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INTENTIONAL BLINDNESS

IAN HANEY-LÓPEZ*

Since the early 1970s, the Fourteenth Amendment's emancipatory potential has dramatically eroded, with rapid plunges followed by ever-lower plateaus. In 2007, we entered another cycle of precipitous devolution. Today, this latest drop seems to be accelerating along two supposedly distinct tracks: intent doctrine and colorblindness.

Ostensibly, the search for discriminatory intent provides a means of ferreting out unconstitutional racial discrimination. In contrast, colorblindness subjects race-conscious laws to strict scrutiny whether their impetus is benign or invidious, rendering intent irrelevant. On and off the Supreme Court, supporters and critics spar over whether these doctrines fulfill the Fourteenth Amendment's guarantee of equal protection. Nevertheless, both sides accept the seemingly fundamental division in racial jurisprudence between intent and colorblindness.

This Article challenges the notion of a divided equal protection. First, it shows that before the advent of colorblindness, intent doctrine formed the undivided—and reasonably efficacious—heart of equal protection. Intent doctrine once worked tolerably well for detecting the mistreatment of non-Whites, and also in distinguishing benign from invidious discrimination—the two tasks at which current equal protection grievously fails. Second, it demonstrates that colorblindness developed in response to intent doctrine, and in turn led to a disastrous reworking of that approach. Intent and colorblindness are not separate, but inextricably intertwined. Rather than seeing equal protection today as bifurcated, we should understand it as again unified, though under what might best be termed "intentional blindness." Combining the names of the two doctrines, this portmanteau captures the marrow of the Court's racial jurisprudence—which seems intentionally blind to the persistence of racial discrimination against non-Whites. It is this resistance that connects the current assaults on antidiscrimination statutes to the impending demise of affirmative action. It also links both of these to a larger history of reversals in equality law spanning four decades.

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The Court that refused to see inequality . . . would be making the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, on flagrant contradiction of known fact.

—Charles Black[1]

INTRODUCTION

Since the end of the civil rights era in the early 1970s, the emancipatory potential of the Fourteenth Amendment has been thoroughly undone. Today, its guarantee of "equal protection" no longer promotes reform but rather protects the racial status quo. This undoing has spanned four decades, with sharp plunges followed by ever-lower plateaus. These reversals have come in two principal areas: in how the Supreme Court evaluates claims of discrimination against non-Whites, an area governed by intent doctrine; and in how it regards affirmative action designed to ameliorate racial inequality, where colorblindness reigns.

We find ourselves now in a renewed period of rapid devolution for equal protection. With *Ricci v. DeStefano* in 2009, conservatives on the Court began to export the logic of intent doctrine beyond constitutional law to statutes prohibiting discrimination.[2] This logic impugns the use of social science to prove discrimination and insists instead on unworkable determinations of individual animus.[3] Meanwhile, the Court extended colorblind hostility beyond affirmative action with its 2007 decision *Parents Involved in Community Schools v. Seattle School District No. 1*.[4] In addition to proscribing efforts to preserve integrated K-12 education, *Parents Involved* may imperil race-consciousness in general policymaking, even where no individual is

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[1] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960).

[2] 129 S. Ct. 2658 (2009).

[3] *See, e.g.*, Gallagher v. Manger, 619 F.3d 823 (8th Cir. 2010), *cert. dismissed* 132 S. Ct. 1306 (declining to decide availability of disparate impact claims in Fair Housing Act litigation); Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2554–57 (2011) (finding no commonality in claims of discrimination and therefore denying class action status); Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009) (curtailing disparate impact in Title VII litigation); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 201–05 (2009) (calling into question the validity of statutory remedies predicated on general conclusions about the prevalence of discrimination).

[4] 551 U.S. 701 (2007).

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classified by race or suffers a discrete harm.[5] Given the emergence of Justice Anthony Kennedy as the swing vote in racial cases, there is also good reason to fear that the Court will soon end affirmative action in higher education.[6] Finally, speculation is rife that the Court may be tempted to extend this ban beyond state actors and to prohibit affirmative action by private universities as well as corporations, foundations, unions, and hospitals.[7]

In the next few months and years, scholars will react to these changes, a few extolling and most bemoaning them, many focusing on distinct cases and some seeing overarching patterns. Yet almost all will accept as the foundation for their engagement the basic division in equal protection between intent and colorblindness. Most critics of intent doctrine ignore its relationship to colorblindness, and vice versa.[8] Others perceptively note that intent and colorblindness work hand-in-glove to preserve the racial status quo, but stop short of examining how these doctrines inform each other.[9] This Article takes a completely different approach. It seeks to understand the present and near future by revising our understanding of the past. In this vein, it offers a wholly new conception of the relationship between discriminatory intent doctrine and colorblindness.

The pronounced tendency to regard these doctrines as fundamentally distinct is understandable. They not only operate in different domains, they also seem to be mirrored inversions of one another.

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[5] *See id.* at 745; *infra* Part VII.C.

[6] *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345) (reviewing the use of race-conscious affirmative action in the higher education context).

[7] *See, e.g.*, Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 22, 2012, at A1 ("A Supreme Court decision forbidding the use of race in admission at public universities would almost certainly mean that it would be barred at most private ones as well under Title VI of the Civil Rights Act of 1964, which forbids racial discrimination in programs that receive federal money.").

[8] For the most part, critics typically parse these doctrines in isolation. In his seminal attack on intent doctrine, Charles Lawrence did not discuss key colorblindness cases. *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). In his equally groundbreaking critique of colorblind reasoning, Neil Gotanda failed to engage the leading intent cases. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); *see also* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (analyzing intent without assessing colorblindness); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989) (same).

[9] From Alan Freeman through Reva Siegel, leading critics of contemporary equality jurisprudence have rued the confluence of intent and colorblindness, though without tracing their interdependent origins. Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1422–33 (1990); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1131–44 (1997).

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Colorblindness today applies when a government actor explicitly employs a racial classification. In practice, this covers affirmative action policies and little else. Under colorblindness, the remedial motives behind affirmative action are irrelevant. Indeed, frequently the Court asserts that whether the government's motives are benign or invidious is inherently unknowable. Distrusting its ability to parse the state's intentions, the Court under colorblindness subjects all affirmative action policies to the most stringent level of "scrutiny," which is to say, it requires the highest level of governmental necessity before such programs will be allowed. This scrutiny is so onerous that, since colorblindness gained five adherents on the Court in 1989,[10] only one affirmative action case has been held to meet that standard[11]—a holding that is now imperiled as the Court reconsiders affirmative action in higher education in the 2012 Fall Term.[12]

In contrast, intent doctrine applies to allegations of discriminatory treatment where a racial classification is *not* explicitly used. In effect, this covers all contemporary cases of discrimination against non-Whites, since instances of frank and open mistreatment are now virtually nonexistent. In its modern incarnation, intent doctrine demands that plaintiffs prove a state of mind akin to malice on the part of an identified state actor. Theoretically, the existence of an illicit purpose is the touchstone of the doctrine. In practice, however, the requirement that malice be proved is so exacting that, since this test was announced in 1979, it has never been met—not even once.[13] The result is that, under intent doctrine, the Court defaults to the most lenient level of review and then rejects the discrimination claim in all cases involving allegations of discrimination against non-Whites.[14]

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[10] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–98 (1989) (assembling five votes for a colorblind repudiation of affirmative action).

[11] *See* Grutter v. Bollinger, 509 U.S. 306, 325 (2003) (upholding affirmative action in higher education).

[12] *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345) (reviewing the use of race-conscious affirmative action in the higher education context).

[13] See the discussion *infra* Part VI.B.1. Beyond constitutional law, antidiscrimination statutes afford somewhat more, though still dismal, protection. A recent empirical study of all employment discrimination cases brought in federal court, including not only claims based on racial mistreatment but also on grounds of gender, age, and disability, documented a grim reality: A vanishingly small two percent of all plaintiffs who litigate their claims to conclusion manage to prevail. Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 187 (2010).

[14] *Cf.* David Kairys, *More or Less Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 675, 675 (2004) ("[G]oing back to the mid-1970s . . . almost all the winning plaintiffs in racial equal protection cases have been white.").

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In short, colorblindness applies to affirmative action; intent doctrine sweeps up allegations of discriminatory treatment against non-Whites. Colorblindness denies that the state's purposes can be discerned; intent doctrine demands proof of malicious purpose. Colorblindness consistently imposes the most stringent form of scrutiny; intent cases always default to the most lenient form of constitutional review. Plaintiffs challenging affirmative action under colorblindness virtually always win; parties challenging discrimination under intent doctrine almost invariably lose.

Yet despite these dramatic dissimilarities, intent and colorblindness are profoundly connected. How could they not be? The contemporary versions of these doctrines were elaborated at the same time, by the same Justices, and to the same ultimate effect: to defeat challenges to, and remedies for, discrimination against non-Whites.

Moreover, for both doctrines, the basic method was and is the same: to deny that context matters. In declaring that malice is the only form of intent that counts, discriminatory intent doctrine excludes evidence of continued discrimination against non-Whites rooted in history, contemporary practices, and social science. More generally, it blinds the courts to the obvious truth that discrimination has evolved since the civil rights era and no longer exclusively takes the form of hooded bigotry. Meanwhile, in pronouncing that motives are unknowable and hence irrelevant, colorblindness similarly closes courthouse doors to evidence showing that state actors sometimes use race to break down inequality and to foster integration. Most fundamentally, colorblindness ignores the changes wrought by the civil rights movement itself, which moved the country from one seeking to enforce racial supremacy to one hoping for its eradication.

As we grapple with the present and look to the future, we should no longer see equal protection as divided between intent and colorblindness. Instead, we should understand it as unified under what might best be termed "intentional blindness." Combining the names of the two doctrines, this portmanteau expresses the marrow of the Court's racial jurisprudence—which seems intentionally blind to racial context, including the persistence of racial discrimination against non-Whites, and the desire of democratic majorities to remedy this lingering stain on American justice.

This Article is divided roughly in half. The first half, comprised of Parts I through III, examines equal protection before the advent of colorblindness. At that time, one doctrine—discriminatory intent—applied to both express and non-express uses of race. These Parts reconsider intent doctrine as it functioned through *Washington v.*

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Davis[15] in 1976 and slightly beyond. The overwhelming consensus among constitutional scholars is that *Davis* is the source of today's failed doctrine, insofar as it required direct proof regarding the minds of government actors. In the words of Laurence Tribe, "*Davis* announced . . . a search for a bigoted decision-maker."[16] Indeed, this is what virtually every constitutional law casebook teaches.[17] But this is wrong, and consequentially so, for this mistake precludes attention to a doctrine that once worked tolerably well.

Part I reviews intent doctrine as it operated during the civil rights era, showing that a contextually grounded evaluation of governmental purposes undergirded the Court's dismantling of Jim Crow segregation. To describe this practice, this Part introduces a core distinction between "contextual intent" and "malicious intent." Contextual intent characterizes intent as applied until the late 1970s, during which time it was a broadly informed inferential approach that focused on motives only in the loosest sense (and sometimes not at all). Malicious intent, characteristic of contemporary jurisprudence, declares direct proof of injurious motives a prerequisite and, more pertinently, renders contextual evidence irrelevant.[18]

Part II focuses on *Davis*. While acknowledging that *Davis* formed part of a gathering backlash against civil rights, this Part also shows that *Davis* did not demand proof regarding individual mindsets. Instead, *Davis* helped formalize the Court's long-established contextual approach to proving intent. Part III demonstrates why the

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[15] 426 U.S. 229 (1976).

[16] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1509 (2d ed. 1988). For a rare exception, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1850–51 (2008). Nelson links *Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), as providing for broad sources of evidence to demonstrate discriminatory intent. Though Nelson does not misread *Davis* in the usual fashion, he does misconstrue intent doctrine during this era by overemphasizing the possibility of inquiries into the subjective intentions of individuals. *See infra* note 127.

[17] Typically, casebooks mash together *Davis* and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). In doing so, they misconstrue *Davis* as requiring direct proof of mental states and miss the most remarkable aspect of *Feeney*: its enormous debt to the colorblind reasoning in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1032 (5th ed. 2006) (defining "the *Davis/Feeney* approach" as the need to prove a "specific purpose to harm members of a group"); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 558 (5th ed. 2005) (interpreting *Davis* in terms of *Feeney*). *But see* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 513 (16th ed. 2007) (noting that under *Davis*, "discriminatory purpose may still be inferred," though without examining the shift to a malice standard in the 1980s).

[18] In contrast to the important distinction between "contextual" and "malicious" intent, this Article uses the terms intent, motive, and purpose interchangeably. For further discussion, see *supra* Part I.B.

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corrective rehabilitation described in Part II is so important. Focusing on two all-but-forgotten cases from 1977, Part III shows that the contextual intent approach worked tolerably well through that year. First, in *Castaneda v. Partida*, the recourse to broadly inferential methods—including the use of social science—allowed the Court to identify entrenched discrimination even when it did not take the form of de jure segregation.[19] Second, and more startling from a contemporary perspective, Part III shows that intent doctrine once applied to affirmative action. As late as 1977, equal protection was unified under the contextual intent approach, and did not distinguish cases based on the presence of an express racial classification. Moreover, when applied in *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (*UJO*) to race-based classifications used by the government to promote racial equality, the intent test readily upheld affirmative action.[20] In short, in 1977 the contextual intent test proved able to accomplish the two fundamental tasks at which current equality jurisprudence grievously fails: detecting discrimination against non-Whites and distinguishing invidious from remedial government practices.

The Article's second half, in Parts IV through VII, details the heretofore unrecognized symbiosis between colorblindness and intent: Colorblindness arose in response to intent doctrine, especially as applied to affirmative action, and in turn, colorblindness impelled intent doctrine toward a singular focus on malice. Part IV sketches a timeline of colorblindness cases—showing that the Court decided *Bakke*, which first introduced colorblind reasoning, one year after its decision in *UJO* upholding affirmative action. The main focus of this part, however, is on *Personnel Administrator of Massachusetts v. Feeney*,[21] the intent case that first introduced the malice standard. This part shows that *Feeney* drew directly on *Bakke* in announcing a new (and now settled) bifurcation of equal protection. Express uses of race would now receive strict scrutiny under colorblindness, while cases lacking an express use of race would fall under intent doctrine. It then argues that colorblindness directly contributed to shifting intent from a focus on context to a demand for proof of malice.

Part V traces the rise and application of malicious intent across the 1980s in three key cases: *Mobile v. Bolden*, involving voting rights;[22] *Memphis v. Greene*, closing a public street traveling between White and Black neighborhoods;[23] and *McCleskey v. Kemp*, the infa-

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19 430 U.S. 482 (1977); *infra* notes 181–93 and accompanying text.
20 430 U.S. 144 (1977); *infra* notes 165–80 and accompanying text.
21 442 U.S. 256 (1979).
22 446 U.S. 55 (1980).
23 451 U.S. 100 (1981).

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mous Georgia death penalty case.[24] It shows that the malice test rendered historical and contemporary evidence of ongoing discrimination irrelevant, including powerful evidence from the social sciences. This Part also demonstrates how a double standard arose in these cases. To *defeat* claims of discrimination against non-Whites, the Court consistently turned to the sorts of contextual evidence and broad inferential reasoning it otherwise disallowed when plaintiffs sought to prove mistreatment. In other words, the Court consistently inferred innocence, even as it repeatedly demanded direct proof of malice.

Part VI reconsiders the actual operation of malice doctrine to offer a damning critique heretofore missing from the literature. Virtually all of intent doctrine's critics accept that today's intent standard actually searches for illicit motives. This is evident in the two primary critiques they lodge. First, critics reprove an exclusive focus on conscious animus that imperils attention to unconscious bias.[25] Second, they remonstrate that requiring proof of malice disables the courts from remedying entrenched disadvantage.[26] In either event, they chide the Justices for failing to improve intent doctrine by updating its conception of cognition and broadening its focus from mindsets to structures. Yet in both cases, these critics assume that the malice test is in fact geared to searching for illicit motives.

Upon reexamination, the conservative Justices may have repeatedly exhorted proof of malice, but they showed no interest in parsing mental states. Instead, their demands seemed geared to closing the

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[24] 481 U.S. 279 (1987).

[25] Exemplars of the argument for increased attention to unconscious bias include: Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Lawrence, *supra* note 8; and David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993). *But see* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1073–100 (2009) (arguing that statutory and constitutional prohibitions on discrimination make no distinction between conscious and unconscious bias).

[26] Leading examples include: Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); john a. powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2008); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). Scholars have also criticized the marginal status of discriminatory intent doctrine. *E.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997).

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courthouse doors to evidence showing continued racial hierarchy. To make this point as powerfully as possible, this Part asks how the malice test would resolve a challenge to Jim Crow segregation. It concludes that the malice approach would fail to arrive at the correct result even in a case like *Brown v. Board of Education*—the paradigmatic equal protection case of the twentieth century.[27]

Bringing the analysis up to the present, Part VII starts by demonstrating the consolidation of intent and colorblindness during the 1990s. This consolidation occurred in two senses: first, in terms of the emergence of a solid bloc of conservative Justices who repeatedly voted to ignore racial discrimination and to strike down affirmative action; and second, in terms of a striking convergence between colorblindness and intent. In a series of decisions challenging the race-conscious creation of voting districts with non-White majorities, the Court applied the intent test, but altered its meaning yet again. The conservative Justices no longer looked for malice, but instead for the intentional use of race—what might be termed "classificatory intent." Of course, an intent test that searches for an intentional use of a racial classification differs little from a colorblindness rule that applies whenever there is an intentional use of race.

Part VII continues by discussing intentional blindness and the Roberts Court, considering specifically *Parents Involved*[28] and *Ricci*.[29] Taken together, these cases as well as others suggest a new plunge in equal protection doctrine. Until very recently, intentional blindness toward racial discrimination was an affliction largely imposed only on the courts. Recent cases suggest a move to blind government generally, as well as to blind private actors such as employers, foundations, universities, and unions.

The Article concludes by offering an encomium to recently retired Justice John Paul Stevens. Appointed by a Republican president and initially hostile to affirmative action as well as to claims of discrimination against non-Whites, Stevens proved willing to learn over his career about racism and social repair. His trajectory emphasizes the irreducible importance of a judiciary with an open mind. Meanwhile, the degree to which his trajectory is truly exceptional serves as an indictment of the current Court, which remains dominated by conservatives wedded to intentional blindness.

A last introductory word: This Article focuses on doctrine, but it is not a doctrinal article. Instead, it takes doctrine seriously in order to

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

[28] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[29] Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

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lay bare the racial politics of the conservative Justices who have reversed equal protection over the last four decades. This story could be told much more simply in terms of elections and judicial appointments. In this version, equal protection's transmogrification since the 1970s follows most fundamentally from a broad backlash against civil rights that resulted in the election of presidents, and in turn the appointment of Justices, hostile toward racial progress. Those Justices, who consistently refused to find discrimination against non-Whites, or to support affirmative action programs, were prepared to reach those results without doctrine or evidence on their side. Crucially, though, they were also quick to craft doctrines and evidentiary standards that confirmed their favored outcomes. It is here that the story becomes complicated, widely misunderstood, and critically important. True, malice doctrine and colorblindness were not so much engines for rolling back civil rights as they were a dissimulating gloss. Over time, however, this gloss has hardened into a strong protective carapace. So long as colorblindness and discriminatory intent remain misunderstood as separate and plausible doctrines, it will be all but impossible to understand ongoing devolutions in the Court's racial jurisprudence. Charles Black in 1960 described the refusal to see racial inequality as self-induced blindness. Colorblindness and intent doctrine are the bandages the Justices use to blind themselves to continued racism against non-Whites. The doctrines also serve to hide from public view the Court's ferocious disfigurement of equal protection. This Article aims to help strip away those stained dressings of rhetoric and pretense.

I
INTENT DURING THE CIVIL RIGHTS ERA

Just prior to *Washington v. Davis*, constitutional scholar John Hart Ely described motive analysis as a "disaster,"[30] while another leading scholar, Paul Brest, derided it as "one of the most muddled areas of our constitutional jurisprudence."[31] At the time, these descriptions seemed apt enough. Having succeeded in the late 1960s in pulling down the last pillar of openly supremacist laws—the ban on racially mixed marriages[32]—the Court entered a period of uncertainty about how, and how far, to proceed in dismantling racial inequality

[30] John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 (1970).

[31] Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99.

[32] Loving v. Virginia, 388 U.S. 1 (1967) (holding that statutory bans on interracial marriage are unconstitutional under the Fourteenth Amendment).

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more generally. Meanwhile, as challenges to racial injustice spread beyond the South, national opposition to civil rights intensified. Both uncertainty about how to proceed and sensitivity to growing resistance to civil rights found expression in confused and sometimes contradictory Supreme Court decisions, including two notable cases declaring—against the great weight of contemporary practice—that an inquiry into motives had no place in ferreting out illegal discrimination.[33] Nevertheless, from several decades' remove one can discern some order by disaggregating intent doctrine in terms of four underlying questions.

First, is it ever appropriate for the Court to inquire into the thinking of other government officials? The undeniable answer is a resounding yes—it would be virtually impossible, and contrary to settled practice, to seek to apply the Constitution with no concern whatsoever for the purposes or interests that other branches of government pursue. Yet, not infrequently, objections to particular inquiries into governmental intent are expressed as blanket objections to all such inquiries.

Second, what evidence will suffice to prove unlawful intent? Must one have relatively direct evidence—for instance, a recorded utterance or a confession? Or will inferences from more general evidence suffice? As we shall see, during the civil rights era the Court relied on a holistic approach that gave weight to multiple sources of evidence, including the likely impact of the government's action, as well as the larger racial and social context. In contrast, with only slight hyperbole one might say that the contemporary malice standard seems to demand a sworn affidavit admitting to discrimination, or perhaps even a confession in open court.

Third, what sort of mindset qualifies to establish an unconstitutional "intent"? Conscious animus, unconscious bias, and reckless indifference provide three standard possibilities. There are also many others, such as the focus on knowing conduct in criminal and tort law. In the civil rights era cases, "intent" served as a legal term of art, such that *no* particular mindset was required. Rather, the Court was content to strike down state action if it generally understood the practice as discriminatory. In contrast, the malice standard seems to demand (as its name indicates) a state of mind akin to malice.

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[33] *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (arguing that a lack of discriminatory intent would not save employment procedures that produced discriminatory consequences); Palmer v. Thompson, 403 U.S. 217, 224–25 (1971) (arguing that it is impossible and futile for judges to determine legislative motives and that the relevant inquiry looks to effect); *see also infra* Part I.D (discussing these cases).

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Finally, if a finding of intent is sufficient to establish unconstitutionality, is it also necessary? Could a showing of racially disproportionate harm, with no finding regarding government purpose, establish a violation of the Fourteenth Amendment? *Griggs v. Duke Power*, an employment discrimination case from the early 1970s, suggested the answer might be yes.[34] As we shall see in the next Part, *Davis* in 1976 resoundingly answered no.[35]

To understand *Davis* properly, one must view it in two lights: First, in the common interpretation, as a backlash case—insofar as it added another nail to the coffin interring the hope that the Court would work to alleviate embedded inequalities. Second, *Davis* must also be viewed in light of the approach toward intent taken by the civil rights cases generally. *Davis* did *not* announce the contemporary discriminatory intent doctrine, but formalized a contextual approach that had been employed since the inception of the modern civil rights era.[36] To illustrate this, the discussion of intent during the civil rights era is organized in terms of the four central questions just introduced.

A. *The Propriety of Inquiring into Intent*

From its earliest years, the Court recognized that enforcing the Constitution required judging the intentions of state actors, including the intentions of those government officials who drafted the Constitution itself.[37] Simultaneously, however, the Court used great delicacy in questioning the motives of elected and executive officials, undertaking this endeavor with shifting levels of trepidation. The first half of the twentieth century exemplifies this volatility. During what we now term the "*Lochner* era," the Court was especially aggressive in evaluating the purposes behind federal and state efforts to regulate the marketplace, as well as in substituting its own judgment that government should play only a minimal role in protecting its citizens from the vicissitudes of capitalism.[38] Chastened by the Great Depression,

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[34] *See Griggs*, 401 U.S. at 432 (arguing that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms" that disproportionately harm minorities "and are unrelated to measuring job capability").

[35] *See infra* notes 147–48 and accompanying text.

[36] That is, the discriminatory intent test roughly translated into a principle that disfavored group disadvantaging. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154–55 (1976) (promoting a group-disadvantaging understanding of equal protection). For a fuller discussion of the relationship between contextual intent and harm, see Part VI.A.2.

[37] *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420–21 (1819) (discussing the framers' intentions in drafting the Necessary and Proper Clause).

[38] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 56, 58 (1905) (discussing the Court's role in evaluating the intentions behind uses of police power).

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the rise of the New Deal administrative state, and by shifting political winds, in the late 1930s the Court vowed to abstain from reviewing government purposes regarding ordinary social and economic legislation.[39] Even so, however, the Court recognized that on occasion more substantial inquiry into motives would be warranted, as when government disfavored "discrete and insular minorities."[40] At the inception of the modern civil rights era, then, the Court had an uneasy relationship with motive review. On the one hand, it had ostensibly largely foresworn this power. On the other, it recognized that enforcing the Constitution would require continued vigilance against the base motives that sometimes found ugly expression in government action.

The result in the civil rights era was a sustained focus on illicit purposes—not as a formal rule, but as a steady undercurrent through the Court's decisions dismantling Jim Crow.[41] Tentatively at first and then indisputably across a range of de jure segregation cases, the Court tied its decisions to impermissible motives. In *Brown v. Board of Education*, for instance, Chief Justice Earl Warren superficially ignored, yet also implicitly upbraided, legislative purpose.[42] Though Warren carefully framed the decision in terms of segregation's "effect," there lurked just below the surface the clear message that the Court abjured segregation because its purpose, not just its result, was to injure.[43] After *Brown*, the Court dismantled Jim Crow principally through terse unsigned opinions that indicated little about the Justices' reasoning. When the Court did explain itself, though, it emphasized unlawful purposes. In *Gomillion v. Lightfoot*, for

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[39] *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (explaining that the Court will not engage in the task of uncovering the motivations of legislators); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (explaining that there is no need for the Court to determine the rationale behind ordinary economic regulation).

[40] *Carolene Prods. Co.*, 304 U.S. at 152 n.4. Amplifying this point, a germinal 1949 article urging the resuscitation of equal protection review pointedly insisted that a workable equality jurisprudence made "inescapable" the need to "look beyond the classification to the purposes of the law." Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

[41] Even before the Court began the process of dismantling Jim Crow schools, it began to reform Jim Crow justice. For instance, the Court handed down numerous decisions overturning the exclusion of Blacks from juries, beginning with *Norris v. Alabama*, 294 U.S. 587 (1935). These decisions deduced discrimination from long patterns of exclusion. *See, e.g.*, Patton v. Mississippi, 332 U.S. 463, 464–66 (1947) (holding that Blacks had been discriminated against based on a showing of a pattern of exclusion from jury service); Hill v. Texas, 316 U.S. 400, 403–04 (1942) (same); Smith v. Texas, 311 U.S. 128, 131 (1940) (same); *see generally* Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401 (1983) (historicizing the key jury discrimination cases).

[42] 347 U.S. 483 (1954).

[43] *Id.* at 492, 494.

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example, the Alabama legislature had rezoned Tuskegee into an "uncouth twenty-eight-sided figure" that removed virtually all black, but no white, voters.[44] The Court found these facts "tantamount for all practical purposes to a mathematical demonstration, that the legislation is *solely concerned with* segregating white and colored voters by fencing Negro citizens out of town . . . ."[45] In *Griffin v. County School Board of Prince Edward County*, the Court repudiated Virginia's decision to close rather than integrate public schools, while providing grants to students attending Whites-only private academies.[46] "Prince Edward's public schools were closed and private schools operated in their place with state and county assistance," the Court concluded, "for *one reason, and one reason only*: to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school."[47] Likewise, in *Loving v. Virginia*, the Court struck down laws criminalizing mixed marriages as "measures *designed* to maintain White Supremacy."[48]

Reflecting the uneasy truce between reviewing and yet limiting attention to governmental aims, the civil rights cases seemingly gave great weight to invidious motives and yet stopped well short of elevating discriminatory purposes into the *ratio decidendi*. The Court's comments on motives provide a crucial window into the reasoning of the Justices, but were never identified by the Court itself as the foundation of its holdings.

B. Contextual Versus Direct Evidence

Five years after *Brown*, famed constitutional law scholar Herbert Wechsler criticized that decision partly because it "involve[d] an inquiry into the motive of the legislature, which is generally foreclosed to the courts."[49] Reflecting the retreat from Lochnerism, legal scholars during this era sought to describe a limited role for the Court in evaluating legislative purposes in part by crafting distinctions between "purposes" and "motives." "Examining motives, it is said, involves inquiry into the subjective reasons for legislative action; purpose, on the other hand, denotes *what* the legislature sought to

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[44] 364 U.S. 339, 340 (1960).

[45] *Id.* at 341 (emphasis added).

[46] 377 U.S. 218 (1964).

[47] *Id.* at 231 (emphasis added).

[48] 388 U.S. 1, 11 (1967) (emphasis added); *see also* Louisiana v. United States, 380 U.S. 145, 149 (1965) (striking down literacy tests for voting as "legislative [efforts] to preserve white supremacy").

[49] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

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achieve, and not *why*."[50] In general, commentators supposed that "courts may inquire into purpose, but not motive."[51] Ultimately, however, the supposedly sharp distinction between motive and purpose bore little fruit, not least because this line was bright only in theory.[52] In this Article, motive, purpose, and intent are used as synonyms. Nevertheless, there is an important insight here—the Court has long been much more comfortable inquiring into the general purposes of a state's actions and far less comfortable looking into the purposes of any precise individual.

This sense—that general motives can be legitimately scrutinized while the motives of individual state actors should be out of bounds—helps connect the first and second key questions regarding intent doctrine. If it is sometimes appropriate to examine intent, what sort of evidence counts to establish governmental purposes? The answer has long been that the Court can legitimately infer general motives from contextual material, but should not inquire into the subjective thoughts of particular individuals. For instance, the Court should not subject government officials to depositions or court examinations. An 1885 race discrimination case offered this calibration:

> [T]he rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation.[53]

Though the Court seemingly announced a general rule that judges cannot inquire into motives, this prohibition did not survive the very sentence that proclaimed it. Rather, the Court held that the purposes behind government action could be legitimately considered, so long as judges used a holistic approach to discern governmental motives. For instance, the government's interest in taking a particular course could be inferred from the context in which it acted—stated most broadly as "the condition of the country."[54] Indeed, courts could legitimately evaluate the government's motives by looking to the foreseeable consequences of its actions. The same paragraph continued: "The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the

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[50] Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887, 1887 n.1 (1970).

[51] *Id.*

[52] *Id.*; *see also* Ely, *supra* note 30, at 1217–21 (concluding that the difference between motive and purpose is tenuous).

[53] Soon Hing v. Crowley, 113 U.S. 703, 710 (1885).

[54] *Id.*

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natural and reasonable effect of their enactments."[55] In other words, intent could be inferred from a given action's foreseeable impact. As we shall see, this is the basic approach adopted by *Davis*, but rejected by *Feeney*.

If the Court was ready to allow attention to motives when appropriately discerned, it nevertheless rejected inquiring into the thoughts of individual government actors. The Court traditionally has eschewed direct evidence of what specific government actors thought, and for good reasons. In the words of the same decision:

> The motives of the legislators . . . considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.[56]

As the opinion mentioned, the state typically acts as a result of decisions reached by myriad actors. Moreover, direct proof of precise mindsets is difficult if not impossible to obtain.[57] For these reasons, the Court had *never* demanded direct proof of the mindsets of identified officials—until it purported to do so in the malice cases.[58]

Returning to the civil rights era, the Court stayed true to this balance of investigating general motives while eschewing a concern for individual intentions. It repeatedly drew inferences about governmental purposes from the larger context, while avoiding direct inquiries into individual mindsets. Sometimes this inferential process reflected little more than judicial notice of race relations. In defending

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[55] *Id.*

[56] *Id.* at 710–11.

[57] *Cf.* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (warning about the dangers of inquiring into "corruption" and "impure motives"). In addition, if an act was found unconstitutional because of the impure thoughts of particular individuals, this would imply the troubling possibility that another act otherwise identical in every respect might be lawful so long as untainted by illegitimate motives. *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (noting the futility of a holding that allows decisionmakers to reenact identical legislation under different motives); Ely, *supra* note 30, at 1214 (same). Also, this would put plaintiffs in the delicate position of proving that state actors, with whom they would likely remain in a working relationship, were liars and bigots. *See* Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 441–42 ("Because it must be shown that the decisionmakers were motivated by that which they deny, the plaintiffs must prove them to be liars."); Krieger, *supra* note 25, at 1163 (recounting the story of a Title VII case which, in essence, required proof that the defendant was a "racist and a liar"). Finally, "a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims . . . ." Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164 (1978).

[58] This is one among many ironies of the current malice test. It seems to invite an unprecedented intrusion into the minds of government actors (though, as we shall see, this danger is merely theoretical, as in practice the advocates of malice doctrine show no concern with establishing actual motives). *See infra* Part VI.B.2.

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the desegregation cases, Professor Charles Black endorsed this style of reasoning, terming the destructive intentions behind segregation "matters of common notoriety" that should serve as "background knowledge [for] educated men who live in the world."[59] At other times, the Justices relied on a more focused examination of surrounding racial patterns, including through the invocation of social science. Perhaps the quintessential example is *Brown* itself, in its famous footnote eleven.[60] Whatever the combination of judicial notice and focused study, the point is that the Court did not demand direct proof of subjective mindsets. Instead, findings of discriminatory purpose reflected inferences drawn from the challenged action as well as the surrounding context—in a phrase popular with the Court, from the "totality of the circumstances."[61]

To capture this style of measuring alleged discrimination through an examination of the larger context, this Article refers to the "contextual" approach or—at the risk of incorrectly suggesting a focus on subjective motivations—employs the neologism "contextual intent." This Article refers to the "malice" or "animus" approach, or uses the shorthand "malicious intent," to discuss interpretations of intent doctrine that require direct proof of precise mindsets. Thus, the Article contrasts "contextual" and "malicious" conceptions of intent. The former focuses on motives only in the loosest sense (or sometimes not at all) and emphasizes instead a broadly informed inferential approach to evaluating possible discrimination; the latter declares direct proof of injurious motives a prerequisite and concomitantly declares contextual evidence irrelevant.

C. *What Constitutes an Illicit Purpose?*

The debate over proof is only roughly separable from the question of what counts as a discriminatory purpose. Had the Court been

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[59] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960).

[60] Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954) (citing social science to demonstrate the harm done by segregation). On the controversy sparked by the footnote, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality 708–09 (2004). For a thoughtful review of the use of social science in racial antidiscrimination law more generally, see Rachel F. Moran, *What Counts As Knowledge? A Reflection on Race, Social Science, and the Law*, 44 LAW & SOC'Y REV. 515 (2010).

[61] White v. Regester, 412 U.S. 755, 769 (1973). In defending attention to legislative motives, both Ely and Brest stressed the need to make inferences from the larger context. Brest, *supra* note 31, at 120–21 ("The chief method of ascertaining a decisionmaker's motivation involves the drawing of inferences from his conduct, viewed in the context of antecedent and concurrent events and situations."); Ely, *supra* note 30, at 1265 (proposing that the Court become more inclined to assume motive from context).

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obsessed with discovering a precise quality of mind on the part of a named individual, it might have been inclined to require relatively direct evidence of intent. Notably, the Court went this direction in the malice cases. The contextual approach in the civil rights cases, however, corresponded to a capacious conception of unconstitutional motive.

The contextual approach seemed geared toward reaching a conclusion about whether the interests behind the challenged government action were generally legitimate or illegitimate, innocent or tainted by racism—rather than establishing whether prejudice or bias on the part of any individual was directly at work. True, the Court in the Jim Crow era sometimes clearly arrived at the judgment that malicious aims lay somewhere behind the challenged practices—for instance regarding Virginia's decision to criminalize interracial marriage.[62] Yet the Court proved willing to intuit some level of ill intent even when it accepted testimony of innocent motives.[63] In addition, several intent cases implied that an illegitimate purpose need not spring from actual bias, but would suffice even if rooted in mistaken good faith,[64] or indeed if tied to thoughtless reliance on established social patterns.[65] Though the Court considered the government's purposes when weighing allegations of discrimination, at base it approached intent not as a question of the precise mental states of identified individuals but as a historical and sociological inquiry into the legitimacy of the challenged government action. At the extreme, "intent" ceased to refer to intentions at all and became simply legal shorthand for

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62 Loving v. Virginia, 388 U.S. 1 (1967).

63 *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."); Eubanks v. Louisiana, 356 U.S. 584, 587–88 (1958) (inferring discrimination in jury selection); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (same).

64 *See* Cassell v. Texas, 339 U.S. 282, 293 (1950) (Frankfurter, J., concurring) (finding that a grand jury commissioner's ignorance gave rise to impermissible conduct); *cf.* Cooper v. Aaron, 358 U.S. 1, 15 (1958) (holding that a school board's "entire good faith" does not absolve it from the duty to comply with desegregation orders).

65 *See* Castaneda v. Partida, 430 U.S. 482, 503 n.2 (1977) (Marshall, J., concurring) (citing social science scholarship, much of it stressing non-conscious psychological dynamics, to buttress the argument that "minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority"). Moreover, the causal nexus between any tainted mindset and the discriminatory outcome frequently remained ambiguous; when pushed, the Court took a relaxed view, finding malevolent intent remote in time sufficient to create an inference of intentional discrimination. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210–11 (1973) (inferring discrimination from the past acts of a school board). In contrast, after *Feeney* the Court suggested that a but-for nexus must connect the evil intent and the challenged harm. *E.g.*, Hunter v. Underwood, 471 U.S. 222, 232 (1985).

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indicating whether the challenged government practice was constitutional or not.[66]

This point bears repeating, as it is easily forgotten in the face of ubiquitous references to "*intent* doctrine." This label is, in effect, a misnomer, or at least badly misleading when used to describe the Court's approach to racial discrimination prior to the mid-1970s. During the civil rights era, the Court was not on the hunt for individual bigots—nor for those guilty of unconscious bias or negligent discrimination, nor for those who might be held responsible on a theory of strict liability. All of those approaches, offered as potential ways to reform intent doctrine, nevertheless contemplate attention to the mindsets of particular actors.[67] This was not the Court's basic approach. In one notable jury exclusion case, Chief Justice Warren bluntly declared: "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."[68] Warren did not mean that impact alone established unconstitutionality, but rather that considering the circumstances as a whole—including, in this case, pervasive Jim Crow practices—the intent of the immediately responsible government officials was simply irrelevant.[69] "Intent," if it is to be used to describe the Court's racial jurisprudence through at least 1977, must not be construed as a reference to the motives of particular individuals. Instead, it must be used as a term of art, connoting a judicial conclusion regarding the illegitimacy of certain racial practices.[70]

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[66] In *Wright v. Rockefeller*, for instance, the Court upheld gerrymandering to maintain a majority-Black voting district. 376 U.S. 52 (1964). The evidence of a race-conscious drawing of jurisdictional lines seemed almost as irrefutable as in *Gomillion*. *See id.* at 59–60 (Douglas, J., dissenting) (describing an eleven-sided boundary between the two districts). Nevertheless, the Court declined to follow its recent precedent, accepting that "the New York Legislature was [neither] motivated by racial considerations [nor] in fact drew districts on racial lines." *Id.* at 56. *Gomillion* and *Wright* seem in deep tension if purpose necessarily refers to subjective intent; they align insofar as "intent" sometimes functioned as a legal conclusion regarding the existence of unconstitutional mistreatment.

[67] *See, e.g.*, Oppenheimer, *supra* note 25 (advocating the reform of intent doctrine along the lines of negligence, at once repudiating a limited focus on conscious motives while retaining a larger focus on mindsets).

[68] *Hernandez*, 347 U.S. at 482.

[69] *See* Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-subordination Constitution: The Story of* Hernandez v. Texas, *in* RACE LAW STORIES 273, 304–05 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (placing *Hernandez* in the context of Jim Crow practices).

[70] Evaluating in 1976 the recent ascendance of public law litigation—with school desegregation and employment discrimination providing "avatars of this new form of litigation"—Professor Abram Chayes noted a shift in fact finding away from the determinations of guilt that characterize private law litigation. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). In public law litigation, Chayes observed, "the inquiry is only secondarily concerned with how the condition came about,

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D. *Impact and Intent:* Griggs *and* Palmer

The final core question raised by intent doctrine is whether equal protection always requires a finding of a discriminatory motive, or whether instead a constitutional violation can sometimes exist absent the proven existence of animus. Contemporary doctrine insists upon a finding of discriminatory intent, while critics repeatedly assail this interpretation as unduly restrictive. The origins of this debate lie in the close of the civil rights era.

The civil rights era arguably ended in the first years of the 1970s. Perhaps most fundamentally, this reflected the new political reality in the country, epitomized by the election and re-election of Richard Nixon, whose campaigns in 1968 and 1972 targeted anxieties among White voters.[71] While Nixon barely eked out his initial victory, he won his second term decisively; his stance as the candidate most likely to pare down civil rights seemed to capture the electorate's mood.[72] In turn, Nixon appointed four Justices skeptical of civil rights—Justices inclined to delay and even reverse the direction the Court had been moving.[73] These four Justices—in order, Warren Burger, Harry Blackmun, and then on the same day Lewis Powell and William Rehnquist—provided core votes for the narrow majorities that limited equal protection in some of the leading cases from this period.

Also heralding the end of the civil rights era, the Court began to confront new issues in cases such as *Griggs v. Duke Power Co.*[74] and *Palmer v. Thompson.*[75] In *Griggs*, a large Southern employer had expressly restricted Blacks to menial work, mandating that no Black should earn as much as the lowest-paid White employee.[76] After the 1964 Civil Rights Act passed, the company complied only nominally,

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and even less with the subjective attitudes of the actors . . . . Indeed, in dealing with the actions of large political or corporate aggregates, notions of will, intention, or fault increasingly become only metaphors." *Id.* at 1296.

71 *See generally* THOMAS BRYNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1991) (describing the role of racial appeals in the emergence of a new Republican majority since 1968); RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 421 (2008) (describing Nixon's use of race and civil rights in his electoral campaigns).

72 *Cf.* DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 180 (1999) (discussing Nixon's 1968 campaign as having been run against the Court).

73 To appeal to the Southern White electorate, Nixon also nominated two Southerners to the Supreme Court, both of whom were narrowly denied confirmation by the Senate. MICHAEL GOLDFIELD, THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS 313 (1997).

74 401 U.S. 424 (1971).

75 403 U.S. 217 (1971).

76 *Griggs*, 401 U.S. at 427.

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adopting facially race-neutral procedures that effectively preserved the established racial hierarchy.[77] Thus, unlike most Jim Crow cases, *Griggs* forced the Court to confront discrimination hidden behind a façade of racial neutrality.[78] Coming down several months later, *Palmer* involved Jackson, Mississippi's decision to close its public pools, rather than operate them on an integrated basis.[79] The city's defense relied in large part on the claim that it closed the pools for fiscal reasons.[80] Whereas Jim Crow cases could be framed negatively as the right to be free from discrimination, *Palmer* pushed the Court to consider whether protecting civil rights created a positive right to force the expenditure of funds to promote racial equality.

Griggs and *Palmer* are important to any discussion of intent doctrine, but not for the reason they are typically cited. Both decisions are famous for seeming to declare that inquiries into motives are at best irrelevant, or maybe even forbidden.[81] Especially with hindsight, however, there is little reason to take these statements seriously, for both decisions lie firmly within the civil rights tradition of looking at intent holistically.[82]

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[77] *Id.* at 427–28.

[78] Though *Griggs* turned on "discrimination" within the meaning of a statute rather than the Constitution, at the time no sharp distinction existed in how courts understood discrimination in one context versus the other. Illustrating this, lower courts after *Griggs* uniformly applied its analysis to discrimination under the Equal Protection Clause. *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing numerous cases which extended the logic of *Griggs* to overturn disproportionate harms to non-Whites despite the lack of any evidence of invidious intent).

[79] *Palmer*, 403 U.S. at 219.

[80] *Id.* at 225.

[81] In *Griggs*, for instance, the Court warned that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups." 401 U.S. at 432. Meanwhile, in *Palmer* it declared 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." 403 U.S. at 224. *Palmer* in particular echoed an earlier decision in which the Court hyperbolically rejected attention to motives even as it cited the legitimacy of the government's purposes in upholding a challenged action. *See* United States v. O'Brien, 391 U.S. 367, 380, 382–83 (1968) (refusing to consider congressional motives in outlawing the destruction of Selective Service draft cards). At the time, *O'Brien*, *Griggs*, and *Palmer* caused deep consternation as to whether attention to motives was permissible. *See* Brest, *supra* note 31, at 99–102 (discussing *Palmer* as the "latest addition" to a "muddled area[ ]" of constitutional jurisprudence); Ely, *supra* note 30, at 1207, 1210–11 (discussing *O'Brien* in the context of the Supreme Court's "traditional confusion about the relevance of legislative and administrative motivation").

[82] Despite its broad language suggesting a concern with equitable outcomes, *Griggs*'s unanimous ruling for the plaintiffs seemed driven by the facts, which strongly suggested impure motives hidden behind a thin charade of neutral workplace rules. The posture of the case may also have contributed to the Court's shift away from the language of intent. The trial court had found, as a matter of fact, that Duke Power Company had not intentionally discriminated. Griggs v. Duke Power Co., 292 F. Supp. 243, 248 (M.D.N.C. 1968).

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The significance of *Griggs* and *Palmer* comes not in any purported rejection of motive analysis, but rather in how they framed related aspects of the last central question confronting intent doctrine: the necessity of finding discriminatory intent before imposing constitutional liability. *Griggs* asked one version of this question by highlighting the role of outcomes in demonstrating discrimination. The Court seemed to answer that outcomes mattered and that action that disproportionately harmed non-Whites would be declared discriminatory unless some legitimate and substantial reason for the action existed. In this way, *Griggs* seemed to push the intent test beyond a search for discriminatory motives and toward a more general inquiry into the sufficiency of the government's purposes, even when these were admittedly legitimate. From a different direction, though, *Palmer* asked the obvious follow-up question: If outcomes mattered, should the Court force the reallocation of resources to promote more equitable results? If government action indeed did cause racially disproportionate harms without good reason—though also without clear animus—should courts order changes in how the state acted? The logic of *Griggs*, and of civil rights more generally, seemed to say yes. The logic of *Palmer* and the developing political backlash against civil rights, however, increasingly said no.

From the outset, the seemingly straightforward mission to end Jim Crow had embedded within it the deeper question of how much structural change the courts should demand. Racism wove material inequality into the fibers of American life, relegating non-Whites to inferior schools, immiserated neighborhoods, and lousy jobs, while reserving for Whites "positions of influence, affluence, and prestige."[83] Early on, the Court confronted one version of this truth when it recognized that simply prohibiting formal segregation would not give Blacks access to White schools. Especially concerned about equality in education, the Court moved from prohibiting segregation

By declaring intent irrelevant, the Court avoided overstepping its bounds in reversing the lower court on a question of fact.

Similarly, *Palmer* too seems driven by a context-based inference of motives, though in that case a divided Court inferred a lack of discriminatory animus. It reached this result despite striking evidence in the case, including a promise by the town mayor, in the immediate wake of a court order to desegregate the local pools, that "we are not going to have any intermingling," and a commendation by Mississippi Governor Ross Barnett of the mayor's "pledge to maintain Jackson's present separation of the races." *Palmer*, 403 U.S. at 250 (White, J., dissenting) (citations omitted).

[83] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 401 (1978) (Marshall, J., concurring in part and dissenting in part).

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to requiring integration.[84] A superficially subtle shift, this change threatened a revolution—for it seemed to promise that the Court would not just work to end egregious forms of supremacist behavior, but would also promote equitable outcomes throughout American life.

In the early 1970s, however, faced with plaintiffs clamoring for structural relief in school funding, housing assistance, and welfare, the Court balked. In such cases, holdovers from the Warren Court (especially Potter Stewart) frequently joined the Nixon Justices to renege on the promise of structural reform.[85] It was this retreat, supported by these same Justices, that shaped *Palmer*.[86] In assessing intent doctrine, *Griggs* and *Palmer* importantly mark what at first seemed like a new frontier (*Griggs*) and then emerged as an outer boundary (*Palmer*) in equal protection. In 1976, *Davis* would lay to final rest any hope that the Court would use intent doctrine to remedy structural disadvantage. The writing was on the wall, though, within months of *Griggs*.

II
THE CONSOLIDATION OF "INTENT DOCTRINE"

In overturning segregation's legal superstructure, the Court implicitly relied on a contextual intent test. Yet it stopped short of formally declaring an intent or purpose to discriminate as the touchstone of equal protection analysis. That changed in three cases spanning 1973 to 1977: *Keyes v. School District No. 1*,[87] *Washington v. Davis*,[88] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[89] *Keyes* turned on persistent school segregation in Denver; *Davis* on racial discrimination in the hiring of police officers in Washington, D.C.; and *Arlington Heights* on discrimination in housing in a virtually all-White suburb of Chicago. Three points are especially striking about these cases. First, they did not announce the restrictive malice test we now labor under, but rather formalized the contextual intent approach that had succeeded in dismantling Jim

[84] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (upholding busing as a means of promoting integration); Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968) (holding a freedom-of-choice desegregation plan to be unconstitutional).

[85] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (school funding); Jefferson v. Hackney, 406 U.S. 535 (1972) (welfare); James v. Valtierra, 402 U.S. 137 (1971) (low-income housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare).

[86] *See Palmer*, 403 U.S. at 224–26 (arguing that financially motivated policies that apply to Blacks and Whites do not constitute a denial of equal protection, even where some evidence suggests improper motives).

[87] 413 U.S. 189 (1973).

[88] 426 U.S. 229 (1976).

[89] 429 U.S. 252 (1977).

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Crow. This point, of course, derogates from the understanding of these cases that is almost uniformly accepted and taught in American law schools.[90] Second, the approach taken by these cases was embraced, rather than repudiated, by the civil rights stalwarts on the Court, including Justices William Brennan and Thurgood Marshall. That these Justices supported this approach makes sense when these cases are understood as consolidating contextual intent. Finally, these cases all came in the context of retrenchment in equal protection, a dynamic heightened by their engagement with discrimination outside the South. Even as they formalized intent doctrine, *Davis* and *Arlington Heights* in particular revealed the limits of contextual intent.

A. Justice Brennan and Contextual Intent: Keyes

Palmer was one among several fractured decisions in the first years of the 1970s that began to sharply curtail equal protection's structural promise.[91] This growing resistance to real change soon enough began to invade the school cases, the area in which the Court had shown the greatest commitment to deep reform. In one decision, the Court upheld vast race and wealth disparities in school funding.[92] In another, it refused to grant remedies for segregation that crossed local jurisdictional lines.[93] In the midst of this retrenchment, the Court circled back to the question of intent and persistent segregation. In *Keyes v. School District No. 1*, the Court confronted segregated schools in Denver, Colorado. Considerable evidence proved that in some school districts the Denver school board had pursued "an undeviating purpose to isolate Negro students."[94] Yet in other school districts, there was little direct evidence of an intent to segregate Black and Mexican-American students from Whites.[95]

Keyes squarely rested constitutional protection from discrimination on findings of discriminatory intent. Indeed, *Keyes* stands out because it went well beyond the typical practice of implicitly judging motives and *expressly* made illegitimate purpose a requirement for liability. *Keyes* clearly announced that "purpose or intent" formed the constitutional prerequisite for proving an equal protection violation.[96]

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[90] *See* BREST ET AL., *supra* note 17, at 1031–32 (interpreting *Davis* as setting forth a malice standard).

[91] *See supra* notes 85–86 and accompanying text.

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

[93] Milliken v. Bradley, 418 U.S. 717 (1974).

[94] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 199 (1973) (quoting Keyes v. Sch. Dist. No. 1, 303 F. Supp. 289, 294 (D. Colo. 1969)).

[95] *See Keyes*, 413 U.S. at 207 (using circumstantial evidence to infer discrimination).

[96] *Id.* at 208.

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Strikingly, it was the more liberal members of the Court who took the lead, with William Brennan writing the opinion and Thurgood Marshall joining it. Given how the intent test would soon devolve, why did Brennan and Marshall embrace, indeed craft, this doctrine?

This question is all the more intriguing given that Powell urged the Court to do away with what he termed "the initial tortuous effort of identifying 'segregative acts' and deducing 'segregative intent.'"[97] Such inquiries, he admonished, "present problems of subjective intent which the courts cannot fairly resolve."[98] Instead, Powell advocated that constitutional liability for segregation be imposed on the basis of outcomes and institutional responsibility: If segregated schools persisted, school boards and other related government institutions should be presumed responsible.[99] What explained a Nixon appointee's willingness to sign onto a capacious theory of discrimination? Powell seemed to be offering the more liberal Justices a bargain—he would agree to a robust theory of liability if in turn the other Justices would agree to reduce pressure on school districts to use busing to promote rapid desegregation.[100]

Why did Brennan and Marshall not accept Powell's offer? One can conjecture that they did not see much of a cost to using the intent test. In order to establish unconstitutional intent, Brennan focused on three factors: the educational context as a whole, including intentional segregation in some districts as well as the persistence of racially-identifiable schools;[101] a history of purposeful segregation, even if remote in time;[102] and the interplay between school practices and

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[97] *Id.* at 224 (Powell, J., concurring).

[98] *Id.* at 225; *see id.* at 233–34 ("[I]t is 'extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment[.]' Whatever difficulties exist with regard to a single statute will be compounded in a judicial review of years of administration of a large and complex school system." (quoting Palmer v. Thompson, 403 U.S. 217, 224 (1971))).

[99] *Id.* at 224, 227–28.

[100] *See id.* at 238–52 (explaining Powell's "profound misgivings" regarding efforts to promote integration through student busing); BREST ET AL., *supra* note 17, at 940–41 (identifying Powell's concurrence as a proffered bargain).

[101] *See Keyes*, 413 U.S. at 209 ("[W]here it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities . . . violation of substantive constitutional rights under the Equal Protection Clause is shown." (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971))).

[102] *See Keyes*, 413 U.S. at 210–11 ("We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting . . . continues to exist, . . . remoteness in time certainly does not make those actions any less 'intentional.'").

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dynamics in other social arenas, particularly housing.[103] In effect, Brennan relied on context to discern "intent."[104] This contextual approach reduced the costs of emphasizing discriminatory purposes. To the extent that the question of unconstitutional intent was measured from context and not tied to any precise state of mind such as animus or prejudice, it retained substantial flexibility to address new, non–Jim Crow forms of discrimination.

In addition, the *Keyes* majority possibly perceived advantages to using the rhetoric of intent. On one level, at least when intent was defined broadly, it provided a plausible explanation for persistent segregation. As in the country generally, segregation in Denver was not simply vestigial or accidental, but to a significant degree reflected a purposeful commitment to protect White privilege—even if no longer expressed openly in the patois of White supremacy. On another level (and most likely of far greater importance to the majority), the language of intentional discrimination carried political and cultural resonance. By 1973, all could see the tidal shift against civil rights, even if the full dimensions of the coming reversals were not yet clear. In particular, it was evident that neither the public nor a majority of the Court held any enthusiasm for structural reforms. In this environment, it may have seemed important to the liberal Justices to invoke the politically potent notion that intentional segregation continued, even outside the South. To talk of discriminatory purposes was to link contemporary discrimination to the reviled practices of the past, to wrap the Court in the legitimacy of the campaign against Jim Crow statutes, and to insulate the Justices from the charge that they were taking the courts in new and unexpected directions. With the possibility of structural justice increasingly closed off, it may have seemed more important than ever—politically and rhetorically—to root persistent inequality in the language of intentional discrimination.

But this approach was not without risk. The resonance of "intent" could also cut in the other direction. Elevating intent into the core element for proving unconstitutionality converted that term into the terrain over which civil rights battles would be fought. In these battles, those seeking to restrict civil rights could take advantage of the

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[103] *See id.* at 203 ("[A school board decision may do] more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races." (quoting *Swann*, 402 U.S. at 21)).

[104] This approach paralleled that laid out the same year for proof of discriminatory treatment under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 805 (1973), insofar as both approaches established the terms under which discrimination would be inferred. Notably, *McDonnell Douglas* was a unanimous decision. *Id.*

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plain-language denotation of intent, redefining that legal term as encompassing only the purposeful actions of an identified individual. For Brennan and Marshall, though, in 1973, that eventuality still lay in the hazy future.[105]

B. *Contextual Intent in* Davis

In *Davis*, decided in 1976, the Court confronted a decision by the Washington, D.C. police force to screen applicants through the use of a standard civil service exam that measured verbal skills, vocabulary, and reading comprehension.[106] The exam resulted in the disqualification of four times as many Black as White applicants and the lower court found that the police department was unable to establish that the test was particularly relevant to policing.[107] A divided Court found no discrimination. Widely denounced for demanding the nearly impossible, the direct proof of purposeful animus, *Davis* merits reconsideration. Four elements of *Davis* demonstrate instead that, like *Keyes*, it merely formalized the contextual intent approach used by the Court in civil rights cases since *Brown*.

First, *Davis* relied squarely on Brennan's decision in *Keyes*, embracing a contextual approach to intent. Quoting Brennan's holding that the critical element in assessing claims of discrimination was a "purpose or intent to segregate,"[108] *Davis* further explained: "Necessarily, an invidious discriminatory purpose may often be *inferred from the totality of the relevant facts* . . . ."[109] Indeed, the Court explained that the "totality of the relevant facts" might include "the fact, if it is true, that the law bears more heavily on one race than another," thus adopting the position that discrimination could be inferred from disproportionate impact.[110]

This reliance on *Keyes* helps explain the curious dissent by Brennan and Marshall. Though they might have been expected to object to any sharp curtailment of equal protection, when Brennan and Marshall dissented in *Davis*, they focused instead on orthogonal issues and failed to object to the intent test.[111]

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105 Of course, even if hazy, that future was fast approaching. In a 5-4 decision the following year, the Court struck down a court-ordered desegregation remedy for the first time since *Brown*—emphasizing the lack of "purposeful" or "deliberate" discriminatory acts by some school districts. *See* Milliken v. Bradley, 418 U.S. 717, 721, 745 (1974).

106 Washington v. Davis, 426 U.S. 229, 234–35 (1976).

107 *Id.* at 237.

108 *Id.* at 240 (emphasis deleted).

109 *Id.* at 242 (emphasis added).

110 *Id.*

111 Just as Brennan and Marshall did not perceive *Davis* as a civil rights disaster at the time, neither did prominent liberal legal scholars. A symposium on motive analysis pub-

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Second, writing for the majority, Justice Byron White did not just extol contextual intent, he employed it—albeit to find no discrimination:

> [W]e think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race . . . .[112]

As in previous civil rights cases, the Justices looked to the totality of the circumstances to evaluate, and in this case reject, the allegation of discrimination.

Third, *Davis* expressly *rejected* attention to actual motives. White confronted the need to square his emphasis on "intent" with the language in *Palmer* that seemed to eschew motive analysis. To do so, he interpreted *Palmer* as ruling that when a legitimate purpose was contextually clear, evidence of individually-held motives could not be introduced to impeach the state's permissible objectives.[113] As a contemporary student note wryly observed, "If invidious 'purpose' is required for a violation of the equal protection clause, but actual motivations of officials are not appropriate evidence of 'purpose,' the inevitable conclusion is that the 'purpose' relevant for equal protection analysis differs from the motivation of individual decisionmakers."[114]

Finally, in concurrence, Stevens proposed measuring intent in terms of the foreseeable consequences of the state's actions, identifying that method as more probative than a search for subjective intent.[115] Stevens urged attention to "objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."[116] This position

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lished in the immediate wake of *Davis* and *Arlington Heights* saw eight of ten scholars, among them John Hart Ely and Paul Brest, welcoming the elaboration of an intent test in those cases. *See* Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978); *see also* Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141 (1978); John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155 (1978).

112 *Davis*, 426 U.S. at 246.

113 *See id.* at 243 ("[T]he holding of the case was that the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations.").

114 Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 327 (1976).

115 *Davis*, 426 U.S. at 253 (Stevens, J., concurring).

116 *Id.*

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corresponded to the established norm that government purposes could be divined from the foreseeable impact of challenged policies—exactly the position that the malice cases, beginning with *Feeney*, would repudiate.[117]

Davis, like *Keyes*, elevated a purpose to discriminate as the key to proving a constitutional violation. Also like *Keyes*, *Davis* was not interested in direct evidence of impure thoughts. Instead, it searched for illicit purposes through a contextual evaluation of the circumstances surrounding the challenged government action.

C. *The Multi-Factor Approach to Proving Intent:* Arlington Heights

The Court further formalized the contextual approach in *Arlington Heights*,[118] already on the calendar when *Davis* was decided.[119] Whereas *Davis* expressly rejected attention to subjective purposes, *Arlington Heights* suggested a limited role for parsing actual motives, if evidence of subjective purposes were available. Writing for the majority, Powell acknowledged: "In some extraordinary instances [legislators] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." [120] As the caveat indicates, Powell doubted the possibility of regularly procuring direct evidence of actual intent, a point he reiterated by observing that legislators typically act for various reasons, which rendered inquiries into legislators' motives a dubious proposition. [121] Rather, Powell proposed "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,"[122] enumerating for consideration: "[t]he historical background of the decision,"[123] "[t]he specific sequence of events leading up to the challenged decision," [124] changes in procedure or departures in substantive decisionmaking criteria,[125] and legislative or administrative history.[126] Subjective intent might be relevant, Powell suggested, but it would be difficult to ascertain; instead, intent should be inferred from a highly contextual examination of the challenged

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117 *See infra* Parts IV and V (discussing the malice cases).

118 429 U.S. 252 (1977).

119 *See also Davis*, 426 U.S. at 245 n.12 (noting that certiorari had been granted in *Arlington Heights*).

120 *Arlington Heights*, 429 U.S. at 268.

121 *Id.* at 265.

122 *Id.* at 266.

123 *Id.* at 267.

124 *Id.*

125 *Id.*

126 *Id.* at 268.

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state action.[127] Like *Keyes* and *Davis*, *Arlington Heights* should be understood as elaborating a contextual intent test.[128] Even more helpfully than these earlier decisions, though, *Arlington Heights* laid out a series of factors to be considered under a contextual intent approach.

D. Judicial Personnel as a Limit on Contextual Intent Analysis

Despite formalizing the contextual intent approach, both *Davis* and *Arlington Heights* demonstrated a crucial limit: Contextual intent provided a way to discern racial discrimination, but it could hardly mandate appropriate findings from Justices who were often obtuse about basic racial dynamics.

Consider the majority's befuddled comments on racial discrimination in *Davis*. Writing on behalf of the Nixon four—Burger, Blackmun, Powell, and Rehnquist—as well as Stewart, Byron White addressed the question of discrimination this way:

> As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed [the civil service exam], whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained.[129]

The seemingly obvious response is that facially race-neutral devices, such as literacy tests, easily discriminate on the basis of race when they readily replicate other race-based disadvantaging practices, such as segregated schooling. This was not a lesson unfamiliar to the Court. On the contrary, it was the clear import of *Griggs*, which saw educational and testing requirements put in place to freeze prior de jure restrictions on the jobs Blacks could and could not hold.[130]

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[127] Professor Caleb Nelson singles out *Arlington Heights* as marking a striking departure insofar as it suggested that reviews of malicious intent might be *permissible*. *See* Nelson, *supra* note 16, at 1851. It seems, rather, that Powell raised this in order to limit this possibility. The real departure, this Article will show, came when the Court purported to *require* examinations of malicious intent.

[128] As in *Davis*, Marshall and Brennan dissented—but to the Court's decision not to remand the case, not to the discussion of the intent standard, with which they specifically concurred. *Arlington Heights*, 429 U.S. at 271–72 (Marshall, J., concurring in part and dissenting in part).

[129] *Washington v. Davis*, 426 U.S. 229, 245 (1976).

[130] *See supra* Part I.D (discussing *Griggs*). *See also* Gaston Cnty. v. United States, 395 U.S. 285, 297 (1969) (rejecting the argument that a literacy test for voting was valid

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But not only did the *Davis* majority seem ignorant of this simple point, it seemed oblivious to the most basic facts about race: that Black and White individuals faced different racial realities, and that race involved groups. The majority continued: "Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed."[131] The notion that Blacks were in no different position to bring a racial discrimination claim than Whites suggested that the *Davis* majority failed to grasp that Black and White individuals are differently situated in a social system structured as a White-over-Black hierarchy. "The conclusion would not be different," the Court added, "in the face of proof that more Negroes than whites had been disqualified by [the civil service exam]. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection."[132] Here, the Court suggested that what happened to Blacks as a group had no bearing on measuring discrimination against individuals who happened to be Black, implying that racial group dynamics were nonexistent. *Davis* reasoned as if racism manifested only through express racial distinctions, that Black and White individuals stood in identical social positions, and as if group dynamics were irrelevant to the experiences of individuals. In short, the majority proceeded from a decontextualized conception of racism: It ignored the way in which racism was woven into the warp and woof of society, shaping the trajectory of individual lives and the contours of group relations, and consequently easily manifesting in myriad practices, few of which expressly referenced race. Immured as the majority was within the hardened amber of its own simplistic understanding of racism, even the contextual intent approach failed to reach it.

The same proved true in *Arlington Heights*. The immediate issue before the Court involved the town's decision in the early 1970s to prevent the construction of low- and moderate-income housing that was likely to be racially integrated.[133] In contentious public hearings, community members argued about "the 'social issue'—the desirability or undesirability of introducing . . . housing that would probably be

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because the County had "systematically deprived its black citizens of the educational opportunities it granted to its white citizens," and declaring that "'[i]mpartial' administration of the literacy test . . . would serve only to perpetuate these inequities in a different form").

131 *Davis*, 426 U.S. at 246.

132 *Id.*

133 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 254, 257–58 (1977).

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racially integrated."[134] Many of those in attendance "were quite vocal and demonstrative in opposition [to the new housing]."[135] Despite cataloguing a list of factors that should be examined under contextual intent, in the end Powell's opinion did little more than acknowledge that "[t]he impact of the Village's decision does *arguably* bear more heavily on racial minorities."[136] Proceeding from this extremely limited racial analysis, the majority found no constitutional violation. Yet the Chicago conurbation in the early 1970s seethed with racial tensions, including animosities shouted in community hearings and expressed in the pull of voting booth levers.

Many of these tensions tied back directly to the kinetics of White flight.[137] Twenty-six miles to the northwest of Chicago, Arlington Heights underwent a demographic shift of a striking racial character during the 1960s. As the Black population of Chicago increased, Whites fled to the suburbs. As the district court reported, "[t]he four-township northwest Cook County area, of which Arlington Heights is a part, had a population increase from 1960 to 1970 of 219,000 people, but only 170 of these were black. Indeed, the percentage of Blacks in this area actually decreased over this ten-year span . . . ."[138] In Arlington Heights itself, the 1970 census counted over 64,000 residents, of whom precisely 27 were African American.[139] By refusing to acknowledge this reality, *Arlington Heights* joined a steady progression of backlash cases in which the Court averted its eyes from persistent racial stratification.[140] Despite their formalization of the contextual approach to measuring intent, *Davis* and *Arlington Heights* rested in large part on the surmise that racism, largely past, could only take the simple form of individual bigotry against individual victims.[141]

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134 *Id.* at 257–58.

135 *Id.* at 257.

136 *Id.* at 269 (emphasis added).

137 *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 806 (1974) (Marshall, J., dissenting) (observing that the majority decision ignores and so authorizes White flight); *cf.* Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1120–24 (2008) (offering an updated exploration of racial and wealth segregation beyond the model of White flight).

138 Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 414 (1975), *rev'd*, 429 U.S. 252 (1977) (footnote omitted).

139 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 255 (1977).

140 Powell's decision in *Arlington Heights* paralleled especially closely his earlier opinion in *Rodriguez*, for there too he articulated, but failed to apply, a constitutional test emphasizing the importance of context and history. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

141 Professor Alan Freeman argues persuasively that the Court adopted a "perpetrator" perspective emphasizing individual psychodynamics and culpability, at the expense of an emphasis on group relations and outcomes. Freeman, *supra* note 9.

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E. Davis *as a Backlash Case*

Beyond drawing upon and legitimating a simplistic conception of racism, *Davis* set back equal protection along two other dimensions: (1) in adopting a rigid on-off approach to heightened review and (2) in closing off the possibility of responding to structural inequality.

During the civil rights era, the Court had implicitly asked whether a given practice was tainted with illegitimate motives. If so, the Court struck it down.[142] Though seemingly mechanical, this approach provided substantial flexibility insofar as it allowed various factors to be weighed in making the initial determination of discrimination. *Davis* seemingly increased the flexibility of the doctrine, but in fact adopted a far more rigid approach when it embraced the tiered review the Court had developed in the fundamental rights context.[143] Under this formulation, the Court asked not only whether it discerned discrimination, but also whether the government had a sufficiently weighty reason for its conduct.[144] In itself, this might have allowed a nuanced approach to resolving disputes over racial mistreatment—for instance if various gradations of harm were balanced against shifting degrees of governmental necessity. Instead, *Davis* took a Manichean approach to alleged discrimination, reasoning that government conduct is binary: either evil or innocent, racially poisoned or completely neutral. It likewise treated the government's legitimate purposes as an on-off proposition: If the challenged discrimination was intentional, the government had to show a "compelling justification." This was the level of justification required under strict scrutiny and almost never

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[142] During the civil rights era, neither strict scrutiny nor rational review accurately captured the actual functioning of discriminatory intent doctrine. Gerald Gunther in 1971 famously sought to highlight an emerging split between what he contrasted as "the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact," and "the deferential 'old' equal protection [involving] minimal scrutiny in theory and virtually none in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). This did not describe the Court's approach to alleged discrimination. On the one hand, in cases in which the Court found no discrimination, the "old" equal protection of virtual abdication did not hold. In *Palmer*, *Davis*, and *Arlington Heights*, the Court carefully scrutinized the actions and proceedings of the state actor. *See supra* Parts I.D. and II.B–D. On the other hand, in no case did the Court detect a discriminatory purpose and then ask whether the government's action might nevertheless be justified by a compelling interest.

[143] *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 400 (2006) (discussing the origins of the compelling state interest test).

[144] *See Davis*, 426 U.S. at 278 (invoking the specter of the state having to demonstrate a "compelling justification," associated with strict scrutiny, in cases of racial disproportionality).

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reached.[145] But if intent was not shown, then the government need not come forward with any reason at all—for under the rational review standard adopted by the Court the test was whether a judge could conceive of a plausible justification. This rigid framework virtually eliminated the possibility of a modulated response to changing racial patterns. It effectively treated the question of discrimination as binary, either flatly prohibited or easily permitted, making it impossible to calibrate different levels of harm against various standards of government care. Reducing the Fourteenth Amendment to an on-off switch betrayed an unwillingness to recognize that racial discrimination was bound to take new forms, including practices that might still merit constitutional disfavor even if not automatic disapprobation.[146]

Second, as mentioned previously, *Davis* fully repudiated the promise of *Griggs* that equal protection extended to equitable outcomes. In one of the most cited passages from *Davis*, the Court defended the imposition of an intent requirement on the ground that to do otherwise "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."[147] *Davis* raised the intent test as first and foremost a bulwark against claims that courts should remedy disproportionate harms to non-Whites. By making a showing of intent a necessary prerequisite for establishing unconstitutionality, it sought to close off equal protection as a means of challenging structural harms to non-Whites. When *Davis* invoked "intent" to reject the *Griggs* test, it did not demand direct proof of subjective malice. But it did renounce a constitutional commitment to ensuring equitable outcomes.[148]

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[145] *Id.* In practice, even after *Davis* the Court did not review the government's purposes under strict scrutiny after finding discrimination. In those cases in which the Court found a discriminatory intent, it simply overturned the challenged state action. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 627 (1982) (finding a denial of equal protection without any inquiry into whether the government had a compelling interest in maintaining the challenged practice); Castaneda v. Partida, 430 U.S. 482, 501 (1977) (same). Notably, both of these cases employed a contextual intent approach. *See infra* Part III.B (discussing *Castaneda*); *infra* Part VI.B.3 (discussing *Rogers*). As to how this doctrine would play out in a contemporary case under a malice test, no case answers this question: The possibility of finding a discriminatory intent remains purely theoretical. *See infra* Part VI.

[146] In addition, this binary structure put increased pressure on the discriminatory purpose test. After *Davis*, disproportionate harm to non-Whites would receive meaningful constitutional scrutiny only if a discriminatory purpose was first shown. Thus doctrinally ossified, the dimming chances that equal protection might respond to shifts in racial discrimination would turn entirely on how "intent" could be proved.

[147] *Davis*, 426 U.S. at 248.

[148] Thus it is unsurprising that the "parade of horribles" language from *Davis*, quoted above, echoed earlier language from a 1973 decision rejecting constitutional concern over

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Legal scholars typically narrate this period in terms of a Court that recoiled from structural change—and perhaps no one does so more powerfully than Alan Freeman.[149] In Freeman's tale, *Davis* certainly plays the villain's role. Yet this Article relates a different narrative. It recognizes that the Court stopped short on incipient developments, as in *Davis*'s repudiation of *Griggs*. But this Article stresses that the Court has subsequently dismantled settled achievements, as in *Feeney*'s betrayal of *Davis*. Yes, *Davis* provided a final nail in the coffin of structural reform. But it also helped formalize a contextual intent approach that dismantled Jim Crow and, as we shall see, still worked tolerably well in the mid-1970s. The rise of color-blindness and malicious intent, however, destroyed the capacity of equal protection to actually protect non-Whites. In this account, *Davis* and contextual intent more generally suffer the fate of victims. It is a sad indicia of how far equal protection has devolved, that the villain of the 1970s is today's honored dead.

F. Misunderstanding Davis

Before leaving *Davis*, a final question demands attention: Why has *Davis* been so widely misunderstood as a case demanding proof of actual motives? This is especially perplexing since the contrary evidence is overwhelming even in the decision itself, let alone when one turns to companion cases such as *Arlington Heights*. Various answers seem plausible. Partly, accusing *Davis* of requiring proof of impure thoughts provided a convenient stick with which to beat a decision that clearly cut back on civil rights, if not in fact by erecting an impossibly high evidentiary burden focused on mindsets.[150] In addition, a plain language interpretation of "discriminatory intent" has likely played a significant role in encouraging this misapprehension. Even

significant wealth disparities as they affected important interests such as public primary education. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) ("How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process . . . .").

149 *See* Freeman, *supra* note 9 (arguing that the courts reneged on the incipient promise of structural reform). For similarly trenchant critiques of the Court's unwillingness to conceptualize civil rights as encompassing affirmative access to material and political resources, see William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999), and KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

150 *See supra* Part I.D (discussing Palmer v. Thompson, 403 U.S. 217, 224–25 (1971)); Part I.B (discussing Soon Hing v. Crowley, 113 U.S. 703, 710–11 (1885)); *see also infra* Part VI.B.3 (discussing the critiques aimed at a contextual intent case, *Rogers*, 458 U.S. 613, by Justices otherwise supportive of the malice standard).

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legal scholars succumb to the temptation to use English, rather than legalese, to understand legal terms. More significantly, the Court itself has consistently promoted this misinterpretation, ubiquitously citing *Davis* for a malice standard at striking variance with the actual holding of the case.[151]

Finally, and perhaps most importantly, one suspects that the stakes at first seemed minor to most scholars. When the Court *did* begin to insist upon proof of malice, it seemingly mattered little that the proper cite was *Feeney* rather than *Davis*. But, it would turn out to matter a great deal. Consider that, as we will see next, in 1977 the contextual version of intent functioned both to readily uphold a race-conscious remedy and to strike down entrenched disadvantage. It would be a dozen years before these most basic attributes of an adequate equality law would come to seem extraordinary, as they do now. In the meanwhile, the erroneous narrative that *Davis* demanded proof of malice solidified, helping to erase from our constitutional memory the cases discussed next.

III
1977: A UNIFIED, WORKABLE EQUAL PROTECTION DOCTRINE

In 1988, the leading treatise on constitutional law summarized the import of *Davis* in the following terms: "In essence, *Washington v. Davis* announced that henceforth every lawsuit involving constitutional claims of racial discrimination directed at facially race-neutral rules would be conducted as a search for a bigoted decisionmaker."[152] In so writing, Professor Laurence Tribe accurately captured the state of intent doctrine in 1988. But he was wrong to impute this structure to *Davis*—and he was wrong not once but twice. As demonstrated in the previous Part, *Davis* did not require a search for a bigoted decisionmaker, but instead envisioned a weighing of the totality of the circumstances. Tribe also erred in suggesting that, under *Davis*, intent applied to "claims of racial discrimination directed at facially race-neutral rules"—that is, that intent doctrine did *not* apply when the state expressly used race.[153] Tribe in effect read back onto *Davis* in 1976 a fundamental schism that occurred in equal protection only with the emergence of colorblindness in *Bakke* in 1978. As discussed below, *Bakke* and the malice cases that built on it divided equal

[151] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 292 n.10 (1987); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

[152] TRIBE, *supra* note 16, at 1509.

[153] *Id.*

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protection in two based on whether the government actor expressly used a racial classification. This rupture has been enormously destructive, creating an equal protection doctrine that aggressively restricts remedial uses of race while insulating practices that harm non-Whites. It is thus important to recognize that this was *not* how equal protection worked before the advent of colorblindness.

This Part centers on 1977, using two cases decided that year to demonstrate that during the civil rights era and up to that point, discriminatory intent provided a unified, workable response to claims of racial discrimination.[154] In *United Jewish Organizations*, or *UJO*, the Court used the intent doctrine to evaluate and uphold a race-conscious remedy.[155] Thus, *UJO* shows that equal protection was unified in that all alleged discrimination—whether or not involving the express use of race—was evaluated under a single approach. *UJO* further demonstrates that equal protection was workable insofar as the search for discriminatory intent easily distinguished oppressive from remedial race-conscious state action. *Castaneda v. Partida*[156] pushed the Court to grapple with racial discrimination against a group locally in the majority, where some members of the otherwise protected group likely contributed to the discrimination. Though it produced a divided opinion that signaled looming trouble, the *Castaneda* majority nevertheless perceived discrimination. Thus, *Castaneda* demonstrates that a contextual intent approach to equal protection was workable in a second sense as well: It enabled the Court to perceive racial oppression that operated beyond the terms set by Jim Crow racism and de jure segregation. To be sure, in 1977 equal protection was merely workable, rather than highly effective, given the backlash limitations imposed by *Davis* (and more fundamentally, given the Justices who wielded it). Nevertheless, it was far more efficacious than today's equal protection doctrine, which neither distinguishes between benign and invidious discrimination, nor recognizes racial discrimination against non-Whites.

A. Intent and Affirmative Action: UJO

Up through 1977, equal protection's evaluative approach did not turn on whether the challenged government action expressly invoked

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154 For the argument that a highly restrictive version of intent doctrine operated largely from Reconstruction through *Norris v. Alabama*, 294 U.S. 587 (1935), to the great detriment of Black rights, see Brando Simeo Starkey, *Criminal Procedure, Jury Discrimination & the Pre-*Davis *Intent Doctrine: The Seeds of a Weak Equal Protection Clause*, 38 AM. J. CRIM. L. 1 (2010).

155 United Jewish Orgs. of Williamsburgh, Inc. v. Carey (*UJO*), 430 U.S. 144 (1977).

156 430 U.S. 482 (1977).

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race. Discriminatory purpose applied when race was not expressly used, as in the Tuskegee zoning case,[157] but also in cases involving express racial classifications, such as the Virginia anti-miscegenation case.[158] Illustrating this, *Davis* itself presumed that the intent test applied to race-conscious state action.[159] Immediately after announcing the need to show an invidious purpose, the Court explained: "This is not to say that the necessary discriminatory racial purpose *must* be express or appear on the face of the statute . . . ."[160] *Davis* thus assumed that the intent test applied to express uses of race, and clarified that it might *also* apply to race-neutral practices. By offering this clarification, *Davis* pointed back toward a basic fact that is now virtually forgotten—the Jim Crow cases were resolved under an implicit intent doctrine. Cases expressly mandating segregation were the initial paradigm intent cases.[161]

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157 Gomillion v. Lightfoot, 364 U.S. 339 (1960).

158 Loving v. Virginia, 388 U.S. 1 (1967). In race-neutral cases, more than in de jure cases, the Court tended to emphasize findings of discriminatory intent. Yet this did not reflect a rule that the intent doctrine applied only in facially race-neutral cases. Rather, this most likely resulted from a greater felt need, in the absence of express segregation, to specify the existence of invidious motives.

159 Perhaps suggesting the contrary, White briefly invoked a decision he had authored more than a decade earlier. "Disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." Washington v. Davis, 426 U.S. 229, 242 (1976) (citing McLaughlin v. Florida, 379 U.S. 184 (1964)). This sentence suggests that *Davis* recognized *McLaughlin* as having announced an anticlassification rule. In turn, this might be read to imply that, lacking an express use of race, a completely separate route toward heightened review existed in the intent doctrine. Equal protection would soon bifurcate in exactly this manner, but this schism did not occur in *Davis*. The parallel White drew between "racial classifications" and "invidious racial discrimination" indicates that, as in *McLaughlin* itself, he continued to understand the express use of a racial classification as deeply linked to purposeful mistreatment. To read either this sentence in *Davis* or the *McLaughlin* decision as announcing an anticlassification rule would be to pull this language out of context. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1502–05 (2004) (tracking the change in the Court during the 1960s that connected the primary emphasis on a law's social impact with an emerging "presumption against racial classification").

160 *Davis*, 426 U.S. at 241 (emphasis added).

161 To illustrate the discriminatory purpose rule, *Davis* cited as precedent two de jure cases: Bolling v. Sharpe, 347 U.S. 497 (1954), which prohibited school segregation in Washington, D.C., and Strauder v. West Virginia, 100 U.S. 303 (1879), which banned jury segregation. *Davis*, 426 U.S. at 239. In *Keyes*, the Court made clear that the de jure/de facto distinction, so important in the 1960s school cases, turned not on facial government references to race, but on the presence of a discriminatory purpose. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) ("[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.").

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Regarding challenges to race-conscious state action assisting non-Whites, the Court again applied an intent test—looking past the use of race to evaluate whether there existed a discriminatory purpose or instead some legitimate government interest. Thus, through the mid-1970s, the Court also looked for (and declined to find) discriminatory purpose when evaluating race-conscious efforts at repair. This included the narrowly remedial context of the school desegregation cases, where lower courts as well as local jurisdictions used race to promote integration.[162] It also included early efforts at crafting electoral districts in which non-Whites might prevail in the voting booth.[163]

Regarding affirmative action in higher education and employment, however, in 1974 the Court initially temporized.[164] Two years later, to the extent that it formalized the Court's intent test, *Davis* seemed to provide a solid basis for resolving affirmative action cases. The same month that the Court heard arguments in *Arlington Heights*, it entertained a challenge to New York's use of race to gerrymander two safe electoral districts for non-Whites. *UJO* involved a 1974 decision by the New York legislature to comply with the mandate of the Voting Rights Act by creating two majority-minority districts in the Williamsburgh area of Brooklyn, partly by redistributing the Hasidic community in that area across several different districts.[165] Objecting to the plan, the plaintiffs challenged its lawfulness under federal voting rights law. The plaintiffs also alleged that the use of race, even

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[162] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (identifying race-conscious means of promoting integration as within "the broad discretionary powers of school authorities"). Justice Breyer recently defended this proposition, surveying the supporting cases in the process. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 823–30 (2007) (Breyer, J., dissenting).

[163] *See* Wright v. Rockefeller, 376 U.S. 52 (1964) (upholding remedial race-conscious redistricting). The Court upheld the express use of race in other cases that year. *Compare* Anderson v. Martin, 375 U.S. 399 (1964) (finding the use of race on ballots unconstitutional), *with* Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam) (upholding the use of racial designations in vital statistics). *See also* Palmer v. Thompson, 403 U.S. 217, 219 (1971) (upholding a municipality's determination that it could not afford to operate pools "on an integrated basis").

[164] *See* DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam) (using mootness to avoid a decision on affirmative action); Morton v. Mancari, 417 U.S. 535, 548–49, 551–52, 554–55 (1974) (avoiding a decision on affirmative action on the ground that a policy favoring Native Americans involved political, not racial, considerations).

[165] *UJO*, 430 U.S. 144 (1977). New York composed the "majority-minority" districts by aggregating Black and Puerto Rican voters, an aspect of the case that passed largely without comment from the Court. *See* Jamie L. Crook, *From* Hernandez v. Texas *to the Present: Doctrinal Shifts in the Supreme Court's Latina/o Jurisprudence*, 11 HARV. LATINO L. REV. 19, 46–50 (2008) (examining in detail the reasons for such a grouping and its impact, or lack thereof, on the case).

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for a remedial purpose, violated the Fourteenth Amendment.[166] *UJO* involved affirmative action in the context of voting power—what Brennan characterized as the use of "race-centered remedial devices."[167] It would be the first race-based affirmative action case in which the Court reached a substantive decision, rather than dodging the issue.[168] While *UJO* merits careful consideration for that reason alone, it is especially instructive here because it employed an intent test.

The decision in *UJO* was nearly unanimous, though various rationales were advanced.[169] Joined by Stevens and Rehnquist in the relevant part, White's opinion declared: "There is no doubt that . . . the State deliberately used race in a purposeful manner."[170] Nevertheless, because the "plan represented no racial slur or stigma with respect to whites or any other race . . . we discern no discrimination violative of the Fourteenth Amendment."[171] White, who wrote the *Davis* opinion, seems to have applied its basic analysis, albeit without invoking that decision by name. In discussing the Fourteenth Amendment, White confined his citations to voting rights cases—though in doing so he cited some that clearly fell within the contextual intent tradition, such as *Gomillion*, the Tuskegee gerrymandering case.[172]

Stewart, joined by Powell, concurred—and did not shy from directly endorsing the applicability of *Davis*: "Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. *Washington v. Davis*."[173] Assessing the record, Stewart found no unlawful intent.[174] Regarding the plaintiffs' argument "that racial awareness in legislative reapportionment is unconstitutional *per se*," Stewart responded with incredulity.[175] "Acceptance of their position," he rejoined, "would mark an egregious departure from the way this Court has in the past analyzed the constitutionality of claimed discrimination . . . on the basis of race."[176]

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166 *UJO*, 430 U.S. at 179 (Stewart, J., concurring).

167 *Id.* at 169 (Brennan, J., concurring).

168 *See supra* note 164 and accompanying text (describing how the Court initially avoided addressing the constitutionality of affirmative action).

169 The only dissent came from Chief Justice Burger. *UJO*, 430 U.S. at 180 (Burger, C.J., dissenting). Justice Marshall took no part in the decision. *Id.* at 168.

170 *Id.* at 165 (plurality opinion).

171 *Id.*

172 *See id.* (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960); White v. Regester, 412 U.S. 755 (1973)).

173 *UJO*, 430 U.S. at 179 (Stewart, J., concurring).

174 *Id.* at 180.

175 *Id.* at 179.

176 *Id.*

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Justice Blackmun joined White on separate grounds,[177] while Justice Brennan concurred but hesitated to endorse the intent analysis, lest this suggest that merely rational review would suffice. For Brennan, even remedial uses of race carried sufficient risks to warrant a more searching, though not strict, review.[178]

Sifting these various rationales, a surprising result emerges: five Justices—and not just any five, but White, Stevens, Rehnquist, Stewart, and Powell—thought that race-conscious remedies should be treated just like every other use of race and evaluated for an intent to harm. All of these Justices, with the exception of White, would soon support the rise of colorblindness. Further suggesting the dominance of the intent approach even among conservatives, Solicitor General Robert H. Bork relied on the intent approach in his brief to the Court: "So long as the redistricting plan was, as here, objectively permissible and not adopted for the purpose of discriminating against the petitioners, they have no right to have it set aside. Cf. . . . Washington v. Davis, No. 74-1492, decided June 7, 1976."[179] Brennan, much more liberal on civil rights, may have hesitated, but not for fear that affirmative action would be readily upheld. Rather, he worried that it would be *too* readily upheld: given the evident absence of a discriminatory purpose, applying intent doctrine to affirmative action would result in virtually no judicial scrutiny whatsoever. Brennan's hesitancy notwithstanding, the Court applied the intent test to uphold a race-conscious remedial measure—with the full endorsement of those who would soon embrace a colorblind standard. To reiterate, in *UJO* those Justices poised to embrace colorblindness concluded that in the absence of any intent to harm, affirmative action was constitutional. What a brief, remarkable constitutional moment—in the first case to squarely address the constitutionality of a race-conscious remedy, the

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[177] Blackmun joined parts of the opinion other than those discussing the Fourteenth Amendment. *Id.* at 147 (plurality opinion).

[178] *See id.* at 170–75 (Brennan, J., concurring) (explaining that a race classification appearing to be benign may, in fact, serve "illicit objectives," that a truly benign racial classification still "may act to stigmatize its recipient groups," and that "even a benign policy of assignment by race is viewed as unjust by many in our society"). Shortly after *UJO*, the Court upheld a Social Security provision employing a gender classification that benefitted women. Califano v. Webster, 430 U.S. 313 (1977) (per curiam). Rather than ask about an intent to harm and then defaulting to rational review, the Court applied an intermediate level of review, asking whether the government's interests were sufficiently weighty to justify differential treatment on the basis of gender. *Id.* at 316–17. This decision seems more in line with the analysis proposed by Brennan in *UJO*.

[179] Brief for the United States at 43 n.40, *UJO*, 430 U.S. 144 (No. 75-104).

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Court for the last time found affirmative action lawful by applying intent doctrine.[180]

B. Intent and Structural Discrimination: Castaneda

UJO demonstrates that in 1977 the search for discriminatory intent, rather than a blanket disapprobation of any racial classification, allowed the Court to discern the chasm between affirmative action and Jim Crow laws. A second case decided that year, *Castaneda v. Partida*, shows that the same approach also allowed the Court to discern structural forms of racial discrimination.[181]

Two months after *Arlington Heights*, the Court in *Castaneda* overturned the disproportionate exclusion of Mexican Americans from juries in a Texas border county.[182] This was not a typical jury discrimination case, however, for the protected class constituted roughly fifty percent of the eligible jurors in Hidalgo County—a sizeable plurality, even if still disproportionately low relative to their eighty percent of the county population.[183] *Castaneda* acknowledged that "purposeful discrimination" had to be shown.[184] The Court then employed a contextual approach, looking to broad sociological patterns. In addition to the jury and population figures, the decision emphasized the "number of ways in which Mexican-Americans tend to be underprivileged, including poverty-level incomes, less desirable jobs, substandard housing, and lower levels of education."[185] *Castaneda* furnishes yet additional evidence that through 1977 discriminatory intent contemplated an examination of the broader context. More importantly here, it demonstrates that intent doctrine could respond to novel forms of discrimination. *Castaneda* was far from a Jim Crow case. Not only was there no formal segregation, but

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180 As with the misunderstanding of *Davis*, one must wonder about the forgetting of *UJO*. Why is *Bakke*, rather than *UJO*, widely regarded as the first full affirmative action decision? Perhaps it is because *UJO* involves voting rights, rather than the more quintessential affirmative action domains of employment or higher education. In line with this, most legal scholars who discuss *UJO* do so in the context of voting rights, and almost never as an affirmative action case. For a rare exception, see Jesse H. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 256–57 (1987). Yet Brennan saw *UJO* as involving a race-conscious remedy. Further, affirmative action in the voting rights context is arguably as consequential—legally and socially—as in the other domains. More likely, *UJO* slipped from memory as an affirmative action case because its reasoning was fractured and, more importantly, its application of intent doctrine to a race-conscious remedy was not followed.

181 430 U.S. 482 (1977).

182 *Id.*

183 *Id.* at 514 (Powell, J., dissenting).

184 *Id.* at 493 (majority opinion).

185 *Id.* at 487–88.

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members of the excluded community were well represented within the local power structure—they indeed may have participated in excluding others of their putative group. In this sense, *Castaneda* resembled *Keyes*. Both cases demonstrated that through a contextually grounded analysis, equal protection could lift its suspicious gaze beyond caste-like oppression to perceive and strike down evolving forms of discrimination.

C. Storm Clouds

The gains of the civil rights movement, including a relatively efficacious equal protection doctrine, faced mounting pressure throughout the 1970s. Breaking over the Court in 1978, the most powerful tempest enveloped affirmative action. But the skies were also darkening for contextual intent. *Davis* and *Arlington Heights* paid lip service to this approach, but ultimately disregarded the racial dynamics in those cases and instead reasoned from a decontextualized conception of racism. These storm clouds further coalesced in *Castaneda*. Despite evidencing the potential of intent doctrine, the case fractured the Court, with four Justices producing three dissents. One exchange in *Castaneda*, between Powell and Marshall, provided an especially telling premonition.

Powell objected that Mexican Americans not only accounted for eighty percent of the local population, but they also held "positions of power and influence" in the county.[186] Powell claimed that, thus empowered, Mexican Americans would not discriminate against themselves: "[W]here Mexican-Americans control both the selection of jurors and the political process, rational inferences from the most basic facts in a democratic society render improbable respondent's claim of an intent to discriminate against him and other Mexican-Americans."[187] In response, Marshall wrote a separate concurrence specifically to voice "profound disagreement with the views expressed by Mr. Justice Powell in his dissent."[188] His retort, grounded squarely in social science, merits extensive quotation:

> Mr. Justice Powell's assumptions about human nature, plausible as they may sound, fly in the face of a great deal of social science theory and research. Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to

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[186] *Id.* at 514 (Powell, J., dissenting).

[187] *Id.* at 515. Powell continued: "If people in charge can choose whom they want, it is unlikely they will discriminate against themselves." *Id.* (quoting Partida v. Castaneda, 384 F. Supp. 79, 90 (S.D. Tex. 1974)).

[188] *Castaneda*, 430 U.S. at 501 (Marshall, J., concurring).

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> the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.[189]

To this, Marshall appended two footnotes citing scholarly literature, including Gordon Allport's *The Nature of Prejudice* and E. Franklin Frazier's *Black Bourgeoisie*, adding for good measure a reference to *Brown*'s scholarship-laden footnote eleven.[190]

In *Castaneda*, both Powell and Marshall looked beyond the mental states of those actually involved in jury selection in order to evaluate the racial discrimination claim. Both used a version of contextual intent—and neither referenced the subjective motives of identified individuals. Yet they employed dramatically different methods. Marshall found social science a compelling resource for helping him understand racial hierarchy.[191] In contrast, Powell appealed to "rational inferences from the most basic facts in a democratic society"[192]—what Marshall correctly described as "Mr. Justice Powell's assumptions about human nature."[193] Like Marshall, Powell stood ready to make inferences about racial discrimination; unlike Marshall, he shunned scholarship, preferring to trust his own hunches. There is more here than simply a contrast between different approaches to evaluating discrimination. One detects on Powell's part an incipient aversion to countervailing evidence (and on Marshall's, a willingness to continue to learn about racism). Powell's opinion in *Arlington Heights* relied on a simplistic understanding of racism stripped of content. His dissent in *Castaneda* anticipated a looming epistemological opposition to social science, history, and local context—at least when these tended to trouble his own racial assumptions. Put more bluntly, in hindsight one can see a developing resistance to evidence of racial discrimination that might challenge the predisposition of many Justices. Out of this disturbed atmosphere, today's reactionary equal protection jurisprudence rapidly precipitated, beginning the very next year.

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189 *Id.* at 503.

190 *Id.* at 484 nn.2–3 (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954); GORDON W. ALLPORT, THE NATURE OF PREJUDICE 150–53 (1954); E. FRANKLIN FRAZIER, BLACK BOURGEOISIE 213–16 (1957)).

191 Even if Marshall looked to racial scholarship largely to confirm already formed views, his citation of this scholarship suggests that he supposed that such work provided appropriate support.

192 *Id.* at 515 (Powell, J., dissenting).

193 *Id.* at 503 (Marshall, J., concurring).

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D. *Contextual Intent as Doctrinal Reform Strategy*

Before turning to *Feeney* and malicious intent, it bears recapitulating where intent doctrine stood as late as 1977. Intent, when measured from context, provided a unified, workable approach to allegations of mistreatment. It allowed the Court to distinguish invidious from remedial practices. In addition, by encouraging courts to judge discrimination with due regard for local circumstances, relevant history, and broader racial dynamics, the contextual approach provided a workable route for identifying racial mistreatment. As a result, it should come as no surprise that once the malice test arose, proposals for reform would urge a return to the contextual approach (even if they failed to appreciate *Davis* itself as a contextual intent case). Perhaps the two most prominent reform proposals—the results test in the Voting Rights Act[194] and Charles Lawrence's cultural meaning test[195]—called for evaluations of discrimination along largely the lines pursued by the Court through 1977. Another measure of contextual intent's strength is that it allowed precisely the sorts of inquiries now commonly urged—those involving attention to the social science of racial discrimination, including evidence of unconscious bias, as well as to structural inequalities.[196]

The de facto embrace of contextual intent as a reform strategy suggests two points. First, it emphasizes that, at least through 1977, equal protection under the guise of intent doctrine continued to ask the right question (was there a harmful purpose?) and promoted the

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194 Congress responded to the Court's shift toward malicious intent by amending the Voting Rights Act "to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test.'" Thornburg v. Gingles, 478 U.S. 30, 35 (1986). By using this language, Congress seemingly jettisoned the intent doctrine altogether. On closer examination, though, this new approach differed little if at all from contextual intent. Effect alone would *not* be sufficient to demonstrate a legal harm. Instead, Congress specified that the courts should consider a laundry list of contextual factors drawn from those employed in cases from *Keyes* to *Arlington Heights*. *Id.* at 36–37.

195 Professor Charles Lawrence in 1987 propounded a "cultural meaning" test urging judges to measure discriminatory intent by assessing whether "a significant portion of the population" would understand a challenged action as racially oppressive. Lawrence, *supra* note 8, at 355–56. This seemed to differ from the contextual test by asking judges to divine the public's understanding, rather than evaluating alleged discrimination by their own lights. To the extent that judges would likely default to their own views, of course, this distinction evaporates. In either event, note the actual method Lawrence proposed. Lawrence observed that judges, no less than others, come to racial issues with "inevitable cultural biases." *Id.* at 380. Rather than exclusively relying on their own intuition, Lawrence urged that courts "analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated." *Id.* at 356.

196 *See supra* Part III.B (discussing how these inquiries were employed in *Castaneda*).

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correct method (a review of the broader context). True, contextual intent was far from perfect. Especially in the hands of Justices hostile to extending civil rights, this approach produced uneven results—sometimes perceiving discrimination in structural disadvantage, though more often not. Nevertheless, up to that point equal protection did not fetishize the mere reference to race, or obsess over direct proof of subjective biases. Rather, as a contextually sensitive search for group harm, "discriminatory intent" formed the workable, undivided heart of equal protection.

Second, it suggests the futility of urging doctrinal reform given the current composition of the Court. Imploring the conservative Justices to embrace contextual intent is tantamount to urging that they return to the status quo ante they managed to overthrow years ago. Holistic engagement with evidence of racial discrimination against non-Whites is exactly what the reactionary Justices on the Court dismantled, beginning with *Bakke* and *Feeney* in the late 1970s. What reasoned argument would compel them to cede their settled victory? More likely, doctrinal change will occur only with a shift in the Court's personnel. Hopefully legal scholarship that strips the current doctrine of legitimacy can accelerate both a change in personnel and a subsequent shift in doctrine—by highlighting the radical nature of the conservative Justices and the need to replace them with jurists committed to justice rather than backlash, and by laying the intellectual groundwork for the wholesale rejection of malice doctrine. It is to the task of stripping away the pretense and obfuscation of malicious intent and colorblindness that this Article now turns in its second half.

IV
1979: COLORBLINDNESS AND MALICE IN *FEENEY*

This Part begins with *Bakke*,[197] a case which marks a fateful turning point in contemporary equal protection, for it is in *Bakke* that Powell offered an initial elaboration of contemporary colorblind reasoning. From there, this Part sketches the eventual acceptance of Powell's analysis over a decade later in *Croson*, leading to the installation of that analysis as the cornerstone of today's colorblind constitutionalism.[198] After establishing a timeline, this Part proceeds to its main focus: a transitional case marking an abrupt rupture in intent doctrine. In 1979, the Court in *Personnel Administrator of*

[197] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[198] For a full discussion of *Bakke* and the rise of colorblindness, see Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

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Massachusetts v. Feeney upheld an affirmative action program for veterans that discriminated against women.[199] *Feeney* is widely criticized for interpreting the intent doctrine as requiring proof of something approaching malice, a standard understood as necessitating direct proof of actual mindsets. As we shall see, *Feeney* did not fully do so. Nevertheless, *Feeney* sharply recast intent doctrine, laying solid groundwork for the embrace of malicious intent announced the following year. It did so squarely in reliance on Powell's colorblind logic in *Bakke*.

A. Affirmative Action and Colorblindness

UJO seemed to serve as a wake-up call to the racially conservative Justices. That decision warned (or from a different perspective, promised) that race-conscious remedies, when reviewed for discriminatory intent, would be readily upheld. Betraying dissatisfaction with that result, the next year in *Bakke* five Justices voted to restrict affirmative action. Yet, likely reflecting their holding from just the prior year, four avoided the constitutional question altogether—they announced instead that a law passed by Congress to prohibit racial discrimination also prohibited affirmative action.[200] Standing alone, Justice Lewis Powell experimented with a constitutional argument. Powell started by rejecting colorblindness, at least when defined as a per se prohibition on any use of race.[201] In its place, though, Powell established the fundamentals of modern colorblind analysis—not automatic invalidity but its close cousin, the mechanical application of the highest level of constitutional hostility to all express uses of race.[202]

Powell had to contradict the Court's precedents to reach this result. Recall that in *UJO* Powell joined in Stewart's concurrence identifying *Davis* as the touchstone case for evaluating race-conscious

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199 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

200 *Bakke*, 438 U.S. at 411–14 (Stevens, Rehnquist & Stewart, JJ., and Burger, C.J., concurring in part and dissenting in part); *cf.* United Steelworkers of Am. v. Weber, 443 U.S. 193, 254–55 (1979) (Rehnquist, J., and Burger, C.J., dissenting) (finding affirmative action barred by an antidiscrimination statute).

201 *See Bakke*, 438 U.S. at 284–85, 287 (Powell, J.) (rejecting a colorblind interpretation of Title VI and rejecting a per se rule for the Fourteenth Amendment).

202 *Id.* at 291. *Bakke* thus proved to be a pyrrhic victory for affirmative action. Though Powell cast the decisive vote upholding the challenged program, he did so only after holding that strict scrutiny should apply. Making this victory even more costly, Powell went on to hold that the government's sole cognizable interest lay in increasing diversity in the classroom. Powell rejected as insufficiently weighty the interests in fostering integration, remedying discrimination, and redistributing scarce resources to reduce the perpetuation of inequality. *See id.* at 305–11.

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remedies.[203] Under that decision, remedial uses of race did *not* merit heightened constitutional scrutiny because they lacked an invidious purpose. In utter disregard of this, in *Bakke* Powell proclaimed that every use of race by government is "inherently suspect" and so automatically warranted the highest level of judicial skepticism.[204] Directly addressing whether this applied to remedial efforts animated by "benign" motives, Powell responded by suggesting that to adopt a rule other than automatic hostility would be to rewrite the Fourteenth Amendment itself.[205] Adverting to the year of its adoption, Powell intoned that "[t]he clock of our liberties . . . cannot be turned back to 1868."[206] Of course, given *UJO*, the relevant date was rather just the previous year.[207] Where under equal protection as it stood in 1977 discriminatory purpose had been king, in 1978 Powell proposed that it be utterly dethroned, at least when evaluating race-conscious efforts to help non-Whites. Though up until then the touchstone for evaluating discrimination had been intent, Powell proposed a new rule for affirmative action programs: They should be automatically suspect, with their animating remedial purposes deemed irrelevant.[208] Put another way, Powell urged that, regarding affirmative action, equal protection should entirely ignore context—blinding itself to the reformatory goals that motivated contemporary uses of race, and even more basically to the dramatic transformation in racial milieu from a society dedicated to enforcing racial hierarchy to a society hoping to dismantle it.

Powell initially attracted no other votes for this perversion of equal protection. Two years later, though, Stewart and Rehnquist exploited the opening created by Powell when they dissented in *Fullilove v. Klutznick*, a 1980 case upholding a minority set-aside in federal construction contracts.[209] For the first time, conservative

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203 *UJO*, 430 U.S. 144, 179 (1977) (Stewart & Powell, JJ., concurring).

204 *Bakke*, 438 U.S. at 290–91 (Powell, J.).

205 *Id.* at 294.

206 *Id.* at 295.

207 Powell distinguished *UJO* by suggesting, first, that the remedy was authorized by an administrative finding of discrimination, and second, that the preference caused no harm insofar as it did not exclude individuals from "meaningful participation in the electoral process." *Id.* at 305. One can debate the particulars of these two observations. The more important point is that *UJO* stood for the approach of evaluating an allegation of discrimination through the application of the intent test. An administrative finding of discrimination, or a putative lack of harm, would be relevant under the intent test, but neither constituted a reason for jettisoning the test altogether.

208 *Id.* at 290–91.

209 *See* Fullilove v. Klutznick, 448 U.S. 448, 522–26 (1980) (Stewart, J., dissenting) (arguing that colorblindness requires striking down a statutory provision that explicitly benefits members of any race); *see also* Minnick v. Cal. Dept. of Corr., 452 U.S. 105, 128–29 (1981) (Stewart, J., dissenting) (reprising his colorblind objections from *Fullilove* to

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Justices declared that the "Constitution is color-blind," employing John Marshall Harlan's famous aphorism from his dissent in *Plessy v. Ferguson*.[210] Yet this position, adopted by only two Justices, still seemed so bizarre that Burger's majority opinion began: "As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."[211] It would take another nine years before a majority of the Justices consolidated behind colorblind logic as a basis for overturning an affirmative action program. In 1989, five Justices in *City of Richmond v. J.A. Croson Co.* used colorblindness to strike down a race-conscious remedy—as it happened, a state set-aside program modeled on the one upheld in *Fullilove*.[212] Since *Croson*, colorblindness has become dominant on the Court, which has struck down remedial program after program, even if typically only with the votes of a bare majority of five Justices.

B. The Bifurcation of Equal Protection

It is into the colorblindness timeline that one must place *Feeney*. Just a year after *Bakke*, in *Feeney* five Justices began to rework intent doctrine. Strikingly, they did so in direct reliance upon Powell's color-blind reasoning—making *Feeney*, not *Croson*, the first case by a decade to assemble a majority behind colorblindness. Extending Powell's analysis in *Bakke*, *Feeney* split equal protection into the separate domains now taken for granted, one governing affirmative action and the other discrimination against non-Whites. In turn, this schism contributed directly to the rise of the malicious intent rule requiring the nearly impossible proof of malice.

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oppose a dismissal of certiorari in an affirmative action case). Rehnquist agreed with Stewart's sentiment, but decided to concur with the majority solely on the ground that he did not view the lower court's decision as final. *Id.* at 127 (Rehnquist, J., concurring).

[210] *Fullilove*, 448 U.S. at 522 (Stewart, J., dissenting) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). In two cases in the early 1960s, Warren Court Justices deployed colorblind rhetoric to decry segregation. *See* Bell v. Maryland, 378 U.S. 226, 289–92 (1964) (Goldberg, J., concurring) (interpreting the Fourteenth Amendment as "declaring that the law in the States shall be the same for the black as for the white" (quoting Strauder v. West Virginia, 100 U.S. 303, 307 (1879))); Garner v. Louisiana, 368 U.S. 157, 185 (1961) (Douglas, J., concurring) (stating that "[o]ur Constitution is color-blind") (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

[211] *Fullilove*, 448 U.S. at 482. Burger's support for affirmative action in *Fullilove* contrasts with his opposition to race-conscious remedies in *UJO*, *Bakke*, and *Weber*. The fact that Burger may have strategically switched his vote in order to exercise his prerogative as Chief Justice to assign the majority opinion to himself does not undercut the significance of his rejection of colorblindness. On the contrary, if Burger sought to limit the basis on which the Court upheld a minority set-aside program and even in that context repudiated colorblindness, this heightens the sense that colorblindness was well beyond the constitutional pale.

[212] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

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In *Feeney*, even the majority recognized that Massachusetts conferred on veterans "a well-nigh absolute advantage" in the competition for civil-service positions.[213] For any available job, the state ranked applicants according to their scores on a competitive exam but placed veterans above all others—the lowest-scoring veteran took his place above the highest-scoring nonveteran.[214] As the Court observed, because ninety-eight percent of veterans were male, "The impact of the veterans' preference law upon the public employment opportunities of women has thus been severe."[215] To challenge this system, Helen Feeney invoked the contextual intent approach formalized in *Davis*. She especially emphasized the concurrence by Stevens, who had urged attention to "objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."[216]

But the majority did not begin by addressing intent. Rather, Stewart, joined by Powell and the three other Nixon appointees, used Powell's equal protection story in *Bakke* to rewrite the Fourteenth Amendment in terms of a basic concern with the act of classification. "Most laws classify," Stewart began, observing that equal protection generally required that distinctions among classes be subjected to no more than rational review—the standard asking only whether the government has a conceivable legitimate interest.[217] "Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm."[218] In this narrative, the simple use of race, without more, triggered constitutional suspicion. "A racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification."[219] Stewart ostensibly reached back to *Brown v. Board of Education* for this radical proposition.[220] Yet, clearly the appropriate citation was Powell's lone opinion in *Bakke*.[221] Only a year after that case—and a full decade before *Croson* would see five Justices say the same to strike down an

213 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 264 (1979).

214 *Id.* at 263.

215 *Id.* at 270–71.

216 Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

217 *Feeney*, 442 U.S. at 271–72. For support, Stewart cited not the typical rational review cases but instead the divisive decisions from the early 1970s rejecting heightened review in the structural discrimination cases. *Id.* at 272. These citations suggest perhaps that the *Feeney* majority saw this case in the context of a larger effort to restrict the zone of heightened review accorded to discrimination claims.

218 *Id.*

219 *Id.* (emphasis added).

220 *See id.*

221 *See supra* Part IV.A.

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affirmative action program—Stewart assembled five votes for the rule that all uses of race, even if remedial, were "presumptively invalid."[222]

Though *Feeney* named race as the paradigm, the case involved gender discrimination.[223] Before continuing with the analysis, it makes sense to pause and ask whether *Feeney* is appropriately viewed as a race case at all. In particular, did the emerging "suspect classification" approach associated with gender cases, rather than colorblindness, push the Court toward recasting equal protection as concerned principally with the use of certain classifications? Suspect classification analysis developed in the 1970s in cases involving the extension of heightened equal protection review beyond race.[224] Reasoning from race, the animating insight of this analysis was that certain social groupings, such as those along gender lines, so closely correlated to illegitimate forms of hierarchy that every state deployment of such classifications warranted a close look.[225] Yet especially as applied in gender cases, the suspect classification analysis rejected the rigid on-off structure developing in race cases, adopting instead a modulated

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[222] Stewart rehearsed this new language in a plurality decision issued a couple of months before *Feeney* involving challenges to discrimination on the grounds of illegitimacy and gender. *See* Parham v. Hughes, 441 U.S. 347, 351 (1979) ("Not all legislation, however, is entitled to [a] presumption of validity. The presumption is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently 'suspect.'"). Stewart quickly repeated a version of this formulation the year after *Feeney*, in a 5-4 decision upholding restrictions on federal subventions of medically necessary abortions. Harris v. McRae, 448 U.S. 297, 322 (1980) ("This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, 'suspect,' the principal example of which is a classification based on race . . . ."). Reflecting on *Feeney*, *Parham*, and *Harris*, Professor Reva Siegel writes: "Increasingly, the Court conflated *Brown*'s holding with the presumption against racial classifications and treated government use of racial classifications as a necessary condition for heightened judicial scrutiny under the Equal Protection Clause . . . ." Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1291 (2011).

[223] Most likely, of course, *Feeney* involved discrimination on both gender and race grounds; yet, the parties only argued the gender claim. *Feeney*, 442 U.S. 256. *Cf.* Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CAL. L. REV. 967 (2008) (exploring the relationship between veterans' benefits, race, and gender).

[224] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 208 (1976) (reasoning from race in developing an approach to evaluating gender discrimination); Sugarman v. Dougall, 413 U.S. 634 (1973) (same—citizenship); Frontiero v. Richardson, 411 U.S. 677 (1973) (same—gender); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (same—wealth); Reed v. Reed, 404 U.S. 71 (1971) (same—gender); Graham v. Richardson, 403 U.S. 365 (1971) (same—citizenship); *see also Parham*, 441 U.S. at 351 (discussing suspect classification analysis).

[225] This concept served as the basis for Justice Brennan's argument against rational review and for intermediate (but not strict) scrutiny in *UJO*. *UJO*, 430 U.S. 144, 169–75 (1977) (Brennan, J., concurring).

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approach that distinguished remedial from invidious discrimination.[226] *Feeney* certainly cited the relevant suspect classification cases,[227] but it deviated crucially in that it automatically imposed the highest level of constitutional scrutiny. The problem in *Feeney* was not simply that the Court became obsessed with government classification by race, but rather that it linked the use of race to nearly automatic invalidity. As Stewart asserted, remedial uses of race were "presumptively invalid and can be upheld only upon an extraordinary justification."[228] *Feeney* supplanted the flexible concern for vulnerable groups that animated suspect class analysis with a rigid colorblindness principle, indifferent to group position and nearly always fatal to remedial measures.

Returning to the doctrinal devolution in *Feeney*, only after having announced a mechanical distrust of any use of race did Stewart address intent doctrine. When he did so, he recast intent doctrine as the inverse of Powell's automatic hostility to express uses of race. Now, absent a reference to race, even government action that disproportionately harmed non-Whites would be presumptively constitutional.[229] Viewed in full, the following paragraph demonstrates how *Feeney* distorted the intent test:

> Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown v. Board of Education*; *McLaughlin v. Florida*. . . . But, as was made clear in *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corp.*, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.[230]

Note the way in which the express use of a racial classification became the crucial pivot. When race is facially used, colorblindness applies, and the challenged law is presumptively invalid. When race is not expressly present, however, intent applies, and the suspect action is presumptively legitimate. In effect, *Feeney* built on *Bakke* to

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226 *See, e.g.*, Califano v. Webster, 430 U.S. 313, 317–20 (1977) (using intermediate review to uphold a Social Security provision employing a gender classification that benefited women).

227 *See Feeney*, 442 U.S. at 273 (citing Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973)).

228 *Id.* at 272.

229 This is not to say that, having accepted Powell's anticlassification analysis, the shift to a malice test ineluctably followed. *See infra* note 250 (discussing the possibility of strictly disfavoring any use of race while also using a contextual approach to ferret out discrimination).

230 *Feeney*, 442 U.S. at 272 (citations omitted).

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bifurcate equal protection into two domains with two dramatically different presumptions of constitutionality.

In the first domain, all racial classifications merit the highest level of constitutional suspicion. Stewart cast colorblindness as skepticism of any "racial classification, regardless of purported motivation."[231] This analysis put a universal spin on the point, as if colorblindness stood in opposition to every use of race: whether propelled by invidious or benign motives, whether Jim Crow or affirmative action. But colorblindness—arising in the late 1970s—stood in opposition to Jim Crow only in its own mythos. In reality, opposition to every use of race meant hostility toward race-based remedies. Powell introduced colorblind logic in *Bakke* in 1978 primarily to evade the thrust of *UJO*. Stewart endorsed anticlassification reasoning in *Feeney* and then immediately seized upon colorblindness to condemn affirmative action in employment in 1980 and 1981.[232] Once five Justices came to this position in *Croson*, colorblindness went on to strike down myriad remedial measures but applied in only *one* case involving the mistreatment of non-Whites[233]—and that over the strenuous objections of Justices Clarence Thomas and Antonin Scalia, two of the most vociferous proponents of colorblindness.[234] The colorblind claim to oppose any government use of race is misleading, for in practice colorblindness opposes race-conscious remedies and nothing more.

Meanwhile, in the second domain, facially race-neutral laws merit almost complete constitutional deference. This characterization too is an obfuscation. After *Feeney*, the "neutral" laws leniently assessed under intent doctrine never involved government action that *helped* minorities; those laws were examined skeptically under colorblindness. Furthermore, these "neutral" laws never involved the supposed mistreatment of Whites. There have been no cases alleging the use of race-neutral devices to discriminate against Whites.[235] Instead, the fruitless search for invidious intent has only been required in

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231 *Id.*

232 *See supra* note 209 and accompanying text (discussing Stewart's opinions in *Fullilove* and *Minnick*).

233 *See* Johnson v. California, 543 U.S. 499 (2005) (holding that colorblind reasoning requires strict scrutiny of the practice of segregating prisoners).

234 *Id.* at 524 (Thomas & Scalia, JJ., dissenting).

235 For the argument that disparate impact *should* apply to Whites, see Roger Clegg, *Unfinished Business: The Bush Administration and Racial Preferences*, 32 HARV. J.L. & PUB. POL'Y 971, 988 (2009), who states "there is no justification for goals and timetables to be triggered when women and minorities are 'underrepresented,' but not when men and non-minorities are." For a contrary position, see Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 527–30 (2003), who critiques arguments that disproportionate impact analysis under Title VII should apply to practices that adversely affect Whites as a group.

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challenges to government practices imposing disproportionate harm on non-Whites.

Thus, in one domain of equal protection, extreme suspicion reigns. In the other, virtually complete abdication prevails. Abstractly, these two domains respectively correspond to facially racial and facially neutral government actions. In reality, they correspond to affirmative action and disproportionate harm to non-Whites. Affirmative action receives fatal-in-fact review; harm to non-Whites is treated with lenient indifference.

C. *The Malice Standard*

Not only was *Feeney* responsible for the bifurcation of equal protection doctrine, it also laid solid groundwork for the malice standard. Recall that Helen Feeney had based her challenge to the veterans' preference law on the premise that discriminatory intent could be measured from its predictable consequences. The majority conceded that it would be "disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable."[236] Nevertheless, *Feeney* rejected this approach for measuring invidious intent. Notoriously, the Court held instead that intent required a showing that the state pursued the challenged action "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[237] That is, *Feeney* defined "intent" as acting not just in full awareness of impending harm but out of a desire to cause such harm. Reva Siegel, among others, understands the Court to have demanded proof of conscious antipathy, something approaching malice: "[I]n *Feeney*, the Court asked plaintiffs to prove that legislators adopting a policy that would foreseeably injure women or minorities had acted with the express purpose of injuring women or minorities—in short, a legislative state of mind akin to malice."[238]

How did the Court come to this stringent definition of intent? At the most fundamental level, it seems likely that the Justices in the majority remade intent in a manner that reflected their basic intuition that discrimination simply had not occurred. To evaluate the possible presence of mistreatment, Stewart relied upon a theory that he had

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236 *Feeney*, 442 U.S. at 278.

237 *Id.* at 279.

238 Siegel, *supra* note 9, at 1135. *See also* R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 578 n.28 (2003) (describing the *Feeney* Court's definition of discriminatory intent as enacting a malice standard).

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developed in *Geduldig v. Aiello*, a 1974 sex discrimination case.[239] There, Stewart reasoned that discrimination on the basis of pregnancy did not constitute gender discrimination because, although only women were harmed, not *all* women were harmed.[240] In *Feeney,* with support from virtually the same Justices that backed him in *Geduldig,* Stewart used a similar analysis: Not *only* women were disadvantaged. Stewart wrote: "[A]ll nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected . . . to permit the inference that the statute is but a pretext for preferring men over women."[241] In effect, both *Geduldig* and *Feeney* relied on a caste theory of discrimination, which required all members of the disadvantaged class to be mistreated relative to all members of the advantaged class. Anything shy of that failed to constitute discrimination.[242] Because the Massachusetts civil service regime disadvantaged some men (nonveterans), the *Feeney* majority was certain no discrimination against women existed.[243]

Yet because the majority in *Feeney* confronted a method for proving invidious purposes that strongly indicated continued discrimination, the conservative Justices needed to narrow intent doctrine to preserve their sense of Massachusetts's innocence. Perhaps simply in order to preserve their hunch that no mistreatment of women occurred, the majority imposed an exacting definition of discriminatory purpose: Only a conscious intent to harm, not simply an awareness of harmful consequences, would qualify.[244] The immediate payoff of this definitional constriction was to exonerate Massachusetts. The long-term impact was a major step toward closing courthouse doors to contextual evidence of discrimination against vulnerable groups.

If the *Feeney* majority recast intent as a malice test principally in obeisance to its intuition that there was no discrimination, the colorblind logic it used also played a fundamental role. Powell's development of colorblindness in *Bakke* elevated affirmative action into a singular threat to equality. Stewart's adoption of that reasoning in

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239 417 U.S. 484 (1974).

240 According to Stewart, the challenged state action created two classes—"pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 497 n.20.

241 *Feeney*, 442 U.S. at 275.

242 For a discussion of this approach couched in terms of a "traditional concept" of discrimination, see Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

243 The gender dynamics of the case also explain the concurrence of Stevens, joined by White. Without acceding to either the colorblind or malice analyses, Stevens concurred on the ground that the preference disadvantaged many men, thereby ruling out discrimination against women. *Feeney*, 442 U.S. at 281 (Stevens, J., concurring).

244 *Id.* at 279.

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Feeney rendered discrimination against vulnerable groups a marginal problem. Once embraced as a way of thinking about equality, colorblindness both legitimized and impelled a highly restrictive approach to proving discrimination against non-Whites.

First, the legitimacy imputed to facially race-neutral government action played a role. The presumption of constitutionality accorded to government action that did not directly rely on a racial classification encouraged raising the bar for showing intent. If such government action deserved deference, then a purpose doctrine under which it was difficult to prevail best protected coordinate branches of government.[245] Malice doctrine protected the state as a defendant by making intent almost impossible to prove.[246]

Second, the malice test seemed to fit neatly with a concern for promoting colorblindness. On one level, if classification constituted the central harm proscribed by equal protection, then malice seemed like its motivational analog. Colorblindness identified Jim Crow laws as the paradigmatic constitutional violation. Conscious malice seemed to capture the mental state behind those oppressive laws.[247] On another level, punishing the intentional use of race seemed to promote colorblindness on the part of government officials. John Hart Ely used this logic in his 1970 defense of motive analysis to argue for an intent test (although not for a focus on malice). "Perhaps the safest long-run course," Ely advised, "is to demand that officials be entirely 'colorblind,' no matter how neutral or benevolent they claim they wish

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[245] To be sure, there were earlier intimations that deference might be due to facially neutral government action, even that which disproportionately harmed minorities. *Davis*, for instance, cautioned that anything more than rational review "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." Washington v. Davis, 426 U.S. 229, 247 (1976). Yet this proposition was far from clearly established. For example, the following year the Court talked of "the presumption of discrimination raised by . . . substantial underrepresentation." Castaneda v. Partida, 430 U.S. 482, 494–95 (1977) (citations omitted).

[246] Notice, though, a central tension created by seemingly mandating intrusive inquiries into the minds of identified state actors—the sort of probing examinations of motive long disfavored by the courts. *See supra* Part I.A (discussing courts' reluctance to inquire into the motives of legislatures). If the point was to protect coordinate branches of government, this method seemed a curious way to go about doing so—or it would have been if malice doctrine had in fact been geared to ferreting out evil intentions, rather than to simply making discrimination almost impossible to prove. *See infra* Part VI.B.2 (discussing the malice test's indifference to actual motives).

[247] *See, e.g.*, Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378, 1393 (2004) ("All told, it seems that the best explanation for the [specific-intent requirement] is the culture's intuition of the simple, categorical, repellent wrongness of the state's deliberately classifying by race.").

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to be. . . . [J]udicial review must await proof of racial motivation and cannot be triggered by disproportion *per se*."[248]

Finally, and most importantly, the celebration of colorblindness as a bulwark against most racial abuse suggested that there was little need for a robust intent doctrine. *Feeney* not only divided equal protection, it also dramatically diminished intent doctrine. Stewart heralded *Brown* as the foundational case establishing automatic hostility toward all express uses of race.[249] Ostensibly, it was distaste for the mere use of race that had guided the Court in its campaign against White supremacy. Retold in this fashion, colorblindness constituted the heart of equal protection. Meanwhile, according to this fiction, the search for discriminatory intent occurred only at the periphery, becoming necessary only in those rare discrimination cases in which colorblindness did not directly defeat an overt use of race. Having served from *Brown* to *Davis* as the undivided heart of equal protection, *Bakke* and *Feeney* forced intent doctrine to the margins and in the process decisively diminished it. Reposing high confidence in the efficacy of colorblindness, equal protection hardly seemed to need an effective intent test, allowing the Court to be sanguine about an approach to measuring mistreatment that rarely produced victories for plaintiffs.

Again, the point is not that colorblindness provided a logic that drove the Court to a malice test.[250] More likely, some Justices' visceral sense that no discrimination occurred provided the primary impetus behind their effort to remake equal protection in a manner that produced what they considered the correct result. In this context, colorblindness was attractive insofar as it seemed to confirm their basic intuitions. Soon enough, though, colorblindness took on a life of its own—not only justifying certain outcomes and doctrinal changes, but establishing a way of seeing race and equal protection that fueled hostility toward affirmative action as well as skepticism regarding claims of racial mistreatment. The malice test and colorblindness were formed and fused in a self-reinforcing dynamic, one which arose out

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248 Ely, *supra* note 30, at 1259–60.

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

250 Note that the move toward a malice test is not determined by *Feeney*'s adoption of a colorblind framework. In theory, one might strictly disfavor express references to race and yet also use a nuanced approach to discern mistreatment even absent the use of a racial classification. *See, e.g.*, Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 561–62 (1977) (adopting an anticlassification understanding of equal protection while also advocating an impact-justification test favorable to plaintiffs). *But see* Ricci v. DeStefano, 129 S. Ct. 2658, 2682–83 (2009) (Scalia, J., concurring) (hyping the tension between the race consciousness involved in evaluating disparate impact and the mandate of colorblindness).

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of, helped justify, and ultimately stoked the belief that racism was past and affirmative action was unjust.

D. *Inferring Innocence*

Feeney was a transitional case. Marking an abrupt departure from past decisions, it endorsed the colorblind reasoning first proposed by Powell the year before in *Bakke* and dramatically narrowed the meaning of intent to a mindset akin to malice. Yet harkening back to prior intent cases, *Feeney* used contextual evidence to decide whether or not the requisite intent existed.[251] The next year, the Court would begin to impose on plaintiffs not only the onerous need to prove malice but also the impossible challenge of doing so through direct evidence regarding the thinking of identified individuals. It is important to note that *Feeney* did not take that second step but remained open to inferences drawn from a totality of the circumstances. This situation bears emphasis not only because it confirms the settled nature of intent doctrine's previous method, but also because *Feeney*'s continued reliance on contextual evidence marked the emergence of a remarkable double standard. Beginning the next year, conservatives on the Court would disparage and reject all but direct evidence to prove animus against non-Whites. But, pursuant to *Feeney*, they

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251 *Feeney*'s footnotes, firmly anchored in prior case law, acknowledged that discriminatory purpose was to be inferred from contextual evidence. To the sentence asserting that discriminatory purpose demanded more than "intent as awareness of consequences," Stewart added a note admitting that "[p]roof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights*. The inquiry is practical." *Feeney*, 442 U.S. at 279 n.24 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). To the next sentence, declaring that intent involved action undertaken "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," Stewart appended another footnote acknowledging the use of inferences to show discrimination: "Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [Massachusetts's law], a strong inference that the adverse effects were desired can reasonably be drawn." *Id.* at 279 n.25. Nevertheless, in *Feeney* itself, Stewart inferred innocence. *Id.* ("When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate . . . the inference simply fails to ripen into proof."). Even as the text demanded proof of subjective malice, guilty footnotes acknowledged that discriminatory purpose doctrine operated through inference from surrounding circumstances—a "practical" approach that examined a range of "objective" contextual factors, including harmful impact.

In turn, the majority's nod toward inference, along with the gender dynamics of the case, likely explain why White, as the author of *Davis*, failed to object to the distortion of that case underway in *Feeney*. *See* 442 U.S. at 281 (Stevens & White, JJ., concurring). The next year in *Mobile v. Bolden*, 446 U.S. 55 (1980), when Stewart demanded proof of malicious intent, White objected vigorously. *See infra* note 282 and accompanying text.

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would continue to draw contextually-based inferences of innocence to *defeat* claims of discrimination.[252]

Feeney reversed the logic of earlier cases, such as *Arlington Heights*, which held that in some cases disproportionate harm to non-Whites was so extreme as to allow no inference other than invidious intent.[253] In *Feeney*, Stewart declared instead that a self-evidently legitimate purpose could negate evidence of discrimination.[254] Ignoring the possibility of mixed motives, Stewart declared that the presence of a single, obvious nondiscriminatory rationale insulated government action by foreclosing the possibility that discriminatory purposes also played some role.[255] A defensible preference for veterans, Stewart reasoned, "necessarily compels the conclusion that the State intended nothing more than to prefer 'veterans.' Given this finding, simple logic suggests than an intent to exclude women from significant public jobs was not at work in this law."[256] In dissent, Marshall offered the obvious retort: "That a legislature seeks to advantage one group does not, as a matter of logic or of common sense, exclude the possibility that it also intends to disadvantage another."[257] The malice cases that followed *Feeney* would demand of plaintiffs direct proof of intent, as if they were deeply concerned with the actual—and necessarily multiple—motivations of individuals.[258] Contrarily, these cases also drew on *Feeney*'s new rule that the presence of a single, legitimate government purpose—discerned generally from the context surrounding the challenged policy—would warrant an unimpeachable inference of innocence. The malice test developed as a rule banning contextual proof of discrimination, while at the same time allowing contextual exonerations.

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252 *Cf.* Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 24–34 (1990) (detailing the rhetorical power of "white innocence" in the Court's race discrimination jurisprudence).

253 *See Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

254 *See Feeney*, 442 U.S. at 275 ("Just as there are cases in which impact alone can unmask an invidious classification, there are others, in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed.") (citation omitted).

255 *Id.*

256 *Id.* at 277.

257 *Id.* at 282 (Marshall, J., dissenting).

258 *Cf.* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (2006)) (amending Title VII to incorporate mixed-motive analysis); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (developing a mixed-motive analysis under Title VII); *see also infra*, Part V.

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V
1980–1987: MALICE APPLIED

The malicious intent test as a bar on claims of mistreatment came into full force almost immediately. In *Mobile v. Bolden*, decided the year after *Feeney*, Stewart again took the lead and this time did demand direct proof of malice. Finding such proof absent, Stewart upheld an electoral scheme that throughout the twentieth century completely excluded Blacks from local office. [259] The next year in *Memphis v. Greene*, largely the same Justices repeated this analysis when blessing a Southern city's decision to close a public street between a White and a Black neighborhood.[260] Perhaps most infamously, in 1987 the Court in *McCleskey v. Kemp* affirmed Georgia's racially discriminatory application of the death penalty because the plaintiff could not directly prove malice.[261] Simultaneously, each of these cases used contextual evidence to affirmatively build the case for innocence. This timeline should not be taken to suggest that, after *Feeney*, the Court demanded direct proof of animus in every case alleging discrimination against non-Whites. On the contrary, in two notable decisions during this period, the Court reverted to the contextual approach, using this method to strike down racially discriminatory practices.[262] Whether in terms of affirmative action or racial discrimination, a high level of doctrinal instability marked equal protection during the 1980s. Nevertheless, equal protection has since consolidated around the malicious intent test, warranting a special focus on the logic of the cases that developed this approach. This Part traces the instantiation of the malice standard, focusing on *Mobile*, *Memphis*, and *McCleskey*.

A. City of Mobile v. Bolden

In *City of Mobile v. Bolden*, Mobile, Alabama employed citywide elections for choosing commissioners. Although African Americans constituted thirty-five percent of the city's population, due to prevalent racism they were consistently outvoted—a pattern that resulted in no Blacks being elected to the city commission since its establishment in 1911. The trial and appellate courts held that Mobile engaged in unconstitutional discrimination by maintaining an electoral system that virtually guaranteed the perpetual exclusion of African

259 446 U.S. 55 (1980).

260 City of Memphis v. Greene, 451 U.S. 100 (1981).

261 McCleskey v. Kemp, 481 U.S. 279 (1987).

262 *See infra* Part VI.B.3 (discussing Rogers v. Lodge, 458 U.S. 613 (1982)); *infra* notes 396–98 and accompanying text (discussing Batson v. Kentucky, 476 U.S. 79 (1986)).

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Americans from local government—and, indeed, that operated to ensure the defeat of even those White politicians seen as more sympathetic to the Black third of the population.[263]

In reversing the trial and appellate courts, *Mobile* first reiterated *Feeney*'s logic regarding exculpatory inferences. Stewart seemed reassured that the at-large electoral structure applied across the country.[264] It would "nearly always be true," Stewart reasoned, that "the character of a law is readily explainable on grounds apart from race . . . where, as here, an entire system of local governance is brought into question."[265] This analysis did not dispose of the case for Stewart, for he proceeded to consider possible intentional discrimination. But it did establish a strong initial presumption that racial discrimination likely was absent.[266]

After reiterating that impact alone would not demonstrate a constitutional harm, *Mobile* weighed each bit of evidence adduced to show racial ill-treatment, though piecemeal and seriatim rather than holistically. This technique of evidentiary disaggregation, which would become routine in malice cases, elicited a strong objection from *Davis*'s author, who correctly pointed out that it violated the spirit of the contextual approach: "By viewing each of the factors relied upon below in isolation . . . the plurality rejects the 'totality of the circumstances' approach we endorsed in . . . *Washington v. Davis* and *Arlington Heights*, and leaves the courts below adrift on uncharted seas with respect to how to proceed on remand."[267]

The most lethal innovation came, however, in measuring each piece of the disassembled evidence for what it could prove regarding

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263 *See* Bolden v. City of Mobile, 423 F. Supp. 384, 387–89 (S.D. Ala. 1976) (recounting evidence of racial discrimination that prevented Blacks from being elected).

264 *See Mobile*, 446 U.S. at 59–60 (asserting that Mobile's electoral system "is followed by literally thousands of municipalities and other local governmental units throughout the Nation").

265 *Id.* at 70. Notice that, whereas during the civil rights era the Court often presumed that widespread dynamics in the South implicated racial oppression, Stewart employed the opposite presumption in *Mobile*. *See supra* text accompanying note 59 (discussing Southern racial ways as "matters of common notoriety").

266 Blackmun, in contrast, concurred despite his sense that "the findings of the District Court amply support an inference of purposeful discrimination." *Mobile*, 446 U.S. at 80 (Blackmun, J., concurring) (quoting *id.* at 103 (White, J., dissenting)). Blackmun agreed to reverse because he thought the ordered remedy excessive. *Id.* at 82–83.

267 *Mobile*, 446 U.S. at 103 (White, J., dissenting) (citations omitted). This technique of evidentiary disaggregation became a common tactic. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987) (examining each piece of evidence potentially suggesting discrimination individually rather than as a whole); City of Memphis v. Greene, 451 U.S. 100, 110–18 (1981) (same); *see also infra* Part VII.A.2 (reviewing the use of the same tactic in the colorblindness arena in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504–05 (1989)).

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malicious intent. Stewart neatly disposed of every probative iota by declaring them individually incapable of showing the actual thinking of an identified state actor. The district court had stressed continued Jim Crow patterns in Mobile. It documented at length the exclusion of African Americans from municipal boards, the relegation of Blacks to menial government jobs, the preservation of overwhelmingly White fire and police departments, and allegations of widespread police brutality that included complaints of mock lynchings.[268] Waiving away this evidence, Stewart rejoined: "[E]vidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices."[269] Clarifying exactly why such evidence was "tenuous and circumstantial," Stewart explained that the district court failed "to identify *the state officials whose intent it considered relevant* in assessing the invidiousness of Mobile's system of government," adding that "the actions of unrelated governmental officials would be, of course, of questionable relevance."[270] Stewart took a similar stance toward "the substantial history of official racial discrimination in Alabama."[271] Stewart declaimed: "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved *in a given case*. More distant instances of official discrimination . . . are of limited help in resolving that question."[272] Finally, Stewart used the same technique to respond to Marshall's dissenting insistence that "historical and social factors" were indispensable to comprehending Mobile's longstanding exclusion of Blacks from political power.[273] Stewart flatly declared, "these gauzy sociological considerations have no constitutional basis."[274] He continued: "[I]t remains far from certain that [such considerations] could, in any principled manner, exclude the claims of any discrete political group that happens, for whatever reason, to elect fewer of its candidates than arithmetic indicates it might."[275]

Mobile constituted the first race case to demand proof of a particular actor's invidious intent. This demand rendered constitutionally

268 *Mobile*, 423 F. Supp. at 388–92.
269 446 U.S. at 74.
270 *Id.* at 74 n.20 (emphasis added).
271 *Id.* at 74.
272 *Id.* (emphasis added).
273 *Id.* at 75 n.22.
274 *Id.*
275 *Id.*

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irrelevant racism's peculiar history in the Deep South, as well as contemporary manifestations of White-over-Black hierarchy. Past discrimination offered only "limited help," meriting derision as merely the distant stain of "original sin."[276] "[H]istorical and social factors" dwindled to "gauzy sociological considerations [without] constitutional basis."[277] Meanwhile, ongoing racism perpetuated by Mobile's government became "tenuous and circumstantial" and "of questionable relevance."[278] Having shorn the city's actions of historical and contemporary context, Stewart insisted that there was no way to distinguish the perpetual exclusion of Blacks from the occasional political losses suffered by other random groups "for whatever reason."[279] In its first iteration, the demand for proof of specific intent worked principally to deprecate the contextual evidence theretofore elemental in proving discriminatory intent.

Before continuing with the development of malicious intent doctrine, recall a seeming quandary regarding *Keyes* and *Davis*. It seemed curious that Marshall and Brennan did not vociferously protest the rise of a restrictive intent test in *Davis*, until it became clear that *Davis* in fact formalized the contextual approach endorsed by these civil rights stalwarts. Compare their dissents in *Mobile*.[280] The palpable upset one might have expected from Marshall and Brennan in *Davis* is found instead in *Mobile*. Note especially Marshall's distress as he accused the majority of "manipulating doctrines" and of "mak[ing] this Court an accessory to the perpetuation of racial discrimination."[281] Likewise, consider the strenuous objection lodged by White, the author of *Davis*, protesting the departure from contextual intent:

> The Court's decision . . . cannot be understood to flow from our recognition in *Washington v. Davis* that the Equal Protection Clause forbids only purposeful discrimination. Both the District Court and the Court of Appeals properly found that an invidious

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276 *Id.* at 74.

277 *Id.* at 75 n.22.

278 *Id.* at 74 & n.20.

279 *Id.* at 75 n.22.

280 *See id.* at 94 (Brennan, J., dissenting) (arguing that proof of discriminatory impact is sufficient); *id.* at 103 (Marshall, J., dissenting) (arguing for a less stringent standard in vote dilution cases).

281 *Id.* at 141. To be clear, Marshall did not attempt to salvage a contextual intent approach in *Mobile*, but argued that intent simply did not apply in the vote dilution context. *See id.* at 104–05 ("[A]n intent requirement is inconsistent with the protection against denial or abridgment of the vote on account of race."). In subsequent malicious intent cases, with a putative difference in domain unavailable as a basis for limiting the application of malicious intent doctrine, Marshall returned to defending a contextual intent approach. *See infra* note 290 (noting Marshall's dissent in *Memphis*).

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> discriminatory purpose could be *inferred from the totality of facts* in this case.[282]

One way to measure discriminatory intent as a response to the mistreatment of non-Whites is to look to the support or opposition it engendered from Marshall and Brennan, the Justices most renowned for their commitment to civil rights. Under this metric, *Davis* constituted an acceptable interpretation of a workable doctrine. Instead, and appropriately, it was *Mobile* that earned the enmity of Marshall and Brennan (and additionally of *Davis*'s author), for it was *Mobile* that crafted the unworkable intent test typically and erroneously attributed to *Davis*.

B. City of Memphis v. Greene

Built as a segregated enclave in the years before World War II, the Hein Park subdivision in Memphis remained all White in 1970, when its residents sought to block off the street passing from an adjoining, predominantly Black area.[283] Officials favoring the closure publicly emphasized the safety of children, neighborhood tranquility, vehicular speed, and litter. Opponents challenged it as an obvious racial affront.[284]

One year after *Mobile*, Stevens, writing for the majority, appropriated that decision's techniques. Again, the Court used the existence of legitimate governmental purposes to impugn the possibility that animus also operated. Crediting traffic control as the closure's impetus, Stevens accepted that the city's decision "was motivated by its interest in protecting the safety and tranquility of a residential neighborhood."[285] This legitimate purpose, in turn, reassured the Court that race was not involved. "It is unlikely that a mother who finds herself 'rushing to the window when I hear screeching brakes,' is concerned about the race of the driver of the vehicle," Stevens averred.[286]

Stevens also resorted to the malicious intent test to rationalize disregarding contextual evidence. Stevens stressed that only the motives of the city officials named in the suit, not of the White voters pressuring them to wall off their neighborhood, should be considered: "We must bear in mind that respondents have sued the city, the

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[282] *Mobile*, 446 U.S. at 94–95 (White, J., dissenting) (emphasis added) (citations omitted).

[283] City of Memphis v. Greene, 451 U.S. 100, 103 (1981).

[284] *See id.* at 135–36, 143 n.9 (Marshall, J., dissenting) (detailing the petitions challenging the closing as racially motivated).

[285] *Id.* at 119 (majority opinion).

[286] *Id.* at 117 n.27 (citation omitted).

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Mayor, and the City Council and its chairman. Therefore, we must focus on the decisions of these public officials, and not on the actions of the residents of Hein Park . . . ."[287] Stevens similarly dismissed evidence of racial prejudice in Hein Park and Memphis generally. Stevens conceded:

> [T]he city of Memphis continued to oppose the prompt desegregation of its municipal parks and recreational facilities as late as 1963; moreover, the pre-World War II development of Hein Park may well have been influenced by the racial segregation which was then common, and the record contains evidence that racial prejudice still exists in Memphis.[288]

But, Stevens opined, with italics to stress his point, "we cannot say that [such evidence] required the District Court to find that the City Council's action *in this case* was racially motivated."[289] Having narrowed the constitutional question to animus on the part of the named parties, and then only as immediately related to the challenged street closing, Stevens confidently asserted, "there is *no* evidence that the closing was motivated by *any* racially exclusionary desire."[290] Like Stewart in *Mobile*, Stevens in *Memphis* had a point. Having used the plaintiffs' inability to directly prove animus to denude the case of its historical and sociological elements, no evidence of discrimination remained.[291]

C. McCleskey v. Kemp

Proof regarding the racially discriminatory application of Georgia's death penalty came in two forms: (1) the Baldus study, the most comprehensive statistical analysis of capital sentencing undertaken to that point; and (2) a detailed history, dating back to slavery's reign, laying bare Georgia's exceptional willingness to execute African

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287 *Id.* at 114 n.23.

288 *Id.* at 116 n.27 (citations omitted).

289 *Id.*

290 *Id.* at 114 (emphases added). Marshall took particular umbrage at the suggestion that there was "no evidence" of racial motivation. *Id.* He remonstrated that such evidence was abundant—and existed in exactly the forms previously deemed relevant by prior discriminatory intent cases. *Id.* at 141 (Marshall, J., dissenting). Marshall rejoined: "A proper reading of the record demonstrates to the contrary that respondents produced at trial precisely the kind of evidence of intent that we deemed probative in *Arlington Heights*." *Id.*

291 In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 195 (2003), a unanimous Court reprised the basic analysis in *Memphis*, suggesting that the racial antipathies of voters were irrelevant in finding purposeful discrimination by specific government actors. *Cuyahoga* then added an additional hurdle, also suggesting that state-action doctrine precluded attention to racism expressed by voters. *See id.* at 196 ("[S]tatements made by private individuals in the course of a citizen-driven petition drive . . . do not, in and of themselves, constitute state action for purposes of the Fourteenth Amendment.").

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Americans. Brennan in dissent reprised both sorts of evidence at length. He devoted four pages to parsing the Baldus study, demonstrating how "[t]he statistical evidence in this case . . . relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations."[292] Brennan then turned to the historical record. Beginning with slavery, he traced over another four pages the workings of a "dual system of crime and punishment" that had long reserved the harshest penalties for Blacks thought to have transgressed racial supremacy through violence against Whites.[293] Brennan acknowledged that this history did not conclusively prove discrimination against McCleskey himself; nevertheless, he insisted on its relevance in evaluating a claim of discrimination in Georgia's application of the death penalty.[294]

The Court, in a five to four decision written by Powell, used malicious intent to reject the pertinence of both the sociological and historical evidence. As in *Mobile* and *Memphis*, the decision began with general inferences tending to expiate the state. The majority suggested that discrimination did not explain the case, pointing instead to the need for discretion in capital sentencing as well as the nature of McCleskey's crime.[295] Then, turning to McCleskey's burden in proving discrimination, Powell shifted away from general inferences,

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[292] McCleskey v. Kemp, 481 U.S. 279, 325–28 (1987) (Brennan, J., dissenting).

[293] *Id.* at 328–34.

[294] *See id.* at 332 ("Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence.").

[295] *See id.* at 294–95, 311 (citing the importance of discretion to the criminal justice system); *id.* at 306 (stressing the relevance of McCleskey's underlying conviction). Powell's emphasis on discretion flew in the face of the Baldus study, which demonstrated that discretion correlated with increased racial discrimination. *See id.* at 287 n.5 (finding that racial factors play the most pronounced role in cases where there is more room for discretion). In addition, Powell's logic elevated discretion into an interest in its own right, rather than regarding discretion as important only insofar as it promoted just outcomes. *See id.* at 336 (Brennan, J., dissenting) (arguing that Powell's logic undermined the "very end that discretion is designed to serve"). With respect to his emphasis on the underlying conviction, again, Powell's logic was suspect. McCleskey claimed that race played a substantial role in influencing who ultimately received a death sentence *from among those convicted of a crime eligible for capital punishment*. *Id.* at 286–87. It can be no answer to this that McCleskey fell among those convicted of a death-eligible crime.

Note that Powell also invoked a prudential concern—the worry that finding an equal protection violation in death penalty sentencing on the basis of a statistical showing of racial disproportionality risked opening up the entire criminal justice system to constitutional challenge. *See id.* at 314–18 ("McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."). This concern echoed the mid-1970s decisions limiting the structural implications of equal protection. *See supra* note 148 (discussing *Davis*'s parade of horribles and Powell's analysis in *Rodriguez*). Brennan's retort that the *McCleskey* majority exhibited "a fear of too much justice," 481 U.S. at 339, seems equally appropriate regarding the earlier cases.

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with italics to emphasize the point: "[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose."[296] Powell then immediately put the writing on the wall, stating that McCleskey "offers no evidence *specific to his own case* that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study."[297] At that point, Powell paused to suggest several reasons why, in general, statistical analyses should not figure in the death penalty context. Once Powell redefined discriminatory purpose as malicious intent, however, the admissibility of statistical analyses became a red herring. Even if admitted, statistics could never "*prove*," as Powell demanded with italics, "that race was a factor in McCleskey's particular case." [298] The posture of the case required the Court to accept the validity of the Baldus study.[299] The majority seemed to respond that though valid, the study was irrelevant—the study proved nothing at all because it proved nothing specific to "McCleskey's particular case."[300] Powell concluded: "[W]e hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose." [301]

Powell separately considered McCleskey's historical argument, measuring Georgia's long romance with White supremacy only for what it could prove regarding the mental states of contemporary legislators. Citing *Feeney*, Powell insisted that no constitutional harm could arise simply by virtue of the Georgia legislature's maintenance of a death penalty regime that it knew to a moral certainty disproportionately executed Blacks.[302] McCleskey's burden was to demonstrate that contemporary legislators consciously pursued this racially murderous end.[303] To meet this burden of proving current malice, history would avail very little. Powell relegated his discussion of Georgia's painful past to a single short footnote that readily dismissed this material, rendered all the more marginal through the use of scare quotes: "McCleskey relies on 'historical evidence' to support his claim of

296 481 U.S. at 292.

297 *Id.* at 292–93 (emphasis added).

298 *Id.* at 308.

299 *See id.* at 291 n.7 (assuming, as did the court of appeals, that the Baldus study was statistically valid).

300 *Id.* at 308.

301 *Id.* at 297.

302 *Id.* at 297–98.

303 *See id.* at 298 ("For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.").

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purposeful discrimination by the State. . . . But unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value."[304] Powell reiterated: "Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent."[305] Powell did not otherwise engage the stained history narrated in detail by Brennan's dissent. Instead, in an echo of *Mobile* and *Memphis*, Powell avowed that "[t]here was *no* evidence . . . that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose."[306] Having used the alchemy of malice to transmute Georgia's history into "no evidence," Powell declared that "we will not infer a discriminatory purpose on the part of the State of Georgia."[307]

VI
BETRAYING *BROWN* WITH SELF-INDUCED BLINDNESS

McCleskey cast into sharp relief the near impossibility of demonstrating racial discrimination. Malicious intent managed to reduce to "no evidence"[308] even a sophisticated statistical study confirmed by, and confirming, obvious historical and sociological patterns of entrenched racism. It is no wonder the demand that evil intent be specifically proved has been widely criticized as making discrimination claims extraordinarily difficult to win.[309] Rather than repeating this damning point, however, this Part offers two new critiques.

First, it argues that these cases exemplify an antidiscrimination doctrine so onerous it likely would not detect impermissible mistreatment even in situations of Jim Crow segregation. In short, the malice test would likely uphold segregation in a case like *Brown v. Board of Education*. This critique, which sharply draws into question the legal and moral legitimacy of intent doctrine, is rarely made because most presume intent doctrine simply does not apply to express uses of race—thus demonstrating yet another level on which malice doctrine is indebted to colorblind mythmaking.

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304 *Id.* at 298 n.20.

305 *Id.*

306 *Id.* at 298 (emphasis added).

307 *Id.* at 299. Powell used the alchemy of malice to dismiss McCleskey's evidence. But, as we shall see, the malice test hardly proved necessary to this result. *See infra* Part VI.B.1 (discussing this point at greater length).

308 *McCleskey*, 481 U.S. at 298.

309 *See supra* note 25 (listing criticisms of the intent doctrine's fixation on conscious animus).

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Second, this Part argues that as malicious intent evolved in *Mobile* and afterward, it did *not* develop to discern mindsets. Rather, malice developed primarily to disparage evidence of discrimination's persistence. The animus test worked principally not to find but to deny discrimination, by justifying quick dismissals of contextual evidence of racial mistreatment.[310]

A. Failing the Brown *Test*

Brown v. Board of Education[311] has emerged as the metric for measuring modern equal protection. No contemporary theory of equal protection is legally or morally legitimate if it would not produce the correct result in that case.[312] Indeed, *Brown* is taught in law schools, and perceived by the public, to be the paragon of just legal decisionmaking. Imagine, then, a court approaching the sort of discrimination overturned in *Brown* not through contextual intent but through the constrained approach of *Mobile* and its progeny. Would a judge employing a malice approach likely have ruled school segregation unconstitutional?

1. No Malice

To begin with, at the time of *Brown*, there would have been few rank expressions of animus by responsible government officials to put before the Court. In 1954, George Wallace was not yet standing in the schoolhouse door ranting "segregation forever," and White mobs were not yet hurling spittle-laced invective on Black children being marched into White schools between phalanxes of soldiers. Those explosive images of racial hate lay in the future, as the response to *Brown* and civil rights activism.[313] Instead, public discourse came in the susurrations of entrenched hierarchy, the calm tones of a social oppression so thoroughly and completely enforced it could be presented as with the consent and for the benefit of the subjugated.

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[310] Thus, if anything, intent doctrine's legions of critics give it too much credit, for they typically take for granted that this doctrine cares at least about conscious intent. *See supra* notes 25–26 and accompanying text (detailing criticisms of intent doctrine).

[311] 347 U.S. 483 (1954).

[312] *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 998 (1998) (noting the canonical position *Brown* occupies); Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 493 (2000) (detailing how even conservative Justices acceded to *Brown*'s validity). *Compare* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (Roberts, C.J.) (invoking *Brown*), *with id.* at 798–99 (Stevens, J., dissenting) ("There is a cruel irony in the Chief Justice's reliance on our decision in *Brown*.").

[313] For a discussion on *Brown* as a sharp impetus to radicalization in Southern politics, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 389–408 (2004).

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Justice Thomas recently emphasized that racial oppression wraps itself in velvet, and did so even during the heyday of Jim Crow.[314] The quotes he garnered from the government officials supporting segregation in *Brown* are instructive here. South Carolina publicly declared itself "confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools."[315] Virginia crowed that extensive research proved the beneficence of segregation:

> Our many hours of research and investigation have led only to confirmation of our view that segregation by race in Virginia's public schools at this time not only does not offend the Constitution of the United States but serves to provide a better education for living for the children of both races.[316]

In 1962, eight years after *Brown*, famed constitutional scholar Alexander Bickel raised exactly the question posed here. If the constitutional standard of discriminatory intent reduces to actual motives, how is one to prove the existence of animus among legislators claiming to act out of benevolence for the benighted Negro? In Bickel's language:

> Who is to say that the majority of a legislature which enacts a statute segregating the schools is actuated by a conscious desire to suppress and humiliate the Negro? Who is to say that for many members more decent feelings are not decisive—the feeling, for example, that under existing circumstances Negro children are better off and can be more effectively educated in schools reserved exclusively for them, and that this is the most hopeful road to the goal of equality of the races under law?[317]

Malicious intent analysis struggles to pierce assertions of kindness—especially where those may well be rooted in genuinely held beliefs about the altruism of racial oppression, beliefs potentially shared by members of the bench and academy.[318]

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314 *See Parents Involved*, 551 U.S. at 778 n.27 (Thomas, J., concurring) (citing numerous examples of segregationists arguing that their racial classifications were benign).

315 *Id.* (citation omitted).

316 *Id.* (citation omitted).

317 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 61–62 (1962).

318 *Cf.* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 815 ("Major portions of the white community, especially in the South, had resolved their own participation in racial domination through an ideological construction of African Americans as 'happy,' 'smiling,' and 'contented.'").

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2. *Indifference to Harm*

Though it has not been stressed before, an additional strength of the contextual approach lay in its ability to evaluate the harm inflicted on vulnerable groups. In *Brown*, for instance, a major portion of the Court's reasoning involved the extent and nature of the harm done to Blacks. The Court condemned the injury done to African-American schoolchildren, reviling "feeling[s] of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[319] In addition, the Court stressed the fundamental nature of the interest invaded: primary education. It summarized its concern by recognizing that "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[320] If animus would have been difficult to find, could the Court employing malicious intent nevertheless recognize a constitutional violation—or at least the likelihood of one—by focusing on the extent and nature of the harm being done by the state?

Feeney and *McCleskey* in particular demonstrate that malicious intent transformed harm into a constitutional irrelevancy. *Feeney* exhibits malicious intent's indifference to the *degree* of harm. Recall that the Court acknowledged the conferral of a "well-nigh absolute" advantage to veterans, producing a "severe" impact on the employment opportunities of virtually all women.[321] Notwithstanding this striking effect, the Court construed the focus on intent to preclude attention to the severity of the impact. Stewart postulated that "degree . . . should make no constitutional difference."[322] He explained: "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not."[323] Stewart seemingly understood malice as a discrete state of mind or an emotional orientation that either was or was not present. Under this conception, the degree of discrimination or the severity of impact had little to do with whether there existed an illegitimate mindset, and so became evidentially irrelevant. By separating harm from the question of antipathy, malicious intent rendered the actual injury imposed upon vulnerable social groups extraneous to constitutional analysis.

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319 Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

320 *Id.* at 493.

321 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 264, 271 (1979).

322 *Id.* at 277.

323 *Id.*

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McCleskey spotlights malicious intent's indifference to the *nature* of the interest abraded. Brennan repeatedly urged Powell to recognize that the case centered on state-mandated death, yet this brute fact never entered the majority's calculus.[324] Powell reasoned as if the same basic search for invidious intent would apply whether the state exercised extraordinary or routine powers, for instance involving state decisions to kill or involving instead only the routing of urban buses.

Compare the Court's approach in contextual intent cases. Leading exemplars, including *Brown*, *Gomillion*, and *Loving*, gave nearly equal emphasis to the fact of discrimination against non-Whites as to the core nature of the interest violated, whether that concerned education, voting, or marriage.[325] Attempting to formalize a dual concern with the identity of the targeted group as well as the nature of the trammeled right, Marshall repeatedly urged that equal protection should be sensitive to the substance of the interest harmed.[326] Marshall's views admittedly never garnered formal endorsement by a Court majority. Nevertheless, given its flexibility, contextual intent allowed the Court to take into account, even if only informally, both the severity and the nature of the injury.[327] In contrast, malicious intent fostered an antidiscrimination doctrine thoroughly indifferent

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[324] *See* McCleskey v. Kemp, 481 U.S. 279, 335 (1987) (Brennan, J., dissenting) ("[Evaluation of McCleskey's evidence] must first and foremost be informed by awareness of the fact that death is irrevocable, and that as a result 'the qualitative difference of death from all other punishments requires a greater degree of scrutiny of the capital sentencing determination.'"(quoting California v. Ramos, 463 U.S. 992, 998–99 (1983))). Powell never acknowledged the central fact that the Court was weighing the death penalty, or rather, never did so in a manner that would *increase* protection. Powell repeatedly emphasized the special importance of discretion in administering death as a reason to *restrict* available methods for proving racial discrimination. *See id.* at 294 (rejecting attention to statistical patterns because "each particular decision to impose the death penalty is made by a petit jury . . . unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense").

[325] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (stressing the "freedom to marry"); Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (stressing the importance of the right to vote); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stressing the importance of education); *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 667–68 (1966) (emphasizing both the invidious quality of wealth distinctions and of infringements on the right to vote).

[326] *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (Marshall, J., concurring) (arguing that the Court should consider the interest at stake); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (same); Dandridge v. Williams, 397 U.S. 471, 519–21 (1970) (Marshall, J., dissenting) (same).

[327] Recall that even *Washington v. Davis* acknowledged that, in evaluating the "totality of the relevant facts," courts could consider "the fact, if it is true, that the law bears more heavily on one race than another," thus adopting the position that discrimination could be inferred from disproportionate harm. Washington v. Davis, 426 U.S. 229, 242 (1976).

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to the degree as well as the fundamental nature of harms imposed upon non-Whites.[328]

3. *The Irrelevance of Context*

Not only would the malice standard require animus, it would also require direct proof of individual mindsets, concomitantly mandating indifference to the abundant contextual evidence demonstrating the discriminatory purposes behind school segregation. Such contextual evidence lay manifest in the systematic material harm done to Black children, including inferior school buildings, truncated curricula, tattered or missing textbooks, and dilapidated grounds and facilities. It also lay bare in the larger context, in local patterns of racial degradation and stigmatized separation, a social order founded on racial hierarchy, and a history of racism running directly from Jim Crow through the Black Codes and back to slavery. In other words, proof of purposeful mistreatment lay plain for all to see—but in exactly the harms and contextual evidence eschewed by *Feeney*, *Mobile*, *Memphis*, and *McCleskey*. Thomas compiled the soothing words of segregation's supporters, quoted above, to bolster the colorblind thesis that invidious and benign motives cannot be distinguished.[329] But the distinction between Jim Crow and affirmative action is unknowable only if one abjures all attention to context—exactly as malicious intent

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[328] Daniel Ortiz argued to the contrary, positing that disparate approaches in discriminatory intent cases from *Davis* through *McCleskey* roughly tracked the kind of harm addressed. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1107 (1989) (arguing that intent serves as a way of "judging substantive outcomes"). He theorized that the Court formulated a more stringent standard for proving intent where it deemed less important interests at stake, such as in the employment context, and a more forgiving standard regarding more vital interests, such as in the voting and criminal contexts. *See id.* at 1140–42 (noting that the Court requires real intent in some contexts and not in others). This story first required Ortiz to misconstrue the stringency of *Davis* and *Arlington Heights* to buttress his claim that the Court disfavored challenges to racial discrimination in ordinary social and economic legislation. He equated the standard in those cases with that developed in *Feeney*. *See id.* at 1113 (grouping *Davis*, *Arlington Heights*, and *Feeney* together analytically). Additionally, it required him to ignore *Mobile* rather than engage a case that contradicted his thesis that the Court favored claims of discrimination in central areas like voting (giving *Mobile* only a single sentence, *id.* at 1126), and to explain away the nearly insurmountable evidentiary hurdle in *McCleskey* (a case Ortiz conceded "cast doubt" on his thesis, *id.* at 1142). At its root, Ortiz's analysis suffered because he ignored both chronology and judicial divisions in analyzing a doctrine that shifted remarkably over the span he considered. Reading discriminatory intent cases from *Davis* in 1976 to *McCleskey* in 1987 as if they were issued more or less contemporaneously by a single monolithic decisionmaker invited an ultimately unpersuasive rationalization of these decisions. For a similar, and similarly unpersuasive, static approach to intent doctrine, see Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998), which attempts to use process theory of the sort proposed by Ely and Brest in the early 1970s to explain divergences in intent doctrine from *Davis* through *McCleskey*.

[329] *See supra* notes 314–16 and accompanying text.

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demands. Laboring under the injunction that animus be proved, and handicapped by the putative irrelevance of actual harm, a court using the malice approach would have found itself blind to what all could see.[330] A court so bound would have struggled to declare discrimination in Whites-only schools unconstitutional. Put bluntly, malicious intent fails the *Brown* test. There could hardly be a more profound indictment of contemporary intent doctrine.

4. *Colorblindness as Cover for Intent Doctrine's Failings*

Intent doctrine is rarely indicted for failing the *Brown* test.[331] One suspects that this is because most contemporary commentators accept the bifurcation of equal protection that gave rise to colorblindness and malicious intent in the first place. Though intent doctrine would not apply in *Brown*, under today's divided equal protection ostensibly this is no cause for alarm because colorblindness would ensure the right result. This response, which requires that one credit the story about equal protection first told by Powell in *Bakke* and Stewart in *Feeney*, directs attention anew to the concurrent rise of colorblindness and malicious intent. Once one dismisses the colorblind conceit that it, and not a contextual intent analysis, defeated Jim Crow, it becomes obvious that malicious intent should be measured against de jure segregation. Contextual intent dismantled Jim Crow, and intent's modern incarnation should at least be capable of this most basic task. But it is not. The fact that this critique is virtually never made testifies to yet another debt malicious intent owes to colorblindness. The malice cases betray *Brown*, yet hide from indictment in shadows deepened by colorblind mythmaking.

B. Intentional Blindness

The malice test would likely fail to find discrimination even in situations of Jim Crow segregation. Yet, however devastating this point, care must be taken not to overly emphasize malicious intent's shortcomings as a means for detecting discrimination. If anything, this critique is too generous. To stress malice doctrine's failure to find discrimination risks taking malicious intent doctrine too seriously, for it assumes that this doctrine actually aims to disinter discrimination. It does not. This section takes another look at *McCleskey* and its

330 *Cf.* Ho Ah Kow v. Nunan (*Queue Ordinance Case*), 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6546) (Field, J.) ("Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.").

331 *But see* Strauss, *supra* note 8, at 964 ("[T]he decisive argument against the 'malice' approach is that it cannot account even for the core case like *Brown* or *Gomillion*.").

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antecedents, and concludes that the malice test was adventitious. Its staunchest supporters seemed prepared to reach the same results even without it; never once looked at the minds of government officials; and in fact repudiated the basic approach they purported to champion, strenuously objecting to dissecting the thinking of state officials. The malice test was never about proving malice.

So what work *did* malicious intent do? Its proponents consistently voted in discrimination cases as if the mistreatment of non-Whites no longer occurred. Given their predispositions, rather than criticize malicious intent for imposing an excessively stringent evidentiary rule, a different critique altogether seems in order. The more appropriate criticism is rather that malicious intent developed as a technique for *not* finding discrimination. At root, the conservative Justices used the malice test to defend themselves from evidence tending to prove discrimination against non-Whites.

1. Unnecessary Malice

Powell's demand for direct proof of animus allowed the quick disposal of the Baldus study, and so might be thought critical to the rejection of McCleskey's discrimination claim. But the malice test proved merely expedient, not necessary, to its rejection. Using the same statistical and historical evidence, McCleskey challenged Georgia's capital regime under both the Fourteenth Amendment's guarantee of equal protection as well as the Eighth Amendment's prohibition of cruel and unusual punishment. While intent doctrine applied for proving an equal protection violation, the standard under the Eighth Amendment was different, requiring instead a showing that capital punishment was "irrationally imposed."[332] As a result, the majority in its Eighth Amendment analysis had no choice but to confront the statistical evidence directly. It was forced, for instance, to grapple with the fact that the Baldus study showed that Georgia put to death African Americans who killed Whites at *twenty-two times* the rate it executed Blacks who murdered Blacks.[333] Unable to sidestep the study's substance, Powell nevertheless easily dismissed it. In the course of a single paragraph he described the numbers as indicating "[a]t most . . . a discrepancy that appears to correlate with race"; shifted to the even more nebulous language of "apparent disparities" and "imperfections"; and then announced, "we decline to assume that what is unexplained is invidious."[334]

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[332] McCleskey v. Kemp, 481 U.S. 279, 328 (1987) (Brennan, J., dissenting).
[333] *Id.* at 286 (majority opinion).
[334] *Id.* at 312–13.

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The Eighth Amendment claim acts as a kind of litmus test for what the conservative Justices thought of the Baldus study. Without that claim, one could argue that the majority dispatched the Baldus study because the malice standard required them to do so. But their treatment of the Eighth Amendment argument shows that even when they had no legal reason (such as the malice doctrine) for giving the study's evidence of rampant discrimination no legal weight, they still dismissed it. With a depressing economy of words, Powell neutralized the report in a quick slide from "discrepancy" through "apparent disparity" and "imperfection" to the merely "unexplained." In this aspect of the case, *McCleskey* seems reminiscent of *Arlington Heights*. Required by the doctrine to confront disturbing evidence, the majority—and Powell in particular—simply dismissed its damning thrust.[335]

2. *No Evaluation of Actual Motives*

The sense that the malice test did not drive the results finds additional support insofar as the Court *never* investigated the thinking of contemporary government officials charged with mistreating non-Whites. There is not a single case in which the Court examined a contemporary state actor's subjective purpose to discriminate against non-Whites. True, the Court in 1985 arguably employed malicious intent to strike down an Alabama felony disenfranchisement law.[336] But in that case the Court probed the mindset of defendants long since dead, the attendees at a 1901 Alabama constitutional convention at which even Rehnquist conceded the "zeal for white supremacy ran rampant."[337] Also, as shall be detailed later, the Court in the 1990s did focus on motives to find unconstitutional discrimination—but only when overturning *remedial* efforts, not in cases involving the racial mistreatment of non-Whites.[338] To reiterate, though the Court claimed to require proof of malicious intent, in no case alleging discrimination against non-Whites did the Court parse the precise mindsets of contemporary government officials. This goes beyond the claim, also true, that no decision ever employed malicious intent to strike down racial mistreatment by current officials.[339] The point here is more

335 *See supra* notes 133–41 and accompanying text (discussing the majority's failure to acknowledge the contextual factors present in *Arlington Heights*).

336 *See* Hunter v. Underwood, 471 U.S. 222, 230–31 (1985) ("[The law] was enacted with the intent of disenfranchising blacks.").

337 *Id.* at 229.

338 *See infra* Part VII.B (discussing classificatory intent as grounds for overturning remedial efforts in the *Shaw v. Reno* line of voting rights cases).

339 After *Mobile*, the few cases finding racial discrimination against non-Whites came when the Court employed a contextual intent approach, typically over the strong objection

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denunciatory than that. The point is that in no case, win or lose, did the Court ever even *look* at the actual motives of today's government officials. Malicious intent doctrine simply never operated to investigate motives.

3. *Malicious Intent as Unseemly Inquiry*

Nor was this utter lack of attention to actual mindsets a surprise, given the strident objections to inquiries into motives lodged by malicious intent's erstwhile supporters. Consider the vigorous objections to such inquiries raised by Stevens[340] and Powell[341] in response to *Rogers v. Lodge*. *Rogers* was another Deep South case—like *Mobile*, two years earlier—challenging racial discrimination in the use of an at-large voting scheme. But in *Rogers*, Stewart, Burger, and Blackmun sided with White, Brennan, and Marshall, the dissenters in *Mobile*, perhaps because *Mobile* had generated substantial criticism, including congressional action.[342] *Rogers* briefly resuscitated the contextual intent approach. Writing for the majority, White started by quoting his opinion in *Davis* that discriminatory intent "may often be inferred from the totality of the relevant facts."[343] From there, he built a historical and sociological analysis in stark contrast to the subjective approach in *Mobile* and *Memphis*.[344] *Rogers* demonstrates once again the contextual method's deep roots as well as its capacity to detect mistreatment.

More important here, though, are the outraged dissents by Stevens and Powell, the authors respectively of *Memphis* and *McCleskey*. Stevens assailed the "costs and the doubts associated with litigating questions of motive."[345] How, Stevens wondered, was invidious intent to be measured? "Assuming that it is the intentions of the 'state actors' that is critical, how will their mental processes be discovered? . . . What if different motives are held by different legislators or, indeed, by a single official?"[346] Stevens warned, "case-by-case appraisal of the malicious intent of local decisionmakers cannot

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of those favoring the malice standard. For post-*Mobile* cases employing contextual intent to find discrimination against non-Whites, see *infra* Part VI.B.3 discussing *Rogers v. Lodge*, 458 U.S. 613 (1982), and *infra* notes 396–98 and accompanying text discussing *Batson v. Kentucky*, 476 U.S. 79 (1986). *See also* Miller-El v. Dretke, 545 U.S. 231 (2005) (discussing the use of relevant facts to ascertain intent).

340 *Rogers*, 458 U.S. at 631.

341 *Id.* at 628.

342 *See supra* note 194 (discussing the amendment of the Voting Rights Act to adopt a "results" test).

343 *Rogers*, 458 U.S. at 618.

344 *See id.* at 625 (describing the relevant historical context).

345 *Id.* at 645 (Stevens, J., dissenting).

346 *Id.* at 647.

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possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment."[347] This seems exceedingly strange coming from the author of *Memphis*, a case that rebuked the plaintiffs precisely because they failed to prove the same "malicious intent of local decisionmakers" that Stevens now insisted "cannot possibly satisfy" the Fourteenth Amendment.[348]

For his part, Powell, joined by Rehnquist, initially repeated the call *for* malicious intent. He reminded the majority that *Mobile* "affirmed that the concept of 'intent' was no mere fiction," and required identification of the specific "state officials whose intent it considered relevant."[349] In addition, Powell objected to "the largely sociological evidence presented," using italics to emphasize his discontent with that type of evidence: "*Mobile* held that this *kind* of evidence was not enough."[350] Powell thus seemed to extol proving the mindset of an identified individual, while criticizing the relevance of social science. Yet just a paragraph later, he complained that under the majority's holding in *Rogers*, "[f]ederal courts thus are invited to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments."[351] Powell disparaged such inquiries as "unseemly,"[352] and insisted that "courts must place primary reliance on [objective] factors to establish discriminatory intent, [which] would prevent federal-court inquiries into the *subjective* thought processes of local officials."[353] For Powell, contextual evidence was suspect, yet inquiries into actual motives were unseemly and should be prevented. The Justices who called for direct proof of malicious intent also rejected its basic method, sometimes from one paragraph to the next.[354]

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347 *Id.* at 643.

348 *See supra* Part V.B.

349 *Rogers*, 458 U.S. at 628–29 (Powell, J., dissenting).

350 *Id.* at 629.

351 *Id.*

352 *Id.* (quoting Karst, *supra* note 57, at 1164–65).

353 *Id.* at 631.

354 Compare Scalia's position in *McCleskey* with his dissent the same term in *Edwards v. Aguillard*, 482 U.S. 578 (1987), an Establishment Clause case involving the evaluation of purpose. Scalia wrote at length explaining why "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." *Id.* at 636 (Scalia, J., dissenting). This dissent would have made considerable sense attached to *McCleskey*, in which Scalia silently concurred in Powell's demand for proof of malicious intent. McCleskey v. Kemp, 481 U.S. 279, 282 (1987). It made much less sense attached to a First Amendment case, where the Court continues to discern purpose contextually. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that the Court has

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4. *See No Evil*

One might marvel that Stevens and Powell aimed these barbs at the majority opinion in *Rogers*, which manifestly did not rest on malicious intent. Perhaps they did so because they objected to the result in *Rogers*, and the majority's use of "intent" opened it up to every critique of that approach, no matter how inapposite to the contours of the intent test actually used. As we have seen previously, it is almost *de rigueur* to besmirch any reference to "intent" as requiring an intrusive and illegitimate mind probe.[355] But the more pressing question is why, in *Memphis* and *McCleskey*, they failed to take their own well-warranted objections to investigating subjective intent to heart. If they knew that "case-by-case appraisal of the malicious intent of local decisionmakers" could not satisfy equal protection, and regarded such investigations as "unseemly," why did they nevertheless endorse malicious intent in key cases?

The resolution seems to be that the malicious intent cases were never truly about discovering discriminatory mindsets. Justices from *Feeney* to *McCleskey* were prepared to uphold the challenged practices with or without the animus standard. They never looked for governmental motives. In fact they correctly, if opportunistically, opposed inquiries into actual mindsets. Upon reconsideration, malicious intent disguised the real action: the consolidation of a majority of Justices disposed to find no discrimination against non-Whites. The repeated exhortations to prove malice were never about calling for evidence of illicit motives, so much as about excluding contextual proof of continued discrimination against non-Whites.[356]

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developed First Amendment doctrine to "flush out illicit motives" by analyzing the effects of legislation).

355 *See supra* note 150 and accompanying text (discussing similar critiques of *Davis*).

356 Stevens's decision in *Memphis* is especially perplexing. It lies in considerable tension with his other writings on malicious intent. In *Davis*, Stevens concurred in order to clarify that intent should be inferred from foreseeable consequences. Washington v. Davis, 426 U.S. 229, 253 (1976). In *Mobile*, Stevens concurred in the result, but wrote separately to say: "I do not believe that it is appropriate to focus on the subjective intent of the decisionmakers." City of Mobile v. Bolden, 446 U.S. 55, 90 (1980) (Stevens, J., concurring). In both *Mobile* and *Rogers*, Stevens wrote that the electoral systems were partly rooted in illicit racial motivations. *See id.* at 92 ("I am persuaded that some support for [retention of Mobile's commission system of government] comes . . . from members of the white majority who are motivated by a desire to make it more difficult for members of the black minority . . . ."); *Rogers*, 458 U.S. at 647 (Stevens, J., dissenting) ("Undoubtedly, the evidence . . . proves that racial prejudice has played an important role in the history of Burke County . . . ."). He voted to uphold them not because he thought there was no discriminatory intent, but because he thought the presence of illegitimate motives ought not to constitutionally upend government action undertaken for otherwise legitimate reasons. *See Mobile*, 446 U.S. at 92 (Stevens, J., concurring) ("But I do not believe otherwise legitimate political choices can be invalidated simply because an irrational or invidious purpose

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Recall the colloquy between Marshall and Powell in *Castaneda* regarding the sort of evidence that the Court should consider when evaluating discriminatory mistreatment: Marshall urged attention to racial scholarship while Powell preferred his own hunches. Malicious intent institutionalized Powell's preference not to be confronted by countervailing evidence. From *Feeney* to *McCleskey*, the prevailing Justices refused to credit claims of group mistreatment. Faced with compelling contextual evidence showing discrimination, they did not *refute* this material—they simply refused to engage it. They did not grapple in any meaningful way with the sexism in civil service employment in *Feeney*, the mock lynchings by the police in *Mobile*, the lily-white demographics in *Memphis*, or the history and killing numbers in *McCleskey*. Instead, they invoked malice to nimbly declare such evidence constitutionally irrelevant. In Stewart's pithy formulation, "these gauzy sociological considerations have no constitutional basis."[357] Ultimately, this is a story of judicial closed-mindedness, of an unwillingness to engage with and thus potentially learn about the operation and evolution of an enduring form of injustice. The intentional blindness of the malice test represents not a genuine application of equal protection law, but a successful effort by conservative Justices to protect themselves from discomfiting evidence that racial mistreatment persists.

C. *Indifference to Discrimination*

Did the conservative Justices close the courthouse doors out of ignorance about pervasive discrimination? Or were they aware that racial mistreatment remains ubiquitous in American life? For Warren McCleskey, executed in 1991, the question hardly seems to matter.[358] Whether the court was blinded by obtuseness, indifference, or something else entirely, for those seeking succor from the courts, the bottom line is that the doors are barred. Nevertheless, in fathoming the politics behind the doctrine, it seems a pressing issue whether malice doctrine emerged out of incomprehension about racism—which might suggest one sort of intervention—or instead came despite

played some part in the decisionmaking process."); *Rogers*, 458 U.S. at 645 n.28, 648 (Stevens, J., dissenting) ("A rule that would invalidate all governmental action motivated by racial, ethnic, or political considerations is too broad."). Thus, in both cases Stevens opposed an inquiry into malicious intent. Why, then, his endorsement of malicious intent in *Memphis*? One can only conjecture that Stevens inferred no overriding discriminatory purpose in that case and found the language of malicious intent the most efficacious manner for disposing of contrary evidence.

357 *Mobile*, 446 U.S. at 75 n.22 (1980).

358 Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A18.

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awareness that discrimination continued, implicating a different response.

The evidence suggests the latter. Powell, for instance, sometimes evinced a sophisticated conception of discrimination. Recall his concurrence in *Keyes*, where he cautioned against "the initial tortuous effort of identifying 'segregative acts' and deducing 'segregative intent,'"[359] and instead advocated imposing constitutional liability on government institutions that exercised significant control over domains plagued by racial inequality.[360] Or consider his engagement with discrimination in *Bakke*. There, Powell ruled that attempting to remedy societal discrimination did not constitute a compelling government interest capable of justifying affirmative action.[361] In so concluding, however, he exhaustively detailed various theories of racial mistreatment, ranging from harm to individuals, to group disadvantaging, to the relatively automatic operation of cultural biases.[362] Perhaps, as in *Bakke*, Powell in *McCleskey* fully understood the thrust of the Baldus study that relentlessly documented the influence of race on who lived and died at Georgia's hands, but nevertheless set this bitter truth to the side.[363]

If this suspicion is tentative with respect to Powell, it seems entirely warranted against Scalia. In an internal memo supporting a draft of the *McCleskey* opinion, Scalia acceded to the majority's demand for proof of malice.[364] Nevertheless, he made clear he did not believe there was insufficient proof regarding racial mistreatment. On the contrary, Scalia acknowledged that unconscious racial antipathies permeated Georgia's criminal justice system, from juries to prosecutors. From Scalia's point of view, however, unconscious racism was simply an "ineradicable" reality that the courts should ignore.[365]

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359 Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 224 (1973) (Powell, J., concurring).

360 *Id.* at 224, 227–28.

361 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307–09 (1978).

362 *See id.* at 306 n.43.

363 One might have hoped that his understanding of discrimination played a role when, some years after retiring from the bench, Powell came to regret his vote in *McCleskey*, concluding that capital punishment should be held unconstitutional. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994). According to his biographer, though, Powell's principal objection lay elsewhere. For Powell, "the death penalty should be barred, not because it was intrinsically wrong but because it could not be fairly and expeditiously enforced. The endless waiting, merry-go-round litigation, last-minute stays, and midnight executions offended Powell's sense of dignity and his conception of the majesty of the law." *Id.* at 452.

364 Memorandum from Justice Scalia to the Conference Re: No. 84-6811, McCleskey v. Kemp (Jan. 6, 1987) (reprinted in Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 528 (1995)).

365 *Id.*

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Challenging the opinion's thin pretense that no correlation with race could be discerned, Scalia stated baldly: "I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal."[366] For Scalia, the issue was not a lack of proof of systemic bias, but its legal irrelevance. "Since it is my view that unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is *real . . . and ineradicable*, I cannot honestly say that all I need is more proof."[367] For Scalia, racism is simply part of the world in which we live, and the law has no role to play, even when the stakes include state decisions to kill.[368]

Intentional blindness, not intentional ignorance, more aptly characterizes the racial jurisprudence of the Supreme Court's conservatives. They seem to understand that racism is a pervasive problem, yet oppose using the courts and the Constitution to contribute to the solution.

VII

INTENT *IN* COLORBLINDNESS, INTENT *AS* COLORBLINDNESS

Two years after *McCleskey*, *City of Richmond v. J.A. Croson Co.* marked the arrival of colorblindness as a doctrine commanding the allegiance of a majority of the Justices.[369] The next year, in a last gasp, Brennan and Marshall voted together to uphold a race-conscious remedy one final time.[370] When Brennan and then Marshall left the Court in 1990 and 1991, their departures facilitated the consolidation of intentional blindness.

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366 *Id.*

367 *Id.* (emphasis added).

368 Similarly acknowledging—and, indeed, encouraging—the ubiquity of racial bias in a jury discrimination case the year before *McCleskey*, Rehnquist, joined by Burger, suggested that discrimination in peremptory challenges would be lawful so long as widely practiced. "In my view, there is simply nothing 'unequal' about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants," Rehnquist wrote, "so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on." Batson v. Kentucky, 476 U.S. 79, 137–38 (1986) (Rehnquist, J., dissenting). He explained: "Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But," Rehnquist insisted, "as long as they are applied across-the-board to jurors of all races and nationalities, I do not see—and the Court most certainly has not explained—how their use violates the Equal Protection Clause." *Id.*

369 City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

370 *See* Metro Broad. Inc. v. FCC, 497 U.S. 547 (1990) (upholding a preference for racial diversity in broadcast licenses, in what would turn out to be Justice Brennan's last majority opinion).

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On one level, the instability of the previous period gave way to repeated holdings in favor of malice as well as colorblindness.[371] After 1991, with very rare exceptions the Court consistently applied the malice test to find no discrimination and struck down all race-conscious remedies. Moreover, from *Feeney* through *Grutter v. Bollinger*, the same Justices crafted both doctrines—and when non-Whites prevailed, this occurred only when a swing-vote Justice such as Powell or O'Connor switched sides, temporarily resulting either in a return to the contextual intent approach or to a lower level of judicial review capable of acknowledging the importance of remedying discrimination.

On another level, doctrinal consolidation also occurred. Colorblindness and malice increasingly melded. To begin with, colorblindness adopted the evidentiary techniques of malice, dismissing evidence of discrimination against non-Whites while inferring White innocence. More strikingly, colorblindness also colonized the intent test, turning it into an ersatz colorblindness rule. It did so by shifting the focus of the intent doctrine from a search for malice, which is to say a conscious intent to harm, to a search for a conscious decision to use race. This Part brings the entwined development of colorblindness and malicious intent into the present. It describes how contextual and malicious intent inform affirmative action decisions and how intent doctrine has been repurposed as an attack on race-conscious remedies. It ends by assessing how the Roberts Court threatens to widen the domain of malicious intent.

A. Contextual Inferences and Double Standards: Croson

In *Mobile*, Stewart boldly declaimed: "[G]auzy sociological considerations have no constitutional basis."[372] As demonstrated, he meant that proof of discrimination against non-Whites would have to be direct. Inferences of innocence, on the other hand, could be loosely based—say on the need for discretion in death sentencing, concerns over traffic, the widespread use of at-large elections, or a legitimate desire to help veterans. Colorblindness would import this double standard into cases evaluating affirmative action. Judgments favoring Whites would rest on loose inferences and unexamined suppositions, even as non-Whites would be forced to prove with specificity prior

[371] There are only a few exceptions. *See* Miller-El v. Dretke, 545 U.S. 231 (2005) (O'Connor and Kennedy accept contextual intent to uphold jury exclusion claim); Grutter v. Bollinger, 539 U.S. 306 (2003) (O'Connor accepts affirmative action in higher education); Easley v. Cromartie, 532 U.S. 234 (2001) (O'Connor shifts to uphold the use of race in majority-minority districting).

[372] City of Mobile v. Bolden, 446 U.S. 55, 75 n.22 (1980).

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discrimination if they hoped to show that affirmative action was warranted.

1. Inferring Innocence

With a population over half Black, Richmond, Virginia, had for years allocated over ninety-nine percent of its construction contracts to White-owned firms.[373] Aiming to break this pattern, in 1983 the Richmond City Council adopted a set-aside program to channel construction dollars to minority-owned businesses.[374] Writing for the new colorblind majority, O'Connor stressed the risks of discrimination—against Whites—associated with affirmative action. To show this sort of mistreatment, O'Connor did *not* examine actual motives, as virtually the same Justices had recently insisted in *McCleskey* would be required to prove discrimination.[375] At no point did the Court parse the intentions of the Richmond City Council. Indeed, as Marshall noted in dissent, there was no "direct evidence that the city council's motives were anything other than sincere."[376] Rather, O'Connor employed inferential techniques, relying on contextual generalities. For instance, she insinuated the possibility of self-dealing by an empowered majority (Blacks) at the expense of a disempowered minority (Whites) by stressing that Blacks accounted for half of Richmond's population and five of the nine city council members.[377] In addition, she grew suspicious because Richmond's definition of the beneficiary class included "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[378] For O'Connor, the class breadth "strongly impugn[ed] the city's claim of remedial motivation."[379] Yet there was an obvious explanation: The city had modeled its program on the federal set-asides upheld in *Fullilove*, which defined minority business enterprises in precisely the same way.[380] O'Connor's decision to use a readily explicable element of the set-aside to "strongly impugn" Richmond's motives indicated a willingness to make damning inferences of discrimination on little hard evidence. Indeed, it suggested a powerful predisposition to distrust affirmative action's supporters.

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373 *Croson*, 488 U.S. at 479–80 (1989).

374 *Id.* at 477–78.

375 Stevens switched from the dissent in *McCleskey* to the majority in *Croson* and Kennedy replaced Powell.

376 *Croson*, 488 U.S. at 546 (Marshall, J., dissenting).

377 *Id.* at 495 (majority opinion).

378 *Id.* at 478 (citation omitted).

379 *Id.* at 506.

380 *Id.* at 550 n.11 (Marshall, J., dissenting).

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The other Justices who wrote separately in favor of colorblindness joined in this profound suspicion. Stevens referred repeatedly to Whites as "the disadvantaged class," and worried that the set-aside program "might be nothing more than a form of patronage."[381] Kennedy lamented that "[w]e are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause . . . corrosive animosities . . . ."[382] Scalia warned against "the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group."[383] As in *McCleskey*, *Memphis*, *Mobile*, and *Feeney*, one sees a contextual approach to evaluating discrimination—but one available only to buttress intuitions of White innocence, and in the line of cases that followed *Croson*, White victimization.[384]

2. *Identified Discrimination as Malicious Intent*

In contrast to the loose inferences regarding the mistreatment of Whites, the colorblind affirmative action cases demand exacting proof of prior mistreatment against non-Whites. Affirmative action would be justified, these decisions hold, only if structured to remedy "identified discrimination" (or, in the higher education setting, to promote

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381 *Croson*, 488 U.S. at 516 & n.9 (Stevens, J., concurring in part and concurring in judgment).

382 *Id.* at 519–20 (Kennedy, J., concurring in part and concurring in judgment).

383 *Id.* at 524 (Scalia, J., concurring).

384 *Cf.* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993) (using the concept of "veiled majoritarianism" to argue that in numerous ways the Supreme Court protects Whites rather than non-Whites). Late in her Supreme Court tenure, O'Connor did come to recognize that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause"—or, more precisely, when upholding as well as when overturning race-based governmental action. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

Continuing the theme of double standards, Justices typically hostile to any recourse to social science in evaluating discrimination claims nevertheless seemed quite willing to cite social scientists who deny ongoing racial stratification. For instance, compare Clarence Thomas's usual disdain for social science with his fondness for the work of Stephan and Abigail Thernstrom. *Compare* Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) ("The judiciary is fully competent to make independent determinations concerning the existence of [intentional discrimination] without the unnecessary and misleading assistance of the social sciences."), *with* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 761 (2007) (Thomas, J., concurring) (citing BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (A. Thernstrom & S. Thernstrom eds. 2002)), *id.* at 763 (citing A. THERNSTROM & S. THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING (2003)), *Grutter*, 539 U.S. at 371 (Thomas, J., concurring) (citing Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. REV. 1583 (1999)), *and* Holder v. Hall, 512 U.S. 874, 894 (1994) (Thomas, J., concurring) (citing A. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987)).

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diversity).[385] But as it turns out, identified discrimination functions similarly to malicious intent: first, as a basis for rejecting contextual evidence, and second, as a receding mirage.

Croson represents the first majority adoption of the "identified discrimination" test, casting this in contrast to "societal discrimination." Ostensibly, the latter was "an inadequate basis for race conscious classifications," while the former "can support and define the scope of race-based relief."[386] But what would be required to establish the requisite discrimination? Ambiguity surrounded "identified discrimination," with O'Connor unhelpfully extolling "the particularity required by the Fourteenth Amendment"[387] and later suggesting the need to prove "a prima facie case of a constitutional or statutory violation."[388]

Ultimately, however, this ambiguity mattered little. Identified discrimination paralleled malicious intent in operating like an unreachable standard against which each piece of evidence was to be separately measured, found wanting, and quickly dismissed. In *Croson*, the local and state contractors' associations were almost all White. Repeating the technique of evidentiary disaggregation from the malice cases, O'Connor rejoined: "[S]tanding alone this evidence is not probative of any discrimination in the local construction industry."[389] A city council member testified to pervasive discrimination in the local, regional, and national construction field. O'Connor declared: "These statements are of little probative value in establishing identified discrimination in the Richmond construction industry."[390] Congress had found nationwide racial discrimination in construction. But, O'Connor insisted: "The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited."[391] "In sum," she concluded, "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry."[392] As with malicious intent, the identified discrimination standard neatly absolved the

385 In addition to crafting "diversity" as a justification for affirmative action in the university setting, Powell also introduced the term "identified discrimination." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307, 322–24 (1978). In a 1986 plurality opinion, he suggested that affirmative action would require a showing of prior discrimination to justify a race-conscious remedy. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

386 *Croson*, 488 U.S. at 497.

387 *Id.* at 492.

388 *Id.* at 500.

389 *Id.* at 503.

390 *Id.* at 500.

391 *Id.* at 504.

392 *Id.* at 505.

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Court of having to engage with the contextual evidence that demonstrated ongoing patterns of racial stratification. In the former capital of the Confederacy—a city half Black but where ninety-nine percent of the municipality's construction dollars went to White-owned firms—the conservative Justices could perceive no evidence of discrimination against non-Whites.

Identified discrimination parallels malicious intent not only in dismissing probative evidence, but also in receding as a mirage. Just as the Court has never found the subjective intent required to strike down contemporary discrimination against non-Whites, the Court has never found the identified discrimination that would justify an affirmative action program. Marshall's dissent in *Croson* gave special attention to its status as the first case in which the majority used colorblindness to justify strict review of race-conscious remedial measures. Insisting that "[a] profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism,"[393] Marshall reiterated his admonition in *Fullilove* that "[remedial] programs should not be subjected to conventional 'strict scrutiny'—scrutiny that is strict in theory, but fatal in fact."[394] O'Connor dismissed this charge: "Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."[395] Almost three decades later and counting, we know this to be false. There is no case in which the Court has upheld a race-conscious remedy because it responds to identified discrimination. A Supreme Court finding of either malicious or identified discrimination remains a purely theoretical proposition.

B. Colorblindness by Another Name: Shaw v. Reno

Colorblindness absorbed the evidentiary techniques of malicious intent and then colonized the doctrine itself, resulting in a monocular focus on express uses of race. The takeover began in jury discrimination cases. In 1986, in the midst of a period otherwise marked by the move toward malicious intent, the Court in *Batson v. Kentucky* applied a contextual approach to alleged discrimination in the prosecutorial exercise of peremptory challenges.[396] Under *Batson*, once a challenger demonstrated that non-Whites were disproportion-

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393 *Id.* at 551–52 (Marshall, J., dissenting).

394 *Id.* at 552.

395 *Id.* at 509 (majority opinion).

396 *See* Batson v. Kentucky, 476 U.S. 79, 96–97 (1986) ("In deciding whether the defendant has made the requisite showing [of discrimination], the trial court should consider all relevant circumstances.").

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ally underrepresented on a jury, prosecutors had to adduce a "neutral explanation" for the imbalance.[397] At the time, the emphasis was clearly on the word "explanation"—to rebut the inference of discrimination, the proffered justification had to "explain adequately" the challenged disparity.[398] In 1991, the newly consolidated conservative bloc responded by interpreting *Batson* to require something like an in-court confession of race-consciousness. "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is *inherent* in the prosecutor's explanation, the reason offered will be deemed race neutral."[399] Several years later, the Court took this point even further, advising that the Constitution "does not demand an explanation that is persuasive, or even plausible"—or, indeed, even one that "makes sense" or manages not to sound "silly or superstitious," "implausible or fantastic."[400] Confronted with a prima facie case of racial discrimination, the Court obligated prosecutors to do no more than string together words, even if nonsensical, that managed not to refer to race.[401] The Court in effect modified discriminatory intent to what might be termed "classificatory intent." The decision to use race, as measured solely through its express mention, emerged as the constitutionally suspect behavior. This was, of course, a deeply ironic evolution for a doctrine the Court only applied *absent* any express use of race. When race was not expressly used, the test for a constitutional violation became essentially an express confession to the use of race. Unsurprisingly, at least in the jury discrimination setting, classificatory intent amounted to just another way to lose.

Yet classificatory intent soon gained greater significance in the voting rights area. In *Shaw v. Reno* in 1993, the Court overturned a congressional district expressly drawn to include a majority of

397 *Id.* at 97.

398 *Id.* at 94.

399 Hernandez v. New York, 500 U.S. 352, 360 (1991) (emphasis added).

400 Purkett v. Elem, 514 U.S. 765, 768–69 (1995).

401 A similar shift was underway in the statutory realm. Under *McDonnell Douglas Corp. v. Green*, discriminatory intent was to be inferred if a prima facie case of disparate treatment was first shown, and if the employer then failed to offer a credible, nondiscriminatory reason for the challenged action. 411 U.S. 792, 802 (1973). In *St. Mary's Honor Center v. Hicks*, Scalia for the majority upended this inferential rule, announcing that even if the employer's proffered explanation was implausible, it might nevertheless have acted for some nondiscriminatory reason it did not bother to "allege" in court. 509 U.S. 502, 510–11 (1993). To prevail, the plaintiff had to disprove the employer's pretexts and also affirmatively prove intentional discrimination. *See id.* at 517; *see also* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 146–47 (2000) (reiterating the reasoning of *St. Mary's Honor Center*, while clarifying that it "is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation").

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African-American voters.[402] Acting under pressure from the Department of Justice, North Carolina had begun to remedy a history of political disempowerment by creating majority-minority districts, leading to the state's first Black congressional representatives since Reconstruction.[403] Despite the urging of the White challengers, O'Connor sidestepped an outright application of colorblindness. Instead, she turned to the intent test, and in particular to the Tuskegee gerrymandering case, *Gomillion*.[404] In doing so, however, O'Connor encountered a major problem. As a contextual case, *Gomillion* had asked whether the facts warranted a judicial inference of a harmful purpose.[405] Here, in the remedial context, no purpose to harm Whites existed.[406]

O'Connor responded by reinterpreting *Gomillion*, introducing a nonsensical distinction between purpose and motive. O'Connor asserted that the relevant inquiry was whether there existed a "purpose" to use race. If so, O'Connor declared, the underlying "motive" was irrelevant. *Gomillion*, O'Connor claimed, stood for the proposition that "district lines obviously drawn for the *purpose* of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the *motivations* underlying their adoption."[407] "Purpose" here seemed to mean an intent to use race; it no longer referred to an intent to harm (or help).[408]

Moreover, the new "classificatory intent" would be read directly from conduct. Thus, *Shaw* announced a Fourteenth Amendment claim against a majority-minority district if a court could detect "an *effort* to segregate voters into separate voting districts because of their

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402 509 U.S. 630 (1993).

403 *See id.* at 676 (Blackmun, J., dissenting).

404 *See id.* at 644–45 (majority opinion).

405 *See supra* notes 44–45 and accompanying text.

406 In this sense, *UJO* offered the more appropriate precedent, as White's dissent pointed out. *Shaw*, 509 U.S. at 658 ("The facts of this case mirror those presented in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, where the Court rejected a claim that creation of a majority-minority district violated the Constitution.") (citing 430 U.S. 144 (1977)).

407 *Id.* at 645 (majority opinion) (emphases added).

408 Further integrating intent doctrine within colorblindness, O'Connor cited to *Washington v. Davis* to support her claim that equal protection's "central purpose is to prevent the States from purposefully *discriminating* between individuals on the basis of race. Laws that explicitly *distinguish* between individuals on racial grounds fall within the core of that prohibition." *Id.* at 642 (emphases added) (citation omitted). The equation of "discriminating" and "distinguishing" converted *Davis* into a ban on intentional racial distinctions rather than intentional harm.

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race."[409] The new intent test effectively abandoned any concern with intentions, whether labeled purposes or motives. Instead, it was solely concerned with the express use of a racial classification. Classificatory intent operated directly as a colorblindness rule.

Applying this new version of intent doctrine, *Shaw* staged an elaborate charade. The majority purported to carefully scrutinize the challenged district for telltale signs that race had been considered, when all parties candidly admitted race-conscious decisionmaking. As White said in dissent: "The State has made no mystery of its intent, which was to . . . improv[e] the minority group's prospects of electing a candidate of its choice."[410] Over the next several years, as the Court entertained further challenges to majority-minority districts, this charade grew to comedic proportions. In 1995, Kennedy parsed racial demographics, district shape, and procedural history in attempting to discern whether Georgia had used race to fashion a majority-minority district.[411] Here again the Justices, otherwise inclined to demand proof of malice against non-Whites, were content to employ a contextual approach to measure potential discrimination against Whites. Even more farcical, after this arduous peregrination through contextual evidence, Kennedy capped the case by exclaiming that Georgia had "admitted" and "conceded" race-conscious motives.[412] Indeed, Kennedy found an admission of classificatory intent in the very brief Georgia submitted to the Supreme Court, wherein it confessed "a desire by the General Assembly to create a majority black district."[413] The next year, when *Shaw* returned to the Court a second time, Rehnquist also marshaled the confessions of state actors.[414] Richest of all, Rehnquist cited as evidence of classificatory purpose White's dissent in the first iteration of that case, where White had complained that the state had "made no mystery of its intent, which was to . . . improv[e] the minority group's prospects."[415] The hitherto fruitless search for illicit purposes was suddenly fecund, detecting evidence of discriminatory motives even in briefs to the Court and the arguments of fellow Justices.

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[409] *Id.* at 658 (emphasis added). Disregarding the tendentious quality of the term "segregate," this was of course the very method employed in crafting *all* majority-minority districts.

[410] *Id.* at 666 (White, J., dissenting).

[411] Miller v. Johnson, 515 U.S. 900, 917–18 (1995).

[412] *Id.* at 918.

[413] *Id.*

[414] *See* Shaw v. Hunt, 517 U.S. 899, 906 (1996) (citing the "plan's principal draftsman" as testifying that two districts were crafted to be majority Black).

[415] *Id.*

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Intent doctrine as a search for animus had long since atrophied in its ability to detect racial discrimination.[416] As a search for the intentional use of race, it proved similarly feeble in protecting non-Whites. Yet once transformed into a search for classificatory intent, this doctrine gained renewed vigor and sprung to the task of finding unconstitutional action in the effort to promote racial justice.

Even as the *Shaw* line of cases seemed to herald the full ascent of colorblindness, however, these decisions also revealed some hesitancy, especially on O'Connor's part. In *Shaw*, the challengers had urged that the majority-minority districts be reviewed as racial classifications immediately meriting strict scrutiny.[417] O'Connor was deeply sympathetic, seeing in every governmental use of race a threat to the unity of the nation.[418] Yet she did not adopt a formal anticlassification rule. Partly this reflected the history of gerrymandering cases coming under intent doctrine. But it also likely reflected a fear that directly applying a colorblind rule would have imperiled *every* majority-minority district, a result that O'Connor expressly disclaimed.[419] Though the *Shaw* cases converted intent into an ersatz colorblindness rule, they did so in a way that preserved modest flexibility. The comedic search for

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[416] Which is not to say that plaintiffs have entirely ceased to bring intentional racial discrimination claims. *Ashcroft v. Iqbal* involved allegations of racial, religious, and national origin discrimination in the arrest and detention of "thousands of Arab Muslim men" in the immediate wake of the September 11, 2001 attacks. 129 S. Ct. 1937, 1942 (2009). Writing for a five-Justice majority, Kennedy drew on the *Feeney* technique of inferring innocence where a legitimate government motive could be imagined: "It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682. He continued: "As between that 'obvious alternative explanation' for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a *plausible* conclusion." *Id.* (emphasis added) (citation omitted) (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 567 (2007)). "Plausible" merits the added emphasis, for the Court was evaluating the claim in the context of a motion to dismiss, where "a court must accept as true all of the [factual] allegations contained in a complaint" and the plaintiff has only to allege a "plausible" claim. *Id.* at 678–79. Even under these most lenient presumptions, the majority's inferences of innocence triumphed, shutting the courthouse doors to evidence that racial and other prejudices contributed to the widespread mistreatment of Arabs and Muslims in the wake of the September 11, 2001 attacks. *Cf.* Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day after September 11*, 72 SOC. TEXT 101, 103–04 (2002) (assessing the legalized hysteria around those perceived to be Arab Muslims after September 11, 2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577–83 (2002) (same).

[417] 509 U.S. 630, 641–42 (1993).

[418] O'Connor warned that a race-conscious reapportionment plan "bears an uncomfortable resemblance to political apartheid," *id.* at 647, and concluded with a paean to a nation in which "race no longer matters." *Id.* at 657.

[419] *Id.* at 642. In *Easley v. Cromartie*, 532 U.S. 234 (2001), when the original *Shaw* case reached the Court for a fourth time, O'Connor abandoned her allies on the right and voted that strict scrutiny was not required in the latest North Carolina majority-minority district.

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intentional uses of race, as well as additional doctrinal innovations carving out other limiting factors, provided a modicum of discretion otherwise unavailable under a rigid colorblind logic.[420] Colorblindness as the automatic application of fatal-in-fact review is severely procrustean. At the very moment in the 1990s that support for colorblindness consolidated on the Court, Justices like O'Connor and occasionally Kennedy seemed to pull back a bit from its most extreme implications. The consolidation of colorblindness, tempered by modest reticence to push its logic imperially outward, defined the most recent past.

C. *Colorblindness Rex:* Parents Involved *and* Ricci

Today, this reticence has evaporated. We are once again in a period of rapid devolution, with a new Supreme Court under the leadership of Chief Justice John Roberts, and with Samuel Alito having replaced O'Connor.[421] The Roberts Court seems determined to fully enforce past colorblind reasoning—indeed, to expand its reach. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the 2007 Seattle and Louisville school integration cases, the Court reprised the basic anticontextualism of colorblindness.[422] For instance, Roberts dismissed the school districts' efforts to preserve integration as "directed only to racial balance, pure and simple."[423] Caricaturing integration as solely concerned with racial balance derogated the many values and aspirations animating the long struggle against continued (and even resurgent) racial segregation in both Seattle and Louisville.[424] Meanwhile, the four dissenters seemed to be talking to themselves in presenting evidence of increasing resegregation in the nation's schools, wasting their time on material the majority treated as no more than "gauzy sociology."[425] The dissenters pounded out detailed local histories of segregation and its evils, ultimately filling

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420 *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 916 (1995) (disfavoring intentional uses of race if race is a "predominant" factor); *Shaw*, 509 U.S. at 644 (disfavoring those districts having a "bizarre" shape); *see also* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1581–86 (2002) (assessing the less stringent application of strict scrutiny in redistricting cases).

421 *Cf.* Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1 ("[O]nly one recent replacement altered its direction, that of Justice Samuel A. Alito Jr. for Justice Sandra Day O'Connor in 2006, pulling the court to the right.").

422 551 U.S. 701 (2007).

423 *Id.* at 726.

424 *Cf.* Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 602 (2008) (linking integration to its underlying ideals).

425 *Compare Parents Involved*, 551 U.S. at 869–72 (Breyer, J., dissenting), *with* City of Mobile v. Bolden, 446 U.S. 55, 75 n.22 (1980) (disparaging "gauzy sociological considerations").

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sixteen pages in the *United States Reports*, but seemed unheard by an indifferent majority disdainful of appeals to "original sin."[426]

More ominously, the Court seemed to contemplate that colorblind ignorance should apply every time a government actor expressly considered race, a possibility that would extend to general policymaking and data collection.[427] Kennedy concurred separately to pointedly warn against the rigid application of a colorblind rule to all general uses of race.[428] Breyer in dissent spelled out the range of policies under threat. [429] Yet Roberts, writing for three other Justices, refused to disavow the possibility that they might soon construe colorblindness to prohibit government decisionmakers from merely considering how race continues to function.[430]

If *Parents Involved* portends the forced imposition of racial blindness on policymakers, *Ricci v. DeStefano* threatens legislative efforts to curtail discrimination by governments as well as public sphere actors.[431] The 2009 New Haven firefighters case effectively replayed the fight between malicious and contextual intent, though this time recast as a conflict between disparate treatment and disparate impact in the context of federal antidiscrimination law. Since *Griggs v. Duke Power* in 1971, there have been two routes for proving unlawful racial discrimination under Title VII: one depending on relatively direct proof of intentional bias (disparate treatment), the other allowing inferences of mistreatment on the basis of contextual evidence, including disproportionate harm to non-Whites (disparate impact).[432] *Ricci* pitted these approaches against each other. Writing for the

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[426] *Compare Parents Involved*, 551 U.S. at 806–22 (Breyer, J., dissenting), *with Mobile*, 446 U.S. at 74 (dismissing evidence of past discrimination as mere reference to "original sin").

[427] *See Parents Involved*, 551 U.S. at 745 (plurality opinion).

[428] *See id.* at 787–90 (Kennedy, J., concurring) (disagreeing with "parts of the [plurality opinion which] imply an all-too-unyielding insistence that race cannot be a factor" in instances when it should be taken into account and arguing that "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body").

[429] *See id.* at 828–29 (Breyer, J., dissenting) (listing statutes that would be threatened by such a ruling).

[430] *See id.* at 745 (plurality opinion) (refusing to discuss the validity of other race-conscious policies).

[431] Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

[432] *See supra* Part I.D (discussing impact and equal protection analysis). Disparate impact had deep roots "among several generations of civil rights activists and sympathetic regulators" before its endorsement in *Griggs v. Duke Power*, 401 U.S. 424 (1971). Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 294 (2011). In 1991, Congress amended Title VII to incorporate the *Griggs* disparate impact approach. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 2000e-2(k)(1)(A)–(B) (2006)).

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Court, Kennedy construed disparate treatment as forbidding any race-based decisionmaking, dramatically shifting disparate treatment from a concern with discrimination to a colorblind focus on the mere use of race.[433] Kennedy then cast this prohibition on considering race as a major limitation on the core of the disparate impact approach—attention to racial context.[434] In effect, the conservative Justices ruled five-to-four that considering racial impact in order to avoid potential discrimination itself constituted racial discrimination. That bears repeating, though the logic induces vertigo: to consider race, even in order to avoid discrimination, *is* discrimination.[435]

Under the malice and affirmative action cases discussed in this Article, when non-Whites allege mistreatment, equal protection blinds

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[433] *See Ricci*, 557 U.S. at 579. Kennedy couched this radical definition of disparate treatment as a "premise": "Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. . . . [E]xpress, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race." *Id.* Defining this as a premise absolved Kennedy of the need to cite any supporting caselaw, and indeed from having to distinguish the various cases that had construed "express, race-based decision-making" in the form of affirmative action as *not* violating disparate treatment. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (finding race-based affirmative action permissible under Title VII); *see also* Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 448–49 (1986) (same); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 516 (1986) (same); *cf.* Johnson v. Transp. Agency, 480 U.S. 616, 641–42 (1987) (finding gender-based affirmative action permissible under Title VII).

[434] Scholars had previously noted that disparate impact required race-consciousness, though they remained sanguine that courts could readily distinguish race-consciousness of the sort involved in combating racism from racism itself. *See* Binion, *supra* note 57, at 455 (noting that courts can easily distinguish between race-conscious policies that enforce versus those that ameliorate racial inequalities); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585 (2003) (noting that "only a very uncompromising court" would hold disparate impact doctrine to be an unconstitutional violation of equal protection). Meanwhile, in *Ricci*, Scalia pointedly warned that "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them." *Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring). What is this coming conflict? It is between a conception of equal protection under which the Constitution prohibits intentional race-based decisionmaking, and a response to discrimination that takes race into account when attempting to discern and respond to racial discrimination. *Cf.* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (discussing the supposed conflict between equal protection and disparate impact).

[435] *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 117 (2010) (assessing the larger implications of a "tautalogy [that] reconstitutes the very concept of discrimination as any antidiscrimination remedy that displaces the expectations of whites with regard to the racial status quo"); *see also* Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 844 (2011) (criticizing "equivalence doctrine" in equal protection, defined as the notion that race-conscious remedies are the equivalent of racial mistreatment).

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courts to their evidence.[436] *Parents Involved* potentially heralds the imposition of racial blindness across government policymakers generally. *Ricci* arguably goes even further in exporting intentional blindness. Because *Ricci* hijacked a federal antidiscrimination statute, its reach extends to all institutions, public and private, covered by that law. Thus, *Ricci* proposes that federal, state, and local governments, as well as other public sphere actors like employers, landlords, and schools, all blind themselves to persistent racial discrimination. Even more perversely, it demands that they do so at the precise moment they seek to combat racial discrimination. A colorblind Fourteenth Amendment may soon come to require, across the whole nation governed by law, only one test for racial discrimination: malicious intent. If it does, malicious intent will continue to work as it has in the courts: as a sure route to finding no discrimination, and as an excuse for intentional blindness toward evidence of continued racial stratification.

CONCLUSION: AN ENCOMIUM TO JUSTICE STEVENS

Upon his recent retirement, it is fitting to close this Article by celebrating Justice John Paul Stevens for his exceptional willingness to learn about racism. Appointed by Republican President Gerald Ford in 1975, Stevens early on doubted the persistence of discrimination against non-Whites and initially opposed affirmative action. [437] Yet unlike most Republican appointees to the Court since the Nixon era, Stevens was not wed to racial know-nothingism. Stevens's dissent in *Fullilove v. Klutznick*, the 1980 decision upholding a set-aside for minority-owned businesses, is especially revealing, for while it showed a Justice deeply naïve about race in the United States, it also foreshadowed a willingness to intellectually engage. [438]

In *Fullilove*, Stevens confidently opined that the mere passage of laws banning discrimination had largely eliminated that scourge.[439] In the same decision, Stevens also disparaged the decision of Congress to

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[436] Indeed, *Washington v. Davis* specifically noted that Congress retained the power to address racism in ways beyond what equal protection directly proscribed—including disparate impact approaches—and presumably affirmative action as well. 426 U.S. 229, 248 (1976).

[437] The former is demonstrated by his concurrences in *Davis*, *Arlington Heights*, *Feeney*, and *Mobile*, and especially by his opinion in *Memphis*. *See supra* Parts II.B, II.C, IV, V.A, and V.B. The latter is evident from his authorship of the opinion in *Bakke* arguing that civil rights statutes barred affirmative action, as well as from his dissent in *Fullilove* and his concurrence in *Croson*. *See supra* Parts IV.A and VII.A.

[438] *See* Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting).

[439] *Id.* at 539–40 ("[I]t is appropriate to presume that [antidiscrimination laws have] generally been obeyed.").

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allow Latinos and Native Americans to benefit from affirmative action because, in effect, the former had snuck across the border while the latter had already had their chance: "[T]he 'Spanish-speaking' subclass came voluntarily, frequently without invitation, and the Indians, the Eskimos and the Aleuts had an opportunity to exploit America's resources before the ancestors of most American citizens arrived."[440] Regarding non-Whites in general, Stevens thought he spied in affirmative action not efforts at racial repair but group rent-seeking. Three times Stevens characterized calls for minority set-asides as an effort to seize "a piece of the action."[441]

Yet *Fullilove* also evidenced Stevens's openness to alternative views on race. In comparing the position of the various racial groups, Stevens recognized that "the Negro was dragged to this country in chains to be sold in slavery."[442] Notably, he quoted this line from Marshall's opinion in *Bakke*, where Marshall had expanded the historical and sociological discussion initially offered in *Castaneda* into perhaps the single most well developed and well documented overview of the racial oppression of Blacks ever to appear in a Supreme Court case.[443] Unlike a majority of those appointed to the Court since 1970, Stevens was willing to learn from Marshall. Perhaps Stevens's most striking language in *Fullilove* read as follows:

> In his eloquent separate opinion in *University of California Regents v. Bakke*, Mr. Justice Marshall recounted the tragic class-based discrimination against Negroes that is an indelible part of America's history. I assume that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate classwide recovery measured by a sum certain for every member of the injured class.[444]

Stevens not only complemented Marshall, but was sufficiently swayed to be willing to endorse monetary reparations for African Americans. Perhaps this sentiment should be discounted as rhetorical posturing in an opinion otherwise opposed to affirmative action. Nevertheless, beginning in 1986, Stevens shifted his position on the Court. With the exception of *Croson*, he did not again demand proof of malice or support a colorblind bar on racial remedies. Indeed, by 1995 Stevens would vigorously chastise the partisans of colorblindness:

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[440] *Id.* at 538.

[441] *Id.* at 536, 539, 542.

[442] *Id.* at 538.

[443] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387–96 (1978) (Marshall, J., concurring in part and dissenting in part).

[444] *Fullilove*, 448 U.S. at 537 (citation omitted) (Stevens, J., dissenting).

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> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor.[445]

The reference to Marshall is poignant, for it was from Marshall that Stevens first started to glean the contours of racism. Yet Stevens himself deserves great credit for being willing to learn.[446]

Stevens's trajectory illuminates the irreducible importance of engaging context when giving life to equal protection. In doing so, however, his growth highlights the tragedy of contemporary equality law. We live today under a Fourteenth Amendment jurisprudence geared toward excluding evidence of the evolving mistreatment of non-Whites. Colorblindness disregards the reparative motives that animate affirmative action and renders immaterial the larger context of continuing discrimination in a society otherwise struggling to get past racism. Meanwhile, when evaluating disproportionate harm to non-Whites, malicious intent dismisses historical and sociological evidence of racial stratification—ostensibly because it cannot prove the animus of named culprits.

In this realm of enforced racial blindness, the inference that racism is over reigns unchallenged. The country deserves an equality jurisprudence with eyes open to racial context. True, some Justices and judges would refuse to recognize racial discrimination and would prohibit racial remedies no matter what the evidence showed. But others, like Stevens, are prepared to learn. Whether replaced with the old contextual intent test or with some new approach, equal protection will not again advance racial justice until colorblindness and malicious intent are overthrown. [447]

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[445] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

[446] *Cf.* Linda Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, at A22 (quoting a 2005 speech in which Stevens emphasized "learning on the job" as "essential to the process of judging").

[447] Nor is this utter fantasy. In *Parents Involved*, four Justices supported moving away from strict scrutiny when evaluating remedial uses of race. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 829–30 (2007) (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (stating that the Constitution is "significantly more lenient" toward employing race-conscious criteria to bring the races together). Six Justices also recently voted for a contextual approach to intentional discrimination. *See* Miller-El v. Dretke, 545 U.S. 231, 251–53 (2005) (Souter, Stevens, O'Connor, Kennedy, Ginsburg & Breyer, JJ.) (finding that the prosecutor used racially-motivated peremptory challenges by assessing "all evidence with a bearing on [the challenges]" and the "broader patterns of practice" during jury selection). Even so, too much faith should not be put in Kennedy. Undoubtedly he has emerged as the new swing vote in race cases, and his opinions in *Parents Involved* and *Ricci* mark him as less rigidly committed to colorblindness than the

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The fact that Stevens's arc is so extraordinary confirms the power of politics in the hijacking of equal protection over the last four decades. The Justices appointed by presidents who campaigned against civil rights have overwhelmingly remained loyal to reactionary racial politics. Indeed, they continue their partisan campaigns today. We are assured that opposition to any use of race in *Parents Involved* reflects a deep commitment to ending racism, just as it supposedly explains the hostility toward disparate impact in *Ricci*. If constrained by the need to provide direct evidence of malice, we would be hard pressed to pierce these familiar assertions of benevolence. But we can employ a contextual approach when evaluating the Court, consulting not only history and electoral politics but Stevens's injunction long ago in *Davis* that government actors typically intend the foreseeable results of their actions.[448] Judging the current Court by this standard suggests that a plurality, and maybe even a majority, intend to expand the realm of racial blindness in order to delay, rather than promote, racial equality. They do so under colorblindness and malicious intent operating as legitimating frameworks. Intentional blindness, as both doctrine and justificatory rhetoric, stands today as a prelude to even more unjust racial politics.

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other four Justices who routinely adopt that stance. *See* Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) (assessing Kennedy's evolving views on race consciousness in different contexts); Siegel, *supra* note 222, at 1303–09 (examining Kennedy's rejection of rigid colorblindness). Nevertheless, these cases also demonstrate that, even if less aggressively so, Kennedy remains steadfastly committed to a colorblind approach toward both remedial and antidiscrimination endeavors. Unfortunately, a revitalized equal protection doctrine—one capable of allowing affirmative action and stopping discrimination—most likely must await a change in the Court's membership.

[448] *See* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("[N]ormally the actor is presumed to have intended the natural consequences of his deeds."); *see also* Alexander v. Sandoval, 532 U.S. 275, 307 n.13 (2001) (Stevens, J., dissenting) (endorsing anew the point that intent can be read from foreseeable consequences).

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