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Making the Case: Did the Government's Response to Hurricane Katrina Violate the Equal Protection Clause.

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NOTES

MAKING THE CASE: DID THE GOVERNMENT'S RESPONSE TO HURRICANE KATRINA VIOLATE THE EQUAL PROTECTION CLAUSE?

MICHAEL KOGUT*

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ABSTRACT

“George Bush doesn’t care about [B]lack people,”¹ exclaimed musician Kanye West during a fundraiser for Hurricane Katrina on NBC. Kanye West was expressing his frustration with the federal government’s re-

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1. Lisa De Morales, *Kanye West's Torrent of Criticism, Live on NBC*, WASH. POST, Sept. 3, 2005, at C1 (seeking to raise money for the American Red Cross, Kanye West and a host of other celebrities performed live on national TV).

sponse to Hurricane Katrina, which he characterized as race-related.² Like West, Whites and Blacks, albeit disproportionately, believe race was a factor in the federal government's "inadequate" response to Hurricane Katrina.³ Indeed, a race-related governmental response to Hurricane Katrina could have constitutional implications. While the Equal Protection Clause of the Fourteenth Amendment protects against discrimination,⁴ it distinguishes between permissible and impermissible discrimination. This Note explores the constitutional implications of the federal government's response to Hurricane Katrina, if any, and whether or not the Supreme Court's interpretation of the Equal Protection Clause provided the residents of New Orleans "the equal protection of the laws."⁵

Since the Federal Emergency Management Agency (FEMA) was created to respond to natural disasters, this Note focuses on FEMA's response to Hurricane Katrina and whether FEMA's response violated the Equal Protection Clause of the Fourteenth Amendment. In all likelihood, when FEMA responded to Hurricane Katrina, the response comported with the Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment. However, the government's slow and inadequate response to "one of the worst natural disasters in United States history" and its uneven distribution of resources to residents in New Orleans created a disparate impact between Blacks and Whites.⁶ In light of the government's slow and inadequate response to Hurricane Katrina, the disparate impact caused by the response, and the purpose of the Equal Protection Clause, perhaps the Supreme Court should re-evaluate its interpretation of the Equal Protection Clause.⁷ While "the intent re-

2. *Id.* (making a remark about George Bush, Kanye rationalized the government's slow and inadequate response to New Orleans by saying, "And, you know, it's been five days [waiting for federal help] because most of the people are [B]lack.").

3. *Reaction to Katrina Split on Racial Lines*, CNN.COM, Sept. 13, 2005, <http://www.cnn.com/2005/US/09/12/katrina.race.poll/index.html> (citing to a CNN/ USA Today/ Gallup poll in which six out of ten Blacks believed the government was slow because many of the residents of Louisiana were Black). However, when comparing Whites, one out of eight believed the government was slow "because" many of the residents of Louisiana were Black. *Id.*

4. U.S. CONST. amend. XIV, § 1.

5. *Id.* ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

6. William C. Rhoden, *Pity the Poorest While America Waves the Flag*, N.Y. TIMES, Sept. 10, 2005, available at <http://www.nytimes.com/2005/09/10/sports/tennis/10rhoden.html>.

7. This Note seeks to answer various questions: When it responded to Hurricane Katrina, did the federal government violate the equal protection guarantees of the Constitution? How would a victim of Hurricane Katrina establish a violation of these guarantees?

quirement” of the Equal Protection Clause may uphold the constitutionality of social service programs, it may fail to “provide equal protection of the laws.”⁸ This Note uses the federal government’s response to Hurricane Katrina to explore the shortcomings of the intent requirement and whether the Supreme Court’s interpretation of the Equal Protection Clause provides “equal protection of the laws.”

The first section of this Note focuses on the city and residents of New Orleans. It describes the conditions of the levees, the intensity of the storm, and some of the pre-existing, pre-Katrina disparities between Blacks and Whites in New Orleans. As this Note argues, FEMA exacerbated these pre-existing disparities when it responded to Hurricane Katrina.

The second section discusses FEMA’s role in natural disasters, its re-organization under the Department of Homeland Security (DHS), and its response to Hurricane Katrina. President George W. Bush, Congress, and the public have characterized FEMA’s response as “inadequate.”⁹ Some of this criticism is grounded in FEMA’s re-organization under DHS and the selection of inexperienced individuals to head the agency. However, this Note focuses on FEMA’s response itself and how it impacted Blacks and Whites differently.

After discussing FEMA’s response and its racially disparate impact, the Note explores the relationship between this response and the Constitution. Specifically, it investigates whether FEMA’s response violated the Equal Protection Clause. However, before discussing FEMA’s potential violation of the Equal Protection Clause, the third section traces the history of the Clause and the Supreme Court’s interpretation of it. As will

Did the Framers intend for the Fourteenth Amendment to protect against systematic (or institutional) racism? Did the federal government fail to provide equal protection of the laws? Does the Supreme Court’s interpretation of the equal protection guarantees in fact guarantee equal protection of the laws? Does the Supreme Court interpretations of these guarantees advance the purposes of the Clause?

8. *Washington v. Davis*, 426 U.S. 229, 248 (finding that the intent requirement of the Equal Protection Clause, in and of itself, may not be able to provide equal protection of the laws).

9. *Bush Admits Katrina Response Was Inadequate*, INT’L HERALD TRIB., Sept. 16, 2005, available at <http://www.iht.com/articles/2005/09/16/europe/web.0915kat1.php>; see U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>. In this report, Congress uses the word “inadequate” to describe the following: response; oversight of the use of federal funds; readiness of FEMA’s response teams; delivery of relief supplies; communication, relocation housing plans, and logistics capacity; preparations for a large population at the Superdome; the shelter of last resort (Superdome and Convention Center); number of qualified personnel; amounts of food and water (at the Superdome and Convention Center); and housing plans. *Id.*

be discussed, scholars have criticized “the intent requirement” the Supreme Court has read into the Equal Protection Clause.¹⁰

The fourth section analyzes FEMA’s response to Katrina under the intent requirement established in the Supreme Court decisions of *Davis*¹¹ and *Feeney*.¹² Even though a survivor could likely establish a disparate impact between Blacks and Whites, the intent requirement would likely preclude the establishment of a constitutional violation. In light of the heavy burden the intent requirement imposes, the fifth section advances the arguments for and against the intent requirement and discusses the potential solutions to its shortcomings. As the fifth and sixth sections argue, the Court should re-evaluate its interpretation of the Equal Protection Clause and find a way to reduce the harms of racial inequality and the burden imposed on the plaintiff by the intent requirement. A negligence standard would better provide “equal protection of the laws.”

I. THE CITY AND RESIDENTS OF NEW ORLEANS

From the beginning, the city of New Orleans was doomed.¹³ Due to its location below sea level, the city was vulnerable to natural disasters.¹⁴ The Army Corps of Engineers constructed levees to reduce the vulnerability of the city. However, the levees were structurally unsound and incapable of protecting the city against high-strength hurricanes.¹⁵ As engineers and scientists predicted,¹⁶ “Katrina’s surge was higher than the system was designed to handle.”¹⁷ While Katrina and its 127 mph winds

10. *Washington*, 426 U.S. at 248; *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (noting that an adverse impact alone is not enough).

11. *Washington*, 426 U.S. at 229.

12. *Personnel Adm’r of Mass.*, 442 U.S. at 256.

13. Evan Thomas, *The Lost City, What Went Wrong: Devastating a Swath of the South, Katrina Plunged New Orleans into Agony. The Story of a Storm and a Disastrously Slow Rescue*, NEWSWEEK, Sept. 12, 2005, available at <http://www.newsweek.com/id/104563> (“Built mostly below sea-level on a spongy sliver of land between a massive lake and a mighty river, New Orleans has always been one big storm away from disaster.”).

14. *Id.* (finding the construction of New Orleans to be under sea level).

15. U.S. Army Corps of Engineers, <https://ipet.wes.army.mil/> (last visited Jan. 25, 2009) (describing the responsibility of the Army Corps of Engineers over New Orleans levee construction).

16. John Swartz, *Army Builders Accept Blame Over Flooding*, N.Y. TIMES, June 6, 2006 (discussing how the levees were “flawed in design” and “not built to handle [a] storm anywhere near [the] strength of Hurricane Katrina.”).

17. U.S. Army Corps of Engineers, <https://ipet.wes.army.mil/> (last visited Jan. 25, 2009) (describing the level of surge the levee’s were designed to handle). “The HPS was designed to protect against severe storm conditions the region typically experiences. But Hurricane Katrina’s surge and waves significantly exceeded those of the typical severe storm striking the Gulf Coast.” *Id.* at 11.

ravaged the city, the levees faltered¹⁸ and flooded eighty percent of the city.¹⁹ The city could not withstand a high-strength hurricane like Katrina.²⁰

Hurricane Katrina was one of the costliest and deadliest hurricanes in the history of the United States.²¹ Katrina's winds reached speeds of 130 mph, its storm surge twenty-seven feet, and its wrath 93,000 square miles.²² But the intensity of the storm is better understood through the damage it caused. It destroyed 300,000 homes, caused \$96 billion in property damage, and resulted in 1300 deaths.²³ Due to the water damage, significant portions of the thirty-fifth largest city in the United States are still uninhabitable.²⁴ Fortunately, the Stafford Act provides assistance to victims of disasters.²⁵ Under the Stafford Act, FEMA is authorized to provide financial assistance and other needs assistance to disasters rising to the level of a state of emergency, as determined by the President of the

18. See Willie Dry, *New Orleans Flooded in Wake of Hurricane Katrina*, NAT'L GEOGRAPHICAL NEWS, Aug. 31, 2005, available at http://news.nationalgeographic.com/news/2005/08/0831_050831_katrina_flooding. See U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 86 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf> (last visited Mar. 23, 2007). Kathleen Babineaux Blanco, the Governor of Louisiana said, "What happened to us this year, however, can only be described as a catastrophe of Biblical proportions. We in Louisiana know hurricanes and hurricanes know us. We would not be here today if the levees had not failed." *Id.*

19. John Swartz, *The Nation: Too Bad Hippocrates Wasn't an Engineer*, N.Y. TIMES, June 6, 2006, § 4 (remarking how a report from the Army Corps of Engineers "concluded that flaws in the design, building, and maintenance of the New Orleans hurricane protection system . . . played a big role in putting 80% of the city underwater.").

20. See R.B. SEED ET AL., PRELIMINARY REPORT ON THE PERFORMANCE OF THE NEW ORLEANS LEVEE SYSTEMS IN HURRICANE KATRINA ON AUGUST 29, 2005, at 8-1 to 8-3 (2005) (summarizing the findings of the failed levees and floodwalls due to the storm surges generated by Hurricane Katrina). Katrina was a category five hurricane on August 28, 2005, but it "weakened" to a category four before it hit New Orleans on August 29, 2005. *Id.* at 1-2.

21. U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 7 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

22. Frances Townsend, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 1 (2006), <http://www.whitehouse.gov/reports/katrina-lessons-learned/.pdf> (describing the force and velocity of Katrina's hurricane winds).

23. *Id.* at 7 (assessing the damages caused by Katrina).

24. June Sawyers, *New Orleans, Greatest Trips, Washington, D.C.*, CHI. TRIB., Feb. 18, 2007, available at <http://chicagotribune.com/chi-070215resourcefulfeb18-story,0484346.story?coll=chi-900siteindex-fea>.

25. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (1974) (codified as amended at 42 U.S.C. §§ 5121-5207 (2000)).

United States.²⁶ FEMA has provided four billion dollars to survivors of Katrina for financial and housing assistance, more than any other single natural disaster.²⁷ In addition to financial and housing expenses, FEMA has issued approximately 240,000 checks to Louisiana residents for “other needs assistance.”²⁸ This type of assistance includes medical, dental, and funeral expenses.²⁹ Unfortunately, Katrina caused 1300 deaths, and eighty percent of the deaths occurred in the New Orleans metropolitan area.³⁰ Katrina and the subsequent flooding of New Orleans directly caused a majority of these deaths; however, they indirectly caused others. For example, the toxic water in New Orleans is responsible for five deaths and the conditions at Superdome and New Orleans Convention Center are responsible for others.³¹ The residents who were stranded in New Orleans waded through the toxic waters to reach the Superdome and New Orleans Convention Center. Lawlessness and disorder were rampant at the places to which the government directed the stranded residents of New Orleans.³² The residents who endured these circumstances were disproportionately poor and Black.³³

One year after Katrina subsided, the Kaiser Family Foundation conducted a study and discovered post-Katrina disparities between Black

26. 42 U.S.C. § 5174 (2000) (describing the type of federal assistance individuals and households may receive as result of major disasters).

27. News Release, FEMA, *By the Numbers: FEMA Recovery Update in Louisiana* (Jan. 17, 2006), *available at* <http://www.fema.gov/news/newsrelease.fema?id=2251>. This number is expected to grow to \$7.7 billion. *Id.*

28. *Id.* § 5174(e)(2) (“The President, in consultation with the Governor of a State, may provide financial assistance under this section to an individual or household described in paragraph (1) to address personal property, transportation, and other necessary expenses or serious needs resulting from the major disaster.”).

29. *Id.* § 5174(e)(1) (“The President, in consultation with the Governor of a State, may provide financial assistance under this section to an individual or household in the State who is adversely affected by a major disaster to meet disaster-related medical, dental, and funeral expenses.”).

30. U.S. HOUSE OF REPRESENTATIVES, *A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA* 74 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf> (providing statistical numbers regarding death counts from Katrina).

31. *Id.* (describing the abhorrent conditions existing post-Katrina); *see* Craig Dolch, *Back to the Bayou*, *PALM BEACH POST*, Sept. 24, 2006, at 8b (detailing the causes of death due to toxins).

32. U.S. HOUSE OF REPRESENTATIVES, *A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA* 9 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

33. *See infra* Section I & IV.

and White residents of New Orleans.³⁴ The storm seemed to have disrupted the lives of twice as many Blacks as Whites.³⁵ To be sure, the pre-Katrina disparities in New Orleans have something to do with the post-Katrina disparities. This Note explores the extent to which the former influenced the latter.

New Orleans is a Black city and a poor city.³⁶ Prior to the hurricane, New Orleans was sixty-eight percent Black³⁷ and the poverty rate was twenty-eight percent,³⁸ which was approximately sixteen percentage points higher than the national average.³⁹ Compared to other counties in the country, the poverty rate in New Orleans was ranked seventh out of two hundred and ninety.⁴⁰ In addition to being a Black and poor city, it was also a “car-less” city. New Orleans was ranked fourth out of two hundred ninety seven cities in terms of households lacking access to automobiles.⁴¹ Consistent with the national trend, in New Orleans, the percentage of Blacks lacking access to automobiles was greater than any other racial group at twenty-seven percent.⁴² The percentage of Whites lacking access to automobiles was five.⁴³ As discussed in Section IV, these statistics are significant because FEMA developed an evacuation plan based on access to automobiles. Such a plan would seem to have burdened Blacks more than Whites and would explain why a disproport-

34. KAISER FAMILY FOUND., *THE KAISER POST-KATRINA BASELINE SURVEY 3* (2007), <http://www.kff.org/kaiserpolls/upload/7631ES.pdf> (finding that Blacks were subject to a greater lively disruption when compared to Whites post-Katrina).

35. Peter Whoriskey, *Katrina Hit Blacks Harder than Whites, Study Finds*, WASH. POST, May 10, 2007, at A02 (noting the extreme racial disparity of those who suffered some sort of disruption post-Katrina).

36. See Adolph L. Reed, *The Real Divide*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 63–64 (David Dante Troutt ed., 2006) (“New Orleans is a predominately [B]lack city, and it is a largely poor city. The [B]lack population is disproportionately poor, and the poor population is disproportionately [B]lack.”).

37. JESSE MCKINNON, U.S. CENSUS BUREAU, *THE BLACK POPULATION: 2000*, CENSUS 2000 BRIEF 7 tbl.3 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

38. ALEMAYEHU BISHAW & JOHN ICELAND, U.S. CENSUS BUREAU, *POVERTY: 1999*, CENSUS 2000 BRIEF 7 tbl.4 (2003), <http://www.census.gov/prod/2003pubs/c2kbr-19.pdf>.

39. *Id.* (according to the Census 2000, 12.4% of the population was below the poverty level).

40. ALLAN BERUBE & BRUCE KATZ, BROOKINGS INST., *KATRINA'S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA 2* (2005) available at http://www.brookings.edu/metro/20050915_katrinacarstables.pdf.

41. *Id.* (“Out of 297 metropolitan areas in the U.S., New Orleans ranked fourth in the proportion of its households without car access . . .”).

42. *Id.* (“[Twenty-seven] percent of African-Americans in the New Orleans area lacked access to a car . . .”).

43. *Id.* (“In the New Orleans metro area as in the rest of the nation, about [five] percent of non-Hispanic whites lacked auto access.”).

tionate amount of Blacks were stranded in New Orleans. Since many poor Blacks lacked automobiles and money, they were unable to evacuate the city without the assistance of the government. In lieu of being evacuated from New Orleans, they were directed to unsafe and unsanitary environments such as the Superdome and the New Orleans Convention Center.⁴⁴ At the Superdome, the survivors of Katrina waited for FEMA in the midst of trash, fecal matter, and dead bodies.⁴⁵ They lived “where people aren’t supposed to live.”⁴⁶ A glimpse at the surroundings should have reminded these survivors of the inequalities between Blacks and Whites in America.⁴⁷ One Hurricane Katrina survivor said, “We saw buses, helicopters, and FEMA trucks, but no one stopped to help us. We never felt so cut off in all our lives.”⁴⁸ The government seemed to look the other way even though it plays a significant role in responding to natural disasters.⁴⁹ The next section of the Note discusses this role.

II. FEMA AND FEMA’S RESPONSE TO HURRICANE KATRINA

FEMA responsibility to respond to natural disasters.⁵⁰ In 1979, President Jimmy Carter created FEMA to provide relief in the wake of natural disasters.⁵¹ In 2003, FEMA was deprived of its independence when it

44. MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 64, 68, 71 (2006) (providing information on conditions of the Superdome and excerpts from Dyson’s account of toxic waters).

45. *Relief Workers Confront “Urban Workforce,”* CNN.COM, Sept. 1, 2005, <http://www.cnn.com/2005/WEATHER/09/01/katrina.impact/index.html>.

46. U.S. HOUSE OF REPRESENTATIVES, *A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA* 7 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

47. Dayna Bowen Matthew, *Disastrous Disasters: Restoring Civil Rights Protections for Victims of the State in Natural Disasters*, 2 J. HEALTH & BIOMEDICAL L. 213, 213 (2006) (finding that Americans were reminded of the racial and economic divisions within America).

48. U.S. HOUSE OF REPRESENTATIVES, *A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA* 6 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf> (quoting a Katrina survivor).

49. Walter Fields, *Legacy of Katrina, One Year Later-Untreated Wounds*, N. J. REC., Aug. 29, 2006, at L11 (“Our nation has looked the other way when confronted with poverty, particularity when its face is [B]lack and the locus is urban.”).

50. Federal Emergency Management Agency, *FEMA History*, <http://www.fema.gov/about/history.shtm> (last visited Jan. 4, 2009) (“[FEMA] is tasked with responding to, planning for, recovering from, and mitigating against disasters.”).

51. Exec. Order No. 12,148, Fed. 44 Reg. 43,239 (July 20, 1979) (establishing FEMA as an agency for federal emergency relief).

was re-organized under the Department of Homeland Security (DHS).⁵² As part of the re-organization, FEMA's objectives were combined with the objectives of twenty-two other agencies and departments, shifting its focus from "tornadoes to terror."⁵³ The Bush Administration shifted the focus of FEMA, the agency created to provide disaster relief, away from disaster relief.⁵⁴ Deficiencies resulting from these organizational changes were apparent when FEMA responded to Hurricane Katrina in a manner characterized by public figures, the President, and Congress as "inadequate."⁵⁵ Prompted by such criticism, the House of Representatives created a bipartisan committee to investigate "the preparation for and response to Hurricane Katrina."⁵⁶ In a report entitled *A Failure of Initiative*, which is referenced throughout this Note, the House of Representatives characterized the government's response as disturbing.⁵⁷ According to the report, the selection of inexperienced individuals to head the agency, coupled with FEMA's re-organization under DHS,⁵⁸ contributed to the disturbing response.⁵⁹ Since the storm has subsided, members of Congress have introduced eight bills seeking to re-establish FEMA as an independent agency.⁶⁰ To be sure, by introducing these bills, Congress was expressing its dissatisfaction with FEMA's response to Hurricane Katrina.

Even though the public, the President, and Congress have criticized the agency's slow and inadequate response to one of the worst natural disasters in U.S. history, other governmental entities are also responsible.⁶¹ In

52. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 317 (2000)).

53. MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 49 (2006).

54. *Id.* at 52.

55. U.S. HOUSE OF REPRESENTATIVES, *A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA* (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

56. *Id.* at ix.

57. *Id.* at 359.

58. *Id.* (discussing how emergency management professions have attributed the decline in FEMA's preparedness to its re-organization under DHS).

59. *Id.*

60. Henry B. Hogue & Keith Bea, *Federal Emergency Management and Homeland Security Organization: Historical Developments and Legislative Options* 1 (Cong. Research Serv., CRS Report for Congress, Order Code RL33369, June 1, 2006), available at www.fas.org/sgp/crs/homsec/RL33369.pdf ("As a result of concerns about the effectiveness of the federal response after Hurricane Katrina, Congress is continuing to rethink the organizational arrangements for carrying out federal emergency management functions.").

61. PEW RESEARCH CTR., *HUGE RACIAL DIVIDE OVER KATRINA AND ITS CONSEQUENCES, TWO-IN-THREE CRITICAL OF BUSH'S RELIEF EFFORTS* 1 (2005), <http://people-press.org/reports/pdf/255.pdf> (criticizing the local government's response to Hurricane Ka-

all fairness, the city of New Orleans made mistakes as well.⁶² For example, it refused to evacuate residents with empty city buses and an empty Amtrak train.⁶³ The empty Amtrak train headed for higher ground without any residents from New Orleans on board. Furthermore, the mayor of New Orleans, concerned with the legal implications of a mandatory evacuation order, was hesitant to order one.⁶⁴ Such a move would have led to fewer deaths and losses. However, despite these poor decisions, the medium-sized city of New Orleans was incapable of managing the large-scale natural disaster without the assistance of the federal government.⁶⁵ Hurricane Katrina required “a national response.”⁶⁶ Due to these circumstances, the stranded residents of New Orleans depended on FEMA to counterbalance the inability of the state and local governments to respond to large-scale natural disasters. Ultimately, FEMA failed.

President George W. Bush declared a state of emergency in Louisiana on August 26, 2005, and authorized FEMA to provide relief in the Gulf Coast.⁶⁷ This declaration triggered physical and financial assistance through FEMA.⁶⁸ Under the Stafford Act, President Bush authorized

trina and its aftermath). Fifty one percent of the public gave “sub-par ratings” to the state and local governments. *Id.*; see MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 62 (2006) (distinguishing between the mistakes made at the local, state, and national level and describing the federal government’s “dangerous” delay as on the verge of “criminal”).

62. Frances Townsend, *THE FEDERAL RESPONSE TO HURRICANE KATRINA LESSONS LEARNED* 1 (2006), <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>.

63. MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 57–59 (2006) (noting that the city of New Orleans refused Amtrak’s offer to evacuate people with its trains and failed to use city buses to evacuate the New Orleans citizens without cars); see Dayna Bowen Matthew, *Disastrous Disasters: Restoring Civil Rights Protections for Victims of the State in Natural Disasters*, 2 J. HEALTH & BIOMEDICAL L. 213, 213 (2006) (stating that “school buses sat idle for lack of drivers, while the waters rose.”).

64. MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 57–59 (2006); see U.S. HOUSE OF REPRESENTATIVES, *A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA* 2 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf> (stating that despite fifty-six hours advanced notice, he did not order the mandatory evacuation until nineteen hours before Katrina hit land).

65. Eric Holdeman, *Destroying FEMA*, WASH. POST, Aug. 30, 2005, at A17 (“[The tragedy] requires a national response.”).

66. *Id.*

67. Press Release, FEMA, Statement on Federal Emergency Assistance for Louisiana (Aug. 27, 2005), available at <http://www.whitehouse.gov/news/releases/2005/08/20050827-1.html>.

68. 42 U.S.C. § 5122 (2000) (“‘Emergency’ means any occasion or instance for which, in the determination of the President, Federal assistance is needed . . . to save lives and to protect property and public health and safety . . .”).

FEMA “to coordinate all disaster relief efforts which have the purpose of alleviating the hardship and suffering caused by the emergency.”⁶⁹ Despite the President’s declaration, the foreseeable breach of the levees, and three days warning of the storm, FEMA’s director, Michael Brown, neither heeded the warnings nor requested the dispatch of FEMA employees⁷⁰ to New Orleans until five hours after the storm struck.⁷¹ Two days after the storm struck, FEMA still “had yet to devote [its] full resources to rescuing the Gulf Coast.”⁷² Michael Brown may have been more preoccupied with public relations than disaster relief. In a memo written by Brown, he asked employees to “convey a positive image of disaster operations to government officials, community organizations, and the general public.”⁷³ Neither an appreciation for appearances nor an inadequate response triggers the Constitution *per se*. However, there may have been a relationship between the government’s response and race. In the words of Louis Elisa, a former regional director for FEMA under President Clinton, “I am telling you, as a professional, that you could not have had a mistake of this nature . . . if something else was not afoot.”⁷⁴

69. *Id.*; see Press Release, FEMA, Statement on Federal Emergency Assistance for Louisiana (Aug. 27, 2005), available at <http://www.whitehouse.gov/news/releases/2005/08/20050827-1.html> (stating that FEMA was authorized to provide relief services “at its discretion”). Significantly, the immunity FEMA receives under the Stafford Act applies to discretionary acts as opposed to constitutional violations. 42 U.S.C. § 5148 (2000) (“The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency . . .”).

70. MICHAEL ERIC DYSON, COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER 64 (2006) (finding that Brown requested one thousand DHS employees to be dispatched within *forty-eight hours* of the request and two thousand within *seven days*); see *GOP Leaders Agree to Joint Katrina Hearings*, CNN.COM, Sept. 8, 2005, <http://www.cnn.com/2005/POLITICS/09/07/katrina.congress/index.html> (noting that the buffer – the forty-eight hours – seems to go against the purposes of FEMA); see also 42 U.S.C. § 5121 (2000) (declaring the necessity of “expediting the rendering of aid, assistance, and emergency services” to individuals and families in response to a major disaster).

71. Keith O’Brian & Bryan Bender, *Chronology of Errors: How a Disaster Spread*, BOSTON GLOBE, Sept. 11, 2005; MICHAEL ERIC DYSON, COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER 63 (2006) (remarking on the lapse of time between when Michael Brown was aware of the possibility for disaster and when he sent troops).

72. MICHAEL ERIC DYSON, COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER 65 (2006).

73. *GOP Leaders Agree to Joint Katrina Hearings*, CNN.COM, Sept. 8, 2005, <http://www.cnn.com/2005/POLITICS/09/07/katrina.congress/index.html>.

74. U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 20 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

According to academic and non-academic segments of society, race played a role in FEMA's response to Hurricane Katrina.⁷⁵ Many believe the government would have responded in a more effective and efficient manner if the people who were stranded were rich and White.⁷⁶ But "the question shouldn't be whether race played a role, but what role it played."⁷⁷ and whether or not this role violated the Constitution. Specifically, did FEMA apply the Stafford Act "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances?"⁷⁸ If not, were White and Black residents of New Orleans protected equally under the laws of the United States? Viewed against the racial compositions and the socioeconomic dispositions of the "survivors" of Katrina,⁷⁹ the disproportionate distribution of resources to residents of New Orleans,⁸⁰ and its response to Hurricanes Charley and Frances in Florida,⁸¹ the government may have applied the Stafford Act "with an evil eye and unequal hand." For example, FEMA may have blasted portions of the levees and troops may have been deployed to protect the White areas of the city at the expense of the Black areas.⁸² However, whether FEMA violated the constitution de-

75. MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 18 (2006) ("It is safe to say that race played a major role in the failure of the federal government . . . to respond in a timely manner to the poor [B]lack folk of Louisiana because [B]lack grief and pain have been ignored throughout the nation's history.").

76. Jacob Weisberg, *An Imperfect Storm*, SLATE.COM, Sept. 7, 2005, <http://www.slate.com/?id=2125812> ("Had the residents of New Orleans been [W]hite Republicans in a state that mattered politically, instead of poor [B]lacks in city that didn't, Bush's response surely would have been different."); see Caren Bohan, *Bush Says Katrina Rebuilding Could Take Years*, REUTERS, Aug. 28, 2006, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KHII-6T53V8?OpenDocument>.

77. MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 18 (2006).

78. *Yick Wo v. Hopkins*, 118 U.S. 356, 374–75 (1886).

79. See *infra* Section IV.

80. *Id.*

81. *Id.*

82. See MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 76, 196 (2006) (stating that levees were blasted during the Great Flood of 1927 to achieve such a purpose); see also LAWYERS' COMM. FOR CIVIL RIGHTS, TESTIMONY OF BARBARA R. ARNWINE, EXECUTIVE DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW 3 (2005), http://katrina.house.gov/hearings/12_06_05/arnwine_120605.pdf (criticizing how National Guardsmen patrolled the areas of the city where predominately White Americans lived to prevent looting of the abandoned houses, while there was "virtually no visible law enforcement presence" at the areas where Black residents evacuated, such as the Superdome and Convention Center). "[T]he protection of [W]hite-owned property became more important than the protection of Black lives." *Id.*

depends on whether the heads of FEMA applied the Stafford Act with the intention to create a disparate impact; these officials could have acted negligently without violating the Equal Protection Clause. The next section begins to explore whether the Supreme Court's interpretation of the Clause is consistent with its purpose.

III. THE SUPREME COURT'S INTERPRETATION OF THE EQUAL PROTECTION CLAUSE

Before evaluating the federal government's response to Hurricane Katrina under the Equal Protection Clause, this section discusses the evolution of the Due Process Clause of the Fifth Amendment and Equal Protection Clause of the Fourteenth Amendment. While the Supreme Court has distinguished between the Due Process and Equal Protection Clauses,⁸³ they both originated "from an ideal of fairness"⁸⁴ and provide seemingly indistinguishable protection.⁸⁵ The Supreme Court has construed the Due Process clause to "contain an equal protection component,"⁸⁶ and the equal protection analysis under the Fifth and Fourteenth Amendments is the same.⁸⁷ Therefore, the Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment establishes the framework for analyzing alleged violations of the Due Process Clause of the Fifth Amendment.

The language of the Equal Protection Clause is ambiguous. The Clause was designed "to foster equality in the face of stark social and economic realities of inequality in America,"⁸⁸ but it is susceptible to multiple interpretations and may have failed to provide guidance to the Supreme Court.⁸⁹ Setting aside, for the moment, the subjectivity of interpretation,

83. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property without due process of law"); U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

84. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

85. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (discussing how the equal protection analysis under the Fifth and Fourteenth Amendments is the same).

86. *Bolling*, 347 U.S. at 497; see *Buckley*, 424 U.S. at 93.

87. *Washington*, 426 U.S. at 239; *Buckley*, 424 U.S. at 93 ("[The] Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

88. Eric K. Yamamoto, Carly Minner, & Karen Winter, *Contextual Strict Scrutiny*, 49 *How. L. J.*, 241, 287 (citing Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988)).

89. Abe Fortas, *The Amendment and Equality Under Law*, in *THE FOURTEENTH AMENDMENT* 100 (Bernard Schwartz ed., 1970) ("[I]t is not true that the words of the Fourteenth Amendment are clear and precise guides to conclusions and decisions.").

the Supreme Court has distinguished between permissible and impermissible forms of discrimination (or uses of race). Since this Note focuses on the disparate impacts between Whites and Blacks in the context of Hurricane Katrina, the following discussion on the evolution of the equal protection guarantee is limited to classifications based on race.

Race-based classifications, unlike other classifications, are “suspect” and they trigger strict scrutiny.⁹⁰ When strict scrutiny is triggered, the classification triggering strict scrutiny violates the Constitution unless the classification serves a “compelling governmental interest” and is “narrowly tailored” to advance the compelling interest.⁹¹ As the Court has interpreted the Equal Protection Clause, there are three ways to trigger strict scrutiny: (1) facial discrimination, (2) discrimination by design, and (3) discriminatory application.⁹² For purposes of this Note, “facial discrimination” and “discrimination by design” are inapposite because the legislation authorizing FEMA to respond to disasters (the Stafford Act) is facially neutral, and evidence of a design to discriminate against an identifiable group is lacking. Therefore, to establish a violation of the Equal Protection Clause, a Hurricane Katrina survivor would have to show FEMA applied legislation with the intent to produce a disparate impact, or “discriminatory application.”

“Men of equal integrity, of equal devotion to freedom and liberty and patriotism, have arrived at fundamentally different interpretations of its words and principles.” *Id.*

90. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). The court held that “all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Id.* The strict scrutiny standard originated in *Korematsu* in which the court stated that race triggers “the most rigid scrutiny” because “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.” *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

91. *See Fullilove v. Klutznick*, 448 U.S. 496, 508 (1980) (holding that the enactment of a set-aside program was designed to serve a compelling governmental interest).

92. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (stating that “the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents”); *Washington*, 426 U.S. at 241 (stating that the discriminatory purpose need not appear on the face of the statute, but that a facially neutral statute cannot be applied “so as to invidiously to discriminate on the basis of race”); *Personnel Adm’r of Mass.*, 442 U.S. at 279 (stating that “a racial classification . . . is presumptively invalid” and that “this rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination”).

A. Discriminatory Application

Laws, neutral on their face, are subject to the protections of the Equal Protection Clause.⁹³ In other words, the government cannot circumvent the Equal Protection Clause by applying facially neutral laws in a discriminatory manner. Unlike Title VII of the Civil Rights Act of 1964,⁹⁴ the Equal Protection Clause requires more than a showing of a disparate impact.⁹⁵ In addition to showing a disparate impact, the plaintiff has to show the government acted intentionally.⁹⁶ The Supreme Court established this intent requirement in *Washington v. Davis*.⁹⁷ In *Davis*, Justice White stated that a statute “must not be applied so as invidiously to discriminate on the basis of race” and that one could infer an invidious purpose from the “totality of the relevant facts.”⁹⁸ However, Justice White also stated that disproportionate impact is “not the sole touchstone of an invidious racial discrimination,” and that, standing alone, it does not trig-

93. See *Vill. of Willowbrook*, 528 U.S. at 564 (stating that the Equal Protection Clause protects against “intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”).

94. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-2 (2000)). The Civil Rights Act of 1991 amended the Civil Rights Act of 1964.

95. *Washington*, 426 U.S. at 239 (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

96. *Id.*; *Personnel Adm’r of Mass.*, 442 U.S. at 279 (noting that a disproportionate impact is not enough by itself). “[A] neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race.” *Id.* at 260.

97. *Washington*, 426 U.S. at 239 (“A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurors of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.”).

98. *Id.* at 242 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). The opinion by Justice White and the concurring opinion by Justice Stevens both cite *Yick Wo*. *Id.* It is hard to discuss violations of the Equal Protection Clause without discussing *Yick Wo*. *Yick Wo*, 118 U.S. 356. Because the Supreme Court has developed the Clause since *Yick Wo*, it was appropriate to relegate the point about the case to a footnote. *Yick Wo* was denied equal protection of the laws because a facially neutral ordinance was applied in a discriminatory manner. *Id.* The disparate impact (and the intent to create the disparate impact) was obvious. *Id.* Two hundred Chinese permit applications were denied, while eighty non-Chinese permit applications were “permitted to carry on the same business under similar conditions.” *Id.* Even though the government intended to benefit one group and burden another, *Yick Wo* did not make such intent a pre-requisite to establishing a violation under the Equal Protection Clause. See *id.* *Washington* and *Feeney* made this a pre-requisite. *Id.* Given the evolution of the clause, a Katrina plaintiff would have to work a lot harder to establish intent. This seems to suggest the Supreme Court has made it harder, over time, to establish a violation under the Equal Protection Clause; see *Yick Wo*, 118 U.S. at 356; *Personel Adm’r of Mass.*, 442 U.S. at 279.

ger strict scrutiny.⁹⁹ According to Justice Stevens's concurring opinion, when the disparate impact is "dramatic," "it really does not matter whether the standard is phrased in terms of purpose or effect."¹⁰⁰ To the extent the *Davis* Court wrote a muddled opinion, it "clarified its position"¹⁰¹ in *Feeney* by defining intent as choosing to apply a law "because of," not merely "in spite of," its adverse effects upon an identifiable group.¹⁰² As discussed below, the intent requirement imposes a nearly impossible burden on the plaintiff.

IV. THE GOVERNMENT'S RESPONSE UNDER THE EQUAL PROTECTION CLAUSE

According to Francis Boyle, a professor of law at the University of Illinois, President Bush and his administration should be impeached for "denying [e]qual [p]rotection of the [l]aws to the Katrina victims because they are African-American and because they are [p]oor."¹⁰³ Additionally, he characterized the Bush administration's treatment of the Katrina victims as "racist," "class-based," and "criminal."¹⁰⁴ FEMA's response to Katrina is one avenue of attack; the Supreme Court's interpretation of the Equal Protection Clause is another. As this paper seeks to demonstrate, to successfully challenge FEMA's response, a survivor of Hurricane Katrina would have to surpass seemingly insurmountable constitutional hurdles (the intent requirement). In all likelihood, the intent requirement of the Equal Protection Clause would preclude a survivor of Hurricane Katrina from establishing a violation of the Equal Protection Clause.

99. *Washington*, 426 U.S. at 242.

100. *Id.* (Stevens J., concurring).

101. Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 963 (1993).

102. *Personnel Adm'r of Mass.*, 442 U.S. at 279 (describing how a course of action must be, at least in part, "because of," not merely "in spite of," its adverse effects upon an identifiable group).

103. Francis Boyle, *Katrina, Bush, Cheney: Grounds for Impeachment*, COUNTERPUNCH, Sept. 16, 2005 (arguing that both President George Bush and Vice President Cheney purposely denied the African-American victims of Hurricane Katrina equal protection under the law simply because of their race). "Witness the racist and class-based criminal mistreatment inflicted by the Bush administration upon the victims of Hurricane Katrina." *Id.*

104. *Id.* (trying to persuade the reader that President Bush should be impeached for the way his administration "criminally abandoned the Black and [p]oor Katrina victims in their grisly and cruel fate").

A. *Disparate Impact*

In *Come Hell or High Water: Hurricane Katrina and the Color of Disaster*, Michael Eric Dyson draws an analogy between the poor Blacks in New Orleans before Hurricane Katrina struck and the slaves in Pompeii before Mount Vesuvius erupted.¹⁰⁵ Neither the poor Blacks in New Orleans nor the slaves in Pompeii were able to evacuate before the destruction of New Orleans and Pompeii, respectively.¹⁰⁶ Despite this similarity, there is a major difference: federal, state, and local governments were obligated to act. Under the Stafford Act, the federal government is supposed to assist state and local governments “in carrying out their responsibilities to alleviate the suffering and damage which result from” natural disasters.¹⁰⁷ However, FEMA failed to alleviate the suffering and damage in New Orleans because it created an evacuation plan based on access to automobiles.¹⁰⁸ To the extent the federal government failed to assist the state and local governments in carrying out their responsibilities,¹⁰⁹ a disparate impact was created between Whites and Blacks in New Orleans.

As discussed in Section I, there were pre-Katrina disparities between Blacks and Whites in New Orleans. The city was divided along lines of race and class, and there was a strong relationship between race and class

105. MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER*, at ix-xii (2006).

106. *Id.*

107. 42 U.S.C. § 5121(b) (2000) (declaring “an orderly and continuing means of assistance by the Federal Government to State and local governments” in response to major disasters). In enacting this statute it is Congress’s intent to provide the assistance of the federal government to states affected by major disasters, such as Louisiana in response to Hurricane Katrina. *Id.*

108. CTR. FOR PROGRESSIVE REFORM, *AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA* 35 (2005), www.progressivereform.org/Unnatural_Disaster_512.pdf (describing how the evacuation plan did not take into account how less privileged families had no cars). “Of the households living in poverty, many have no access to a car.” *Id.* “This lack of access became crucial, given an evacuation plan premised on the ability of people to get in their cars and drive out of New Orleans.” *Id.*

109. See Keith O’Brian & Bryan Bender, *Chronology of Errors: How a Disaster Spread*, *BOSTON GLOBE*, Sept. 11, 2005 (“[G]overnment officials at every level – local, state, and federal – misjudged, miscommunicated, and underestimated both the power of the storm and the seriousness of its aftermath. Their decisions, or in some cases failure to decide anything at all, left tens of thousands imperiled.”); see also *Bush Admits Katrina Response Was Inadequate*, *INT’L HERALD TRIB.*, Sept. 16, 2005, available at <http://iht.com/articles/2005/09/16/europe/web.0915kat1.php> (quoting President Bush as saying, “When the federal government fails to meet such an obligation, I as [P]resident am responsible for the problem” *Id.*

in New Orleans.¹¹⁰ Sixty-seven percent of New Orleans was Black and twenty-eight percent of the population lived below the poverty line.¹¹¹ The percentage of New Orleans citizens living below the poverty line was approximately sixteen percentage points higher than the national average.¹¹² Of the twenty-eight percent of its residents living below the poverty line, eighty-four percent were Black.¹¹³ In addition to being a poor city, New Orleans was also a segregated city. In general, the poor Blacks lived in the areas of the city below sea level, and the “well-to-do” Whites lived in areas above sea level such as the French Quarter.¹¹⁴ Unlike the French Quarter, the Ninth Ward, one of the most flood-prone areas of the city, was ninety-eight percent Black.¹¹⁵ As with housing, access to cars was unequal for Blacks and Whites.¹¹⁶ Out of the households in poverty without a car, approximately 21,800 were Black, 2600 were White, and 1400 were other.¹¹⁷ In other words, out of the households in poverty without a car, eighty-five percent were Black. These pre-existing, pre-Katrina statistics are significant because FEMA’s evacuation plan was based on access to automobiles.

110. See Jason DeParle, *The Nation: Cast Away; Broken Levees, Unbroken Barriers*, N.Y. TIMES, Sept. 4, 2005 (“It was a cleavage of race and class, at once familiar and startlingly new, laid bare in a setting where they suddenly amounted to matters of life and death.”).

111. U.S. CENSUS BUREAU, FACT SHEET, NEW ORLEANS, LOUISIANA (2000), http://factfinder.census.gov/home/saff/main.html?_lang=en (search “New Orleans” for city and select “Louisiana” from the dropdown list of states; then follow the “2000” hyperlink) (listing demographic statistics for New Orleans, Louisiana based on the 2000 census).

112. *Id.* (reporting 12.4% of individuals in the United States below the poverty level as of the year 2000).

113. *Id.* (search “New Orleans” for city and select “Louisiana” from the dropdown list of states; then follow the “2000” hyperlink tab; then follow the “view a Fact Sheet for a race, ethnic, or ancestry group” hyperlink; then select “Black alone”; and click “Go”) (according to the 2000 Census 110,215 of the 130,896 individuals below the poverty level in New Orleans, Louisiana were Black or African-American).

114. See Jason DeParle, *The Nation: Cast Away; Broken Levees, Unbroken Barriers*, N.Y. TIMES, Sept. 4, 2005 (“Hydrology joined sociology throughout the story line, from the settling of the flooded city, where well-to-do [W]hite people lived on the high ground, to its frantic abandonment.”).

115. Greater New Orleans Community Data Center, <http://www.gnocdc.org/orleans/8/22/people.html> (last visited Dec. 29, 2008).

116. See ALAN BERUBE & STEVEN RAPHAEL, BROOKINGS INST., ACCESS TO CARS IN NEW ORLEANS 1 (2005), http://www.brookings.edu/metro/20050915_katrinacarstables.pdf (discussing a specific disparity that separated New Orleans residents by race). The disparity between the number of African-Americans lacking access to automobiles in New Orleans, compared to non-Hispanic Whites, became immediately apparent after Katrina. *Id.*

117. Jason DeParle, *The Nation: Cast Away; Broken Levees, Unbroken Barriers*, N.Y. TIMES, Sept. 4, 2005. The figures were compiled based on 2000 Census data, and the article noted that thirty-five percent of Black households didn’t own a car compared to only fifteen percent of White households.

FEMA's evacuation plan was incomplete. It was incomplete because it failed to account for the households without access to cars. In this way, it "led to preventable deaths, great suffering, and further delays in relief."¹¹⁸ As demonstrated above, the households in poverty without a car were predominately Black. Even though there was a relationship between poverty and cars (or lack thereof), there was also a relationship between race and cars (or lack thereof). Even if all the households without a car (in poverty and not in poverty) are considered, twenty-seven percent were Black and five percent were White.¹¹⁹ Clearly, the evacuation plan hindered evacuation and burdened Blacks because Blacks were less likely than Whites to have cars. These disparities, coupled with FEMA's evacuation plan, explain why a disproportionate number of the residents stranded in New Orleans were Black. Since FEMA developed the evacuation plan, it created the consequential disparate impact between Blacks and Whites.¹²⁰

In addition to being stranded, these residents were burdened by the government's delay in executing the incomplete plan. Michael Brown sent FEMA employees to New Orleans after Katrina struck, and when

118. U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 2 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

119. ALAN BERUBE & STEVEN RAPHAEL, BROOKINGS INST., ACCESS TO CARS IN NEW ORLEANS 1 (2005), http://www.brookings.edu/metro/20050915_katrinacarstables.pdf ("In the New Orleans metro area . . . about five percent of non-Hispanic [W]hites lacked auto access. By contrast, twenty-five percent of African-Americans in the New Orleans area lacked access to a car . . .").

120. See CTR. FOR PROGRESSIVE REFORM, AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA 36 (2005), www.progressivereform.org/Unnatural_Disaster_512.pdf; see also Caren Bohan, *Bush Says Katrina Rebuilding Could Take Years*, REUTERS, Aug. 28, 2006 (remarking how Blacks "bore the brunt of the suffering"); see also Salim Muwakkil, *Katrina's Racial Wake*, IN THESE TIMES, Sept. 7, 2005, http://www.inthesetimes.com/article/2314/katrina_racial_wake ("African-Americans make up about sixty-seven percent of the population of New Orleans, but clearly they were disproportionately victimized by the hurricane and its aftermath."); see also Noah Leavitt, *The U.S. Government's Flawed Response to Hurricane Katrina: Why It Should Be Viewed as a Human Rights Failure, and What the Consequences of That Could Be*, FINDLAW, Mar. 7, 2006, <http://writ.news.findlaw.com/leavitt/20060307.html> ("Of course, FEMA's orders were not racially discriminatory on their face, but they had a dramatically disparate impact because of the high poverty rate of African-Americans compared to other groups in and around New Orleans."). According to Ann Fagan Ginger, even though the "FEMA orders" were facially neutral, "everyone familiar with the facts knew they would have a disparate impact on people of color because the poverty rate in Black communities is much higher than in [W]hite communities." *Id.*; see also Benjamin Dangl, *Human Rights Violations in the Aftermath of Hurricane Katrina*, TOWARD FREEDOM, Dec. 6, 2005, <http://www.towardfreedom.com/home/content/view/691>.

they arrived, they directed the stranded residents to unsafe and unsanitary shelters, namely the Superdome and New Orleans Convention Center. Had the government developed an all-encompassing plan and responded to Hurricane Katrina in a timely manner, the stranded residents could have avoided the effects of the flood and the conditions at the Superdome and the New Orleans Convention Center. FEMA could have lessened the disparate impact between Whites and Blacks, the effects of which are still lingering. Studies such as the one conducted by the Kaiser Family Foundation have identified a number of lingering effects. According to the study, the percentage of Blacks who “described their lives as disrupted” was double the percentage for Whites.¹²¹ Whites surely suffered from Katrina’s wrath, but “[B]lack were disproportionately living in the areas that were most flooded.”¹²² Unfortunately, unlike Title VII of the Civil Rights Act, the Equal Protection Clause requires more than a showing of a disparate impact.¹²³

B. *The Intent Requirement*

In addition to satisfying the disparate impact requirement, a petitioner challenging the government’s response would have to satisfy the intent requirement of the Equal Protection Clause.¹²⁴ While a majority of Blacks believe the government’s response was related to race,¹²⁵ the petitioner would have to show the government intended to create a disparate impact. After scrutinizing the disproportionate distribution of resources between Blacks and Whites, contrasting the federal government’s response to Hurricane Katrina with Hurricanes Charley and Frances in Florida, and taking into account the government’s knowledge about the

121. Peter Whoriskey, *Katrina Hit Blacks Harder than Whites, Study Finds*, WASH. POST, May 10, 2007, at A02 (highlighting the findings of a survey conducted by the Kaiser Family Foundation).

122. *Id.* (quoting Mollyann Brodie, vice president of public opinion and media research for the Kaiser Family Foundation).

123. *Washington*, 426 U.S. at 239 (describing how a discriminatory purpose is also necessary).

124. *Id.* at 241 (explaining how a particular act can, however, create a prima facie showing of intent). “With a prima facie case made out, ‘the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.’” *Id.* (citation omitted).

125. Sheryll Cashin, *Katrina: The American Dilemma Redux*, in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA 30 (David Dante Troutt ed. 2006) (“Most [B]lack people . . . felt in their bones that this delay would not have happened if the majority of people stranded at the Superdome and New Orleans Convention Center had been [W]hite.”).

vulnerable groups in New Orleans, a fact-finder could infer the government acted intentionally.

The distribution of resources benefited Whites more than Blacks. First, the National Guard protected White areas of the city at the expense of the areas to which many Blacks evacuated such as Superdome and New Orleans Convention Center.¹²⁶ A curfew was imposed on the French Quarter and the National Guard policed the wealthy areas, such as the Superdome and Convention Center.¹²⁷ The Superdome and Convention Center were supposed to be safe havens, but conditions there escalated to the point where bus drivers, fearing violence, refused to drive there.¹²⁸ The protection of White property was seemingly more important than the protection of Black lives.¹²⁹ Second, as Louis Farrakhan has suggested,¹³⁰ portions of the levees may have been blasted to save the rich, mostly White areas of the city at the expense of the poor, mostly Black areas of the city. There is evidence of a “levee bomb,” the explosion of which flooded the Ninth Ward.¹³¹ Before a House Committee, witnesses

126. See LAWYERS' COMM. FOR CIVIL RIGHTS, TESTIMONY OF BARBARA R. ARNWINE, EXECUTIVE DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW 3 (2005), http://katrina.house.gov/hearings/12_06-05/arnwine-120605.pdf; see also MICHAEL ERIC DYSON, COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER, at v (2006). A survivor who was stranded at the Convention Center was quoted as follows:

We were in the Convention Center for five days without food, without water, without help. Only way we got food is we had to go in restaurants and stores where people had looted and vandalized to feed ourselves and give ourselves water We had nowhere to sleep, we had no security, we had no light. We had to survive in the streets I think that was the worst nightmare I ever had. *Id.*

127. LAWYERS' COMM. FOR CIVIL RIGHTS, TESTIMONY OF BARBARA R. ARNWINE, EXECUTIVE DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW 3 (2005), http://katrina.house.gov/hearings/12_06-05/arnwine_120605.pdf (discussing race and class inequities in the New Orleans area).

128. *Id.*

129. *Id.* (explaining how Hurricane Katrina exposed race inequities within New Orleans).

130. U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 19 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf> (“Louis Farrakhan suggested New Orleans’ levees were intentionally blown up to destroy primarily African-American neighborhoods.”).

131. Lisa Myers & the NBC Investigative Unit, *Were the Levees Bombed in New Orleans? Ninth Ward Residents Give Voice to a Conspiracy Theory*, MSNBC.COM, Dec. 7, 2005, <http://www.msnbc.msn.com/id/10370145/> (referencing the testimony of a New Orleans resident, Dyan French, before the House Select Committee on Hurricane Katrina). She testified that she “has witnesses that they bombed the levee walls.” *Id.* Furthermore, other New Orleans residents believe the levee bombing theory to be factual and an “act of genocide” and “ethnic cleansing.” *Id.* Harvard professor Alvin Pouissant believes that “such conspiracy theories are fueled by years of government neglect and discrimination

testified to “explosion sounds” and a “30 foot crater at the bottom of the Seventeenth Street levee.”¹³² Whether the levee bomb is real or not, protecting one group (or one group’s property) over another is evidence of intent. Coupled with the federal government’s response to Hurricane Charley and Frances and the government’s knowledge of the vulnerable groups in New Orleans, the evidence becomes more compelling.

The federal government’s response to Hurricane Katrina in Louisiana was “starkly different” from its response to Hurricanes Charley and Frances in Florida.¹³³ The difference lies in FEMA’s response times to the hurricanes. Even though Charley and Frances were less intense than Katrina,¹³⁴ the government responded to these low intensity hurricanes in an adequate and timely manner. The Wall Street Journal characterized FEMA’s response to Charley and Frances as a “tour-de-force.”¹³⁵ Whereas Michael Brown ignored the warnings for Hurricane Katrina, supplies were “pre-positioned” and ready-to-go before Hurricanes Charley and Frances struck.¹³⁶ Indeed, much of the hardship suffered by the survivors of Katrina stemmed from FEMA’s incomplete evacuation of New Orleans. Despite plenty of advance notice, FEMA was not pre-

against [B]lacks.” *Id.* These levee bombing theories are “partly rooted in historical fact.” *Id.* “In 1927, the levees were bombed to save parts of the city, and [B]lack neighborhoods were inundated.” *Id.* A team from the University of Berkeley headed by Professor Robert Bea studied the levee failures and found no evidence indicating explosions. *Id.*

132. *Challenges Facing African-American Evacuees from Hurricane Katrina* (C-SPAN television broadcast Dec. 6, 2005), available at <http://www.c-span.org> (search “Challenges Facing African-American Evacuees from Hurricane Katrina”).

133. John Dinan & Dale Krane, *The State of American Federalism, 2005: Federalism Resurfaces in the Political Debate*, 36 PUBLIUS: J. FEDERALISM 327, 329 (2006) (citing the Wall Street Journal); see Eva Paterson, *Katrina Victims Cast to Streets in Coldest Months, Holidays*, PROGRESSIVE, Nov. 29, 2005, available at http://www.progressive.org/media_mppeterson112905 (describing FEMA’s responses to Katrina and Charley as “very different” and painting two very different pictures of FEMA’s responses).

134. See generally Press Release, Office of Press Sec., Responding to Hurricanes Charley and Frances (Sept. 14, 2004), available at <http://www.whitehouse.gov/news/releases/2004/09/20040914-14.html> (last visited Dec. 20, 2008) (noting Hurricane Charley was a category IV and Hurricane Frances was a category II).

135. Ann Carrns, Chad Terhune, Kris Hudson, & Gary Fields, *Overwhelmed: As U.S. Mobilizes Aid, Katrina Exposes Flaws in Preparation—Despite Warnings, Officials Say There Wasn’t Clear Plan For a New Orleans Disaster—Bush: Recovery to ‘Take Years,’* WALL ST. J., Sept. 1, 2005, at A1 (describing how, in hurricanes Charley and Frances, the government was able to quickly and effectively get aid to victims).

136. Eva Paterson, *Katrina Victims Cast to Streets in Coldest Months, Holidays*, PROGRESSIVE, Nov. 29, 2005, available at http://www.progressive.org/media_mppeterson112905 (“Days before Charley reached Florida’s shores, truckloads of water and supplies were pre-positioned for rapid deployment. Two days after that hurricane, President Bush and his brother, Gov. Jeb Bush, were on the ground, handing out ice to the primarily [W]hite survivors.”).

pared for Katrina, and such lack of preparedness led to preventable deaths and losses.¹³⁷

Notwithstanding the differences, there is one significant similarity between FEMA's responses to these hurricanes. FEMA appears to have mismanaged resources in Florida and Louisiana. Strangely, FEMA paid for approximately two hundred funerals in Florida even though Hurricanes Charley and Frances caused no deaths.¹³⁸ Under the Stafford Act, FEMA cannot pay for funerals unless the death is directly related to the disaster.¹³⁹ By paying the funeral expenses for deaths unrelated to Hurricanes Charley and Frances, FEMA officials violated the Stafford Act.¹⁴⁰ Even though a grand jury indicted some FEMA employees for fraud,¹⁴¹ the threat of a criminal conviction did not deter them from mismanaging FEMA resources. If nothing else, this underscores the Stafford Act's potential for abuse. The evidence underlying a mismanagement of resources in New Orleans is no less compelling.¹⁴²

Based on statistical information widely available, the federal government knew or should have known that a substantial percentage of the

137. U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 2 (2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

138. Sally Kestin, Megan O'Matz & Jon Burstein, *FEMA Paid for at Least 203 Funerals Not Related to 2004 Hurricanes*, S. FLA. SUN-SENTINEL, Aug. 10, 2005, available at <http://www.sun-sentinel.com/news/local/southflorida/sfl-fema10aug10,0,1862957.story> ("The federal government used hurricane aid money to pay funeral expenses for at least 203 Floridians whose deaths were not caused by last year's storms . . .").

139. See 42 U.S.C. § 5174(e)(1) (2000) (making financial assistance dependent on those affected by a disaster). "The President, in consultation with the Governor of a State, may provide financial assistance under this section to an individual or household in the State who is adversely affected by a major disaster to meet disaster-related medical, dental, and funeral expenses." *Id.*

140. See Sally Kestin, Megan O'Matz & Jon Burstein, *FEMA Paid for at Least 203 Funerals Not Related to 2004 Hurricanes*, S. FLA. SUN-SENTINEL, Aug. 10, 2005, available at <http://www.sun-sentinel.com/news/local/southflorida/sfl-fema10aug10,0,1862957.story>; see also Megan O'Matz, *Court to FEMA: Turn Over Documents*, S. FLA. SUN-SENTINEL, June 23, 2007 available at <http://www.sun-sentinel.com/news/local/southflorida/sfl-74femadocuments,02517325.story> ("FEMA paid millions of dollars to people who had little or no damage from Hurricane Frances and some of the other storms that hit in 2004.").

141. Sun-Sentinel.com, Sun-Sentinel Investigation: FEMA, <http://www.sun-sentinel.com/news/sfl-femacoverage,0,6697347.storygallery?coll=sfl-bonus-news> (last visited Dec. 22, 2008) (reporting that the grand jury has indicted more than a dozen FEMA employees on fraud charges).

142. *GOP Leaders Agree to Joint Katrina Hearings*, CNN.COM, Sept. 8, 2008, <http://www.cnn.com/2005/POLITICS/09/07/katrina.congress/index.html> (referencing Nancy Pelosi, who believes that if FEMA is going to succeed, it needs to focus on management and accountability).

Black population in New Orleans was living below the poverty level.¹⁴³ It knew or should have known that a substantial percentage of the Black population in New Orleans also lacked access to automobiles.¹⁴⁴ FEMA knew or should have known its plan would impact Blacks and Whites disproportionately. Even though FEMA's plan should have reflected these demographical and socioeconomic statistics, it devised a plan based on access to automobiles and failed to use forms of public transportation to evacuate the residents without access to automobiles. Additionally, it knew or should have known Katrina was approaching and the levees were structurally unsound, but it delayed the evacuation process.¹⁴⁵ Simply put, FEMA knew, or should have known, Blacks would suffer more than Whites under its evacuation plan, but it proceeded to implement the plan anyway. It seems as if FEMA acted negligently, but negligence is insufficient to establish a violation of the Equal Protection Clause.

Assuming a survivor of Hurricane Katrina could show the government acted intentionally, it would have to show the government acted "because of" not "in spite of" the disparate impact.¹⁴⁶ FEMA could have known its application of the law would create a disparate impact. However, unless FEMA intended to create the disparate impact, it did not violate the Constitution. As the discussion on the intent requirement demonstrates,

143. U.S. CENSUS BUREAU, FACT SHEET, NEW ORLEANS, LOUISIANA (2000), http://factfinder.census.gov/home/saff/main.html?_lang=en (search "New Orleans" for city and select "Louisiana" from the dropdown list of states; then follow the "2000" hyperlink tab; then follow the "view a Fact Sheet for a race, ethnic, or ancestry group" hyperlink; then select "Black alone"; and click "Go") (alluding to the statistic that eighty-four percent of the individuals living below the poverty level in New Orleans, Louisiana are African-American or Black).

144. LAWYERS' COMM. FOR CIVIL RIGHTS, TESTIMONY OF BARBARA R. ARNWINE, EXECUTIVE DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW 3 (2005), http://katrina.house.gov/hearings/12_06_05/arnwine_120605.pdf ("Census data available on the FEMA website prior to Katrina showed approximately 40,000 residents without automobiles and without access to private transportation lived in predominantly African-American sections of the City."). "Before Katrina hit, it was clear to FEMA and to anyone who inquired that the people in New Orleans who could not evacuate on their own would be Black." *Id.*

145. *See supra* Section II.

146. *Personnel Adm'r of Mass.*, 442 U.S. at 279.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature, 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 (footnote omitted).

the U.S. Supreme Court has imposed a nearly impossible burden on the plaintiff.¹⁴⁷

V. A CRITIQUE OF THE INTENT REQUIREMENT

The intent requirement established in *Washington v. Davis*,¹⁴⁸ and refined in *Feeney*,¹⁴⁹ fails to account for unconscious discrimination.¹⁵⁰ As the Supreme Court has interpreted the Equal Protection Clause, an intention to discriminate on the basis of race is a prerequisite to establishing a constitutional violation.¹⁵¹ Opponents have attacked this interpretation of the Equal Protection Clause because it places a near impossible burden on the plaintiff and “racial inequality exists irrespective of the decision makers’ motives.”¹⁵² Under the intent requirement, plaintiffs are essentially required to establish the mental state of the governmental actor who allegedly violated the Equal Protection Clause. Furthermore, the governmental actor must have applied (or written) the race-neutral legislation “because of, not in spite of” its discriminatory effect.¹⁵³ To be sure, this narrower definition of intent makes it harder to establish a violation of the Equal Protection Clause.

147. Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978) (“A motive-centered theory forces the litigants in a race case into name-calling on one side and self-righteousness on the other.”).

148. *Washington*, 426 U.S. at 245 (concluding that proof of “discriminatory racial purpose” is necessary to establish an equal protection violation).

149. *Personnel Adm’r of Mass.*, 442 U.S. at 279 (noting that an adverse impact alone is not sufficient).

150. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 388 (2007) (describing how legislatures have “little incentive” to consider how policies help perpetuate racial inequality).

151. *Washington*, 426 U.S. at 239 (distinguishing between the intent requirement of the Equal Protection Clause and the disparate impact requirement of Title VII of the Civil Rights Act of 1964). Title VII of the Civil Rights Act requires a showing of “a seemingly neutral practice or policy that has a significantly adverse impact on persons of a protected class.” *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993). After the plaintiff shows this disparate impact, the burden shifts to the employer to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” *Id.* (citing 42 U.S.C. § 2000e-2(k)(1)(A)(2000)). Opponents of the intent requirement have proposed adopting this standard in place of the intent requirement.

152. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987). The burden is seemingly impossible because the plaintiff must prove state of mind, which is “easy to hide.” *Id.*; see Barbara J. Flagg, “Was Blind, but Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 967 (1993) (“[T]he discriminatory intent requirement had borne steady and intense academic criticism.”).

153. *Personnel Adm’r of Mass.*, 442 U.S. at 279 (showing how an act that is merely known to cause a disproportionate impact is still valid if there was a legitimate, not discriminate, purpose behind the legislation).

Because the intent requirement fails to account for unconscious discrimination, it is a “poor tool” for addressing racial disparities.¹⁵⁴ It is a “[W]hite way of thinking about racial harm,”¹⁵⁵ and it suggests that it is more blameworthy to use race consciously (as opposed to unconsciously) as a factor in decision-making.¹⁵⁶ When the Supreme Court established the intent requirement, it seemed to have underestimated the potential extent of “unconscious racism.”¹⁵⁷ According to author Charles Lawrence, our history has influenced our thought processes and to this extent “we are all racists” and that “most of us are unaware of our racism.”¹⁵⁸ It is unclear why the Supreme Court has interpreted the Equal Protection Clause to protect against intentional racism and not unintentional racism. In short, the Equal Protection Clause fails to provide “equal protection of the laws” when the government, perhaps influenced by unconscious racism, applies a law so as to create a disparate impact. Since the Equal Protection Clause should protect against conscious and unconscious racism, it is time for the Supreme Court to re-evaluate its interpretation of the Clause and consider some alternatives to the intent requirement.

The commentators who have criticized the Supreme Court’s interpretation of the Equal Protection Clause have offered solutions to the shortcomings of the intent requirement.¹⁵⁹ These solutions would reduce the

154. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 375 (2007) (discussing how the mechanisms which may cause disparities may not be intentional). “While a social scientist might undertake an analysis to further uncover and understand the mechanisms that produce these disparities, law has traditionally provided poor tools for understanding these mechanisms and prompting public intervention to address racial disparities.” *Id.*

155. Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 968 (1993) (providing an explanation for the stability of the discriminatory intent requirement despite ample criticism). “[W]hite people tend to view intent as an essential element of racial harm; non-[W]hites do not.” *Id.* “[T]he *Davis* rule presupposes the existence of race-neutral decision making. White’s level of confidence in race neutrality is much greater than non-[W]hites’” *Id.*

156. *See id.* at 980 (describing one of two assumptions that the intent requirement might rest upon to provide justification for approving unconsciously race-specific decision making).

157. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”).

158. *Id.* (commenting that racism plays a dominant role in America’s historical and cultural heritage). “[Americans] do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.” *Id.*

159. Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 967 n.66 (1993) (citing numerous critics of the discriminatory intent requirement). Some of these critics offer solutions

harms of racial inequality and the burden on plaintiffs challenging the conduct of the government under the Equal Protection Clause. One solution is to replace the intent requirement with the disparate impact standard of Title VII of the Civil Rights Act.¹⁶⁰ To establish a violation under Title VII of the Civil Rights Act, an employment practice must have caused “a disparate impact on the basis of race, color, religion, sex, or national origin.”¹⁶¹ Unlike plaintiffs suing under the Equal Protection Clause, plaintiffs suing under Title VII do not have to satisfy an intent requirement. Presumably, this reduced burden provides a disincentive to discriminate in the employment context. While the disparate impact standard is suitable in the employment context, it is not suitable in the Equal Protection context. If the Supreme Court limited its analysis under the Equal Protection Clause to a disparate impact, the constitutionality of social service programs would be called into question and the floodgates would be opened.¹⁶² However, there is a more practical solution to the intent requirement.

Another way to reduce the burden of the intent requirement is to replace it with a negligence standard. Like the intent requirement and unlike the disparate impact standard, this standard requires some degree of culpability, albeit a lesser degree than intent. It punishes a governmental actor when he or she knew or should have known the application of a law would create a disparate impact. As demonstrated above, FEMA knew or should have known its response would create a disparate impact. Therefore, a plaintiff challenging its response could have prevailed under some type of negligence standard.

VI. CONCLUSION

Under current equal protection jurisprudence, FEMA can prepare for and respond to a disaster without taking racial and socioeconomic conditions into account. As the discussion above demonstrates, FEMA can

to the intent requirement, such as broadening the conception of intent, holding the government more accountable for its actions that have foreseeable discriminatory effects, and using a heightened standard of scrutiny to review cases that result in a disproportionate impact. *Id.*

160. See generally 42 U.S.C. § 2000e-2 (2000) (lacking language requiring intent). “A plaintiff in a Title VII action can proceed under three different theories, disparate treatment discrimination, pattern and practice discrimination or disparate impact discrimination. The first two theories require a showing of discriminatory intent, while the third does not.” *Knopf v. Tech Data Corp.*, 225 F.R.D. 263, 265 (M.D. Fla. 2004) (citation omitted).

161. 42 U.S.C. § 2000e-2 (2000) (describing the “disparate impact” standard).

162. *Washington*, 426 U.S. at 248 (acknowledging the far-reaching effects of a rule that would invalidate a statute simply because it happens to burden one race more than another).

negligently create a disparate impact. Whether FEMA acted intentionally or negligently when it responded to Hurricane Katrina, it discriminated against Blacks.

“Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life.”¹⁶³ The Equal Protection Clause was enacted to protect people against discrimination. Curiously, the Supreme Court has limited this protection to intentional discrimination notwithstanding our ability to discriminate without an intention to discriminate.¹⁶⁴ Since the subconscious influences decision-making, the Supreme Court’s limitation fails to provide equal protection of the laws. Even though FEMA’s response impacted Blacks and Whites disproportionately and even though FEMA may have acted negligently, the intent requirement would preclude a survivor of Katrina from establishing a violation of Equal Protection Clause. This is inconsistent with the purposes of the Equal Protection Clause and Equal Protection Clause precedent is a “poor tool” for addressing racial discrimination.¹⁶⁵ As with the “separate but equal” doctrine,¹⁶⁶ the Supreme Court should re-evaluate its interpretation of the Clause and provide the tools necessary to ensure equal protection of the laws.

163. *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting).

164. Sara Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: A Study of Chin v. Runnels*, 31 T. MARSHALL L. REV. 43, 43 (2005) (“In the years since *Washington v. Davis*, legal scholars have criticized the intent doctrine for failing to address the underlying problems of racial and unconscious discrimination.”).

165. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 375 (2007) (describing how discrimination may be completely unconscious). Toxic and polluting facilities are more often sited in minority communities, even when controlling for income levels. African-American youths receive longer, harsher sentences than [W]hite youths who commit similar crimes and with similar criminal histories. These examples of contemporary racial disparities illustrate the puzzle of modern day racial inequity: Disparities in a wide variety of social indicators exist, yet the causal mechanisms that produce these disparities are not immediately apparent. *Id.* (footnotes omitted).

166. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning the “separate but equal” doctrine).