6-1-1993

Inequitable Siting of Undesirable Facilities and the Myth of Equal Protection

Rodolfo Mata

Follow this and additional works at: http://lawdigitalcommons.bc.edu/twlj

Part of the Civil Rights and Discrimination Commons, and the Environmental Law Commons

Recommended Citation

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
INEQUITABLE SITING OF UNDESIRABLE FACILITIES AND THE MYTH OF EQUAL PROTECTION

I. INTRODUCTION

When former California Governor George Deukmejian and the state legislature proposed to build a state prison in the City of Los Angeles, the tremendous public outcry from local residents caught them by surprise. After years of absorbing undesirable facilities, many people living near the proposed site felt that they should not play host to another. One group of residents, Mothers of East Los Angeles, launched an organized attack against the Governor’s proposal that has put the prison’s future in doubt; in addition, they, along with other plaintiffs, brought suit against the state to stop, or at least delay, the prison’s construction. These residents feel that the state government discriminates against their neighborhood because of its large percentage of poor working-class Mexican-American residents.


2 An undesirable facility is a facility “that everyone thinks we ought to have . . . : airports, prisons, landfills, power plants and even low-income housing. All are generally thought essential to society—and yet widely opposed wherever they threaten to alight.” MICHAEL O’HARE ET. AL., FACILITY SITING AND PUBLIC OPPOSITION 1 (1983).

East Los Angeles residents, for example, have been subjected to several disruptive urban construction projects, including five freeways “gouging” through the eastside; several high rise buildings; and the construction of Dodger Stadium, requiring the bulldozing of old Mexican neighborhoods. See del Olmo, supra note 1, at 5. See also Keith v. Volpe, 618 F. Supp. 1132 (D.C. Cal. 1985), aff’d, 858 F.2d 467 (9th Cir. 1988) (residents in the path of a proposed freeway (Caltrans) filed an environmental and civil rights lawsuit against state and federal government officials).

3 See George Ramos & Gabe Fuentes, One Suit Filed, Another OKd to Oppose Prisons, L.A. TIMES, Jan. 12, 1990, at 3B.

4 See id.; Telephone Interview with Keith Pritsker, Attorney for the City of Los Angeles (Feb. 7, 1992); Telephone Interview with Frank Villalobos, Community Activist, Los Angeles, Cal. (Feb. 10, 1992).

5 While community leaders such as Juana Gutierrez assert that undesirable facilities are being located disproportionately in poor latino communities in Los Angeles, the suit alleges that the state failed to submit an adequate environmental impact report (EIR) that accounts for all potential hazards of the prison. See Ramos & Fuentes, supra note 3, at 3; Louis Sahagun, The Mothers of East L.A. Transform Themselves and Their Neighborhood, L.A. TIMES, Aug. 13, 1989, part 2, at 1. According to an attorney with the city of Los Angeles, the suit challenges the EIR and does not address the discrimination issue because proving discriminatory purpose in a court of law would be too difficult. Telephone Interview with Keith Pritsker, Attorney for the City of Los Angeles (Feb. 7, 1992).
In New York City, a group calling itself the Coalition of Bed­ford-Stuyvesant Block Association (Coalition) also attempted, but failed, to stop the conversion of an armory in the Bedford-Stuyves­ant section of Brooklyn into a shelter for homeless men. The Coalition and other community groups continue to oppose the dumping of such “social ills,” including an AIDS hospice, a meth­adone clinic, and a jail, in their predominantly black community.

Communities composed primarily of underrepresented persons frequently have been chosen to host undesirable facilities. Although there are many issues of concern planners and developers face in choosing a particular location to site a facility,

---


9 “Planners and developers” refer to persons generally responsible for siting decisions. This may include locally elected officials.

10 See O’HARE, supra note 2, at 1–2, 4. Although socioeconomic status plays a role in undesirable facility siting, the UCC Report concluded that “race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities [across the United States].” UCC REPORT, supra note 8, at xiii.
the site selection process often follows a "path of least resistance." More often than not, this path leads to minority communities where political resistance may be ineffectual, resources to fight a protracted legal battle may be lacking, and public awareness may be limited. These communities must then absorb the negative costs associated with undesirable facilities.

Based on the conclusions of several recent studies, underrepresented persons living in communities disproportionately burdened with undesirable facilities may be victims of race discrimination. Because federal, state, and municipal officials participate in siting procedures, persons living in these communities who may be victims of discrimination are potentially entitled to relief under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This Note argues, however, that the burden of establishing a violation of the Equal Protection Clause is so onerous that equal protection is incapable of affording relief to those who may be victims of discrimination in the context of facility siting. Without the possibility of relief based on equal protection,


12 BULLARD, supra note 8, at 4. See Russell, supra note 11, at 25–26. Minority communities have been especially attractive to siting committees because the communities often lack the political and economic power needed for opposition—they are "paths of least resistance" in that these communities are easier targets for siting than white affluent communities. See Russell, supra note 11, at 24.

13 In Facility Siting and Public Opposition, the authors Michael O'Hare, Lawrence Bacow, and Debra Sanderson suggest that communities be reimbursed for assuming negative factors associated with an undesirable facility. See supra note 2, at 68–73. They propose that in exchange for siting an undesirable facility in a particular community, the developer should compensate the community for assuming the negative externalities. In this manner, the host community is "paid" for assuming the externalized costs and risks of the undesirable facility. Id.

The compensation approach is unfair, however, because many minority communities need the items used as inducements even before assuming the risks of an undesirable facility. See BULLARD, supra note 8, at 102. Moreover, the communities may exchange their health and neighborhood ambience for a package that may not materialize or adequately compensate for losses. See id. In an interview with community leader Charles Streudit, Bullard quoted Streudit as saying: "Sure, Browning-Ferris Industries [owner of Whispering Pines Landfill in Houston, Texas], pays taxes, but so [does our black community]. . . . But we shouldn't have to be poisoned to get improvements for our children." Id. at 94. New York City, for instance, located the city's largest sewage-treatment plant in West Harlem in exchange for the construction of a state park on the roof of the facility. Austin & Schill, supra note 8, at 70. While the plant is in operation, the park has yet to be completed. Id.

14 See UCC REPORT, supra note 8, at xiii; GAO REPORT, supra note 8, at 1.

15 See generally Godsil, supra note 8, for a discussion on the use of the Equal Protection Clause and Civil Rights Act in cases alleging discrimination in the siting of commercial hazardous waste facilities.
efforts by minority communities to fight against unfair siting practices are reduced to “not in my backyard” (NIMBY) tactics.\textsuperscript{16} Communities claiming discrimination in the siting process are addressing a problem rooted deep in this country’s social and political structures—they are not just using NIMBY to oppose a specific facility at a specific site.\textsuperscript{17}

Central to the siting controversy is the siting process itself, which is lengthy, involves many parties, and requires the combined skills of various professionals.\textsuperscript{18} Siting practices, which are conducted usually in accordance with state siting statutes,\textsuperscript{19} are highly susceptible to political forces.\textsuperscript{20} An active and aware coalition of local residents and community leaders opposing the siting of an undesirable facility can derail a project or at least discourage consideration of a community as a potential site.\textsuperscript{21} Although an in-


\textsuperscript{17} The disproportionate impact of undesirable facilities on poor and non-white communities also may be a global phenomenon. For example, the United Nations recently alleged that a Swiss and an Italian firm entered into an agreement with Somalia to dump up to 550,000 tons of waste in that country. Associated Press, Two firms plan to dump toxic waste in Somalia, UN says, BOSTON GLOBE, Sept. 11, 1992, at 5. Other articles and authorities have noted environmental and social problems associated with developed nations using developing countries as waste dumps. See generally Julienne I. Adler, Symposium Issue on the Selection and Function of the Modern Jury: Comment: United States’ Waste Control Program: Burying Our Neighbors in Garbage, 40 AM. U.L. REV. 885 (1991); Theresa A. Wallbaum, America’s Lethal Export: The Growing Trade in Hazardous Waste, 1991 U. ILL. L. REV. 889 (1991); Charles Lee, Address at the Boston College Diversity Month Racism and the Environment Speaker Series (Mar. 3, 1992) (transcript on file with the Boston College Third World Law Journal) [hereinafter Lee Address].

\textsuperscript{18} See O’HARE, supra note 2, at 6–9.


\textsuperscript{20} See O’HARE, supra note 2, at 6–9. Belknap Data Solutions conducted a study to investigate the factors governing the decisions of 1000 of the largest U.S. industrial corporations on locating new facilities. BELKNAP DATA SOLUTIONS LTD., FACILITY LOCATION DECISIONS Introduction (1977). The study reported that “[h]alf the companies [surveyed] have concealed their identities when looking for new locations . . . .” Id. at 1. Although control of the site price was the primary reason for concealing identity, the next major reason was “to avoid nuisance of phone calls, salesmen, pressure from site location committees, etc.” Id. at 23. See also Roger W. Schmenner, MAKING BUSINESS LOCATION DECISIONS 19 (1982) (discussing how a business searching for a new location makes “discreet” or “anonymous” contact with potential host communities).

\textsuperscript{21} Some communities have been successful in defeating proposals for the siting of un-
depth description of various siting mechanisms is beyond the scope of this Note, an assumption underlying the Note’s discussions is that siting processes in general are highly complex and subject to an infinite number of influences.\textsuperscript{22}

This Note uses the on-going debate over the disproportionate impact of facilities such as incinerators and hazardous waste dumps on minority communities as a model for other similarly undesirable facilities. Although most, if not all, published reports on the disproportionate impact of undesirable facilities on minority communities focus on hazardous waste sites, the same discrepancies may exist in other contexts such as the siting of prisons, airports, highways, housing projects, sewage treatment plants, and homeless shelters.

Part II presents the findings of various studies that document the disproportionate siting of undesirable facilities in communities composed primarily of underrepresented persons. Part III sketches the development of the equal protection doctrine. Part IV discusses cases where plaintiffs have used, unsuccessfully, the equal protection doctrine to challenge discrimination in facility siting. These claims faltered in court because the plaintiffs could not adequately prove discriminatory purpose. Part IV also discusses an alternate equal protection analysis in which a court would apply heightened scrutiny where the historical and social contexts of siting statutes, siting decisions, and environmental impacts demonstrate racial bias. Finally, the Note concludes that the present equal protection doctrine is ineffective for addressing discrimination in the context of siting undesirable facilities because it requires an unrealistically high burden of proof. Without some form of judicial intervention, persons suffering from what may be discriminatory siting practices remain vulnerable and must fend for themselves against possibly insurmountable odds.

\textsuperscript{22}See generally Canter, supra note 19; Duffy, supra note 19.
II. Framing the Problem

Undesirable facilities have external costs: they negatively impact the health, safety, and general welfare of residents, and devalue neighboring property.23 Such facilities may affect adversely the ambiance of any neighborhood. Because the whole of society benefits from these facilities, all should bear equally the social costs associated with their construction and operation. According to the findings of numerous studies and authorities, however, equal distribution of costs does not occur.24

In a 1983 United States General Accounting Office study (GAO Report), the GAO found a relationship between the siting of off-site hazardous waste landfills and the racial makeup of surrounding and host communities in several southern states together known as the Environmental Protection Agency's (EPA) Region IV.25 The objective of the GAO Report was to determine the correlation between the location of hazardous waste landfills and the racial and economic status of surrounding communities in Region IV.26 The GAO Report found that blacks made up the majority of the population in three of the four communities where the four off-site hazardous waste landfills in Region IV are located.27 The findings of the GAO Report, along with other developments in issues surrounding the siting of hazardous waste facilities in racial communities,28 led to a 1986 study conducted by the United Church of Christ Commission for Racial Justice (UCC Report).

The UCC Report is perhaps the most comprehensive and conclusive study regarding the disproportionate impact of hazardous waste facility siting practices on minority communities. The UCC Report, supra note 8, at xiii; GAO Report, supra note 8, at 1; see also National Law Journal Study, supra note 8, at S2; Lee Address, supra note 17.

24 UCC Report, supra note 8, at xiii; GAO Report, supra note 8, at 1; see also National Law Journal Study, supra note 8, at S2; Lee Address, supra note 17.
25 GAO Report, supra note 8, at 1–2. Off-site hazardous waste landfills are those which dispose of hazardous waste generated at facilities remote to the landfill. On-site waste disposals are located where the hazardous wastes are generated, such as at industrial and manufacturing plants. The EPA Region IV is composed of the following eight states: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. Id.
26 Id. at 2.
27 Id. at 1.
28 A 1982 demonstration in opposition to the siting of a hazardous waste facility in Warren County, North Carolina, helped direct the focus of the UCC Report towards studying the relationship between hazardous waste facilities and race. UCC Report, supra note 8, at xi–xii.
Report found that race was the most significant variable associated with the siting of commercial hazardous waste facilities. This finding was consistent across the United States.

In 1990, the EPA conducted a study on environmental equity (EPA Equity Report). The EPA Equity Report found that racial minorities experience differences in exposure to pollutants and are subject to discrepancies in the siting of undesirable facilities. Although the study concluded that there were limited data explaining the environmental contribution to differences in disease and death rates among racial groups, the study found that underrepresented persons and low-income populations experienced greater exposures to pollutants and waste facilities.

---

29 Id. at xiii.
30 Id. The UCC Report examined two cross-sectional studies on demographic patterns associated with commercial hazardous waste facilities and uncontrolled waste sites. Id. at 9. The first study revealed that "the minority percentage of the population in relation to the presence of commercial hazardous waste facilities was statistically very significant." Id. at 13. Additionally, the UCC found that communities with the highest number of commercial hazardous waste facilities also had the greatest composition of minority residents. Id. at xiii. Furthermore, in communities with two or more facilities or one of the nation's five largest landfills, the average percentage of underrepresented persons of the population was 38%, whereas in communities without facilities the figure was 12%. Id. (the report noted that "race" was measured by "minority percentage of the population"). Race also played a more significant role in the siting of commercial hazardous waste facilities than socioeconomic status. Id. The second study found a widespread presence of uncontrolled toxic waste sites in communities composed primarily of underrepresented persons. Id. at xiv. Uncontrolled waste sites are those that are closed and abandoned. Id. at xii.

Since the Commission published the UCC Report, racism in the environment has surfaced as an important and high profile issue in this nation's environmental and civil rights debate. Lee Address, supra note 17. For example, the United Church of Christ sponsored the first National People of Color Environmental Leadership Summit in October 1991 in Washington, D.C. UNITED CHURCH OF CHRIST, PROGRAM GUIDE: THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (1991).

31 EPA EQUITY REPORT, supra note 8, at 2; All Things Considered (National Public Radio broadcast, Feb. 8, 1992) [hereinafter All Things Considered].

32 See EPA EQUITY REPORT, supra note 8, at 12–15.

33 Id. at 11, 12–15. Robert Wilcott of the EPA claims, however, that economic factors and not racism are responsible for inequities in undesirable facility siting. All Things Considered, supra note 31. Wilcott claims that firms making siting decisions do not operate "strictly from a racial targeting basis," but base them on efficiency considerations such as land cost. Id.

The EPA's findings were subject to a critical attack by California Congressman Henry A. Waxman, chairman of the House Health and the Environment Subcommittee, when preliminary results were first publicized. In a news release issued by Congressman Waxman, he criticized the EPA Equity Report for "driving a wedge between activist groups and traditional civil rights organizations [by] show[ing] no appreciation of the serious environmental threats faced by minority communities." Congressman Henry A. Waxman News Release, Environmental Equity Report is Public-Relations Ploy, Feb. 24, 1992 (transcript on file with the Boston College Third World Law Journal) [hereinafter Public-Relations Ploy].
These studies reveal the disproportionate siting and impact of undesirable facilities in communities composed primarily of underrepresented persons. The findings reflect a national pattern and indicate that the way local governments site undesirable facilities is socially unjust: race is somehow related to how costs associated with undesirable facilities are distributed. At the very least, these communities are entitled the same treatment as their white cohorts pursuant to the equal protection doctrine.

III. THE MODERN EQUAL PROTECTION DOCTRINE

The Fourteenth Amendment provides in pertinent part that "[n]o state shall . . . deny to any person within its jurisdiction the..." Congressmen Waxman also accused the EPA of "being concerned about appearances, not substance." Id.

In a related but separate staff report, Waxman summarized EPA internal agency documents showing that the confidential EPA "communications plan" for the EPA Equity Report promotes an objective that conflicts with the stated purpose of the EPA Equity Report. Henry A. Waxman, Staff Report, The Real Story Behind EPA's Environmental Equity Report: An Evaluation of Internal EPA Memoranda, Feb. 24, 1992 (no page numbers) (transcript on file with the Boston College Third World Law Journal). Congressman Waxman claims that the Equity Report is "less than candid about EPA's track record" and that the EPA has resisted "initiatives to address proven instances of disproportionate impact." Id. Waxman alleges that the EPA fears environmental equity would become "one of the most politically explosive environmental issues yet to emerge." Public Relations Ploy, supra. The EPA's confidential "communication plan," according to Waxman, was designed to prevent the issue from reaching a "flash point" by winning over mainstream environmental groups while simultaneously slighting grassroots groups. Id.

Even in the enforcement of federal environmental laws, underrepresented persons are more prone to unequal treatment than their white counterparts. Moreover, this unequal treatment is influenced more by race than by income, according to a recent study of United States environmental lawsuits concluded in the past seven years. National Law Journal Study, supra note 8, at S2. The National Law Journal Study produced several findings based on a computer-assisted analysis of census data, the civil court docket of the Environmental Protection Agency, and the agency's own performance record at 1,177 toxic waste sites slated for cleanup pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (also known as CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (1988). The study found that penalties under hazardous waste laws at sites with the greatest white populations were about 500% higher than penalties at sites having the greatest population of underrepresented persons. National Law Journal Study, supra note 8, at S2.

Under Superfund, abandoned hazardous waste sites in areas occupied by underrepresented persons take 20% longer to be placed on the national priority action list than those in white areas. Id. Furthermore, action on cleanup at Superfund sites occupied by underrepresented persons begins from 12% to 42% later than at sites occupied by whites. Id. Finally, at sites occupied by minorities, the EPA chooses "containment"—the capping or walling off of a hazardous dump site—seven percent more often than the cleanup method preferred under the law—permanent treatment. Id. On the other hand, the EPA orders permanent treatment rather than containment 22% more often at white sites. Id.
equal protection of the laws." Congress enacted the Fourteenth Amendment in 1868 to address racial discrimination against blacks. The modern Supreme Court often has stated that a law alleged to be racially discriminatory must have a racially discriminatory purpose. Accordingly, a racially disproportionate impact created by governmental action is not unconstitutional per se—discriminatory purpose must still be shown.

---

35 U.S. Const. amend. XIV, § 1.
38 Id. There are two types of discrimination associated with governmental action: de jure and de facto. Gunther, supra note 36, at 687–88. De jure discrimination occurs when a law, though neutral in language and application, is enacted with a purpose or motive to discriminate. Id. at 687. De facto discrimination refers to "governmental action that is racially neutral in its language, administration, and purpose but which has a disadvantaging impact or effect." Id. As Gerald Gunther, professor of law at Stanford University, has noted, in modern cases that allege non-obvious purposeful discrimination (such as in the siting of undesirable facilities) of either form (de jure or de facto), the central issues concern what data are important and what burdens of proof apply to the challenger and the government. Id.

Under equal protection analysis, there are varying degrees of judicial scrutiny. Under rationality analysis, a challenged law or state action neutral on its face must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" in order to be constitutional. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); see also Gunther, supra note 36, at 594. Where a challenged law or state action treats groups differently on the basis of race, the standard of judicial review is strict scrutiny. See Korematsu v. United States, 323 U.S. 214, 216 (1944). Under strict scrutiny analysis, "to pass constitutional muster, [the law or state action] must be justified by a compelling governmental interest [and be necessary to accomplish a] legitimate purpose." Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984). Between these two standards lies intermediate (heightened) scrutiny, whereby a governmental action must serve "important" objectives and "must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). The standard is "intermediate" with respect to both ends and means: where ends must be "compelling" to survive strict scrutiny and merely "legitimate" under [rationality analysis], "important" objectives are required here; and where means must be "necessary" under [strict scrutiny] and merely "rationally related" under [rationality analysis], they must be "substantially related" to survive the "intermediate" level of review. Gunther, supra note 36, at 591.

A facially neutral law, however, may effect purposeful discrimination through its administration. Id. at 688 (discussing Yick Wo v. Hopkins, 118 U.S. 356 (1886)). Although in Yick Wo statistical data were sufficient to demonstrate purposeful discrimination, instances of such conclusive data are rare. Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1976). Since Yick Wo, the use of statistical and other empirical data allegedly showing purposeful discrimination has been commonplace, though "controversial," because the Court is not clear as to how much data is adequate to show purposeful discrimination. Gunther, supra note 36, at 689.

In modern cases, the Court has often discussed "improper motive" (discriminatory intent)
Prior to 1976, many lower courts believed that *de facto* discrimination, like *de jure* discrimination, was unconstitutional. This belief was due largely to the manner in which the Supreme Court handled discrimination claims based on congressional statute. For example, in *Griggs v. Duke Power Co.*, former Chief Justice Burger stated that the Civil Rights Act of 1964 "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." The Court found that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." A year later, however, the Court rejected a *de facto* discrimination claim in *Jefferson v. Hackney*. The Court refused to accept the appellants' theory that disproportionate impact alone was sufficient to prove unconstitutional discrimination because such an acceptance "would render suspect each difference in treatment among . . . classes, however lacking in racial motivation and however otherwise rational the treatment might be." The Court indicated that substituting "effect" for "purpose" would render unconstitutional under the Fourteenth Amendment most legislative efforts to address social problems through welfare programs.

The Supreme Court clarified its stand on the requisite proof requirements for discrimination claims under the Fourteenth Amendment in the 1976 case, *Washington v. Davis*. The Court indicated that disproportionate impact alone was insufficient to prove discrimination, though it may be evidence of discriminatory

---

39 GUNTHER, supra note 36, at 691.
41 *Id.* at 431. In *Griggs*, the plaintiff challenged the legality of intelligence tests and high school diploma requirements for job applicants. *Id.* at 425–26. Griggs alleged that the employment discrimination provision of the Civil Rights Act of 1964 prohibited these job requirements. See *id.*
42 *Id.* at 432 (emphasis in original).
43 406 U.S. 535 (1972). Appellants challenged the constitutionality of applying a lower percentage reduction factor (to determine standard of need) to Texas recipients of Aid to Families With Dependent Children than that applied to those recipients of assistance pursuant to other programs (there was a higher proportion of minorities among the AFDC recipients than in the other groups). *Id.* at 537–38.
44 *Id.* at 548.
45 See *id.* at 548–49; GUNTHER, supra note 36, at 692.
Thus, proving discrimination in the siting process of an undesirable facility requires proof of discriminatory purpose.

*Village of Arlington Heights v. Metropolitan Housing Corporation*\(^48\) reaffirmed *Washington v. Davis* and also attempted to define what would meet the purposeful discrimination standard. In *Arlington Heights*, the plaintiff sued a Chicago suburb for refusing to rezone certain property from single-family to multi-family use.\(^49\) A non-profit developer wanted to build federally subsidized housing units in a predominantly white suburb.\(^50\) The housing would have attracted low and moderate income tenants, including minorities. At the trial level, the court found that concerns for preserving the zoning plan’s “integrity” were responsible for the refusal, and not social hostility.\(^51\) The court of appeals reversed the decision and held that the refusal was unconstitutional because its “ultimate effect” was racially discriminatory.\(^52\) Justice Powell, however, rejected the court of appeals’ reliance on effect rather than purpose because effect alone did not prove a sufficiently discriminatory purpose.\(^53\) Nevertheless, the Court indicated that disproportionate impact was a good starting point for an inquiry into discriminatory purpose.\(^54\)

Powell outlined various inquiries for determining and proving discriminatory purpose. These include queries into the impact of the official action, historical background, sequence of events, departures from normal decision-making processes, and legislative history.\(^55\) The historical background of the state’s decision or action may reveal “a series of official actions taken for invidious purposes.”\(^56\) The specific series of events preceding the disputed decision or action also may reveal invidious discrimination in the state’s actions.\(^57\) Evidence of departure from standard decision-making procedures also may indicate improper purpose, as will substantive departures, especially if factors ordinarily held important by challenged decision-makers “strongly favor a decision contrary to the

---

\(^{47}\) See id. at 242.


\(^{49}\) Id. at 254.

\(^{50}\) Id. at 254–55.

\(^{51}\) Id. at 259.

\(^{52}\) Id. at 259–60

\(^{53}\) Id. at 264–65. See also *Washington v. Davis*, 426 U.S. 229, 244–45 (1976).


\(^{55}\) Id. at 267–68.

\(^{56}\) Id. at 267.

\(^{57}\) Id.
one reached." The Court indicated that the legislative or administrative history might be important, such as minutes of the decision-making body. These written histories can shed light on discriminatory purpose hidden in the legislators' actions or decisions. The Court concluded its suggestions for other evidentiary inquires by noting that the list was not exhaustive.

The answers to these queries may provide sufficient evidence that discriminatory purpose "was a motivating factor," that is, that there is an inference of discriminatory purpose in the defendant's decision. If so, the burden shifts to the defendant to show that the same decision would have resulted even without discriminatory purpose. If the defendant were successful in meeting this burden, then no purposeful discrimination would be found.

Showing discriminatory purpose in an equal protection claim is a difficult burden to carry, as exemplified by McCleskey v. Kemp. In McCleskey, the defendant was sentenced to death for murdering a white police officer during the course of an armed robbery. In McCleskey's petition for a writ of habeas corpus, he included a claim—based on the Baldus Study—that the Georgia capital sen-

58 Id.
59 Id. at 268.
60 Id.
61 See id. at 270
62 Id. at 270–71 n.21.
64 McCleskey, 481 U.S. at 283.
65 The results of this study are published in David C. Baldus et al., Equal Justice and the Death Penalty (1990).
tencing process was administered in a racially discriminatory manner in violation of the Fourteenth Amendment.66

Justice Powell's majority opinion, however, refused to accept the Baldus Study results as proof of discriminatory purpose because the proof was not "exceptionally clear."67 The plaintiff failed to prove both that the death penalty was imposed "because of" and not "in spite of" the ethnicity of the condemned, and that the Georgia legislature maintained capital punishment because of the racially disproportionate impact.68 The Court did not infer discriminatory purpose even in the face of the compelling findings of the Baldus Study.

As case law suggests in Davis, Arlington Heights, and McCleskey, the equal protection doctrine has evolved to require a high standard of proof in discrimination cases. Showing discriminatory effect is usually no longer sufficient to prove discriminatory purpose in most every instance. Because discriminatory purpose is difficult to prove, plaintiffs in several cases have discovered that modern equal protection is not a viable source of relief for those who may be suffering from discriminatory siting practices.

IV. MODERN EQUAL PROTECTION DOCTRINE IN THE CONTEXT OF SITING PROCESSES

A. Case Law

In Bean v. Southwestern Management Corporation,69 the plaintiffs requested a preliminary injunction contesting a decision by the Texas Department of Health (TDH) to grant Southwestern Waste Management (SWM) a permit to operate an undesirable facility at the edge of the City of Houston.71 The plaintiffs contended that the decision to locate the facility in their predominantly black

66 McClesky, 481 U.S. at 286. The Baldus Study researchers studied over 2000 murder cases that occurred in Georgia during the 1970s. Id. at 286. The raw figures showed disparities in the imposition of the death penalty, with higher occurrences where victims were white and defendants were black. See id. at 286–87. The Baldus Study researchers found similar discrepancies in death penalty rulings even after taking into account 230 variables that could have explained the disparities on non-racial grounds: black defendants charged with murdering white victims still were more likely to be given the death sentence. Id.
67 Id. at 297.
68 Id. at 298.
69 482 F. Supp. 673 (S.D. Tex. 1979), aff'd without opinion, 782 F.2d 1038 (5th Cir. 1986).
70 Browning-Ferris Industries, Inc. (BFI) was also a defendant. Id. at 676.
71 Id. at 674–75 (the facility was a solid waste facility).
neighborhood and adjacent to a high school with no air-conditioning, was partly motivated by racial discrimination in violation of 42 U.S.C. § 1983.72

The plaintiffs presented two theories of liability.73 The first suggested that TDH's permit approval was part of a pattern of discrimination in the placement of solid waste sites.74 When the court reviewed the data produced by the defendants, however, it did not find a pattern of discrimination. Nevertheless, the court did recognize that if more detailed data had shown that facilities in predominantly white communities were located in minority neighborhoods, such data may have proved discriminatory intent.75 The plaintiffs' second theory of liability alleged that TDH's permit approval process was tainted with discrimination.76 The plaintiffs presented three sets of data that the court found convincing "at first blush," but after further analysis, the court determined that the data were not enough to prove discriminatory intent.77

The court included in the opinion several unanswered questions for the plaintiffs to pursue if they continued their legal actions.78 For example, the court indicated that the plaintiffs should determine the exact locations of solid waste facilities within each...
census tract to show whether the sites were located primarily next to minority neighborhoods within predominantly white tracts. The court indicated that the plaintiffs should delineate more carefully the boundaries of the area affected by the undesirable facility, and that they should inquire into the site selection process itself. If the plaintiffs discover that the private contractors considered many possible sites, the plaintiffs could analyze the various choices to see if any patterns of discrimination were apparent. Finally, the plaintiffs should investigate the factors that influenced TDH's decision to grant the permit. While the court considered these questions “unanswered,” it did not indicate how much additional data favoring the plaintiff’s case would be sufficient to infer that the decision was motivated by a discriminatory purpose.

In Coalition of Bedford-Stuyvesant Block v. Cuomo, the court similarly held that the plaintiff failed to show discriminatory purpose. The City of New York, in attempting to fulfill its “legal and moral” responsibilities to supply shelters for the homeless, proposed to construct a shelter in Brooklyn. The Coalition of Bedford-Stuyvesant Block Association (Coalition) submitted an application for a preliminary injunction to halt construction of the undesirable facility, alleging that the siting decision intentionally discriminated against black and Hispanic residents in placing an additional shelter for the homeless in the Sumner Avenue Armory. The plaintiffs alleged that the siting process reflected a “pattern and policy of racial discrimination.” Because of this pattern, the plaintiffs claimed that the city located all except one city shelter in the Stuyvesant area of Brooklyn. The plaintiffs claimed that such discrimination violated their rights under laws such as the Fourteenth Amendment and 42 U.S.C. § 1983. They sought to enjoin the city from building or placing any persons within shelters in North and Central Brooklyn, particularly in the Sumner Avenue Armory.

79 Id.
80 Id. If discovery reveals that the impact is felt beyond the census tract, they can make a larger target area analysis; or, if the impact is limited, they can reduce the target area focus accordingly. Id.
81 Id.
82 Id.
84 Id. at 1205.
85 Id. at 1206.
86 Id.
87 Id.
88 Id.
89 Id. At the time this case was litigated, there were 18 community districts in Brooklyn,
The court first addressed the discrimination claim, equating discrimination with disparate impact. The court stated that a disproportionate impact, inferred from statistics, is a form of discrimination when the disproportionality is “significant.” With respect to the plaintiffs’ claims, the court said that to show discrimination in the shelter siting process, the plaintiff had to consider the entire city in the statistical analysis. To that end, the court found the plaintiffs’ evidence, which was limited to statistical data on Brooklyn, inconclusive. The court indicated that the data were inaccurate, failed to show disparate impact, and were inappropriate because they were not based on city-wide impact. The court concluded that the figures presented by the plaintiff did not demonstrate a “significant disparity” between the number of shelters located in primarily white and predominantly minority districts.

The court emphasized that a plaintiff must establish intentional or purposeful discrimination in the defendants’ site selection decision even if discriminatory effect were shown. In the end, the court dismissed the plaintiff’s case, which was based solely on statistical data.

Of which eight had a white majority population. Of the six shelters for the homeless located in Brooklyn, four were located in community districts with few whites and one was located in a white majority district. The second largest shelter in Brooklyn, sheltering over 30% of Brooklyn’s homeless, was located in a district with an almost 50% white population. In addition, two of the city’s five family shelters were in Brooklyn.

The city-wide shelter information for that time showed that 38 of the city’s 59 districts contained either shelter sites for homeless persons, families, or both. Of the 38 districts, 16 had a white majority, and half of these 38 had a population which was at least 40% white. The largest “singles” shelter in the system was located in Manhattan where the population was 84.2% white.

The homeless family figures showed that 16 of the 25 districts sheltering such families had a population of at least 40% white, 12 had a population of over 50% white, and 11 had a population of over 60% white. Manhattan, a predominantly white area, hosted over 25% of all such families housed by the city at that time. The court also indicated that 47.4% of the homeless families were housed in the 12 districts with a majority white population. Referring to 1980 census figures, minority districts hosted almost 40% of all homeless, whereas primarily white districts hosted 44.6% homeless, and mixed districts, 14.6%. Id. at 1206–07.

90 Id. at 1209 (citing De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979)).

91 Id. (citations omitted).

92 Id.

93 Id.

94 Id. at 1210.

95 Id. (citing Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)). The plaintiff had to show that the defendants selected the Brooklyn site at least in part “because of” and not merely “in spite of” the negative impact on the minority communities alleging discrimination. Id.
tistical analysis, because it failed to establish an inference of discriminatory purpose.96

Coalition demonstrates the impossibility of proving discriminatory purpose using only statistical analysis in complex issues such as alleged discriminatory siting practices. But even when a plaintiff uses both statistics and supplemental evidence as that suggested in Arlington Heights and Bean, showing that a decision was motivated by a discriminatory purpose is difficult. For example, the plaintiffs in East Bibb Twiggs v. Macon-Bibb County Commission relied on such evidence yet were unable to prove discriminatory purpose.97

In East Bibb Twiggs, the plaintiffs alleged that the decision of the Macon-Bibb County Planning and Zoning Commission (Commission) to site an undesirable facility98 in a predominantly black community was motivated in part by racial considerations.99 The Commission initially denied a conditional use application for the operation of the facility after concluding that the facility would be sited next to a residential area; that the area would be subject to heavy truck traffic which would increase noise in the area; and that the additional traffic and noise would be "undesirable" in a residential area.100 After a rehearing, however, the Commission reversed its decision and granted the applicants permission to site the undesirable facility at the disputed location.101

The court held that the plaintiffs failed to prove that discriminatory purpose was a motivating factor behind the Commission's siting decision.102 Using the Arlington Heights criteria as a basis for equal protection analysis, the court dismissed the plaintiff's disparate impact analysis by noting that the siting of any undesirable facility necessarily would have a disproportionate impact on the community in which it is located.103 The court reasoned that because blacks comprise the majority of the population in the community in question, they would absorb most of the facility's externalities. Another decision by the Commission which resulted in the siting of a similar facility in a predominantly white community prompted
the court to dismiss any siting pattern explainable on racial
grounds.\textsuperscript{104} Still, the plaintiffs argued that the district was composed of approximately 70\% black residents, notwithstanding the majority white community within the district to which the court referred.\textsuperscript{105}

The court found no suggestion of discrimination in the Commission's history of decisions even though the plaintiffs introduced numerous newspaper articles that allegedly showed a series of actions taken by the Commission for discriminatory purposes.\textsuperscript{106} Nor did the court infer discrimination in the Commission's decision-making process even though the plaintiffs showed that the Commission was aware of racial and socioeconomic discrimination in the community.\textsuperscript{107} The court also found that the administrative history contained no inference of discriminatory purpose even in light of the Commission's decision to site the undesirable facility after the initial denial.\textsuperscript{108}

Like the plaintiffs in \textit{East Bibb Twiggs}, the plaintiffs in \textit{R.I.S.E. v. Kay}\textsuperscript{109} were unable to provide evidence from which discriminatory purpose could be inferred. In \textit{R.I.S.E.} the plaintiffs opposed the development of an undesirable facility (landfill) in their community. They alleged that they were deprived equal protection under the Fourteenth Amendment because of the historic placement of landfills in predominantly black communities.\textsuperscript{110} Although the court admitted that the siting of such undesirable facilities in King and Queen County, Virginia, from 1969 to the time of trial has had a disproportionate impact on black residents, the court held that the plaintiffs did not provide sufficient evidence proving the requisite discriminatory purpose.\textsuperscript{111}

The court found that the plaintiffs did not provide any evidence that met the criteria established in \textit{Arlington Heights}.\textsuperscript{112} The administrative steps taken by the King and Queen County Board

\textsuperscript{104} Id.
\textsuperscript{105} Id. at 884–85.
\textsuperscript{106} Id. at 885.
\textsuperscript{107} Id. at 885–86. The plaintiffs cited to a study on housing issued in March of 1974 in which the Commission found that racial and socioeconomic discrimination existed in the community. Id.
\textsuperscript{108} Id. at 886–87.
\textsuperscript{110} Id. at 1149.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
of Supervisors (Board) to negotiate the purchase of the site and the authorization of its use as a landfill revealed "nothing unusual or suspicious." The court noted that the Board "appear[ed] to have balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner." According to the court, the Board responded to the concerns and suggestions of citizens opposed to the landfill even after the first proposed site was rejected because of fiscal constraints. The Board established a citizens' advisory group, evaluated alternative site recommendations made by the Concerned Citizens' Steering Committee, and discussed with the landfill operator ways to mitigate the negative impact of the facility. In short, the court refused to infer discriminatory purpose, thus deferring to the Board, and effectively sanctioned a process that ultimately leads to the disproportionate placement of undesirable facilities in black communities.

The outcomes in Bean, Coalition, East Bibb Twiggs, and R.I.S.E., indicate a process that consistently results in the siting of an undesirable facility in a minority community will pass constitutional muster so long as the evidence does not allow an inference of discriminatory purpose. Plausible reasons for siting discrepancies other than discrimination can obscure discriminatory purpose. Though case law identifies inquiries which may prove discriminatory purpose, it does not indicate the degree of proof necessary to infer discriminatory purpose. Even if the degree of proof needed is quantifiable, it is unclear if plaintiffs would be able to meet the burden.

B. Discriminatory Siting Practices and Unconscious Racism

1. The Legitimacy of Judicial Intervention

Commentators have argued that judicial intervention is warranted where, for example, a dispute is "so deeply divisive as to

113 Id. at 1149–50.
114 Id. at 1150.
115 Id.
116 Id. United States District Judge Richard L. Williams said that "[a]t worst, the [Board] appear[s] to have been more concerned about the economic and legal plight of the County as a whole than the sentiments of residents who oppose the placement of the landfill in their neighborhood." Id.

The court commented that "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official actions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race." Id.
moot the applicability of basic democratic principles." These basic democratic principles encompass the proposition that laws enacted by majority vote dictate how disputes are legally resolved. Historically, segregation laws, for example, were enacted by majority vote and were summarily dismantled by an arguably activist Supreme Court. Since that time, however, such blatantly racist laws are no longer in effect, yet the effects of others—such as siting statutes—demonstrate that they too can have an impact along racial lines.

Given that underrepresented persons are finding themselves subject to disproportionate levels of environmental risks, and that siting processes legally place undesirable facilities in minority communities in higher numbers than in white communities, the courts should be a proper forum in which victims can seek relief. There are other ways traditionally disempowered groups have, to a degree, successfully brought about changes in the law, such as through grass roots activism. The courts should intervene, however, where the impact of disproportionate placement of facilities may have a detrimental effect on entire racial categories that historically have been subject to unequal treatment in various contexts. The intervention need not dictate wholesale judicial intrusion into the legislative and political processes. On the contrary, such intervention, in the context of allegedly discriminatory siting, may only counsel the application of heightened scrutiny under equal protection analysis.


119 See supra notes 23–34 and accompanying text.

120 See Cole, supra note 8, at 1997. Luke W. Cole, Staff Attorney for the California Rural Legal Assistance Foundation, notes that although the civil rights movement of the 1950s and 1960s brought about changes in the law by activists “taking to the streets across the country,” “conservative courts” have weakened civil rights laws. Id.

121 The UCC Report concludes that the disproportionate negative effect of toxic waste on minorities is part of a pattern consistent with the findings of other studies. See UCC Report, supra note 8, at 15. For example, the Children’s Defense Fund found that black infant mortality rates were twice as high as those for white children during the first year of life. Children’s Defense Fund, A Children’s Defense Fund Budget: An Analysis of the FY 1987 Federal Budget and Children 319 (1986). In the U.S. Department of Health’s report on black and minority health, the report showed that there was a wide health gap between minority and non-minority persons in the United States. See 1 U.S. Department of Health and Human Services, Black and Minority Health 1–5 (1985).
2. Unconscious Racism and "Cultural Meaning"122

Although there are several legal strategies available for plaintiffs to pursue,123 claims based on federal equal protection are unlikely to succeed because they attempt to rectify "unconscious racism."124 The modern equal protection doctrine is, for the most part, ineffective against forms of discrimination where discriminatory motivation is subtle because requiring proof of intent or purpose does not take into account "both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious."125 In light of cases such as Coalition and East Bibb Twiggs, and in the face of studies such as the UCC Report, unconscious racism may explain the disproportionate siting of such facilities in minority communities.126 If unconscious racism is responsible for the disproportionate placement of undesirable facilities in minority communities, then present federal equal protection is an inadequate legal remedy.

There is an alternative to the current equal protection analysis, however, that addresses unconscious racism by taking into account

---

124 Lawrence, supra note 122, at 321–23. The burden of proving discriminatory purpose set forth in Davis is extremely difficult to meet. As Laurence Tribe, professor of law at Harvard Law School, has indicated:

... Washington v. Davis announced that henceforth every lawsuit involving constitutional claims of racial discrimination directed at facially race-neutral rules would be conducted as a search for a bigoted decision-maker. This [perspective] sees contemporary racial discrimination not as a social phenomenon—the historical legacy of centuries of slavery and subjugation—but as the misguided retrograde ... behavior of individual actors in an enlightened, egalitarian society. If such actors cannot be found—and the standards for finding them are tough indeed—then there has been no violation of the equal protection clause.


In the context of proving discriminatory purpose in a complex process, such as the siting of an undesirable facility, a plaintiff would face the nearly impossible task of finding the "bigoted decision-maker." As Tribe notes, this standard does not address discrimination as a social phenomenon. See also Lawrence, supra note 122, at 324–25 ("[b]y insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended").

125 Lawrence, supra note 122, at 323.
126 See supra notes 24–34 and accompanying text.
the "cultural meaning" of an allegedly racially discriminatory act.\footnote{Lawrence, supra note 122, at 355.}

Applying this theory,

\[\text{[t]he court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny.}\footnote{\text{Id. at 356.}}\]

Thus, instead of looking at the reasonableness of the governmental behavior, a court would determine whether the state action serves an "important" objective and is "substantially related" to attaining the objective.\footnote{See supra note 38 for discussion of heightened scrutiny analysis. Under heightened scrutiny, the state actor is held to a standard of review higher than under mere rationality analysis. This added edge in the legal analysis would give state actors less judicial deference and impose on the plaintiff a lower burden of proof.\footnote{482 F. Supp. 673 (1979). For another application of Lawrence's cultural meaning analysis to the facts of Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), see Lawrence, supra note 122, at 366--69.}}

3. Application of Cultural Meaning to Discriminatory Siting Cases

Application of this test to \textit{Bean v. Southwestern Waste Management Corporation} illustrates this theory.\footnote{See Lawrence, supra note 122, at 366 n.231--32 and accompanying text.} Under the cultural meaning analysis, several kinds of evidence demonstrate that the decision to site the undesirable facility had a cultural meaning that denigrated blacks. In addition to the evidence they originally provided, the plaintiffs in \textit{Bean} could present the findings of national studies such as the UCC Report, the GAO Report and the National Law Journal Study as evidence of historical placement of undesirable facilities in minority communities and the related negative impacts. They could also include accounts of housing segregation mandated by statutes and restrictive covenants as analogous to the concentration of undesirable land uses in minority communities.\footnote{See Lawrence, supra note 122, at 366 n.231--32 and accompanying text.} As further evidence of the cultural meaning Houston residents applied to the TDH's decision to locate the facility in the minority community, the plain-
tiffs could show whether any public meetings were held, and the reactions of those in attendance.\textsuperscript{132} The comments by residents and public officials at the meetings could reveal a "social issue" agenda.\textsuperscript{133} Although such evidence, in and of itself, may not lead to the conclusion that racial animus led to the placement of the undesirable facility in a minority community, it would be probative of the cultural meaning of TDH's decision to site the facility in a black community.\textsuperscript{134}

Finally, the court could look to the irrationality of the decision by the TDH to site the facility where it did as evidence of the action's racial meaning.\textsuperscript{135} In dicta following the \textit{Bean} court's analysis of the statistical and non-statistical evidence, for example, the court strongly criticized the TDH's decision to issue the facility a permit. The court indicated that if it were the TDH, it would have denied the permit because "[i]t simply does not make sense to put the [facility] so close to a high school . . . [nor] does it make sense to put a solid waste site so close to a residential neighborhood."\textsuperscript{136} This criticism levied by the court indicates that there were racial implications to TDH's action and provides additional evidence of cultural meaning. Taken together, these factors could convince a court, by a preponderance of the evidence, that many thought of TDH's action in racial terms. Thereafter, the presumption would be that this unconscious racial attitude is shared by society as a whole and had influenced TDH's action. Thus, heightened scrutiny would be applicable and the defendant state actor would bear a greater burden in defending its actions.

In \textit{Arlington Heights}, Justice Powell suggested several sources of circumstantial proof that could show discriminatory purpose.\textsuperscript{137} The proposed analysis would take the \textit{Arlington Heights} inquiry one step further to include circumstantial evidence of additional trends of discrimination. This next step is necessary, for example, because

\textsuperscript{132} The local residents in \textit{Bean} formed the Northeast Community Action Group as a way of organizing their efforts to stop the facility's construction. \textit{Bullard}, supra note 8, at 53.

\textsuperscript{133} See \textit{Lawrence}, supra note 122, at 367 (discussing how supporters and opponents referred to the "social issue" of rezoning in Arlington Heights). \textit{See also Arlington Heights}, 429 U.S. at 257-58.

\textsuperscript{134} See \textit{Lawrence}, supra note 122, at 368.

\textsuperscript{135} \textit{See id.} (discussing the "unreasonableness of the nonracial criteria upon which the [Arlington Heights] board relied").

\textsuperscript{136} \textit{Bean v. Southwestern Management Corp.} 482 F. Supp. 673, 679-80 (S.D. Tex. 1979), aff'd without opinion, 782 F.2d 1038 (5th Cir. 1986). The court also said that "[l]and use considerations alone would seem to militate against granting this permit." \textit{Id.} at 679.

\textsuperscript{137} \textit{See supra} notes 55-62 and accompanying text.
cases such as Bean show the difficulty of providing "statistically significant" evidence of disparate impact where there are relatively few facilities.\footnote{See Bean, 482 F. Supp. at 678.} Coalition similarly demonstrates the inadequacy of relying on the number of facilities within small geographic areas for evidence of disparate impact.\footnote{See supra notes 91–94 and accompanying text.} That the size of a sample is too small to support an inference of disparate impact does not necessarily mean that local siting practices are not tainted with illegal discriminatory purpose. Ultimately, this proposed analysis would complement present equal protection doctrine, as enunciated by Justice Powell in Arlington Heights.

V. Conclusion

This Note examined the disproportionate siting of undesirable facilities in minority communities. Although there are studies documenting the disproportionate siting of toxic waste dumps, the same disparity may exist with respect to other similarly unwanted land uses as prisons, homeless shelters, and low-income housing. What is clear, however, is that the modern equal protection doctrine is ill-suited to address discriminatory siting practices because of the unwieldy discriminatory purpose requirement. The realities of complex siting processes can obscure most any discriminatory motive, just as any legal reason can explain most siting decisions. Equal protection perhaps can provide relief if the current doctrinal analysis includes serious consideration of other factors, such as history and social context. By using these factors as part of the analysis, courts can justify applying a heightened scrutiny where, as in the disproportionate siting of undesirable facilities, history has shown that particular racial groups have been subject to unfair treatment. This change in equal protection analysis would not represent a dramatic shift away from current doctrine, as enunciated in Arlington Heights, but it would demonstrate a court’s willingness to acknowledge a discrete and observable phenomenon.

Rodolfo Mata