mitchell, *supra* note 6, at 183; Godsil, *supra* note 6, at 410.

remedy the disproportionate burden of hazardous waste facilities in low-income and minority communities and should be a starting point in future Equal Protection Clause litigation.