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Expressivism, Empathy and Equality

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EXPRESSIVISM, EMPATHY AND EQUALITY

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In this article, Professor Godsil argues that the Supreme Court should not limit its application of heightened scrutiny to facially neutral government actions motivated by discriminatory intent, but rather, that the Court should apply such scrutiny when the challenged government action expresses contempt or hostility toward racial, ethnic, and gender groups or constitutes them as social inferiors or stigmatized classes. This article builds upon recent scholarship seeking to transplant this form of expressivism from the Establishment Clause to the Equal Protection context. However, this article contends that this scholarship has misconceived the test to be applied. For any expressive theory, the operative step is determining whether a government action sends a proscribed message. Most expressivist scholars have argued that the meaning of government action should be determined from the perspective of a "universal" objective observer, the standard adopted by Justice O'Connor in the Establishment Clause Cases. Professor Godsil argues that a universalist objective observer standard will underserve the goals of expressivism and the Equal Protection Clause by marginalizing the views of those affected by the government action. This article proposes instead that the meaning be determined from the perspective of a reasonable member of the allegedly affected community. This refined expressive harm test will require the judge to empathize with the affected community to determine how a reasonable member of that community would view the challenged action. A reasonable community member standard will also lead to a greater degree of objectivity in judicial decisions because the individual judge's views will not necessarily prevail.

INTRODUCTION

Outright expressions of racial bigotry have been largely eliminated from our public discourse.[1] However, numerous studies tell

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1. Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV C.R.-C.L. L. REV. 91, 95 n.11.

us that more subtle forms of racial bias continue to exist,[2] even among those who believe themselves to be non-racist.[3] This form of bias translates into the tendency of people unthinkingly to treat more favorably those who belong to their own racial group and to judge more harshly those who belong to other racial groups.[4] Government actors are unlikely to be immune from this phenomenon.[5] Indeed, examples abound of circumstances in which government actions disproportionately benefit white communities or harm people of color: enforcement of environmental laws is more stringent in white communities; noxious land-uses are more likely to be placed in communities of color; a black defendant is more likely to be charged with a capital offense if the alleged victim is white; and people of color are more likely to be imprisoned for longer periods of time for nonviolent drug offenses.[6]

Yet when minority plaintiffs seek redress under the Equal Protection Clause, the Supreme Court requires proof that the government actor possesses an *intent* to discriminate.[7] Civil rights advocates and many scholars have countered that the intent test is inherently flawed because it suffers fatal problems of proof and fails to uncover the more prevalent unconscious bias. While this issue has been debated for decades with little effect, there are two persuasive reasons to revisit the issue now.

The first is pragmatic: until recently, the practical effect of the Court's adoption of the intent test was ameliorated considerably by

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2. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997) (noting that there is a "broad consensus that discrimination today is generally perpetrated through subtle rather than overt acts.").

3. Green, *supra* note 1, at 95–96. This form of bias has been named "aversive racism" and refers to the practice of acting upon unconscious negative feelings by those who believe themselves to be non-racist. *Id.* at 8.

4. *See* Ian Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1813 (June 2000) (citing social science studies).

5. *Id.* at 1723.

6. *See, e.g.*, Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307 (1995); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); LUKE COLE & SHEILA FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM & THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2000) (discussing the evidence that government actions have resulted in a disparate burden of pollution upon minority communities).

7. Washington v. Davis, 426 U.S. 229 (1976). In its stated standard, the Court recognizes that there may be mixed motives behind a given decision and requires only that a decision-maker select a course of action "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1977). However, at least one commentator has noted that "the Court has only seen discrimination, absent a facial classification, in the most overt or obvious situations—situations that could not be explained on any basis other than race. Whenever the Court found room to accept a nondiscriminatory explanation for a disputed act, it did so." Selmi, *supra* note 2, at 284.

federal regulations promulgated under Title VI of the Civil Rights Act of 1964, which provided that any federally-funded action having a disparate impact upon a racial group constituted a violation of Title VI.[8] Thus, since the late 1960s, civil rights plaintiffs had access to a disparate impact standard to challenge governmental activities that disproportionately affected them.[9] However, in 2001, the Supreme Court held that there is no private right of action under the regulations.[10] Because the Court had previously held that Title VI itself "proscribe[s] only those racial classifications that would violate the Equal Protection Clause,"[11] civil rights plaintiffs must now meet the elements necessary to prove intent.

The second reason to revisit the viability of the intent test is jurisprudential. In recent Establishment Clause, voting rights, and affirmative action cases, the Supreme Court has reinvigorated a strand of constitutional interpretation that assesses whether the *message* sent by a government action comports with the underlying values embodied in the constitutional provision at issue.[12] This method has been named expressivism. Expressivist scholars have developed a rich literature detailing the contours of expressivist theory and its application to constitutional adjudication.[13] These

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8. Paul K. Sonn, Note, *Fighting Minority Underrepresentation in Publicly Funded Construction Projects After* Croson*: A Title VI Litigation Strategy*, 101 YALE L.J. 1577, 1581 n.25 (1992) (citing Title VI disparate impact regulations promulgated by the Departments of Labor, Agriculture, Energy, Commerce, State, Housing & Urban Development, Justice, Labor, Treasury, Defense, Education, Veterans Affairs, Interior, Health & Human Services, and Transportation).

9. This is not to say that civil rights lawyers brought every case in which a government action resulted in a racially disparate impact. The practice at the NAACP Legal Defense and Educational Fund, where I was an assistant counsel in the mid 1990's, was to bring only cases that showed what we called colloquially "disparate impact plus" or where as Ted Shaw, the Deputy Director Counsel would say, there was "race in the air." This article stems largely from my efforts to elucidate what it means for there to be "race in the air."

10. Alexander v. Sandoval, 532 U.S. 275 (2001). The *Sandoval* decision left open the question of whether Title VI regulations created rights that could be enforced by individual plaintiffs under § 1983. While the first court to consider this question found § 1983 did create a federal right, the decision was subsequently reversed by the Third Circuit. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd* 274 F.3d 771 (3d Cir. 2001).

11. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978).

12. Bush v. Vera, 517 U.S. 952 (1996); Lynch v. Donnelly, 465 U.S. 668 (1984); Adarand Constructors v. Pena, 515 U.S. 200 (1995).

13. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000) [hereinafter Hellman, *The Expressive Dimension*]; Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653 (2001) [hereinafter Hellman, *Judging by Appearances*]; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U.

recent cases provide clear support for a reevaluation of the intent test, and the literature lays the groundwork for the adoption of a test rooted in expressivist theory.

In this article I contend that expressive harm theory, as developed by scholars and embodied in recent Court decisions, is a potentially powerful approach; but if it is adopted as currently conceived by scholars, the theory will fail to achieve the goal of ensuring that the government provides equal concern and respect to all.[14] Prominent expressivist scholars have argued that the meaning of government action should be determined from the perspective of an "objective observer," the standard adopted by Justice O'Connor in the Establishment Clause cases.[15] This objective observer standard presumes that different racial and gender groups place the same meaning upon the expressive content of a government action that affects them differently. I will thus call it a "universal" objective observer standard. This assumption of universality lacks support in the philosophical, sociological, and legal literature. It has become conventional wisdom that whites and blacks view issues like police brutality, racial profiling, or the appropriateness of O.J. Simpson's acquittal very differently based upon their life experiences. In other words, contrary to any assumption of a universal meaning, it seems quite clear that, in charged contexts, the same actions or set of circumstances may be perceived very differently depending on the perspective of the observer. Therefore, the meaning assigned to such actions is inherently rooted in the perspective of the person interpreting them. There is no *inevitable* message that lies beyond the particular beliefs and values of the interpreter.[16]

PA. L. REV. 2021 (1996) [hereinafter Sunstein, *Expressive Function*]; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) [hereinafter Sunstein, *Social Norms*].

14. Ronald Dworkin has long argued that the underpinning of the Equal Protection Clause is the guarantee that government provide equal concern and respect—this does not mean equality of result, but it means more than that the government refrain from the most virulent form of racism. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1978).

15. *See* WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES (1994); Anderson & Pildes, *supra* note 13. *But see* Hellman, *The Expressive Dimension*, *supra* note 13, at 22–23.

16. Of course, some messages are so clear that perspectival differences are highly unlikely to arise. If that were not the case, ordinary communication among people who speak the same language would be much more difficult than it in fact is. For example, the message of a red octagonal sign at the corner of a road containing the letters "stop" is that motorists must stop their car. It is expected that everyone driving on the road will receive the same message regardless of their perspective. This article is concerned with the subset of messages in which the shared meaning is likely to be contested and where the basis for the contest will be a different racial or gender experience.

The question, then, is whether the reality of differing interpretations should have legal significance in the Equal Protection context. This article argues that it must. It proposes that the meaning of a government action be determined from the perspective of a reasonable member of the allegedly affected community.[17] A universal observer standard in practical application will likely lead judges to interpret the expressive content of the government's actions from their own point of view—after all, the judge is an "objective observer" to the extent that the judge has no stake in the outcome of the dispute. However, federal judges are overwhelmingly upper middle class white men.[18] If the interpretations of judges from this subgroup are considered the "universal" meaning of government action, then the objective meaning will closely resemble the interpretation of that particular group. Because the government actors are also likely to be members of the majority white group, the judge will very likely perceive the action the same way the government actor did. Unless the government actor is an overt racist, he would be unlikely to engage in an action he thought expressed contempt and hostility toward a racial group or stigmatized them as a pariah class. However, someone from a racial group that has historically experienced discrimination and who has suffered previous ill treatment from the government may interpret this same action very differently. Yet, her interpretation will not be considered valid under the "universalist" objective standard, and she will therefore be further marginalized when her interpretation of the meaning of a government action departs from the

17. As with any reasonableness standard, the reasonable community member standard is not subjective—it does not simply require the judge to compile the actual responses of community members. Rather this standard requires the judge to create a construct—the reasonable member of the affected community—and to decide what meaning this objectively reasonable person would assign to the government action. The views of actual community members will necessarily inform the judge's decision, but this standard does not mean that plaintiffs will automatically prevail. This inquiry—whether to apply a universal test to determine reasonableness or to narrow the universe to a subgroup within the universe—is familiar from tort cases and scholarly commentary upon such cases. For a detailed discussion in the tort context, see GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 26–30 (1985).

18. Sherilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 n.3 (2000) (citing *Miles to Go: Progress of Minorities in the Legal Profession* 9 (ABA Comm. on Opportunities for Minorities in the Profession ed., 1998)). As of 1998, African Americans comprise only 3.3% of judges. Over 90% of all federal appellate judges were white. Only one federal appellate judge is Asian American. As of 1999, 79.4% of federal judges were men. Employee Relations Office, U.S. Courts, *The Judicial Fair Employment Practices Report*, (Fiscal Year 1999). As of 1991, 91% of state judges were men. BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S (1994).

"objective" interpretation. The universalist objective standard thus not only fails to capture the reality of differing perceptions, it also has the effect of finding the view held by the majority to be correct and objective, and communicating that the minority's view is confused or misguided.

The refined expressive harm test I propose, if practiced in good faith by judges, should have other salutory effects for both judicial decision-making and governance. The current intent standard requires the court to look only at the information possessed by and potential motives of the government actor, thereby rendering irrelevant the point of view of the allegedly affected community.[19] The current standard also expressly requires the court to find that the challenged action was taken at least in part *because of* racial animus.[20] By so directing the court's inquiry, the current intent standard requires the trial judge to stand in the shoes of the government actor to assess whether racial animus might have existed. Standing in someone else's shoes is an integral part of what cognitive theorists call perspective-taking empathy.[21] Given the equality norms currently espoused, if not always followed by our society, most judges will be extremely reticent to conclude that a government actor with whom he has been invited to empathize is a racist.

By contrast, an expressive harm test that requires the court to determine the expressive content of the government action by discerning how a reasonable member of the allegedly affected community would view the action will invite the judge to empathize with the community rather than the allegedly discriminating government actor. Such a focus is consistent with the constitutional goal of ensuring equal concern and respect.[22] It will also provide an incentive for government actors to engage in the same sort of empathy to ensure that their actions are constitutional.

Part I of this article sets forth the origins of expressive or stigmatic harm theory in the Supreme Court's Equal Protection jurisprudence beginning with *Strauder v. West Virginia*,[23] and its un-

19. Washington v. Davis, 426 U.S. 229, 245 (1976).

20. *Id.*

21. BECKY LYNN OMDAHL, COGNITIVE APPRAISAL, EMOTION, AND EMPATHY, 17–20, 227–28 (1995).

22. DWORKIN, *supra* note 14, at 180. Dworkin's notion that the Equal Protection Clause requires that government provide "equal concern and respect" to members of different racial groups is widely accepted as the appropriate norm. A similarly well-accepted notion is that the Equal Protection Clause prohibits government from engaging in "selective indifference" to the concerns and interests of members of suspect classes. The two concepts are mirror images of each other—one positive and the other negative—and this article will utilize this combined notion as the appropriate goal of any standard for measuring whether a government action is in compliance with the Equal Protection Clause.

23. 100 U.S. 303 (1879).

examined disappearance when the Court adopted the intent test in *Washington v. Davis*.[24] This Part critiques the intent test and contends that the Court's replacement of a stigmatic harm test with the intent test was both unjustified and unjustifiable. Part II additionally argues that the intent test requires judges to empathize with government actors and to ignore the perspectives of those claiming harm.

Part II describes the re-emergence of stigmatic harm theory in the Court's Establishment Clause jurisprudence and those Equal Protection Clause cases addressing the creation of majority-minority districts and affirmative action plans. This section then describes the academic exploration of the theory, renamed "expressive harm theory" by Richard Pildes and Richard Niemi, and then elaborated upon in a seminal article by Pildes and Elizabeth Anderson.

Part III sets forth an alternative test in which government actions are evaluated to determine if they express a lack of equal concern and respect as perceived by a reasonable member of the affected community. The standard is philosophically more sound than the universalist objective observer standard because it acknowledges that the perceived meaning of the government action may be contingent upon the perspective of the recipient of the message. In light of this "contingency of meaning," this test provides clear direction to courts on which perspective should trump. Ironically, because this standard does not simply allow the view of each individual judge (or panel of judges) to prevail, the reasonable member of the affected community standard is more likely to lead to decisions that are "objective" than the universalist objective observer standard.[25]

Part IV provides examples of how the proposed test would work in application. This Part will also address the argument that the test engages in the type of essentialism that itself undermines the Equal Protection clause. This Part concludes that while the danger of essentialism is certainly cause for concern, the benefits of a reasonable community member standard exceed the risks. First, the group from which the reasonable member is drawn is not permanent—it is defined and circumscribed by the context of the government's alleged harm, not by any underlying assumptions about the nature of a racial or ethnic group in general. Second,

24. 426 U.S. 229 (1976).

25. I do not mean objective in any metaphysical sense, but rather that decisions will be more likely to transcend the particulars of the decision-maker.

the test does not require the (clearly wrong) view that people who share membership in racial or gender groups feel the same way about an issue; it only recognizes that they may have greater sensitivity to the question of whether they have been treated unfairly than members of the majority or dominant group. Finally, even an imperfect reasonable community member standard is better than an attempt to seek a universal truth that will wholly marginalize minority groups.

I. EQUAL PROTECTION JURISPRUDENCE: STIGMATIC HARM AND INTENT

While the academic focus upon expressive theories of law is relatively new,[26] it is widely acknowledged by commentators that the Supreme Court's Equal Protection Clause jurisprudence has included a strand of analysis focusing upon the stigma caused by government action that looks very much like what is now called expressive harm theory. Commentators have not, however, focused attention upon how the Court abandoned its emphasis upon stigmatic harm. This Part describes the trajectory of the Supreme Court's Equal Protection Clause jurisprudence from the earliest interpretations following the adoption of the Fourteenth Amendment to the present. The cases in which the Court applied a stigmatic harm test in good faith served an important function in the progression of race relations in this country by proscribing government action that sent a message that blacks were inferior. This conclusion is well illustrated by the Court's most famous application of a stigmatic harm test, *Brown v. Board of Education of Topeka*,[27] as well as by subsequent decisions invalidating statutes requiring segregation. This Part then examines the cases in which the Court abandoned its focus upon stigmatic harm and instead adopted the intent test. This change occurred without explanation or justification.

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26. Anderson & Pildes, *supra* note 13; Hellman, *The Expressive Dimension*, *supra* note 13; Hellman, *Judging by Apearances*, *supra* note 13; Sunstein, *Expressive Function*, *supra* note 13; Sunstein, *Social Norms*, *supra* note 13. The University of Maryland Law Review devoted an issue to a symposium exploring the philosophical and legal issues raised by expressivist theory. *See, e.g.*, Marcia Baron, *The Moral Significance of How Things Seem*, 60 MD. L. REV. 607 (2001); Simon Blackburn, *Group Minds and Expressive Harm*, 60 MD. L. REV. 467 (2001); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506 (2001).

27. 347 U.S. 483 (1954).

A. Defining Discrimination as Sending a Stigmatic Message: Early Interpretations of the Equal Protection Clause

Strauder v. West Virginia was the second case interpreting the Equal Protection Clause after its adoption and the first in which the Court referred to the constitutional harm of a state's message.[28] In *Strauder*, a black man challenged his murder conviction by an all-white jury on the ground that the West Virginia statute that limited jury service to white male persons violated the Equal Protection Clause. In holding the law unconstitutional, the Court was careful to note that the question before it was not whether "a colored man . . . has a right to a . . . jury composed in whole or in part of persons of his own race or color."[29] Rather, the issue was whether all members of his race may be excluded from consideration at the outset by an express piece of legislation. This distinction defined the demarcation between constitutionality and unconstitutionality—and was the beginning of a jurisprudence that looked not at the *result* of the state action, but rather at what *attitude* was expressed by the state action. The Equal Protection Clause provided a positive right, which the Court considered most valuable to the "colored race," to "exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, *implying inferiority in civil society*, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."[30] The Court then explained exactly what the Equal Protection Clause proscribes and why:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[31]

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28. 100 U.S. 303 (1879).
29. *Id.* at 305.
30. *Id.* at 308 (emphasis added).
31. *Id.*

The constitutional infirmity is caused by the state's act of singling out a particular racial group for exclusion. The suggestion is that singling out of this sort sends a message that the state considers members of the group inferior. That message then acts as a stimulus to racial prejudice. In *Strauder*, then, the Court defined discrimination to include protection from certain messages sent by a state's legislation.

Twenty years later, in one of the Court's most ignoble opinions, the Court again considered the constitutionality of state legislation that accorded people different treatment based upon race. In *Plessy v. Ferguson*,[32] the Court upheld a statute that provided "equal but separate accommodations for the white, and colored races."[33] In *Plessy*, the Court did not abandon the inquiry into the message sent by the state legislation. In several passages, the Court expressly considered what the statute implied. However, the Court was simply disingenuous about its conclusions.

> [a] statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reëstablish a state of involuntary servitude.[34]

The Court here appears to be stating that a message of distinction based upon race is not sufficient to constitute discrimination because the distinction does not undermine equality. The Court went on to say that "[l]aws permitting, and even requiring, [the] separation [of the two races] . . . do not necessarily imply the inferiority of either race to the other."[35] Rejecting the plaintiff's argument that "the enforced separation of the two races stamps the colored race with a badge of inferiority," the Court made the infamous statement that "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[36]

While using language that suggests that it considered the message sent by the statute, the Court neither acknowledged that the

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32. 163 U.S. 537 (1896).

33. *Id.* at 540.

34. *Id.* at 543.

35. *Id.* at 544.

36. *Id.* at 551. Of course, if the Court had been required to determine whether the "colored race" was reasonable to put such a construction upon the act, the inquiry would have had a different result.

"colored race" reasonably understood the act to be communicating their inferiority nor addressed how the white majority likely understood the message conveyed by the act, as the equally well-known dissent by Justice Harlan articulates. Quoting the language from *Strauder* as the controlling precedent, Harlan rebutted the claim advanced by the majority that the statute at issue was constitutionally sound because it applied equally to whites and blacks alike. He first noted the impermissible purpose behind the statute: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[37] Harlan then stated as an overriding principle underlying the Equal Protection Clause that a state may not create a caste system based upon race—or any other immutable characteristic: "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. . . . In respect of civil rights, all citizens are equal before the law."[38]

Justice Harlan went on to say that the legislation is constitutionally infirm because the statute in question, by proceeding on the ground that "colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens," will "arouse race hate [and] create and perpetuate a feeling of distrust between these races."[39] He refers to the separation of citizens on the basis of race as a "brand of servitude and degradation" which is irreconcilable with the equal protection of the law.[40] This language suggests that Justice Harlan was concerned with more than the purpose of the legislation (he correctly interpreted racial hostility as the only likely purpose for such otherwise arbitrary separation of people). He was also concerned with the effect of the message sent by such separation—both upon the whites who are likely to have their racism fueled by the official sanction suggested by the legislation and upon the blacks who will be degraded by the message and whose distrust of the majority will be intensified.

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37. *Id.* at 557 (Harlan, J., dissenting).

38. *Id.* at 559 (Harlan, J., dissenting). While much is laudable about Harlan's dissent, an almost equal amount of his opinion is as contrary to our current understanding of racial equality as the majority's opinion. At the same time that he asserted the importance of the principle of equality before the law, Justice Harlan also assumed continued white hegemony and affirmed the exclusion of the Chinese from citizenship. *Id.* at 559, 561.

39. *Id.* at 560 (Harlan, J. dissenting).

40. *Id.* at 562 (Harlan J. dissenting).

In subsequent Equal Protection cases, without specifying precisely what standard it is applying, the Court appeared quite concerned with the purposes underlying racialized legislation as opposed to the message sent by such legislation. For example, in *Cumming v. Richmond County Board of Education*, though the Court denied an Equal Protection challenge by black parents to a Georgia county's decision to subsidize a high school for white girls while not providing any similar subsidy to a high school for black children, it noted that:

> if it appeared that the Board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court. . . . The state court . . . rejected the suggestion that the Board proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded or had acted in hostility to the colored race.[41]

This language appears to suggest that a racially hostile purpose is necessary for a government decision to be constitutionally impermissible even though the decision to fund a school for whites and not for blacks clearly shows racial favoritism. The message conveyed by such obvious racial favoritism is not mentioned.

B. Challenges to Segregation and the Adoption of Expressivism in Brown

The case in which the Court made most famous use of the stigmatic theory of harm underlying an Equal Protection violation is *Brown v. Board of Education of Topeka*.[42] As has been detailed

41. 175 U.S. 528, 545 (1899).

42. 347 U.S. 483 (1954). It might have been expected that as the Court began to consider the desegregation cases leading up to *Brown* the Court would again focus upon the expressive effect of legislation. However, a line of cases beginning with *McCabe v. Atchinson*, 235 U.S. 151 (1914), and continuing through *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), and *Sweatt v. Painter*, 339 U.S. 629 (1950), focused upon the right to equal protection of the laws as a personal and individual right. While these cases could easily have been decided using a stigma theory, the Court did not address the effect of the message of exclusion at all and instead concentrated solely upon the opportunities the plaintiff was deprived of as a result of the exclusionary legislation. It is important to note that in *Sweatt*, unlike *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court rejected formalist syllogisms—the new law school at issue, which was created for blacks, excluded whites just as the University of Texas excluded blacks—and recognized the reality of white power in the state; but still, the Court

elsewhere,[43] plaintiffs sought to place squarely before the Court the issue of segregation itself and thus stipulated that the schools were equalized with respect to tangible factors such as buildings, curricula, qualifications and salaries of teachers.[44] In response to the question of whether segregation of children on the basis of race even in light of the equality of tangible factors deprived the children of the minority group of equal protection, the Court stated that such segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[45] This finding focused specifically upon the recipient's response to the message: it does not refer to the response of the white children or the larger community. The Court then quoted the district court stating that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group," which the court found has the effect of limiting educational achievement and thus opportunity.[46] This language as well suggests that the relevant inquiry is the perception of those in the "negro" group, since it describes the effect of the message as resulting in limited educational opportunity. Based in large part upon its conclusion that the Equal Protection Clause prohibits the stigmatic message conveyed *to* African Americans by the segregation of the races, the Court held that, in the field of public education, the doctrine of "separate but equal" has no place.

Over the next two years, in per curiam opinions without any analysis, the Court also held that segregation was impermissible in

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limited its analysis to opportunities of individuals and did not address the larger social meaning of excluding blacks from the state's primary law school.

The University of Oklahoma's treatment of Hugh McLaurin, which led to *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950), was an even more obvious opportunity for the Court to focus upon the message sent by state action. In that case, Mr. McLaurin, after being admitted to the University of Oklahoma pursuant to court order, was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria. *Id.* at 640. But again, instead of considering the symbolic message conveyed by this treatment to either Mr. McLaurin or society generally, the Court focused more narrowly upon the effect of such treatment upon Mr. McLaurin's education.

43. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY, (1975); MARK TUSHNET, BROWN V. BOARD OF EDUCATION: THE BATTLE FOR INTEGRATION (1995).

44. *Brown*, 347 U.S. at 492.

45. *Id.* at 494.

46. *Id.*

various facets of life, including buses,[47] municipal golf courses,[48] and public beaches and bathhouses.[49] Thus, the Court appears to have applied stigmatic harm theory as developed in the *Brown* decision to any instance in which government expressly segregated the races. Similarly, in the educational desegregation cases following *Brown*, the Court often mentioned the stigmatic harm to African American school children as an impetus for finding various desegregation proposals constitutionally inadequate.[50]

In applying stigmatic harm theory outside the education context, the Court also addressed the effect of the message upon those outside the African American community. For example, in *Anderson v. Martin*,[51] in which it invalidated a Louisiana statute requiring that a candidate's race be designated on the ballot, the Court was concerned that the statute "furnishe[d] a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another" in light of the message the requirement conveys.[52] "[B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines."[53]

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47. Gayle v. Browder, 352 U.S. 903 (1956).

48. Holmes v. City of Atlanta, 350 U.S. 879 (1955).

49. Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955). In this case, the Court affirmed a decision by the Fourth Circuit holding segregation of recreational facilities unconstitutional in reliance upon the language in *Brown* concerning the feeling of inferiority generated by separating black children from white children of the same age solely because of race. The Court also reversed and remanded numerous cases addressing segregation in light of *Brown*, including, *Muir v. Louisville Park*, 347 U.S. 971 (1954).

50. *See, e.g.*, Wright v. Council of Emporia, 407 U.S. 451, 466 (1972).

51. 375 U.S. 399, 402 (1964). Another example is *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970). In *Carter*, plaintiffs were a class of African American citizens of Greene County, Alabama, who alleged that they had been systematically excluded from jury service within the county solely on the basis of race. Alabama's jury selection procedure was governed by statute and provided that a clerk must compile a list of eligible citizens which will be used by the three-member jury commission to prepare a jury roll and box containing the names of all qualified citizens who are "generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment." *Id.* at 323 (quoting 30 ALA. CODE § 21 (1958)). African Americans composed 75% of the population in Greene County in 1960; however, the application of this statute in Greene County resulted in African Americans comprising only (at most) 7% of the persons on the jury list between 1951 through 1967. In holding such practice unconstitutional, the Court quoted *Strauder v. West Virginia*, 100 U.S. 303 (1879), for the proposition that "[t]he exclusion of Negroes from jury service because of their race is 'practically a brand upon them . . ., an assertion of their inferiority . . . .'" *Id.* at 330 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)) (ellipses in original).

52. 375 U.S. at 402.

53. *Id.*

While many cases invalidating racial classifications appeared to have been decided because of the stigma resulting from such classifications, the Court continued to focus upon the racially discriminatory purpose of such legislation as well. In *Anderson*, for example, the Court noted that the legislation could not be justified by the state's assertion that it was "reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates," since the Court could "see no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office."[54] Instead, "this factor in itself 'underscores the purely racial character and purpose' of the statute."[55] In *Loving v. Virginia*,[56] the racial purpose appeared to be the primary factor the Court relied upon in invalidating Virginia's anti-miscegenation statute.[57] The Court rejected the "equal application" theory advanced by the State, in which the State argued that the statute could not be said to discriminate because the statute penalized whites and non-whites alike for intermarrying, claiming that the fact of the racial classification alone requires scrutiny. The Court then held that the statute did not survive strict scrutiny because "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures *designed* to maintain White Supremacy."[58] The Court in *Loving* did not mention the stigmatic message sent by the statute, but instead relied upon the purpose the statute appeared to promote.

C. Ascendance of the Intent Test

During this same post-*Brown* period, the Court began to grapple with how to determine the constitutionality of government action with racially discriminatory effects, as opposed to racially explicit legislation. The Court appeared to reject a "purpose test" and to adopt an "effects test" in *Palmer v. Thompson*,[59] only to reverse itself

54. *Id.* at 403.
55. *Id.* (quoting Goss v. Bd. of Educ., 373 U.S. 683, 688 (1963)).
56. 388 U.S. 1 (1967).
57. *Id.* at 11–12.
58. *Id.* at 11 (emphasis added).
59. 403 U.S. 217 (1971).

five years later in *Washington v. Davis*.[60] These cases have been analyzed in many articles addressing the Court's Equal Protection Clause jurisprudence;[61] however, they have not been analyzed for their implicit abandonment of a stigmatic or expressive harm test.

In *Palmer*, plaintiffs challenged the decision of the city of Jackson, Mississippi to close all city-operated swimming pools following a court decision requiring the pools to be integrated. Rejecting plaintiffs' argument that the City's actions violated the Equal Protection Clause because they were motivated by a desire to avoid racial integration, the Court held that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[62] The Court distinguished cases in which motive or purpose had been discussed as being primarily focused upon the "actual effect of the enactments, not upon the motivation which led the States to behave as they did."[63] The Court stated that it found no facts in the case to suggest that blacks and whites were being treated differently and thus, no constitutional violation.[64] The *Palmer* majority also mentions briefly the "faint and unpersuasive argument" that the closing of the pools to keep the races separate constituted a violation of the Thirteenth Amendment as a badge or incident of slavery—analogized to an argument made by Justice Harlan in his dissent in *Plessy*.[65]

Like the *Plessy* majority, the majority in *Palmer* chose to ignore the quite clear message sent by the City's decision. The dissents, however, did not. Justice White unmasked the majority's attempt to "white wash" the message of the City of Jackson's actions: "The fact is that closing the pools is an expression of official policy that Negroes are unfit to associate with whites. . . . The Equal Protection Clause is a hollow promise if it does not forbid such official deni-

60. 426 U.S. 229 (1976).

61. *See, e.g.* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 738 n.46 (1983) (citing Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978); and Seth F. Kreimer, Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976)); Robert Hayman, *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 86 n.152 (1995); Andrew Luger, *Liberal Theory as Constitutional Doctrine: A Critical Approach to Equal Protection*, 73 GEO. L.J. 153 (1984).

62. 403 U.S. at 224.

63. *Id.* at 225.

64. *Id.*

65. *Id.* at 226.

grations of the race the Fourteenth Amendment was designed to protect."[66] White also argued that the responses of whites and blacks to the decision to close the pools would differ and that the difference is of constitutional significance:

> [T]he reality is that the impact of the city's act falls on the minority. Quite apart from the question whether the white citizens of Jackson have a better chance to swim than do their Negro neighbors absent city pools, there are deep and troubling effects on the racial minority that should give us all pause. As stated at the outset of this opinion, by closing the pools solely because of the order to desegregate, the city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility.[67]

Justice White then pressed his view that *Brown* and its progeny prohibited official endorsement of the notion that Negroes are not equal to whites.[68] He concludes that, while whites will be angered by the loss of the pools, "Negroes feel that and more. They are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal. And the closed pools stand as mute reminders to the community of the official view of Negro inferiority."[69]

The deficiency in *Palmer* is the majority's insistence that only effect (and a truncated view of effect) is constitutionally relevant; purpose and message are considered to be of no significance. Interestingly, though, while the majority quite ably attacked the pitfalls of a purpose test, the majority never addressed the stigmatic harm test the Court had been applying, as articulated by Justice White's dissent. When five years later in *Washington v. Davis*[70] the Court adopted the purpose test it had appeared to reject in *Palmer*, Justice White wrote for the majority.

Washington v. Davis involved an Equal Protection challenge to a qualifying test administered to applicants for positions as police officers in Washington D.C. that excluded a disproportionately high number of African Americans.[71] Plaintiffs did not claim that

66. *Id.* at 241 (White, J., dissenting).
67. *Id.* at 266 (White, J., dissenting).
68. *Id.* at 267 (White, J., dissenting).
69. *Id.* at 268 (White, J., dissenting).
70. 426 U.S. 229 (1976).
71. *Id.* at 233.

there was intentional or purposeful discrimination, but only that the test bore no relationship to job performance, and had a highly discriminatory impact in screening out black applicants.[72] The Supreme Court held that the Court of Appeals had erroneously applied the standard devised in Title VII cases.[73] Justice White's majority opinion expressly rejected a rule under which disparate impact alone is sufficient to trigger strict scrutiny.[74] Justice White cited *Strauder* for the proposition that, while exclusion of "Negroes" from juries violates the Equal Protection Clause, the fact that a particular jury does not statistically reflect the community does not itself constitute a violation.[75] He then quoted *Akins v. Texas*[76] for the proposition that "[a] purpose to discriminate" must be present to find a constitutional violation for systematic exclusion of jurymen.[77] Justice White went on to discuss *Wright v. Rockefeller*,[78] involving a claim that district lines had been racially gerrymandered, in which plaintiffs did not prevail because they failed to show that the gerrymandering "was either motivated by racial considerations or in fact drew the districts on racial lines."[79] White also claimed that the school desegregation cases adhered to the principle that the invidious quality of law must be traced to a racially discriminatory purpose.[80] Disproportionate impact may be relevant to finding discriminatory purpose, and may even be so dramatic as to constitute a prima facie case, but White held that disproportionate impact is not the sole touchstone of an invidious racial discrimination—"[s]tanding alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny."[81] White acknowledged that *Palmer* and *Wright* suggested otherwise but claimed they do so only in dicta;[82] he then

72. *Id.*
73. *Id.* at 238.
74. *Id.*
75. *Id.* at 239.
76. 325 U.S. 398, 403–404 (1945).
77. *Washington*, 426 U.S. at 239.
78. 376 U.S. 52 (1964).
79. *Washington*, 426 U.S. at 240.
80. *Id.*
81. *Id.* at 242 (citation omitted).
82. *Id.* at 242–43. Justice White also ignored the fact that *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), had been described by the Court as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional." United States v. O'Brien, 391 U.S. 367, 384–85 (1968) (quoted in John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1210 (1970)).

proceeded to critique the application of an impact test to the facts of the case.[83]

Apart from his selective use of precedent, White's only explanation for the inappropriateness of an impact test is the oft-quoted line:

> [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[84]

Justice Stevens' concurrence suggests that the demarcation between discriminatory purpose and impact is not "nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."[85] Stevens claimed that the effect of the government's action will continue to be the focus of the court's inquiry because "normally the actor is presumed to have intended the natural consequence of his deeds."[86] Stevens contended that the subjective state of mind of any actor—but particularly when the government is the actor—is largely unknowable since the "governmental action . . . is frequently the product of compromise, of collective decisionmaking, and of mixed motivation."[87]

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83. 426 U.S. at 245–48. Justice White first questioned how a race neutral qualification that happens to result in the members of one racial group failing more than another could possibly be a violation of the Equal Protection clause. *Id.* at 245. The Constitution cannot prevent government from modestly upgrading communicative ability of employees when a job requires special ability to communicate orally and in writing (ignoring the fact that the test had not been validated). *Id.* at 246. He then claimed that the level of disproportionality was not significant enough to suggest that the test was a purposeful device to discriminate, and that the test is neutral on its face and is rationally related to the reasonable goal of government. *Id.* at 247. Justice White found that in this case, the government's affirmative efforts to recruit blacks negated any inference of discriminatory intent. *Id.*

84. *Davis*, 426 U.S. at 248. While not cited, this explanation mirrors the argument John Hart Ely set forth in his influential Yale Law Journal article published in 1970. As examples of "laws which fall most heavily on one racial group from which it would be difficult to infer racial motivation", Ely mentions "tax breaks for farmers and oilmen, sales taxes, graduated income taxes, literacy tests, and perhaps certain criminal statutes." John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1254 & n.140 (1970).

85. *Davis*, 426 U.S. at 254 (Stevens, J., concurring).

86. *Id.* at 253 (Stevens, J., concurring).

87. *Id.*

Therefore, Stevens acknowledged that it is "unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker," and noted that by the same token, a "law conscripting clerics should not be invalidated because an atheist voted for it."[88]

Stewart repudiated this vision of intent the following term in *Personnel Administrator v. Feeney*.[89] Rejecting the notion that the actor intends the natural and foreseeable consequences of his voluntary actions, Stewart stated "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . 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."[90] None of the Justices in either *Feeney*, or *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[91] the other case that term in which the Court addressed the application of the Equal Protection Clause to facially neutral government actions, mentioned the stigmatic harm theory. That strand of analysis, which had run through the Equal Protection cases beginning with *Strauder*, was simply abandoned without discussion.

D. The Limitations of Intent

It is widely agreed that the operative purpose of the Equal Protection Clause is to ensure that government actors treat citizens

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88. *Id.* Only Justices Brennan and Marshall dissented from the opinion. What is extraordinarily curious is that the dissent never mentions the fact that the Court had rejected the impact standard and adopted a purpose standard–in direct contravention of *Palmer*–which has had an enormous impact. The dissent focused exclusively upon the narrow and very technical question of whether the test at issue is properly validated and the fact that it is inconsistent with EEOC regulations. 426 U.S. at 256 (Brennan, J., dissenting).

89. 442 U.S. 256 (1979).

90. *Id.* at 279 (citation omitted). In dissent, Justices Marshall and Brennan attempted to resuscitate the forseeability interpretation of the purpose test but were unsuccessful. *Id.* at 281 (Marshall, J., dissenting).

91. 429 U.S. 252 (1977). In *Arlington Heights*, the Court held that the following factors are relevant to determining whether an official action was motivated by a discriminatory purpose: "(1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision, especially if it 'reveals a series of official actions taken for invidious purposes;' (3) the sequence of events preceding the decision; (4) any departures, substantive or procedural, from the normal decision making process; and (5) the legislative or administrative history, specifically contemporaneous statements, minutes of meetings, or reports." Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 409 (1991) (citing *Arlington Heights*, 429 U.S. at 266–68).

with equal concern and respect regardless of racial group. The intent test has failed in this task. The intent test requires the trial judge to discern the state of mind of the relevant government official or officials. In order for the plaintiff to prevail, the trial judge must conclude that the government official took the contested action at least in part because of her racial animus. After *Feeney*, it is not enough for the plaintiff to show that the government actor took the contested action with the knowledge that it would harm a particular group, the plaintiff must show that the official took the action because the action would have adverse effects upon the suspect group.[92] In other words, the plaintiff must prove to the judge's satisfaction that the government official was motivated by the views of an old-fashioned bigot. This standard has been soundly and convincingly critiqued by numerous legal scholars as too harsh a standard in an era in which racism has gone underground.[93]

A primary reason that the intent standard has become such a roadblock for plaintiffs is that, contrary to Stevens' concurrence in *Washington v. Davis*, intent has not been construed in the Equal Protection context to mean that the government actor "intended" the natural and knowable consequences of her actions. If intent were so interpreted (as it is in the tort context[94]), government action that resulted in a substantially disproportionate impact would generally be sufficient to prove intent.[95] Instead, the trial judge must attempt to discern something much more difficult: what specifically a government official was thinking when she made a certain decision or cast a certain vote.[96]

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92. *Feeney*, 442 U.S. at 260.

93. *See, e.g.*, Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998); Haney López, *supra* note 4, at 1830; Kenneth L. Karst, *The Supreme Court 1976 Term Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997).

94. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS, 48 (2000). A defendant has intent if she either "has a purpose to accomplish that result, or . . . lacks such a purpose but knows to a substantial certainty that the defendant's actions will bring about the result."

95. *Feeney*, 442 U.S. at 272.

96. *Id. But see*, Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989). Ortiz argues that the Court has not in fact required that plaintiffs meet such a high standard for intent in all cases brought under the Equal Protection Clause, but rather has reserved this standard for challenges to government actions that do not implicate fundamental rights. Ortiz makes a convincing argument that the Court sometimes applies a less stringent standard even when the intent test purportedly applies. However, that conclusion is itself problematic since it suggests that judges are exercising undisclosed discretion as to when to apply the harsh standard. *See* Foster, *supra* note 93, at 1068.

Such an inquiry thus focuses the trial judge's attention upon the information the government official possessed, the statements that she made, the actions that she took, and any other evidence relevant to her intentions. Any evidence concerning the history of the plaintiffs' treatment by the government, if not by that same government actor, and the plaintiffs' perceptions of their treatment by the government is largely irrelevant since it does not directly address the defendant government's intent. The current intent standard dismisses the plaintiffs' experience; instead it requires the trial judge to stand in the shoes of the government actor to assess whether any motivation apart from racial animus might have existed. Indeed, under the *Feeney* "because of" not "in spite of" standard, the trial judge is also essentially directed to inquire whether there are any plausible non-racist explanations for the action taken. Because government decisions tend to be the products of complex and multi-faceted planning and review, it is rare indeed for there not to be a single non-racist justification for a decision or action.

Moreover, even if the racial explanations may be more persuasive, the process of standing in the government actor's shoes may well lead to what cognitive theorists call perspective-taking empathy.[97] Empathy is the process of "understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other."[98] The substantive result advanced by encouraging empathy with government defendants seems to be a disincentive to find for plaintiffs in Equal Protection cases unless the most virulent racism is present that even an empathetic judge cannot ignore.[99] If one views the Equal Protection Clause as intended to eradicate selective indifference or lack of equal concern and respect by government actors, the empathy encouraged will have a perverse effect. First, given the equality norms currently espoused, if not followed, by our society, most judges will be extremely reticent to conclude that a government actor with whom he has been invited

97. *See, e.g.*, BECKY LYNN OMDAHL, COGNITIVE APPRAISAL, EMOTION, AND EMPATHY, 17–20, 227–28 (1995).

98. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987).

99. Sheldon Nahmod has critiqued the Supreme Court's decision in qualified immunity jurisprudence on these grounds. Sheldon Nahmod, *The Restructuring of Narrative and Empathy in Section 1983 Cases*, 72 CHI.-KENT L. REV. 819, 820 (1997). Nahmod argues that by requiring judges to determine whether a section 1983 defendant has acted reasonably the judge must read the defendant's narrative and "imagin[e] what it was like when she acted as she did under the circumstances confronting her." *Id.* at 828–29. He contends that such narratives "encourage empathy and mercy for the § 1983 tort defendant in connection with the potential for significant personal damages liability." *Id.* at 829.

to empathize is a racist. As Kenneth Karst has argued: "Think about who most of the judges are, and then ask yourself, in which direction is judicial empathy likely to flow in these disputed-motives cases: to those who are claiming discrimination, or to the officials whose motives are challenged."[100] Second, a government actor is essentially given the message that the only conduct she must avoid is open racism; she need not vigilantly guard against the more unconscious forms of racism that she is in fact more likely to engage in.[101]

In any event, the government official in present day Equal Protection cases is unlikely to be of the old fashioned George Wallace variety.[102] Powerful social norms ensure that such blatant racism is no longer tolerated.[103] However, the virtual elimination of the virulent prejudice of a different age does not mean that those in the majority group no longer take race into account in decision making. In 1987, Charles Lawrence described the phenomenon of unconscious racism in his article: *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism.*[104] During the last decade, two well-known social scientists, John F. Dovidio and Samuel L. Gaertner, have documented a modern form of bias they refer to as "aversive racism," which describes the practice of acting upon unconscious negative feelings by those who believe themselves to be non-racist.[105] It has certainly been my experience representing

100. Kenneth Karst, *Judging and Belonging,* 61 S. CAL. L. REV. 1957, 1961 (1988). Slightly less cynically, jon powell has suggested that "subtle and unconscious forms of racist behavior, because of their ephemeral nature, are often purposefully overlooked. No one wants to accuse another of being racist if it is at once clear that the person's behavior is unconscious." jon powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in Democratic Society,* 16 LAW & INEQ. 97, 127–28 (1998).

101. *See* Haney López, *supra* note 4.

102. Wallace, an infamous segregationist, is most noted for his virulent efforts to prevent the University of Alabama from admitting blacks. *See* TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE, 136, 144 (1987).

103. The Trent Lott debacle in December 2002 illustrates that the public will not tolerate blatantly racist statements by modern-day politicians. When the media publicized Lott's statement that the country would have been better off if Strom Thurmond had been elected President in 1948–on a platform that supported segregation—Lott was forced to resign as Senate majority leader. *See* Carl Hulse, *Lott Apologizes Again on Words about '48 Race,* N.Y. TIMES, December 12, 2002, at A1. However, while numerous studies document the dramatic shift from blatant racism to public expression of egalitarian values, a more subtle form of racism continues to operate "to the detriment of women and minorities." Green, *supra* note 1, 95–96.

104. Lawrence, *supra* note 93.

105. Green, *supra* note 1, at 96 (citing to the works of John F. Dovido and Samuel L. Gaertner, including: John F. Dovidio & Samuel L. Gaertner, *Changes in the Expression and Assessment of Racial Prejudice, in* OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA 119 (Harry J. Knope et al. eds., 1991); John F. Dovidio & Samuel

communities in civil rights law suits that the most likely defendant is a harried bureaucrat or elected official who views the world from her own class and race position and thus engages in selective indifference rather than out-and-out racism. She is generally very upset and feels unjustly maligned by the suggestion that she is racist and, if the case goes to trial, can convincingly testify that racial animus never entered her mind when she made the challenged decision.

Thus, during the same period that the Court imposed a legal standard requiring plaintiffs to prove discriminatory purpose, racism went underground. This confluence, not surprisingly, has led to the extraordinary lack of success that people of color have had in bringing suit against governmental actions that they argue have harmed them disproportionately.[106]

II. EXPRESSIVE HARM AND THE OBJECTIVE OBSERVER STANDARD

A decade after intent replaced both an impact and an expressive harm standard in the Equal Protection context, expressive harm theory resurfaced. In both the Supreme Court's Establishment Clause jurisprudence and in Equal Protection Clause challenges to majority-minority districts and affirmative action plans, Justice O'Connor has applied expressive reasoning. Following its re-emergence in the Courts, scholars have developed an extensive literature exploring the application of expressivist theory.

L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism, in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998); and John F. Dovidio & Samuel L. Gaertner, *The Effects of Race, Status, and Ability on Helping Behavior*, 44 SOC. PSYCH. Q. 192 (1981)).

106. *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.4 (3d ed. 1999). Rotunda and Nowak thoroughly explore the Supreme Court's treatment of statistics in disparate impact cases and show that while litigation based primarily on statistics has been successful in discrete areas such as the Voting Rights Act, the discriminatory intent requirement of the Court's Equal Protection doctrine is likely to defeat most Equal Protection challenges where plaintiffs cannot produce a smoking gun of intentional discrimination. In addition, as noted in the introduction, prior to the 2000 term, many plaintiffs chose to bring discrimination claims under Title VI and its implementing regulations which allowed them to proceed under a disparate impact theory.

A. The Re-emergence of Expressive Harm Theory in the Courts

In *Lynch v. Donnelly*,[107] Justice O'Connor suggested clarifying the oft-criticized test for Establishment Clause inquiry set forth in *Lemon v. Kurtzman*[108] with what has been called the endorsement test. In *Lemon*, the Court created a test that synthesized the criteria developed by the Court over many years: "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive government entanglement with religion."[109]

Justice O'Connor examined the purpose and effect prongs of the *Lemon* test, explaining that "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion" while the effect prong asks whether "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[110] She concluded that "[a]n affirmative answer to either question should render the challenged practice invalid."[111] However, Justice O'Connor critiqued the traditional understanding of each prong and argued that they should be replaced by an endorsement test.

Justice O'Connor noted that the purpose prong has been deemed satisfied if a government activity has a secular purpose, but she argued that the "mere existence of some secular purpose, however dominated by religious purposes" does not satisfy this prong.[112] Rather, she claimed the inquiry should be "whether the government intends to convey a message of endorsement or disapproval of religion."[113]

More importantly, Justice O'Connor explained that the focus of the effects test should not be whether the government practice "in fact causes, even as a primary effect, advancement or inhibition of

107. 465 U.S. 668 (1984).

108. 403 U.S. 602 (1971).

109. *Lemon*, 403 U.S. at 612–613 (citations and internal quotation omitted). In *Washington v. Davis*, Justice White cited the first prong of the Lemon test to support the proposition that purpose is relevant to the Establishment Clause inquiry. 426 U.S. 229 (1976). Justice White's reliance on an Establishment Clause case suggests that the Court has long recognized the obvious parallels between the goals of the Establishment clause and those of the Equal Protection clause.

110. 465 U.S. at 690 (O'Connor, J., concurring).

111. *Id.*

112. *Id.* at 691 (O'Connor, J., concurring).

113. *Id.*

religion,"[114] citing cases upholding tax exemptions for religious organizations, and mandatory Sunday closing laws.[115] Rather, she argued, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, *whether intentionally or unintentionally*, that make religion relevant, *in reality or public perception*, to status in the political community."[116] The ultimate inquiry of Justice O'Connor's endorsement (or disapproval) test is whether the government action "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[117]

What Justice O'Connor means here is that the endorsement test does not invalidate every government act or decision that may assist religions, such as a tax exemption for religious organizations or Sunday closing laws which allow members of some, but not all, religions to observe their Sabbath more easily. Instead, Justice O'Connor states, the endorsement test invalidates those government actions that create the appearance that some religions or religious groups are disfavored or favored. Justice O'Connor refined and expanded upon her endorsement test in a series of concurring opinions following *Lynch*.[118] And, while *Lemon* was still cited as the operative test, Justice O'Connor's endorsement language from *Lynch* was adopted by the majority of the Court in *Sante Fe Independent School District v. Doe*.[119]

Shortly after Justice O'Connor introduced expressive theory in the Establishment Clause context, she reintroduced it in the context of white challenges to race specific government action that purported to benefit minorities.[120] In *Richmond v. J.A. Croson Co.*,

114. *Id.* at 691–92 (O'Connor, J., concurring).

115. *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Zorach v. Clauson, 343 U.S. 306 (1952)).

116. *Id.* at 692 (O'Connor, J., concurring) (emphasis added).

117. *Id.* at 688 (O'Connor, J., concurring).

118. Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772 (1990) (O'Connor, J., concurring).

119. 530 U.S. 290, 309 (2000). "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherants [sic] 'that they are outsiders . . . .'" *Id.* at 309–10 (Quoting *Lynch*, 465 U.S. at 688 (1984) (O'Connor, J. concurring)).

120. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). While it is important for my argument that the Court is again applying expressive harm theory in its Equal Protection jurisprudence, I do not necessarily agree with the Court's decisions in the context of what has been called the benign use of race. Rather, I agree with Mary Ann Case that the Court's Establishment Clause jurisprudence, which recognizes that government may recognize religion without violating the Establishment Clause, may support a broader rec-

the Court invalidated a set-aside program established by the City of Richmond to benefit minority construction contractors on the ground that classifications based upon race "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[121] Justice O'Connor has also used expressive theory to explain the constitutional infirmity in the creation of majority-minority voting districts.[122] Indeed, the term expressive harm was coined by Richard Pildes and Richard Niemi in an article explaining Justice O'Connor's reasoning in *Shaw v. Reno*, in which the Court invalidated a majority-minority district on the ground that its "bizarre" shape made clear that race was the primary purpose behind its creation.[123]

In the voting cases, plaintiffs are not challenging a racial classification since the actual action of creating a voting district is race neutral. In these cases, the Court has couched the inquiry in the language of intent, asking whether a discriminatory purpose animated the drawing of district lines.[124] In determining whether the intent test is met, however, Justice O'Connor has used the language of expressive theory:

> [R]eapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separate by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.[125]

She went on to argue that it sends a pernicious message to elected representatives, suggesting that they are obligated to represent only one racial group.[126]

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ognition of race. *See* MARY ANN CASE, LESSONS FOR THE FUTURE OF AFFIRMATIVE ACTION FROM THE PAST OF THE RELIGION CLAUSES? (Chicago Public Law and Legal Theory Working Paper No. 11, 2001). Similarly, Deborah Hellman, who has written most extensively to date on the application of expressivist theory to the Equal Protection Clause, has argued against the assumption that expressivist theory precludes the use of race to empower racial minorities. Hellman, *Judging by Appearances*, *supra* note 13, at 685.

121. Shaw v. Reno, 509 U.S. 630, 643 (1993).

122. *Id.* at 648; Shaw v. Hunt, 517 U.S. 899 (1996); Bush v. Vera, 517 U.S. 952 (1996).

123. Richard Pildes and Richard Niemi, *Expressive Harms, Bizarre Districts and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

124. Shaw, 509 U.S. at 646.

125. *Id.* at 647

126. *Id.*

B. The Theory of Expressivism

Elizabeth Anderson and Richard Pildes have set forth a "restatement" of expressivist theories of law.[127] They posit that the legality of an actors' conduct is dependent upon whether that conduct "expresses appropriate attitudes toward various substantive values."[128] Actions that convey attitudes that are contrary to accepted norms constitute "expressive harms."[129] Like the cases described in Part I, this theory is based upon the idea that stigmatizing messages result in concrete harms to people as members of the polity.

An expression is an action, statement, or any other expressive vehicle that manifests a state of mind.[130] The state of mind can be cognitive—beliefs, ideas or theories—but can also include "moods, emotions, attitudes, desires, intentions, and personality traits."[131] Expression can also take place at the level of state action, where policies and deliberative principles can be interpreted as "expressing official state beliefs and attitudes."[132] The role of expression is to bring a state of mind into the open for others to recognize and interpret.[133] A particular action, statement or other vehicle may be more or less successful in conveying the state of mind of the actor.[134]

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127. Anderson & Pildes, *supra* note 13, at 1503. While Anderson, Pildes, and Niemi should be credited for their work in the resurgence of expressivism, in 1987 Charles Lawrence set forth what he termed a 'cultural meaning' test. Lawrence, *supra* note 93. Lawrence argued that governmental conduct should be evaluated to see if it "conveys a symbolic message to which the culture attaches racial significance." *Id.* at 324. Heightened scrutiny would apply if a significant proportion of the population would think of the government action in racial terms. *Id.* However, Lawrence proposed the cultural meaning test as a "proxy for the unconscious motivation of the decisionmaker"–a mechanism to uncover instances of unconscious but still intentional racism that the standard application of the purpose test would overlook. *Id.* at 379 & n.293. Because he continues to assume that intent is dispositive—even if unconscious—his test differs fundamentally from expressive theory. This difference is most evident in Lawrence's willingness to require the dominant group's interpretation of the cultural meaning of a government action to be dispositive. *Id.* at 379 n.293. Lawrence states that he is not entirely comfortable with this solution, and acknowledges that there may be instances in which the "minority subculture may well see the dominant culture more clearly than the dominant culture sees itself." *Id.* I agree with Lawrence's latter point and posit that the ultimate goal of the Equal Protection Clause is for government to have to familiarize itself with how its actions are perceived by minority communities.

128. Anderson & Pildes, *supra* note 13, at 1504.

129. *Id.* at 1511.

130. *Id.* at 1504.

131. *Id.* at 1506.

132. *Id.*

133. *Id.*

134. *Id.*

Despite the link between expression and the state of mind of the actor, an action, statement, or other expressive vehicle may express a state of mind without being caused by that state of mind.[135] An example is musicians who play music that expresses the state of mind of sadness without feeling sad themselves and lawmakers who deny blacks the right to vote, which expresses contempt for them even though the lawmakers do not themselves feel that contempt but are merely pandering to white voters.[136] The operative reference for determining expressive meaning is the state of mind expressed by a particular statement or action, not the particular state of mind of the actor who made the statement or action.

The primary concern of an expressivist theory of law is whether the performance of a particular act conveys an attitude toward persons that is inconsistent with a legally prescribed norm.[137] Adopting an expressivist approach would "regulate actions by regulating the acceptable justifications for doing them" because it requires people to "act in accordance with norms that express the right attitudes toward persons."[138] An expressive theory of rights and equality law asserts that state action must express equal concern and respect[139] toward people and must also express an understanding of all citizens as equal members of the state despite racial, ethnic, or religious differences.[140] An expressive harm thus occurs when a person is treated in a way that expresses that she is not an equal member of the state or is not entitled to equal concern and respect.[141]

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135. *Id.* at 1508.

136. *Id.* Anderson and Pildes state that *communication* of a state of mind can only occur from a deliberate attempt to inform others of ones state of mind. *Id.* at 1508. They note, however, that *expression* of state of mind occurs independently of intent and whenever an action is taken. *Id.*

137. It thus is neither purely consequentialist, because it does not approve of any means toward a desirable end nor purely deontological, because it is not devoid of concerns for the ultimate ends of the act but rather requires consideration of consequences (we cannot express right attitudes toward people if we ignore the consequences of our actions toward them). *Id.* at 1509, 1512.

138. *Id.* at 1511–12.

139. *Id.* at 1520 n.30 (citing DWORKIN, *supra* note 14).

140. *Id.* at 1518.

141. A communicative harm is a special class of expressive harms in which a person is intentionally subjected to negative or inappropriate attitudes by another. *Id.* The difference between the two is that an expressive harm need not be the result of an intentional act while a communicative harm by definition is intended. *Id.* at 1528. Anderson and Pildes focus their discussion of expressive harm theory as applied to the Equal Protection Clause upon cases in which there is a racial classification or in which race consciousness can be inferred. However, they also acknowledge throughout their Article that expressivism holds government accountable when a government action conveys a stigmatic message even if such a

C. Expressive Harms and Heightened Scrutiny

By design, the expressive harm test focuses attention on the message rather than the intention. The goal, then, is to determine if, by virtue of its message, a government practice has the effect—even unintentionally—of making race relevant to status in the political community. If the Equal Protection Clause has any meaning, it would seem to be that race should not lower one's status as a member of the polity.[142]

Similarly, there does not seem to be a coherent explanation for why government action that unintentionally causes such an effect to a member (or non-member) of a religious group should be an Establishment Clause violation, but that only when such actions are intentional should there be an Equal Protection Clause violation.[143] The only explanation the Court gives in *Washington v. Davis* to explain the centrality of intent is the overinclusiveness of a pure disparate impact test.[144] However, an expressive harm test responds to the overinclusiveness problem. Just as Justice O'Connor concludes that a law providing for tax exemptions for religious organizations is not invalid simply because it advances religion, so too, a toll or sales tax that requires members of racial groups that are disproportionately poor to pay a higher percentage of their income need not be considered invalid. So long as the toll or sales tax does not send a message that there are insiders or outsiders in the political community based upon their race, the toll or sales tax would be valid.

John Hart Ely has advanced the argument that courts should not interfere with decisions reached according to democratic processes unless there is reason to distrust the process.[145] Discriminatory motivation is an improper basis for decisionmaking and thus constitutes a justification for courts to interfere with democratic decisions. However, if one accepts that it is now aversive or unconscious racial bias that distorts decisionmaking, then the search for

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message was unintended. *Id.* at 1546. In addition, they note their disagreement with the Court's application of its discriminatory purpose test. *Id.* at 1541 n.90.

142. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (stating that the "evil to be remedied by the [Equal Protection Clause]" was "the existence of laws . . . which discriminated with gross injustice and hardship against [the newly emancipated Negroes] as a class").

143. Scholars have noted Justice O'Connor's implicitly similar approach to religious, racial, and gender based differences. *See, e.g.*, Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 49 (1987).

144. 426 U.S. at 248.

145. Ely, *supra* note 84, at 1210.

conscious discriminatory motivation is too narrow. Expressivism provides a mechanism for uncovering unconscious bias. As Justice O'Connor points out, a democratic process that results in actions that send the message to one segment of the community that it is less valued is also flawed and should be closely scrutinized by courts.[146]

D. Discerning an Expressive Harm: Expectations of Universality

It is critical to define the attitude or state of mind that is actually expressed by a given statement or act. What people (or groups)[147] intend to express should not be dispositive since the intention may deviate from what they in fact express. People may act negligently or thoughtlessly and be unaware of how others may construe their actions; they may be unaware of social conventions or norms by which the public determines attitude or they may have unconscious attitudes or biases that motivate their conduct.[148] Expressivism holds people accountable for the "public" rather than the private meaning of their actions.[149]

Anderson and Pildes argue that public or expressive meanings of actions are social constructs that are not defined by those who engage in the acts, the recipients of the acts, or even the general public.[150] The meanings "are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community . . . they have to be recognizable by it, if people

146. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

147. Anderson and Pildes argue that individuals and groups are equally capable of expressing a particular idea, belief or attitude. Anderson and Pildes, *supra* note 13, at 1514–15, 1519. If all individual members of a group express a particular idea then the group is also expressing that idea as a reflection of the shared beliefs of the group's membership. This group belief informs group decision-making as to particular courses of action and further informs group attitudes. Because groups are capable of expressing attitudes, then they should be held to the same moral and rational principles as individuals. Collectives should therefore be required to express the right attitudes towards people. *Id.* at 1514–19. Anderson and Pildes discuss collective action only in terms of universal agreement. Under their approach, it seems as though if the bulk of a group expresses an idea, then the group as a whole expresses that idea–despite the fact that some members of the group failed to express the idea, or may have outright denied it. *Id.* at 1518. This approach presumes that the group has some mechanism for aggregating preferences. Some groups will not; however, because the focus of this article is government action, this distinction is not salient.

148. *Id.* at 1512–13.

149. *Id.* at 1512.

150. *Id.* at 1523–24.

were to exercise enough interpretive self-scrutiny."[151] To determine these meanings, they try to fit them into "an interpretive context."[152]

The Court has adopted a universalist objective observer test.[153] Justice O'Connor describes the test as whether "an objective observer, acquainted with the text, legislative history, and implementation of the [relevant government action], would perceive it as a state endorsement."[154] She describes the objective observer as similar to the "reasonable person" in tort law who is a "personification of a community ideal of reasonable behavior, determined by the [collective] social judgment."[155] The objective observer should be "deemed aware of the history and context of the community and forum in which the religious display appears."[156] Anderson and Pildes appear generally to applaud a universalist objective observer test because, "the constitutionality of state laws cannot be held hostage to observer's subjective feelings."[157]

However, a universalist objective observer test will fail the goal of ensuring the government treats persons with equal concern and respect. The universalist objective observer test, by definition, presumes that there is a meaning of an action that is not dependent upon the particular perspective of the person assessing the meaning.[158] The racial perspective of the person assessing the meaning will often affect how that person reads the meaning of the action. Therefore, the effect of the universalist objective observer standard will be to reify the majority group's read of a contested action and further to alienate members of the minority community. Such a result only exacerbates the constitutional injury that constitutional expressivism is intended to address.

Anderson and Pildes recognize that there may be a variety of meanings emanating from a single action when they differentiate

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151. *Id.* at 1525.

152. *Id.*

153. *Id.* at 1546–48. *See also* Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). In *Sante Fe Independent School District*, Justice Stevens appears to have abandoned his quest for a reasonable observer test particularly focusing upon a "reasonable observer who may not share the particular religious belief[s]" the state action allegedly expresses. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J. dissenting).

154. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

155. *Capitol Square*, 515 U.S. at 779–780 (quoting W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)).

156. *Id.* at 780.

157. Anderson and Pildes, *supra* note 13, at 1547.

158. *See* Minow, *supra* note 143, at 32 ("Although a person's perspective does not collapse into his or her demographic characteristics, no one is free from perspective, and no one can see fully from another's point of view.").

between the intended meaning of an act and the public meaning of an act.[159] They give as an example of this distinction the white man who, while checking into a hotel, drops his keys into the hands of the first black man he sees at the door.[160] The black man is insulted despite the white man's sincere protests that he did not intend any offense.[161] It is unclear, however, whether Anderson and Pildes recognize that it may not be possible to discern the "public" meaning of such an incident without adopting a specific perspective. They appear to credit the black man's view that the action conveyed a message of racial indignity.[162] I would as well. For a white man to assume that any black man standing near a hotel entrance is a valet suggests a stereotyped view of black men as servants rather than fellow businessmen. Therefore, the action expressed that stigmatizing message. However, it is easy to imagine other whites thinking that the incident was simply an honest mistake made by a harried traveler and that the black man was being overly sensitive. How would a "universalist" objective observer faced with two or more interpretations of what the white man's actions expressed credibly choose between them?

Anderson and Pildes also address the contingency of meaning when they argue that the recipients of the message do not control its meaning any more than the senders do.[163] They use the Supreme Court's decision in *Memphis v. Greene*[164] to illustrate this point. The case involves an Equal Protection challenge to a decision by the city of Memphis to erect a barrier preventing any traffic into a residential cul de sac. The majority, while acknowledging that the plaintiffs are black and the beneficiaries of the traffic barrier are white, paints a race-neutral picture of homeowners seeking only to protect the "safety and tranquility of a residential neighborhood" by preventing "undesirable traffic."[165] Justice Marshall's dissent shows a very different image. He quotes the trial court's conclusion that the case was about an "all white neighborhood . . . seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street."[166] Justice Marshall focuses upon the "symbolic message" of the barrier, which an

159. Anderson and Pildes, *supra* note 13, at 154.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. 451 U.S. 100 (1981).
165. 451 U.S. at 115, 119.
166. *Id.* at 137 (Marshall, J., dissenting).

expert stated will serve as a "monument to racial hostility."[167] By acknowledging that the recipients of the government's actions viewed the action as racially charged while the majority of the Court did not, Anderson and Pildes acknowledge the contingency of meaning.[168] They do not address, however, the fact that the racial perspective of the observer may have been the determinant of how the government's action was read.[169] This case dramatically illustrates the flaws of an objective observer standard.[170] Clearly, Justice Stevens, writing for the majority, did not view himself as engaging in a selective misreading of the facts. However, this case demonstrates the differences in perception that may occur when the same facts are viewed from an outsider—as opposed to insider—perspective.

The shortcomings of an objective observer standard have been raised by scholars generally, and particularly by critics of the standard employed by Justice O'Connor.[171] Neal Feigenson relies upon contemporary philosophers of language for the argument that there is no set of "objective meaning[s]" for a particular government act.[172] Rather, different audiences will impose different meanings upon the same act depending upon their particular

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167. *Id.* at 138, 140 (Marshall, J., dissenting).

168. Anderson and Pildes, *supra* note 13, at 1507.

169. This does not mean that a white person would necessarily read the action one way and a black person another. The fact that Justice Brennan signed Justice Marshall's concurrence is surely evidence of that. Rather, it means that the point of view from which the action is read (here, the black residents of Memphis or the white majority) and the facts relevant to that determination (the history of de jure segregation or simply the minutes of the zoning meaning) will be determinative.

170. Interestingly, Lawrence describes *Memphis v. Greene* as "almost as easy as *Brown*." Lawrence, *supra* note 93, at 363. He claims that the construction of the wall clearly signified whites' "need to separate themselves from blacks as a symbol of their superiority" and then states that if we ask "even the most self-deluded among [the members of the city council] what the residents of Memphis would take the existence of the wall to mean, the obvious answer would be difficult to avoid." *Id.* at 357–58. However, the fact that the majority of the Court and respected scholars such as Anderson and Pildes read the case differently suggests that Lawrence's assumptions about the universality of cultural meanings may be incorrect. *See* Anderson and Pildes, *supra* note 13, at 1524.

171. *See, e.g.*, Rena M. Bila, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535 (1995); Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994); Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273 (1994); Stephen G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463 (1994); Stephen G. Gey, *Why Religion is Special?: Reconsidering the Accomodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Hellman, *The Expressive Dimension*, *supra* note 13; Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713 (2001).

172. Neal Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 85–86 (1990).

beliefs and understandings.[173] Steven Smith has remarked that expressivists are essentially evoking a premodern metaphysics when they assert that an objective meaning is possible.[174] Smith challenges O'Connor's objective observer test in the Establishment Clause cases claiming that the cultural meaning of a government act that concerns religion is likely to be ambiguous and contested between those with different substantive visions of the role of religion in society.[175] Indeed, Smith argues, the process of concluding that a particular act has a universal meaning is itself anathema if the goal of the Establishment Clause is to recognize a plurality of views.[176] Andrew Koppelman and Shari Seidman Diamond expand upon Smith's argument by claiming that the objective observer standard may well exacerbate the alienation the endorsement test ostensibly intends to redress since "Jews may be offended by a state-sponsored nativity display, but at least the display does not subject plaintiffs to a lecture, as some of Justice O'Connor's opinions do, expressing why they are unreasonable to feel offended!"[177]

Evoking a "universalist" objective observer standard in the Equal Protection context will ensure that this phenomenon occurs between those with different racial perspectives as well.[178] Referring back to the misidentification of the African-American businessman described earlier, one can imagine that after learning of his mistake, the white guest uttered sincere protests that he did not intend to be insulting. The black businessman may well believe this is so, but he will likely assume a degree of unconscious racial bias was present that caused the reflexive misidentification. The white guest may well think that the black man is being overly sensitive and should not be so miffed by such a minor incident. Were the white businessman to be misidentified as a valet, he may think it a funny anecdote to share. The difference in the reaction is not that this particular black man is simply more sensitive. In other words, the men do not just have different "subjective" reactions to the same incident. Rather, they belong to different "intepretive

173. *Id.*

174. Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 554 (2001).

175. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 322–23 (1987).

176. *Id.*

177. Seidman Diamond & Koppelman, *supra* note 171, at 724.

178. See Minow, *supra* note 143, at 72–78. Martha Minow, and many others, have long argued that the Court has unselfconsciously adopted a racial perspective that harms others. *Id.*

communities"[179] for purposes of this action.[180] Unlike the black man, the white man does not belong to a group with a history and experience of being demeaned and kept in subservient roles as a result of his race. Whether the white man's actions will be taken to express contempt or a stereotyped view of black men is utterly dependant upon whether that history is taken into account.

Thus, if the "objective" observer is more likely than not to be a member of the dominant interpretive community, the risk is that the objective observer standard will privilege that dominant view. If the black man is then informed by an "objective observer" that a reasonable person would not consider the white man's assumption that he was a valet a racial insult but merely an honest mistake, the black man will undoubtedly be doubly offended. He has felt insulted by the white guest's conduct and now he is being labeled unreasonable for taking offense.

Other scholars urging the adoption of an expressive harm test have recognized flaws in the pure objective observer standard and have proposed alternatives.[181] Deborah Hellman posits that the public meaning of a state action should be assessed according to Jürgen Habermas' conception of the ideal conversation in which the judge seeks to ascertain what meaning would emerge from a conversation under fair conditions among real people with different views.[182] She suggests that the judge should use the litigation process to approximate an ideal conversation in which parties would come together to discuss the question under fair conditions in which "all are equally able to contribute to the discussion and

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179. See STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989). Fish uses the phrase "interpretive community" to rebut the claim that perception is indeterminate. *Id.* at 83. To the contrary, he claims there is no entirely subjective interpretation because "the observer is always a product of the categories of understanding that are his by virtue of his membership in a community of interpretation." *Id.* This article's use of the term "interpretive community" is similar to Kenneth Karst's term "communities of meaning." In his comment *Judging and Belonging*, Karst argues that those who have been acculturated in different environments inhabit different communities of meaning which do not just produce different points of view but "different realities, different worlds." Karst, *supra* note 100.

180. The men may well be part of the same interpretive community at another point in time. If, for example, one of the men tells a female co-worker that her dress shows off her great body, she may be quite offended. Both men may agree that she is being overly prissy. The men then will be in the same interpretive community vis-a-vis the female co-worker although they are in different interpretive communities with respect to race.

181. Deborah Hellman, *The Expressive Dimension*, *supra* note 13; Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1 (1996) ; Seidman Diamond and Koppleman, *supra* note 171.

182. Hellman, *The Expressive Dimension*, *supra* note 13.

all are committed to hearing and learning from the views of others."[183]

While Hellman's proposal responds to the same concerns this article addresses, Hellman's "dialogic" solution does not satisfy the critiques of the objective observer standard. Indeed, Habermas' method has been criticized for assuming that the end result of his ideal conversation will be a universal meaning that transcends different perspectives.[184] Richard Rorty, for example, rejects Habermas' conclusion that there will be a "transcendent moment of universal validity which will burst every provinciality asunder."[185] Instead, Rorty responds that to refer to the end product of the ideal conversation as the universal meaning will simply mask the continuing diversity of meaning that initially necessitated the conversation.[186] Hellman's adoption of Habermas suffers from a similar flaw. There is unlikely to be consensus at the end of the litigation process. Thus, the meaning deemed "objective" by the court will be imposed upon the parties by the court. In addition, if the judge is directed to find the "objective" meaning of the government action, even if he listens with an open mind to the views of others (which judges should do in any case), he will likely find most persuasive those views that cohere with his own perspective.[187]

In a wide-ranging article critiquing Ronald Dworkin's vision of equality, Jerry Kang proposes a "banned meaning" conception of equality that closely resembles expressive harm theory.[188] Kang argues that the Equal Protection Clause provides a "right not to suffer disadvantage from a governmental practice that conveys an objective social meaning of stigma."[189] In his discussion of how to interpret the social meaning of a government action, Kang acknowledges that the social meaning of a government practice can never be "neutrally, clinically, or uncontroversially gleaned."[190] However, Kang's solution suffers from the same defects as Hellman's dialogic solution. He argues that the court should be required to look at the practice from the perspective of each party to the litigation and then weigh the competing perspectives against

183. *Id.* at 23. Hellman is adopting this method from JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990).

184. RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY, 66–67 (1989).

185. *Id.* at 68.

186. *Id.* at 67–68.

187. *See* Karst, *supra* note 100.

188. Kang, *supra* note 181, at 23.

189. *Id.* at 24.

190. *Id.* at 25.

one another.[191] During this weighing process, the court should "test [the various social meanings] for blindspots, insensitivities, and oversensitivities."[192] Kang fails, however, to prescribe which view should ultimately prevail, relying on the court to decide.[193] Apparently, Kang has more faith than I that judges will not without more guidance simply favor the perspective most like their own.

III. REASSERTING EXPRESSIVE HARM THEORY

Building upon Justice O'Connor's Establishment Clause jurisprudence, facially neutral government actions should be judged according to expressive standards of harm. As other expressivist scholars have argued, a race neutral government action that expresses a lack of concern and respect for one racial group should be subject to heightened scrutiny, even if that expression is unintended. For the reasons argued in Part II, however, the universalist objective observer standard adopted by the Court (and applauded by Anderson and Pildes), as well as the alternatives advanced by Hellman and Kang, are inadequate to ensure that the constitutional harm is discerned. Instead, I suggest a "reasonable community member" standard, in which the government action would be examined from the perspective of a reasonable member of the affected or allegedly harmed community. This standard would require the judge to consider the actions of the government from the perspective of a member of the allegedly affected community to determine whether, with the information possessed by such a person and the community's experience of treatment by the government, such a person would reasonably conclude that the government's action "express[es] contempt, hostility, or inappropriate paternalism toward racial, ethnic, gender, and certain other groups" at issue "constitute[s] them as social inferiors or as a stigmatized or pariah class,"[194] or suggests that they are worthy of less concern and respect than the majority group.

191. *Id.* at 26.
192. *Id.*
193. *Id.*
194. Anderson & Pildes, *supra* note 13, at 1503.

A. A Reasonable Community Member Standard and Empathy

An expressive harm test that requires the court to determine the expressive content of the government action by discerning how a reasonable member of the allegedly affected community would view the action will invite the judge to empathize with the affected community—to attempt to view the government's actions from the affected community's perspective. Judicial empathy can be a powerful tool to ensure a more complete judicial understanding so long as it is directed toward the appropriate substantive ends. If expressive theory is intended to ensure the *appearance* of governmental fairness,[195] it is most important to determine whether the government action is seen as fair from the perspective of the community affected by the action. In addition, directing a judge to empathize with the affected community will be a step toward ensuring that the judge's own perspective—or his own unconscious bias—does not influence his own determination of the message.[196]

This latter phenomenon is illustrated by Lynne Henderson's discussion of the Supreme Court's use of empathy in deciding *Brown*.[197] Henderson observes that the content of the opinion shows a "recognition of human experience and pain—of feeling" in the famous phrase: " 'To separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' "[198] Henderson also describes, however, the different Justices' grappling with the issue of whether to reverse *Plessy* and order desegregation.[199] Justice Reed apparently was most resistant to the notion that " 'segregation was . . . an act of discrimination.' "[200] His resistence stemmed from his discomfort that " 'a nigra [sic] can walk into a restaurant at the Mayflower Hotel and sit

195. In *Judging by Appearances*, Deborah Hellman provides a fuller treatment of the philosophical implications of focusing upon the appearances of government actions without regard to the consequences of those actions. Hellman, *The Expressive Dimension*, *supra* note 13, at 655–68.

196. Martha Minow has written extensively on the dangers of assuming that judges are objective, instead of subjective. *See, e.g.*, Minow, *supra* note 143, at 33.

197. Henderson, *supra* note 98, at 1592–1606.

198. *Id.* at 1594 (quoting *Brown*, 374 U.S. at 494) (emphasis omitted).

199. *Id.* at 1602–1606.

200. *Id.* at 1606 (quoting KLUGER, *supra* note 43, at 595).

down . . . right next to Mrs. Reed.' "[201] Henderson posits that Justice Reed was able to empathize with a white southerner's desire for segregation because of his own desire to keep his wife in a segregated environment but "couldn't imagine the discomfort caused the black by being excluded."[202] Henderson suggests that Justice Reed was finally swayed by Chief Justice Warren's arguments that "defenders of *Plessy* were white supremacists" and the disastrous consequences of a dissent.[203]

While the foregoing is a dramatic example that hopefully does not reflect views held by any current member of the judiciary, judges are, like everyone else, likely to be influenced by unconscious racial bias.[204] Studies suggest that such unconscious racial bias can be controlled, but is unlikely to be if decision makers are unaware of its effect.[205] Specifically, decision-makers who are not required to "articulate the reasons for their decisions" are more apt to be influenced by discriminatory bias.[206] Judges articulate reasons for their decisions in the form of written opinions. However, only if judges are directed to empathize with the affected community will they be required to differentiate between their own perceptions of the government actions and those of a member of a racial group about whom they may have unconscious bias. Indeed, as Justice Reed's example suggests, absent a directive, judges may have difficulty empathizing with another group.[207] Cognitive theory suggests that empathetic responses are generally more likely when there is an incentive for understanding.[208] Only a standard expressly requiring the judge to engage in empathy may help to overcome unconscious racism, particularly when unconscious racism stands as a roadblock to that empathy.[209]

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201. *Id.* at 1607 (quoting KLUGER, *supra* note 43, at 595).

202. *Id.*

203. *Id.* at 1606.

204. Haney López, *supra* note 4, at 1819. Haney López examines unconscious racial bias among judges in the context of two cases in which Mexican-American defendants advanced Equal Protection arguments to challenge their indictments by all-white grand juries. His article sets out a theory of racism that "reconcil[es] the statistical evidence of judicial discrimination with the judges' insistence that they never intended to discriminate." *Id.* at 1722.

205. Green, *supra* note 1, at 104–08.

206. *Id.*

207. Minnow, *supra* note 143, at 51–54, 60–63.

208. Henderson, *supra* note 98, at 1584.

209. Empathetic responses are less likely if "the one in distress is not seen as a human or like oneself." Henderson, *supra* note 98, at 1586 (citing Hoffman, *The Development of Empathy, in* ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY AND DEVELOPMENTAL PERSPECTIVES 57–58 (J. Ruston & R. Sorrentino eds. 1981)).

Even without the specter of actual bias in judges' decisions, the reasonable community member standard is necessary to prevent the reification of the point of view of the predominantly white male judiciary. A universalist objective observer standard presumes that it is possible to view the world without a lens created by any particular race, class, or gender perspective. However, social science data and most of our experience suggests that this presumption is mistaken, that people do in fact generally view the world—and particularly charged situations—from the perspective of their race, class, and gender.[210] Judges so far have not escaped this propensity.[211] As a result, accepting the universalist observer standard will define as objective the perspective of the judge and impose that perspective upon the plaintiffs.[212] We would all like to believe that our judicial system is able to rise above the individual biases and prejudices of its individual members. Ironically, the best way to approximate this ideal impartiality is a more frank recognition of the real differences in perspective that judges, like all humans, possess.

To the extent that the Equal Protection Clause has been construed to have as its purpose the elimination of disparities caused by race, but not other conditions such as poverty,[213] the expressive

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210. Green, *supra* note 1, at 96–99 (discussing the wealth of social science data concerning the existence of modern racism and its effect upon decision making). It has become commonplace in academic discourse to "talk of the partiality–or inevitably interpretive nature–of all of the 'discourses,' 'paradigms,' or 'lenses' through which we make sense of our human world, and in turn constitute ourselves." Lucie E. White, *Seeking ". . . the Faces of Otherness . . .": A Response to Professors Sarat, Festiner, and Cahn*, 77 CORNELL L. REV. 1499, 1500 (1992). *See* Hellman, *The Expressive Dimension*, *supra* note 13 (referring to the different reactions of many whites and African-Americans to the O.J. Simpson acquittal and noting that there are instances when different groups may interpret the same event in radically different ways as a result of their different experiences in the world).

211. LINDA G. MILLS, A PENCHANT FOR PREJUDICE: UNRAVELING BIAS IN JUDICIAL DECISION MAKING (1990). Hellman also describes the necessary "partiality" of a judge's individual perspective and the impossibility of achieving a "view from nowhere." Hellman, *supra* note 13, at 21.

212. *Cf.* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: the Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1211 (1990). In this article, Professor Ehrenreich discusses the reasonable person standard in the context of a sexual harassment case and finds that the court by "[r]elying on apparently neutral constructs to resolve the group conflict in the case . . . obscures the fact that its ruling actually enforces (and reinforces) a particular, identifiable perspective—that of upperclass men." *Id. See also* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) ("Because most judges are men, who have experienced the traditional forms of male socialization, their instinctive reaction is to embrace the perspective of the employer. . . . If Title VII is to be a useful tool in combatting sexual harassment, courts must recognize that there is another perspective from which it is possible, in fact necessary, to view these activities.").

213. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

harm test using a reasonable community member perspective should also solve the problem of overinclusiveness that bedevils the pure disparate impact test. Even an action that has a disparate impact must be found to suggest that a particular racial group is less worthy of concern and respect than the majority group.[214] Therefore, the average sales tax or bridge toll with a disparate impact will not be subject to successful challenge because the purely economic disparate impact does not express government animus or indifference to members of minority groups.[215]

B. Perspectival Difference and the Possibility of Objectivity

While I am arguing against an objective observer standard for discerning whether an expressive harm exists, I am not arguing that objectivity itself is impossible. If, as some have argued, law is wholly indeterminate and any judicial decision reflects nothing more than the personal preferences of those empowered to judge, it would be futile to propose an alternative standard.[216] Instead, by proposing a reasonable community member standard I am seeking to bring Equal Protection Clause decisions closer to some form of objectivity. Obviously I am not referring to the sort of metaphysical objectivity that has been largely discredited in both philosophy and law.[217] Rather, I propose the level of objectivity that Owen Fiss de-

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214. DWORKIN, *supra* note 14, at 190.

215. It is possible to imagine a scenario in which a bridge toll does carry a racial message. Consider, for example, a community that is divided by a bridge. As one section of the community becomes predominantly minority, the cost of the toll going from the minority to the white part of town continues to rise until it becomes economically difficult for many minorities to enter that part of the city. Under these circumstances, the toll might be read to symbolize the separation of the two sides of town and the desire of the white section to exclude the minority section. *Cf.* Memphis v. Greene, 451 U.S. 100, 137–138 (1981).

216. *See, e.g.* Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 378–84, 394–96, 399–402 (1982) (arguing that objectivity, even in a limited sense, is impossible); *but see* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982) [hereinafter Fiss, *Objectivity*] (arguing that a degree of objectivity is possible even though the judge will play some role in giving meaning to texts); Owen M. Fiss, *What is Feminism?* 26 ARIZ. ST. L.J. 413, 424 (1994) (critiquing Catharine MacKinnon's mockery of objectivity on the ground that the denial of objectivity is inconsistent with MacKinnon's affirmation of equality—if gender hierarchy is to be condemned on the ground that it offends equality than she is treating equality as having objective value).

217. Metaphysical or ontological objectivity is generally understood as corresponding to an external reality. *See, e.g.* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 7 (1990). For a legal judgment to be objective in this sense seems to require a conclusion that there is a single answer to a particular legal dispute that is mandated by an external force–such as a statute or the Constitution. *See* Fiss, *Objectivity*, *supra* note 216, at 742. Fiss notes that some provisions of the Constitution meet this standard such as the provision requiring the Presi-

scribes as "transcend[ing] the particular vantage point of the person offering the interpretation".[218] I will call this degree of objectivity "adjudicative objectivity."[219]

Adjudicative objectivity will be difficult, if not impossible, to attain in cases involving racial classifications brought under the Equal Protection Clause due to the deep societal divisions as to the role of race in society and the role of government in responding to the problem of race.[220] Because judges themselves are mired in these divisions,[221] their decisions on cases with similar facts will differ according to where on the spectrum they fall. However, with regard to race-neutral government actions, I would hope that there is general societal consensus that government should provide equal concern and respect to its citizens regardless of race, and that government should not act in such a way that creates an

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dent to be at least 35 years old. *Id.* However, Fiss argues that the Equal Protection Clause is too general and too comprehensive to ever meet such a demanding standard. *Id.*

218. Fiss, *Objectivity*, *supra* note 216, at 743.

219. This level of objectivity is often attainable in "easy" cases in which clear legal precedent corresponds to the facts of a given case. An example is if a statute prescribes a 2 year statute of limitations to bring an action for tort and the plaintiff brings the action 2 years and 6 months from a car accident. It is hard to imagine that such a case would be decided differently by different judges. However, it is also often the case that such cases are rarely brought or settle quickly if they are. Posner, *supra* note 217, at 7. Posner describes this type of objectivity as a finding that is "replicable . . . if different investigators, not sharing the same ideological or other preconceptions . . . would be bound to agree with it." *Id.* Posner provides a third degree of objectivity: "conversational objectivity" which is "not willful, not personal, not (narrowly) political, not utterly indeterminate though not determinate in the ontological or scientific sense, but as amenable to and accompanied by persuasive though not necessarily convincing explanation". *Id.* at 7. Posner suggests that this degree of objectivity is often readily attainable but that it is so weak as to not be meaningful. Stanley Fish, in reviewing Posner's degrees of objectivity, argues that conversational objectivity is replicable depending upon "the relevant community, the relation of available argumentative resources to skillfull advocates, the pressures for generating a conclusion in one direction or another, the routes by which that decision might be reached, and innumerable other *contingencies* that may or may not meet together in happy conjunction." Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1448 (1990) (emphasis in original).

220. *See generally* AMY GUTMAN & ANTHONY APPIAH, COLOR CONSCIOUS (1994). In separate essays within the book, philosophers Gutman and Appiah address the complex history of race and racism in the United States. Appiah argues first that "race" is a construct with no biological reality but with a social reality created by those seeking to maintain white hegemony. *Id.* at 69–74, 76–80. Appiah argues that the idea of race should be rejected by those who seek to eliminate racism, but acknowledges that perceptions of one's race is socially salient. *Id.* at 80–81. Gutman addresses the color blind theories of government, and though she too rejects the idea of race, she argues that "color consciousness" continues to be necessary to respond to existing racism and the disparities between people society considers to be of different races. *Id.* at 173–78.

221. As an example of the wildly divergent ways in which Supreme Court Justices view government's use of race, compare the majority decisions in *Shaw v. Reno*, 509 U.S. 630 (1993) with the dissents, *id.* at 659 (White, J., dissenting), *id.* at 676 (Blackmun dissenting), *id.* (Stevens dissenting), and *id.* at 679 (Souter dissenting).

insider and an outsider group based upon race. When either can be shown, I would also hope that there would be societal consensus that government actions should be subject to heightened scrutiny. What remains is to find a method for ascertaining when these conditions are met that achieves adjudicative objectivity.

The universalist objective observer standard fails precisely because it ignores the likelihood of perspectival difference. By not recognizing that membership in different interpretive communities is likely to result in different interpretations of the same action, whomever is empowered to act as the objective observer will likely assume that his own interpretation is objective.[222] This means that the perspective of the particular judge—or on appellate review the majority of judges—will by fiat determine the objective standard. By contrast, if judges are required to take perspectival difference into account and directed that the reasonable perspective of the affected community should prevail if there is a difference in interpretation, judgments are less likely to be dependant upon the specific views of the judge.[223] In addition, this standard provides a greater degree of transparency. Instead of wordlessly elevating the perspective of the judge to the status of "objective" while relegating any opposing interpretation to the realm of "subjective," the reasonable community standard communicates outright that, when measuring whether government

222. John Rawls' conception of objectivity has been criticized on similar grounds. *See, e.g.*, Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1222 (1994). Rawls considers a political or moral conviction objective if "reasonable and rational persons, who are sufficiently intelligent and conscientious in exercising their powers of practical reason, and whose reasoning exhibits none of the familiar defects of reasoning, would eventually endorse those convictions, or significantly narrow their differences about them, provided that these persons know the relevant facts and have sufficiently surveyed the grounds that bear on the matter under conditions favorable to due reflection." JOHN RAWLS, POLITICAL LIBERALISM 119 (1993). Feldman is interested in whether it is possible to render an objective judgment upon a legal concept such as negligence, fraud, or rape, which are by their very nature constituted by our "practices, goals, values, and beliefs." Feldman, 92 MICH. L. REV. at 1188. She calls these concepts "blend concepts." *Id.* Feldman argues that Rawls' "monologic" conception of objectivity necessarily fails when applied to blend concepts because it will not "reflect the intersubjective evaluations of merit implicit" in the definition of a blend concept. *Id.* at 1223. Rawl's conception cannot reflect the existence of multiple views of value because "no single individual is likely to be aware of and sensitive to all the relevant conventional mores, cultural ideas, community values, and customs that world-guide a particular blend concept. Users of the concept are likely to vary in their knowledge of and sensitivity to such information, depending upon how they are situated within the culture." *Id.* at 1224.

223. *See* Minow, *supra* note 143, at 45. Minow argues against abstract universalism on the ground that it hides unstated reference points and suggests that "[m]aking explicit the unstated points of reference is the first step in addressing this problem; the next is challenging the presumed neutrality of the observer who in fact sees from an unacknowledged perspective." *Id.*

action creates an insider or an outsider class based upon race (or religion), the view of the outsider group prevails.

Of course, the opposite could also be true: one could achieve the same degree of adjudicative objectivity and transparency by preferring the reading of the majority group. This, however, would be highly counter-productive. If the goal of the Equal Protection Clause is to eliminate the perception that there is an insider and an outsider class, then preferring the interpretation of the allegedly insider class would obviously frustrate that function.

C. Ordinary Reader of a Particular Race and the Reasonable Woman Standard

In several different contexts, courts have adopted a "reasonable member of a particular community" standard.[224] The two closest corollaries are the "ordinary reader of a specific race" standard some courts have used in determining whether an advertisement violates the Fair Housing Act and the "reasonable woman" standard in employment law.[225]

In *Ragin v. The New York Times Co.*,[226] the Second Circuit held that section 3404(c) of the Fair Housing Act (which prohibits advertisements that indicate a racial preference) is violated if the ad would be read by an ordinary reader to "discourage an ordinary reader of a particular race from answering it."[227] Plaintiffs sued The New York Times for publishing real estate advertisements featuring

224. In addition to the race and gender contexts described *supra*, the Supreme Court has recently adopted the reasonable police officer perspective in determining whether a police officer is entitled to qualified immunity when sued for violating constitutional rights. *See* Saucier v. Katz, 533 U.S. 194 (2001). The Court has also long construed treaties with Indian tribes from the perspective of the Native American. Choctaw Nation v. Oklahoma, 397 U.S. 620, 630–31 (1970). "The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as [the Indians] would have understood them and any doubtful expressions in them should be resolved in the Indians' favor." *Id.* at 630–31 (citing Jones v. Meehan, 175 U.S. 1, 11 (1899) and Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918).

225. A number of courts have adopted the "reasonable woman" standard. *See* Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3rd Cir. 1999); Newton v. Depart. of Air Force, 85 F.3d 595 (Fed. Cir. 1996); Lehmann v. Toys 'R' Us Inc., 132 N.J. 589 (1993); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Yates v. Avco Corp. 819 F.2d 630 (6th Cir. 1987). A smaller number of courts have rejected the standard. *See* DeAngelis v. El Paso Mun. Officers Ass'n, 51 F.3d 591 (5th Cir. 1995); Radtke v. Everett, 501 N.W.2d 155 (Mich. 1993).

226. 923 F.2d 995 (2d Cir. 1991).

227. *Id.* at 1000.

exclusively white models as residents and the only black models as custodians. The court held that a trier of fact could find that such a use of models may indicate a racial preference.[228] The court stated that "[w]e live in a race-conscious society, and real estate advertisers seeking the attention of groups that are largely white may see greater profit in appealing to white consumers in a manner that consciously or unconsciously discourages non-whites."[229] In addition, the court noted that the claim by the creator of the ad that he had not noticed the race of the models could be disbelieved or considered "an inadvertent or unconscious expression of racism."[230]

Other courts have not been as direct in concluding that the race of the recipient of the message is relevant to the court's inquiry.[231] While the Seventh Circuit rejected the explicit use of the "ordinary African-American" reader,[232] it nonetheless held that the Fair Housing Act is violated "if an ad . . . would discourage an ordinary reader of a particular [protected group] from answering it."[233] The Seventh Circuit upheld the district court's instruction, which said that "an ad expresses a preference, limitation, or discrimination if it would discourage an ordinary reader of a particular race from answering it."[234] Thus, the court required the determination of preference to depend upon how an ordinary reader of a particular race would be affected by the content of the ad.

Some courts have also employed a particularized reasonableness standard in sexual harassment cases.[235] A number of courts have replaced the reasonable person standard (which itself replaced the reasonable man standard) with a reasonable woman standard in order to recognize that women's perceptions of their situation may be a "product of our nation's long and unfortunate history of sex discrimination"[236] and also that men and women "may be vulner-

228. *Id.*

229. *Id.*

230. *Id.* at 1001.

231. *See, e.g.*, U.S. v. Hunter, 459 F.2d 205; Iran C. Smith, Comment, *Discriminatory Use of Models in Housing Advertisement: The Ordinary Black Reader Standard* 54 OHIO ST. L.J. 1521, 1533 (1993) ("Discussion of the race of the ordinary reader is conspicuously absent from most cases applying the ordinary reader standard to alleged instances of subtle exclusionary advertising, particularly all-white models cases.").

232. Jancik v. Dep't of Hous. and Urban Dev., 44 F.3d 553, 556 (7th Cir. 1995).

233. *Id.* at 556 (quoting *Ragin*, 923 F.2d at 999–1000).

234. *Id.*

235. *See supra* note 225.

236. Washington v. Wanrow, 559 P.2d 548, 558 (Wash. 1977) (quotation omitted).

able in different ways and offended by different behavior."[237] As the Sixth Circuit held in *Yates v. Avco*,[238]

> [i]n a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be 'the reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.[239]

The Ninth Circuit explained that, while there is a broad range of view points among women generally, women tend to have an incentive to be more concerned about sexual behavior than do men as a result of women's vulnerability to sexual violence.[240] Specifically, the court noted, men may lack an appreciation for "the social setting or the underlying threat of violence that a woman may perceive."[241] The court held that it adopted a reasonable woman standard "because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[242]

The Supreme Court has continued to refer to the "reasonable person" standard in sexual harassment cases[243] and many commentators debate the efficacy of the reasonable woman standard.[244] However, there is a compelling reason for adopting a reasonable community member standard in the Equal Protection context not present in the sexual harassment context. Sexual harassment suits are brought under Title VII and provide access to a jury trial.[245] Therefore, the decision as to whether the conduct at issue is offensive will almost certainly include a number of women. By contrast, the vast majority of suits challenging government action under the

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237. Ellison v. Brady, 924 F.2d 872, 873 (9th Cir. 1991); Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (male supervisor might believe it legitimate to tell a female supervisor that she has great figure while that female might find it offensive); Yates v. Avco, 819 F.2d 630, 630 (6th Cir. 1987).

238. 819 F.2d 630.

239. *Id.* at 636.

240. *Ellison*, 924 F.2d at 878.

241. *Id.*

242. *Id.* at 879.

243. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

244. *See, e.g.*, Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. GENDER & L. 195 (2001); Elizabeth A. Schoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does it Matter?* 10 AM. U.J. GENDER SOC. POL'Y & L. 633 (2002).

245. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Equal Protection Clause seek equitable relief and are issues of law decided by a judge, who is likely to be a white man.[246] Because the fact-finder will be unlikely to include the perspective of anyone in the affected community, it is more critical that the standard require the fact-finder to seek and apply that perspective.[247]

IV. APPLICATION: SYMBOLIC GOVERNMENT ACTS AND GOVERNMENT ACTS THAT SYMBOLIZE

In order to have a sense of how an expressive harm test with a reasonable community member standard would function in practice, Part V will analyze its application in several different contexts. It will begin with the context that is most like the Establishment Clause cases: government acts that are strictly symbolic, such as the flying of the Confederate flag. It will then analyze the application of an expressive harm test to a decision of the Ohio Highway Department to place sound barriers and landscaping around a highway as it traverses a white community, but to forego such protections when the same highway dissects a black community. Finally, Part V will apply the expressive harm test to a suit brought by African-American and Hispanic residents of New York City challenging the New York City Parks Department's decision to close community gardens and to replace the gardens with housing.

A. The Reasonable Black Citizen and the Confederate Flag

In 1990, Alabama had three flags flying atop the capitol dome on a single flag pole: the United States flag, the Alabama state flag,

246. *See supra* Part II.

247. In the context of sexual harassment, women's actions both legally and politically—and most vividly the Anita Hill-Clarence Thomas incident—have rendered both men and women more cognizant of sexual dynamics in the workplace. Thus, social expectations may have caused men and women to be more likely to consider the perspective of women as to whether given conduct is offensive. In addition, virtually all men have relationships with women—mothers, sisters, daughters, wives, and others. The same cannot be said with respect to whites and people of color. Sadly, many whites still do not have intimate relationships with those outside of their racial group. *See* Haney López, *supra* note 14, at 1813. While the existence of such relationships between men and women certainly does not mean that men and women (of the same racial group) view the world from identical perspectives, relationships may at least present an opportunity for actual dialogue between men and women of the same racial group. The relative lack of such relationships between whites and people of other races means that such opportunities are less frequently present.

and the Confederate flag.[248] The NAACP sued the Governor of Alabama and other officials claiming that the flying of the Confederate flag atop the capitol dome violated, among other rights, their members' Equal Protection rights.[249] The Eleventh Circuit stated that the state chose initially to raise the flag to commemorate two occasions: the first was in 1961 reflecting the 100th anniversary of the Civil War, and the second was the morning of April 25, 1963, the "day that United States Attorney General Robert F. Kennedy travelled to Montgomery to discuss with then-Governor George Wallace the governor's announced intention to block the admission of the first black students to the University of Alabama."[250] These were considered two separate reasons why Alabama flies the flag, and the court held that, because there were two accounts of why Alabama flies the flag, "it is not certain that the flag was hoisted for racially discriminatory reasons."[251] In addition, the court held "there is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position."[252] Under the intent test then, according to the Eleventh Circuit, it is constitutional for a state to fly the confederate flag.[253]

An application of the expressive harm test would proceed quite differently. First, the inquiry would not be whether there was a discriminatory purpose behind flying the flag. Instead the inquiry would be whether a state's decision to fly the confederate flag (1) expresses contempt or hostility toward the racial group at issue, (2) portrays them as social inferiors or as a stigmatized or pariah group, or (3) suggests that they are worthy of less concern and respect than the majority group.

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248. NAACP v. Hunt, 891 F.2d 1555, 1558 (11th Cir. 1990).

249. *Id.*

250. *Id.* at 1558.

251. *Id.* at 1562.

252. *Id.*

253. *But see* Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897 (1998); James Forman, Jr., note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 510 (1991). Both Forman and Bein make a persuasive case that under a careful reading of the intent test, *Hunt* was wrongly decided. However, *Hunt* was not the sole decision to reach the same conclusion. As *Hunt* notes, in *Augustus v. School Bd. of Escambia County, Fla.*, 507 F.2d 152, 158 (5th Cir. 1975), the Fifth Circuit reversed a district court order enjoining school officials from using the name "Rebels" for the school's sports teams and from using the confederate flag as a symbol. In addition, in *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997), the Eleventh Circuit rejected an Equal Protection challenge to the Georgia flag which incorporates an emblem of the confederate battle flag.

The first source to determine what the flag expresses would be its history. As James Forman has detailed, the Confederate flag was designed as a rallying point for Confederate troops who were fighting to secede from the Union, in large part to maintain the slave regime.[254] In addition, as the *Hunt* Court acknowledges, the Confederate flag was reinvigorated by several states to express symbolic opposition to court-ordered desegregation of the schools.[255]

The second inquiry would concern the flag's current use. In addition to being flown by several southern states and as a identification mark by some number of schools in the south, the flag is also currently used by racial hate groups as a symbol of white supremacy. It is also often flown at all-white social affairs such as Confederate balls.[256]

The next question addresses the meaning currently ascribed to the flag. The Eleventh Circuit recognized in *Coleman v. Miller* that the Georgia state flag, which contains the Confederate symbol, "conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression."[257] Some consider it a representation of Confederate heritage generally.[258] James Coleman, one of the plaintiffs who brought suit challenging states' decisions to fly the flag, testified that the "Confederate symbol . . . inspires . . . fear of violence, causes him to devalue himself as a person, and sends an exclusionary message to Georgia's African-American citizens."[259] The NAACP in *Hunt* argued that because the flag had inspirational power in the confederate army and was adopted by the Ku Klux Klan, it was a badge and incident of slavery.[260] One member of the NAACP testified that he had difficulty saluting the American flag when the confederate flag was flying from the same flag pole.[261]

A plaintiff challenging a state's decision to fly the Confederate flag would thus argue that the decision expressed contempt or hostility toward her to the extent that it was hoisted to decry integration. She would claim that, to the extent that the flag celebrates the southern way of life prior to the civil war, the state is

254. Forman, *supra* note 253, at 514.
255. *Id.*
256. *Id.*
257. 117 F.3d 527, 530 (1997).
258. *Id.* at 528.
259. *Id.* at 529.
260. *NAACP v. Hunt*, 891 F.2d 1555, 1564 (11th Cir. 1990). While this was a legal claim the NAACP sought to raise under the 13th Amendment, it could also be considered an argument about symbolism and what the flag expressed to them, which would be relevant to an expressive inquiry.
261. *Id* at 1565.

celebrating slavery, which was rooted in a view of African Americans as property and thus the flag has a stigmatizing effect. Finally, a plaintiff would argue that the decision to fly the flag knowing that its presence is deeply offensive to African American citizens suggests that the state lacks equal concern and respect for African Americans.

The court will then have to determine whether a reasonable person would agree that the state is sending such a message. One might think that the answer would be the same under either a universalist objective observer standard or a reasonable person from the affected community standard. However, a recent case suggests that some judges applying an objective observer standard may disagree with plaintiffs' contentions.

In *Griffin v. Department of Veterans Affairs*,[262] the plaintiff, a descendant of a Confederate soldier, pursued a First Amendment challenge to a Department of Veterans Affairs ("VA") regulation that prohibited the flying of the Confederate flag in a cemetery in which Confederate soldiers were buried, except on Memorial Day and Confederate Memorial Day. Plaintiff sought to display a full-sized, historically accurate Confederate flag from a site called Point Lookout, which contained a memorial to Confederate soldiers buried there.[263] The VA responded that it had a "compelling interest in avoiding a message of racial intolerance or divisiveness on federal property" and as such had reasonably exercised its rights to restrain speech.[264] The district court disagreed that its restrictions were reasonable. The court held that the flying of the Confederate flag in an all Confederate cemetery was only a "'shrine[] as a tribute to *our* gallant dead.'"[265] As such, and because similar displays had not resulted in protests, the court held that "one is hard put to imagine a rationally thinking person attributing a racial or discriminatory message to it."[266] This case involved a private individual

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262. 129 F. Supp. 2d 832 (D. Md. 2001), *rev'd on other grounds*, 274 F.3d 818 (3rd Cir. 2001). The Third Circuit noted:

> We agree with the VA that that purpose is to honor, as Americans, in tranquil and nonpartisan surroundings, those who have given their lives to the Nation. We also conclude that the Secretary's restrictions are reasonable both as a means of ensuring the integrity of the VA's own message (which, in this case, coincides with the purpose) and, relatedly, as an effort to maintain the nature of the forum.

274 F. 3d 818, 821.

263. 129 F. Supp. 2d at 836.

264. *Id.* at 837.

265. *Id.* at 841 (quoting 38 U.S.C. § 2403(c)) (emphasis added).

266. *Id.*

seeking to display the flag in a Confederate cemetery, not a state choosing to place the Confederate flag on its capitol dome. However, the fact that a federal judge, in 2001, held that no "rationally thinking person" could attribute a racially discriminating message to a full-sized Confederate flag flown on federal property suggests that some judge applying an objective observer standard may also conclude that flying the Confederate flag above the state capitol does not send a discriminatory message.

By contrast, it is almost impossible to conceive that a federal judge applying the standard of a reasonable person of the affected community would not conclude that a state decision to fly a Confederate flag constitutes an Equal Protection violation. If the judge is directed to view the decision from the perspective of an African American resident of the state, the testimony of the plaintiffs has more salience, and the overwhelming political response from the African American community nationally is relevant to the inquiry. Indeed, the Eleventh Circuit acknowledged the testimony of Dan Carter, a professor of Southern history at Emory University, who concluded that the symbolic role of the Georgia flag was "an attempt to bolster the morale of those Georgians struggling to maintain white supremacy."[267] To the extent that a judge is required to view the flag and the state's decision to celebrate it as would an African American resident of the state, the decision seems clear.

B. When Does the Failure to Provide Similar Services Send a Message?

A more challenging context for an expressive harm test is government allocation of municipal services. This part will examine two cases in which plaintiffs brought civil rights challenges against government agencies for the allegedly disparate provision of services.

In *Tolbert v. the State of Ohio Department of Transportation* ("ODOT"),[268] African-American residents of the Cherrywood apartment complex claimed that ODOT discriminated against them on the basis of race when it provided sound barriers in a white neighborhood to protect them from the noise of a newly

267. Coleman v Miller, 117 F3d 527, 529 (11th Cir. 1997).

268. 172 F.3d 934, 936 (6th Cir. 1999). After the remand to the district court, the parties settled the action. Conversation with Norman Chachkin, NAACP Legal Defense Fund (March 2002).

constructed highway, but did not provide sound barriers to the Cherrywood residents.[269]

The case involved two highway expansions planned by ODOT: the Parkway and Interstate 75. The northbound lanes of the Parkway are located 75 to 100 feet from Cherrywood.[270] The residents of Cherrywood are 84% African-American.[271] A noise analysis of the effect of the Parkway indicated that it would raise the noise level from 79 decibels to 90 decibels.[272] ODOT decided not to provide sound barriers or other mitigation measures, claiming that existing background noise levels made sound barriers impractical.[273]

Interstate 75 traverses an area that is 86% white.[274] According to a noise analysis, the widening of I-75 would result in noise levels between 70 and 82 decibels, "creating an increase of no more than three decibels above the original sound level."[275] The noise analysis recommended *against* constructing sound barriers, but ODOT nonetheless decided to construct them.

In this case, the district court held that the plaintiffs had failed to allege sufficient facts to establish a claim of intentional discrimination.[276] Were an expressive test applicable, plaintiffs would allege that ODOT's decision to provide sound barriers to a white community but to deny them to an African-American community, when the sound-level increase was greater in the African American community, suggests that the Cherrywood residents are worthy of less concern and respect than the similarly situated white residents. Plaintiffs may also argue that ODOT's differential treatment suggested that there is an insider and an outsider group delineated along racial lines. This appears to be a relatively straightforward case in which the facts point to differential treatment that could lead a reasonable member of the affected community to conclude that race affected the type of services the government chose to provide. However, it is certainly possible that an objective observer would conclude that the government actions sent no such message because each decision was distinct and made at a different point in time and thus could not be considered a message.

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269. 172 F.3d at 936.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 937.
275. *Id.*
276. *Id.* at 941.

Under either standard, plaintiffs would have more difficulty with the facts presented in *New York City Environmental Justice Alliance v. Giuliani*.[277] The New York City Environmental Justice Alliance (NYCEJA) and a host of other community groups and individuals claimed that city officials' decision to sell community garden lots for housing development had a disparate impact on people of color. Along with evidence that the majority of community garden lots are located predominantly in communities of color, plaintiffs submitted evidence that community gardens play an important role in community life—including contributing to community cohesion and pride, providing a place for cultural activities, and free space for family celebrations.[278]

The Second Circuit of New York affirmed a dismissal by the district court on two grounds. First, the court held that plaintiffs had failed to establish that minorities would be adversely affected.[279] While the court accepted the evidence that the majority of gardens closed would be in communities of color, the court noted that the majority of all gardens were in communities of color.[280] Because a benefit was provided in greater proportion to communities of color, curtailing this benefit did not raise an inference of discrimination.[281] The more relevant measure, according to the court, was the overall provision of park space.[282] The court held that the absence of evidence showing that the city's provision of open space and parkland was discriminatory rendered the evidence inadequate.[283] Second, the court held that, even had a disparate impact been shown, the provision of affordable housing was sufficient justification for any harm the closing of the community gardens might have caused.[284]

Many people of color in New York were very angry when then Mayor Rudolph Giuliani attempted to close the community gardens.[285] However, were an expressive harm test to apply, on the

277. 214 F.3d 65 (2d Cir. 2000).
278. *Id.* at 69.
279. *Id.*
280. *Id.* at 71.
281. *Id.*
282. *Id.*
283. *Id.* at 71–72.
284. *Id.* at 72.
285. *See, e.g.*, Associated Press, *62 Arrested in City Garden Protest*, NEWSDAY, May 6, 1999, at A38 ("Shouts of 'Save the gardens, stop the auction!' drowned out a police officer's warning that protesters sitting on Chambers Street between Greenwich and West Streets would be arrested on disorderly conduct charges. One man stood and tried to shove lilacs into the officer's bullhorn. 'Once it's bulldozed and sold, there's no going back,' 52-year-old Alice Morris said of her little plot known as Albert's Garden. 'It'll be a terrible tragedy.' "); David M. Herszenhorn, *Two More Suits Seek to Stop Sale of Gardens*, N.Y. TIMES, May 8, 1999 at B2

facts as presented, it seems unlikely that plaintiffs would prevail. Plaintiffs may attempt to argue that the closing of the gardens showed a lack of equal concern and respect for communities of color. However, even using a reasonable community member standard, a court may not be persuaded. First, the lack of evidence that the City has in fact provided greater access to parks to whites than minorities would render the claim somewhat weak. The second issue presents an even greater hurdle: it is difficult to discern a reasonable view in which the decision to provide affordable housing rather than community gardens conveys an inappropriate attitude. Because the conflict was not a clear cut instance of the government favoring one group over another, however angry some people in the community were, a constitutional violation could not be established.[286]

C. Critiques: Defining Community Itself Violates Equal Protection

This section addresses the major critique that the proposed reasonable community member standard will engender: that any attempt to construct a reasonable member of a particular community itself is inconsistent with the ideals underlying the Equal Protection Clause because it rests upon the offensive (and clearly inaccurate) presumption that people who happen to be of the same race or gender all have the same view of the world.[287] This has been a common critique of the reasonable woman standard, levied

("sale [of city gardens] would violate the civil rights of minority New Yorkers, who "have dramatically less access to green recreational space than its white residents.")

286. However, the lawsuit and accompanying political action had salutary effects. During the course of the litigation, a not-for-profit organization bought 150 of the most popular community gardens to maintain their garden status. Dan Barry, *Sudden Deal Saves Gardens Set for Auction*, N.Y.TIMES, May 13, 1999, at B1.

287. A second likely critique is that this proposal will fail because it will be impossible for white judges to interpret the world from any but their own perspective. See RICHARD DELGADO, THE COMING RACE WAR? 4–36 (1995). Delgado's work does not focus on the inability of judges to empathize, but rather on the abilities of white public interest lawyers. Delgado claims that lawyers generally, and white liberal lawyers particularly, are singularly unable to do more than engage in "a sentimental, breast-beating kind of [empathy]" in which the lawyer actually becomes complicit in his client's oppression. *Id.* at 12. *But see* powell, *supra* note 100, at 112. In his article, jon powell suggests that Delgado is describing not empathy but rather bathos–a term of literary criticism referring to the "unexpected appearance of the vulgar or the base in otherwise elevated language." powell, *supra* note 100, at 11. He posits that real empathy is possible, though difficult to attain, and requires a willingness "to identify constraints, including power and hierarchy." *Id.* at 115.

by some women's groups as well as by some conservative critics.[288] For example, the Supreme Court of Michigan declined to adopt the reasonable woman standard, claiming to be persuaded by amicus curiae University of Michigan Women and Law Clinic which argued that "the 'reasonable woman' standard may reinforce the notion that women are 'different' from men and therefore need special treatment—a notion that has disenfranchised women in the workplace."[289]

While these arguments are cause for concern, I think that the benefits of a reasonable community standard applied as part of an expressive harm exceed any potential costs.[290] In determining how a reasonable member of community would view a certain action, the definition of the community is not permanent. Rather, it is circumscribed only for purposes of the particular government action that caused the alleged harm. A reference back to the example of the two hotel guests may provide a useful analogy. The white and black men were in opposing interpretive communities with regard to the valet misidentification, which demarcated different perspectives on race issues. However, they may be in the same interpretive community with regard to a suggestive comment to a female coworker because such a comment may demarcate different perspectives on gender issues. So too, an interpretive community created by one government action may splinter into opposing interpretive communities in response to another. The only claim that is being made about a particular interpretive community is that people in it are *likely* to respond to a message in a certain way because of their membership in the community. The claim is not that every single person who fits into the interpretive community actually feels a certain way.

People enter interpretive communities of this sort all the time. For example, if New York City decides to rebuild Yankee stadium

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288. *See, e.g.*, Radtke v. Everett, 501 N.W.2d 155, 166–67 (Mich. 1993).

289. *Id.* at 167 n.37 (quoting Cheryl L. Dragel, Note, *Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard be Adopted?*, 11 J.L. & COM. 237, 254 (1992)).

290. Two scholars, Koppleman and Seidman Diamond, have proposed that in Establishment Clause or Equal Protection cases in which an expressive harm test is applied, the court should determine the meaning of the government action by relying upon results of surveys as is done in trademark litigation. Seidman Diamond & Koppleman, *supra* note 171. This proposal would avoid the problem of essentializing because the court would not be attempting to delineate a single "reasonable" perspective, but would presumably accept the majority view. However, such surveys would apply easily only to purely symbolic acts such as flying a Confederate flag. It would be much more difficult to design a survey adequate to determine the meaning of government acts such as the provision of differing levels of services. The litigation may well devolve into battles over which survey was designed properly. In addition, it would be very expensive for plaintiffs to undertake survey efforts.

but not Shea stadium, Mets fans will likely feel ill-treated. Needless to say, the creation of such an interpretive community does not rise to a constitutional moment. However, it is not considered an affront to acknowledge that Mets fans will respond differently than Yankee fans to a certain set of facts. The corollary that does raise a potential Equal Protection concern is if New York City spends money disproportionately to abate lead paint in apartment houses in all-white sections of the City and fails to do the same for apartment houses in African-American and Latino parts of town. In response to that message, African-Americans and Latinos in these areas of town are placed in an interpretive community—and are likely to view the action as suggesting that they are less worthy of concern and respect. Indeed, the whites who live in these same neighborhoods are also in the same interpretive community. They reasonably may view the action as suggesting that their neighborhood is treated less well because it is predominantly minority, and thus they are victimized by this ill-treatment.

In other words, seeking to determine the point of view of a reasonable member of an affected community should not require a court to engage in the type of racial or gender essentializing that undermine the goals of the Equal Protection Clause. There is no claim that people who belong to a certain racial or gender group share any characteristic other than the perception that the government has acted unfairly. Even if there is unlikely to be a consensus as to particulars between members of a racial group or gender, when issues arise regarding fairness in treatment of a group to which one belongs, it is likely that there is shared concern about that treatment.[291]

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291. *See, e.g.* TIM B. HEATON, BRUCE A. CHADWICK, & CARDELL K. JACOBSON, STATISTICAL HANDBOOK ON RACIAL GROUPS IN THE UNITED STATES, 323 (2000) (71.4% of blacks but only 28.1% of whites think the government spends too little improving the condition of blacks, while 59.4% of whites and 59.7% of blacks believe the government spends too little protecting the environment). Zachary Carter, a former United States Attorney for the Eastern District of New York, describes a working group of African American United States Attorneys focusing on the sentencing disparities between crack and powder cocaine sentencing. *The First Annual Northeastern People of Color Legal Scholarship Conference: Law Professors of Color in the Postmodern World, comments by* Zachary Carter in panel discussion: *Status, Progress, and Integration of Lawyers of Color in the Legal Profession*, 19 W. NEW ENG. L. REV. 111, 114 (1997). Carter notes that the effect of the disparities has been to imprison an enormous number of young black men for sentences of 10 years or more. *Id.* There was no consensus as to whether there should be equalization or some level of disparity, but "there was consensus that the 100-1 ratio did not represent a warranted level of disparity." *Id.* at 115. It is unlikely that a working group of white United States Attorneys would reach the same consensus or would address the disparities.

CONCLUSION

Expressivism has great promise to better effectuate the Equal Protection Clause's goal of ensuring equal concern and respect. However, this promise is unlikely to be realized if the majority group's perspective determines the meaning of a challenged government action. While racism has certainly declined following the Civil Rights Movement, it is a sad but enduring fact that race continues to shape people's experiences in this country. Because membership in a racial minority affects one's experiences, it also affects one's perceptions. If these differences are ignored by courts applying expressive theory to Equal Protection challenges of government actions, minority plaintiffs will continue to face overwhelming odds against finding redress in the courts. By contrast, if judges are directed to view the government action from the perspective of a reasonable member of the affected community, the experiences and perspective of members of the community will become central to the inquiry. Judges will have an incentive to empathize with community members in order properly to decide how a reasonable person would view the government's action. Government officials will also be given an incentive to empathize with community members prior to making decisions so that their actions are less likely to be challenged. Expressivism will then have a much greater likelihood of leading to true equality.