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Racially Neutral in Form, Racially Discriminatory in Fact: The Implications for Voting Rights of Giving Disproportionate Racial Impact the Constitutional Importance It Deserves

by Gary J. Simson*

In two decisions in the mid-1970s, *Washington v. Davis*[1] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[2] the U.S. Supreme Court made clear that proving that a law racially neutral on its face disproportionately disadvantages racial minorities does not establish a violation of the Equal Protection Clause[3] or even create a presumption that such a violation has occurred. Disproportionate racial impact "is not irrelevant," the Court explained, but "it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[4] The key, according to the Court, lies in proving that the

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1. 426 U.S. 229 (1976).

2. 429 U.S. 252 (1977).

3. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. *Davis*, 426 U.S. at 242.

law was the product of a racially discriminatory purpose.[5] My focus in this Article will be the fundamental inadequacy of that approach and the reprieve that it wrongly gives to voter identification laws, purges of voters from registration rolls, and other legal barriers to voting that, though framed in terms that make no mention of race, disproportionately disadvantage racial minorities.

Legal barriers to voting that disproportionately disadvantage racial minorities are hardly a modern phenomenon. Most obviously, it took a Civil War and the ratification in 1870 of the Fifteenth Amendment[6] to put an end to state laws treating African Americans' race as a disqualification for voting,[7] and it was not until Congress's enactment of the Voting Rights Act of 1965[8] that states had to stop using literacy tests as a pretext to keep many blacks from the polls.[9]

However, as the U.S. Commission on Civil Rights documented in detail in a 2018 report,[10] recent years have seen an increase in the variety and number of legal impediments to voting that disproportionately disadvantage racial minorities.[11] Voter identification laws, for example, "were not prominent until the late 20th century,"[12] but by 2000, they existed in fourteen states in one or another form, and since 2000, that number has been "on the rise."[13] Also according to the report, the justifications commonly offered in defense of legal barriers to voting that disproportionately disadvantage racial minorities tend to be exceptionally weak.[14] Under the circumstances, one hardly needs to be a cynic to question the reality of a claimed justification and to believe

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5. *Id.* at 238-42.

6. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

7. *See Introduction to Federal Voting Rights Laws,* U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/introduction-federal-voting-rights-laws (last visited Mar. 1, 2020).

8. As amended, the Act is codified at 52 U.S.C. §§ 10301–14 (2020).

9. *See Introduction to Federal Voting Rights Laws, supra* note 7.

10. U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES (2018), www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

11. The chapter that is by far the longest in the report, "Recent Changes in Voting Laws and Procedures That Impact Minority Voters," *see id.* at 83–198, identifies the principal changes in voting laws and procedures in recent years and analyzes in detail the impact of those innovations on racial minorities.

12. *Id.* at 85.

13. *Id.* at 86.

14. *See, e.g.*, *id.* at 282 ("Study after study, including from the Republican National Lawyers Association, confirm that voter fraud is extremely rare in the United States.").

instead that racial bias played a crucial role. After unanimously finding that "[r]acial discrimination in voting has proven to be a particularly pernicious and enduring American problem,"[15] the Commission underlined the wide range of state-created impediments that in its view have perpetuated that problem. "In states across the country," the Commission maintained, measures that "wrongly prevent some citizens from voting have been enacted and have a disparate impact on voters of color and poor citizens, including but not limited to: voter ID laws, voter roll purges, proof of citizenship measures, challenges to voter eligibility, and polling place moves or closings."[16]

In Part I of the Article, I lay out more fully the lessons of *Davis* and *Arlington Heights* for challenges under the Equal Protection Clause to facially race-neutral laws that disproportionately disadvantage racial minorities. In Part II, I argue that, from the start, the *Davis–Arlington Heights* approach posed relatively little threat of invalidation to laws disproportionately disadvantaging racial minorities. Drawing on legal barriers to voting for illustrations, I maintain that, due to a combination of factors, the only laws truly threatened by the approach are ones at the extreme—ones patently and unmistakably the product of bias against racial minorities. In Part III, I argue that the *Davis–Arlington Heights* approach to disproportionate racial impact wrongly ignores basic assumptions about the lawmaking process that help explain the Court's longtime treatment as "suspect" of laws explicitly disadvantaging racial minorities. In Part IV, I propose an alternative approach that gives disproportionate racial impact the independent importance that I believe it deserves under the Equal Protection Clause. In Part V, I briefly discuss the implications of adopting my proposed approach, with special attention to the implications for prevalent legal impediments to voting. I conclude in Part VI by highlighting the practical importance of my proposal even if today's Supreme Court may not appear to be an ideal audience to embrace it.

I. THE LESSONS OF *DAVIS* AND *ARLINGTON HEIGHTS*

To understand the lessons of *Davis* and *Arlington Heights,* it is helpful to begin with a decision by the Court several years earlier—*Palmer v. Thompson*[17] in 1971. Faced with a judgment declaring that it

15. *Id.* at 277. *See also* Letter of Transmittal from Catherine E. Lhamon, Chair, U.S. Comm'n on Civil Rights to President Donald J. Trump *et al.* (Sept. 12, 2018), *in id.* at unnumbered prefatory page ("The Commission voted unanimously to reach key findings . . . .").

16. *Id.* at 282.

17. 403 U.S. 217 (1971).

was violating the Equal Protection Clause by maintaining racially segregated public swimming pools, the city of Jackson, Mississippi closed all the pools. Various African-American residents then challenged the closings in federal court as violating the Equal Protection Clause. After the federal district and appellate courts rejected the challenge, the Supreme Court by a 5-4 vote affirmed.

Whether in the majority or in dissent, the Justices seemed agreed that the case turned on the city's purpose in closing the pools. They disagreed sharply, however, as to what the city's purpose should be understood to be. From the perspective of Justice White, who authored the principal dissent,[18] the city's claim that it had closed the pools out of concern that, if integrated, the pools could not be operated safely and economically was not even "colorable."[19] The "only evidence in this record" to support the existence of any such purpose, Justice White maintained, "is the conclusions of the officials themselves, unsupported by even a scintilla of added proof."[20] In his view, the city's purpose in closing the pools was "solely" to circumvent the desegregation order,[21] and the city's acting pursuant to that purpose "express[ed] its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility."[22] The impact of the closings, according to Justice White, therefore fell equally on blacks and whites only in the most superficial sense. "[T]he reality" was a markedly disproportionate negative impact on the minority.[23] "Whites feel nothing but disappointment and perhaps anger at the loss of the facilities," Justice White explained. "Negroes feel that and more. They are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal."[24]

Writing for the majority, Justice Black took a very different view of the city's purpose—a view that led him to conclude that there was no equal protection problem at all. From Justice Black's perspective, it was a very simple case: The city had argued that it closed the pools because

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18. Justice White's detailed and often impassioned dissent was joined by Justices Brennan and Marshall and spanned about thirty pages in the *United States Reports*. Justice Douglas dissented in a separate opinion about one-third that length, and Justice Marshall wrote a very brief opinion joined by Justices Brennan and White that largely referenced the other two dissenting opinions.

19. *Palmer*, 403 U.S. at 266 (White, J., joined by Brennan and Marshall, JJ., dissenting).

20. *Id.* at 260.

21. *Id.* at 266.

22. *Id.*

23. *Id.*

24. *Id.* at 268.

"they could not be operated safely and economically on an integrated basis";[25] there was "substantial evidence in the record"[26] to lend support to that description of the city's purpose; and under that understanding of the city's purpose, there was no reason to think that the pool closings impacted blacks any differently than whites, and the challengers' equal protection claim necessarily failed. As Justice Black saw it, the dissent's charge that the city's stated purpose was pretextual and that the city instead had acted on the basis of an invidious purpose of avoiding the mixing of the races was simply out of bounds. "[N]o case in this Court," Justice Black maintained, "has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it,"[27] and he made clear that he was not about to start striking down laws on that basis in *Palmer*.

To illuminate the "pitfalls"[28] of courts' inquiring into purposes other than those acknowledged by the lawmaker, Justice Black first cited a page in one of Chief Justice Marshall's legendary opinions. The page alluded to the sensitivity of courts' questioning the motives of "members of the supreme sovereign power of a State" and spoke of the need for a "principle by which judicial interference would be regulated" if courts were to embark on invalidating laws passed with improper motive. [29] Justice Black then ticked off a series of practical objections: "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment"; "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators"; and "there is an element of futility in a judicial attempt to invalidate a law [based on] the bad motives of its supporters" because "it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."[30]

Several years later, when the Court handed down its decision in *Washington v. Davis,* the majority opinion was authored by Justice White, who had objected so strenuously in *Palmer* to the Court's refusal there to take seriously any purpose that the lawmaker was unwilling to claim as its own. Perhaps because Justice Black was no longer on the Court to object, Justice White was content to rely on a rather oblique reference to *Palmer* in a footnote to signal that the *Palmer* approach to

25. *Id.* at 225 (majority opinion).
26. *Id.*
27. *Id.* at 224.
28. *Id.*
29. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810).
30. *Palmer*, 403 U.S. at 224–25.

motive was officially dead,[31] but there could be no doubt that his opinion had laid it to rest. *Davis* was an equal protection challenge[32] to a District of Columbia police department's use of a written qualifying exam that had the effect of screening out a much higher proportion of black applicants for the police force than white applicants. Justice White made clear that a law having a disproportionate racial impact may be successfully challenged under the Equal Protection Clause if the challenger can prove that the impact can "ultimately be traced to a racially discriminatory purpose."[33] However, having opened the door somewhat to motive-based challenges, Justice White went on to explain why such a challenge to the police department's qualifying exam did not present a close case. In his view, the district court's finding that a higher percentage of black, than white, applicants failed the test paled in significance alongside the department's "affirmative efforts . . . to recruit black officers"[34] and other factors deemed important by the district court.[35]

While denying relief on the ground that the challengers had failed to prove that the disproportionate racial impact was traceable to a racially discriminatory purpose, Justice White also took care to lay to rest any thought that the disproportionate racial impact might have any constitutional importance other than as possible evidence of such a purpose. In the case at hand, the federal appellate court below had ruled for the challengers and, in doing so, had made clear that it understood disproportionate racial impact as having such independent

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31. *Davis*, 426 U.S. at 244 n.11 ("To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases—as indicated in the text—are to the contrary. . . .").

32. Strictly speaking, *Davis* did not implicate the Equal Protection Clause because the Court has long treated that clause as applicable to state and local government, but not the federal government, and because the District of Columbia is a federal, rather than state or local, entity. However, the challenge in *Davis* could be predicated on equal protection principles because the Court has also long treated the Due Process Clause of the Fifth Amendment as having an equal protection component. *See, e.g.,* Bolling v. Sharpe, 347 U.S. 497 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

33. *Davis*, 426 U.S. at 240.

34. *Id.* at 246.

35. *See id.* ("changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program"). Justice White noted earlier in the opinion the district court's observation that the test was devised by the U.S. Civil Service Commission, rather than the D.C. police department, and was used throughout the federal civil service system. *Id.* at 234–35. Although he did not cite the test's origins outside the department and wide use as especially casting doubt on the validity of the motive-based challenge to the department's use of the test, Justice Stevens did so in his concurring opinion. *Id.* at 254–55 (Stevens, J., concurring).

importance.[36] The appellate court had expressly indicated that it was proceeding on the assumption that it should apply in the constitutional realm the approach to disproportionate racial impact that the Court in 1971 in *Griggs v. Duke Power Co.*[37] had applied in the statutory realm.[38]

In *Griggs* the Court had interpreted Title VII of the 1964 Civil Rights Act—the Act's employment discrimination provisions—as making presumptively invalid any "tests or criteria for employment or promotion"[39] that disproportionately burden racial minorities. Unless the employer could show that the test or criterion "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used,"[40] the test or criterion could not lawfully be used. "[G]ood intent or absence of discriminatory intent," the Court in *Griggs* maintained, "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[41]

In no uncertain terms, however, the Court in *Davis* rejected the notion that the *Griggs* approach to disproportionate racial impact applied to constitutional challenges. As the Court explained, "Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor."[42] In fact, in the Court's

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36. Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976). Although the D.C. Circuit did not claim in this case that *Palmer v. Thompson* implicitly established that disproportionate racial impact had independent constitutional importance, a number of courts did so prior to *Washington v. Davis*. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 296–97 (1991) (explaining the courts' thinking in interpreting *Palmer* that way).

37. 401 U.S. 424 (1971).

38. *Davis v. Washington*, 512 F.2d at 957 n.2.

39. *Griggs*, 401 U.S. at 431.

40. *Id.*

41. *Id.* at 432.

42. *Davis*, 426 U.S. at 238. Professor Fiss has strongly criticized the Court's insistence in *Davis* that *Griggs* had no bearing on the constitutional issue at hand:

> [The Supreme Court in 1969] announced a doctrine founded on an understanding of the interconnection between practices that disadvantaged Blacks. That case—*United States v. Gaston County*—condemned the practice of denying Blacks the right to vote for failing a literacy test when they had been systematically denied equal educational opportunities as children . . . . [T]he Justices were driven by an idea—let's call it the theory of cumulative responsibility—which condemns any institution, regardless of its own past actions, from engaging in a practice that aggravates, perpetuates, or merely carries over a disadvantage Blacks had received at the hands of some other institution acting at some other time and in some other domain.
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> . . . .

view, the appellate court's application of Title VII standards to resolve the constitutional issue was such " 'plain error' "[43] that the Court felt obliged to set straight the matter of the applicable standards even though the petition for certiorari did not ask the Court to address it. According to the Court, the court below lost sight of "the constitutional rule"[44] that runs through the Court's equal protection decisions—"the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[45]

Although the plaintiffs in *Davis* came away empty-handed, *Davis* was not all bad news for future challengers of disproportionate racial impacts. The Court's departure in *Davis* from the *Palmer v. Thompson* approach to motive-based challenges did create an opportunity that some challengers might use to good advantage. Furthermore, a year later, the Court in *Arlington Heights* seemed intent on cementing the importance of that opportunity. Unlike Justice White, who in *Davis* had

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> . . . [T]he Supreme Court [in 1971 in *Griggs*] applied the theory of cumulative responsibility in the employment context and barred private employers from using tests or other educational requirements that would, because of the inferior quality of the schooling that Blacks had received, result in disparate impact on them . . . .
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> The theory of cumulative responsibility appreciates the interconnected character of social life and the fact that people carry disadvantages they receive in one domain, say education, to others, such as employment. It is predicated on the sad truth that inequality begets inequality. The *Griggs* principle is founded on this theory . . . .
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> Th[e] obligation [recognized by the *Griggs* principle] is not imposed because we assume or even believe that the firm in question has played a role in creating the racial caste system that now subjugates Blacks. Rather, it arises from a proper understanding of the responsibility that every member of the community, even one born yesterday, now has to eradicate the stratified social structure that has marred American society since its inception . . . .
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> In its 1976 decision in *Washington v. Davis*, the Supreme Court . . . drew a bold distinction between constitution and statute and downgraded the *Griggs* principle to a statutory rule. Such a move has always struck me as a strained reading of *Griggs*. Although as a purely technical matter, *Griggs* had been brought under Title VII of the Civil Rights Act of 1964, the Chief Justice's opinion [for the Court] in that case had a constitutional quality. The crucial precedent upon which Chief Justice Burger relied, namely, *Gaston County*, was based on the Constitution . . . .

Owen Fiss, *The Accumulation of Disadvantages*, 106 CALIF. L. REV. 1945, 1946–47, 1949–51 (2018).

43. *Davis*, 426 U.S. at 238 (quoting Rule 40(1)(d)(2) of the Revised Supreme Court Rules).

44. *Id.* at 239.

45. *Id.* at 240.

made no real effort to refute Justice Black's stated reasons in *Palmer* for refusing to delve into motive, Justice Powell, writing for the Court in *Arlington Heights*, took on the task in earnest.

Drawing on a leading scholarly article on unconstitutional motive written in direct response to *Palmer*,[46] Justice Powell countered each of Justice Black's reasons.[47] He acknowledged that lawmakers are "properly concerned with balancing numerous competing considerations" and that, as a result, judicial inquiries into the "merits" of lawmakers' decisions are sensitive, and judges must be deferential in conducting any such inquiries.[48] He maintained, however, that "proof that a discriminatory purpose has been a motivating factor in the decision" fundamentally changes the picture, and "judicial deference is no longer justified."[49]

Similarly, while conceding that determining whether a lawmaker was moved by an unconstitutional motive can frequently be difficult, Justice Powell rejected the notion that it is somehow beyond a court's capacity to make such a determination. He not only affirmed, as a general proposition, the feasibility of making sensible determinations by careful judicial inquiry into "such circumstantial and direct evidence of intent as may be available."[50] Even more importantly, he went further and offered a "summary [that] identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed."[51] According to that summary, the "subjects of proper inquiry" include: whether the law " 'bears more

46. *See Arlington Heights,* 429 U.S. at 266 n.12, 268 n.18 (citing Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95). At the time of writing the article, Professor Brest was very early in an illustrious academic career that would span many years at Stanford Law School and include numerous influential pieces of scholarship on constitutional law. *See Paul Brest*, STANFORD LAW SCHOOL DIRECTORY, https://law.stanford.edu/directory/paul-brest/ (last visited Mar. 1, 2020).

47. Perhaps simply out of deference to the memory of a widely admired Justice who had died only several years earlier, Justice Powell was less explicit than he might have been in pointing to Justice Black's opinion in *Palmer* as the source of the reasons that Powell was refuting. Powell did not mention *Palmer* by name in the text of his opinion. However, his references in footnotes to *Palmer* and to Professor Brest's article critiquing *Palmer* made clear that Black's reasons in *Palmer* for rejecting motive inquiries were very much at the forefront of Powell's mind when he authored the Court's opinion in *Arlington Heights. See Arlington Heights,* 429 U.S. at 265 nn.10 & 11, 266 n.12, 268 n.18.

48. *Id.* at 265.

49. *Id.* at 265–66.

50. *Id.* at 266.

51. *Id.* at 268.

heavily on one race than another' ";[52] the "historical background of the decision"; the "specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; "[s]ubstantive departures" from the weight usually assigned particular factors; "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports"; and in "extraordinary instances," trial testimony about purpose by lawmakers subpoenaed and "called to the stand."[53]

Justice Powell did not argue that Justice Black was wrong in asserting that determining a multi-member body's single or principal purpose in enacting a law can be an insuperable task. Instead, he maintained that the determination was simply beside the point. The relevant question according to Powell is not whether an unconstitutional purpose was the lawmaker's sole or primary purpose in adopting the law. Instead, it is whether the unconstitutional purpose was a "motivating factor" in the lawmaker's decision to adopt the law.[54]

Lastly, although Justice Powell did not expressly address Justice Black's futility objection, he did discount its significance indirectly. The essence of Black's objection was that striking down a law because it was found to be adopted for an unconstitutional purpose would be a waste of everyone's time because the legislature could simply reenact the law and state for general consumption that it was doing so for one or more constitutionally permissible purposes. In an important footnote at the end of the opinion, Justice Powell clarified the parties' burdens of proof in a case in which the challenger seeks to invalidate a law based on an unconstitutional purpose:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. . . .[55]

Although Justice Powell's footnote was not addressed to the reenactment scenario that was the focus of Black's futility objection, Powell's burden-shifting prescription in the footnote can fairly be

52. *Id.* at 266 (quoting *Davis*, 426 U.S. at 242).
53. *Id.* at 266–68.
54. *Id.* at 265–66.
55. *Id.* at 270 n.21.

understood as supplying the answer that he would have given to that objection.[56]

The challenged governmental action in *Arlington Heights* was a village's refusal to rezone a parcel of land to allow the construction of low- and moderate-income housing that would be expected to increase significantly the percentage of racial minorities in the village. In light of both Justice Powell's strong affirmation of the Court's willingness to entertain motive-based challenges and his detailed description of "subjects of proper inquiry," one might have anticipated that he would be slow to reject the challenge at hand and that if he were to reject it, he would feel obliged to provide a detailed explanation. Instead, he appeared to treat the challenge as presenting not at all a close question and rejected the challenge in short order. He conceded that the "impact of the Village's decision does arguably bear more heavily on racial minorities,"[57] but he found nothing in the other "subjects of proper inquiry" he had articulated to lend support to the notion that the disproportionate racial impact may have been rooted in a discriminatory purpose. "Respondents simply failed," he stated in conclusion, "to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."[58]

Although *Davis* and *Arlington Heights* put in place what continues to be the Court's basic approach under the Equal Protection Clause to disproportionate racial impact, a third Supreme Court decision from the 1970s, *Personnel Administrator of Massachusetts v. Feeney*,[59] offered important clarification.[60] *Feeney* involved an equal protection challenge

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56. According to Justice Powell, proof that a racially discriminatory purpose was a motivating factor in the adoption of a law logically calls for shifting to the government the burden of proving that the law would have been adopted even if that purpose had not been considered. In keeping with that logic, if a law is struck down based on proof that it would not have been adopted but for a racially discriminatory purpose, and if the law is subsequently reenacted, it easily follows that the government should bear the burden of proving that the reenactment did not depend on consideration of that racially discriminatory purpose.

57. *Arlington Heights,* 429 U.S. at 269.

58. *Id.* at 270.

59. 442 U.S. 256 (1979). *Feeney* actually came up to the Supreme Court twice, both times on appeals of judgments from a three-judge district court striking down the law under review. The first time that *Feeney* came before the Court, the Court had already decided *Davis* but not *Arlington Heights.* The Court disposed of the appeal by remanding for reconsideration in light of *Davis*, which the Court had decided after the district court's decision in *Feeney*. The second time that *Feeney* came before the Court, the Court had already decided both *Davis* and *Arlington Heights*.

60. For a collection of articles by leading constitutional scholars that was sparked by the Court's opinions in *Davis* and *Arlington Heights* and preceded the Court's decision in

to a law disproportionately disadvantaging women, not racial minorities, but the Court made very clear that it regarded *Davis* and *Arlington Heights* as the controlling precedents and was expounding upon their meaning.[61]

The law challenged in *Feeney*—a Massachusetts law giving veterans who pass a civil service examination what the Court called a "well nigh absolute advantage"[62] in competing for civil service jobs—starkly presented the question of the significance, for purposes of a motive-based equal protection challenge, of two factors: the magnitude of the disproportionality in impact on the group represented by the challengers; and the foreseeability of that impact. Whether gauged at the time the statute was first enacted (1896), at one of the times the

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Feeney, see Colloquium, *Legislative Motivation in Constitutional Law*, 15 SAN DIEGO L. REV. 925 (1978).

61. *Feeney*, 442 U.S. at 272–73. Professor Haney-Lopez has pointed to *Feeney* as far more than simply an exposition of *Davis* and *Arlington Heights*. Rather, it was a "transitional case marking an abrupt rupture in intent doctrine." Ian Haney-Lopez, *Intentional Blindness*, 87 NYU L. REV. 1779, 1825 (2012). In his view, a proper understanding of *Feeney* requires "plac[ing]" it into the "colorblindness timeline" that begins with Justice Powell's well-known lead opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)—an opinion in which Justice Powell announced the judgment of the Court but wrote only for himself. Haney-Lopez, *supra*, 87 NYU L. REV. at 1828. That opinion, according to Professor Haney-Lopez, "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." *Id.* at 1826. As he further explained:

> Just a year after *Bakke*, in *Feeney* five Justices began to rework intent doctrine. Strikingly, they did so in direct reliance upon Powell's colorblind reasoning . . . . 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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> . . . [O]nly after having announced a mechanical distrust of any use of race did Stewart [in his opinion for the Court in *Feeney*] 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 . . . .
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> . . . *Feeney* defined "intent" as acting not just in full awareness of impending harm but out of a desire to cause such harm . . . .
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> 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 . . . .

Id. at 1828, 1831, 1833.

62. *Feeney,* 442 U.S. at 264.

statute was amended to expand its coverage to include veterans of later wars (1919, 1943, 1949, 1954, 1968),[63] or at the time the challengers in *Feeney* brought suit (1974),[64] the law, in the Court's words, "operate[d] overwhelmingly to the advantage of males,"[65] and it would "be disingenuous to say that the adverse consequences of this legislation for women . . . were not foreseeable."[66] At the time of suit, primarily as a result of federal laws that "restricted the number of women who could enlist" and "the simple fact that women have never been subjected to a military draft,"[67] only 1.8% of veterans in Massachusetts were women.[68]

In short, *Feeney* was the epitome of a case in which both the disproportionality in impact on the disadvantaged group and the foreseeability of that impact were very high. As a result, in and of itself, the *Feeney* Court's rejection of the motive-based challenge to the law under review spoke volumes about the limited significance that the Court assigned to those factors in the discriminatory purpose inquiry authorized by *Davis* and *Arlington Heights*.

The Court's express reasoning in *Feeney* also offered important insight into the nature of that inquiry. Perhaps out of some recognition that the two factors noted above might appear to many to militate strongly for the opposite result, the Court addressed more directly than it had in *Davis* and *Arlington Heights* a question that lies at the heart of that inquiry: What counts as a "discriminatory purpose"? The Court explained that the term "implies more than intent as volition or intent as awareness of consequences."[69] Instead, it "implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[70] A discriminatory purpose only exists if "the adverse effects were desired."[71] In the case at hand, the Court found that there was no such

63. The history of the Massachusetts statute is set forth in *id.* at 266–67.

64. *See* Anthony v. Massachusetts, 415 F. Supp. 485, 493 (D. Mass. 1976) (3-judge court), *vacated & remanded,* 434 U.S. 884 (1976).

65. *Feeney*, 442 U.S. at 259.

66. *Id.* at 278.

67. *Id.* at 269–70.

68. *Id.* at 270.

69. *Id.* at 279.

70. *Id.*

71. *Id.* at 279 n.25. For a proposed very different definition of discriminatory purpose that calls on lawmakers to act as if they are unaware of the race (or sex) of the persons affected by the law, see David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989). According to Professor Strauss:

purpose because "nothing in the record demonstrates that this preference for veterans was originally devised or subsequently reenacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service."[72]

Finally, to the extent that the Court's opinions in *Davis*, *Arlington Heights*, and *Feeney* may not make entirely clear the logic of its approach to disproportionate racial impact, the seminal article on unconstitutional motive cited by Justice Powell in *Arlington Heights* appears to fill in any gaps. In that article, Professor Paul Brest addressed the question of when, if ever, a court should strike down a law because it was adopted, in whole or part, to achieve an unconstitutional purpose. His answer rested on two key concepts. First, some purposes are constitutionally barred.[73] Second, although courts' responsibility to enforce the Constitution typically requires them to ensure that the products of the lawmaking process conform to constitutional requirements, that responsibility also requires them to ensure that the lawmaking process itself stays within constitutional bounds.[74] As Professor Brest explained:

> The fact that a decisionmaker gives weight to an illicit objective may determine the outcome of a decision. The decisionmaking process consists of weighing the foreseeable and desirable consequences of the proposed decision against its foreseeable costs . . . . To the extent that the decisionmaker is illicitly motivated, he treats as a desirable consequence one to which the lawfully motivated decisionmaker would be indifferent or which he would view as undesirable.
>
> . . . Assuming that a person has no legitimate complaint against a particular decision merely because it affects him adversely, he does have a legitimate complaint if it would not have been adopted but for the decisionmaker's consideration of illicit objectives. . . . [75]

> The formula that best captures this definition is what I will call the "reversing the groups" test. A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.

Id. at 956–57.

72. *Feeney*, 442 U.S.at 279.

73. Brest, *supra* note 46, at 116 ("Governments are constitutionally prohibited from pursuing certain objectives . . . ."); *see also infra* Part III.A.

74. Brest, *supra* note 46, at 116–18.

75. *Id.* at 116.

Under this purity-of-process rationale, although courts generally must allow the lawmaker broad discretion to weigh the costs and benefits of possible courses of action, such deference is unwarranted when the challenger can prove that the lawmaker has counted as a benefit the achievement of an unconstitutional purpose. In such instances, the law must be struck down unless the government can carry the "heavy burden" of proving that counting the achievement of that purpose as a benefit was essentially harmless error—"not determinative of the outcome."[76]

II. THE LIMITED PRACTICAL SIGNIFICANCE OF THE *DAVIS–ARLINGTON HEIGHTS* APPROACH

Intentionally or not, the approach that the Court formulated in *Davis* and *Arlington Heights* was virtually hard-wired to be almost all bark and no bite. Four factors in particular combined to ensure that the approach would be of relatively little importance in practice. I discuss each of those factors below, but before doing so, I should underline that I do not mean to suggest that the contribution that the Court made in *Davis* and *Arlington Heights* by repudiating the *Palmer v. Thompson* approach was unimportant. The *Palmer* approach wrongly treated as insuperable certain objections to invalidating a law because it was the product of an unconstitutional purpose. Taken together, Justice Powell's majority opinion in *Arlington Heights* and Professor Brest's article on unconstitutional motive provide a solid rebuttal to Justice Black's reasons for preferring the *Palmer* approach. Even though the Court in *Davis* and *Arlington Heights* opened a door through which very few equal protection challenges could successfully pass, that was a marked improvement over *Palmer*, which had slammed the door shut.

A. The Exceptionally High Bar

As the Court explained in *Feeney*, proving a racially or sexually discriminatory purpose means proving that the lawmaker desired the adverse effects the law has on racial minorities or women. In terms of the cost–benefit balance described by Professor Brest, a legislature acts with a racially discriminatory purpose when it counts those adverse effects as a benefit, rather than a cost. Consider, for example, a certain form of voter ID law that, if adopted, is apt to have a substantial

76. *Id.* at 117–18. To similar effect, see Justice Powell in *Arlington Heights*, 429 U.S. at 270 n.21 (quoted *supra* text accompanying note 55). For a wide-ranging critique and proposed reformulation of the significance of unconstitutional purpose under the Equal Protection, Establishment, Free Exercise, and other Clauses, see Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent,* 130 HARV. L. REV. 523 (2016).

disproportionate racial impact. A legislature acts with a racially discriminatory purpose if it treats that likely impact as a reason to adopt the law, as opposed to a reason to reconsider the wisdom of enacting the law.

In thinking about the kind of showing required to prove a racially discriminatory purpose, it is helpful to ask what kind of people act with racially discriminatory purposes. The short answer: thoroughgoing racists, people who get gratification from making racial minorities miserable. Proving that a racially discriminatory purpose was a "motivating factor" in the lawmaker's decision to adopt a particular law therefore means showing that a significant proportion of those voting for the law are eminently rotten people. With very rare exception, that can't help but be a very steep hill for the challenger to climb.

The Court's approval of the laws in *Arlington Heights* and *Feeney* nicely illustrates the point. Justice Powell's opinion for the Court in *Arlington Heights* acknowledged that the plaintiffs' request to rezone a parcel of land to allow for the construction of low- and moderate-income housing had triggered some racial tensions in the community. According to Justice Powell, "[s]ome of the comments" at three public meetings held by the local government "addressed what was referred to as the 'social issue'—the desirability or undesirability of introducing at this location in Arlington Heights low- and moderate-income housing, housing that would probably be racially integrated."[77] The federal appellate court whose judgment was later reversed by the Court gave a more blunt and detailed description of the atmosphere in Arlington Heights. The description leaves little doubt that the local government officials charged with deciding the rezoning request must have foreseen the racial impact of granting or denying the request when they ultimately voted to deny it:

> The instant case reflects the unfortunate fact that historically the Chicago metropolitan area has been segregated in terms of housing. . . .[T]he population of Arlington Heights in 1970 was 64,884, but only twenty-seven residents were black. The 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 while the percentage of the population in the entire Chicago metropolitan area that was black increased from fourteen percent to eighteen percent.

77. *Arlington Heights,* 429 U.S. at 257–58.

> . . . Though the building of this project might have only minimal effects in terms of alleviating the segregative housing problem for the entire Chicago area, it might well result in increasing Arlington Heights' minority population by over one thousand percent. What is even more crucial is that this suburb has not sponsored nor participated in any low income housing developments, nor does the record reflect any such plans for the future. Realistically, Lincoln Green[, the proposed development,] appears to be the only contemplated proposal for Arlington Heights that would be a step in the direction of easing the problem of de facto segregated housing. Thus, the rejection of Lincoln Green has the effect of perpetuating both this residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem.[78]

The Arlington Heights Plan Commission had voted against recommending to the village's Board of Trustees that the Board approve the rezoning request, and the Board had then voted to deny the request. Under the circumstances described by the Court of Appeals, isn't it fair to assume that some of those voting against the request probably were motivated at least in part by a racially discriminatory purpose? Didn't some of them probably count it as a plus that denying the request would preserve residential segregation and fence out blacks? The above excerpt strongly suggests that the Court of Appeals would have answered "yes" to both questions. As an indication of how very steep a hill a litigant must climb to get a court to strike down a law based on a finding of a racially discriminatory purpose, it is therefore especially instructive not only that the Supreme Court made no such finding but that the Court of Appeals stopped short of doing so as well.[79]

In contrast to *Arlington Heights*, there is no particular reason in *Feeney* to suspect that any of the lawmakers who voted years ago for the veterans' preference statute under review in *Feeney* did so at least in part because they valued its negative effect on the group—in this instance, women—disproportionately impacted by the law. *Feeney* is

78. Metro. Housing Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 413–14 (7th Cir. 1975), *rev'd & remanded*, 429 U.S. 252 (1977).

79. The Court of Appeals was reviewing the district court's finding of no discriminatory purpose, and it proceeded on the assumption that it could only reject that finding if it concluded that the finding was clearly erroneous. Although the Court of Appeals decided the case before the Supreme Court had decided *Davis*, it inquired into purpose much as the Court would later do in *Davis*. If the Court of Appeals felt at all constrained by the Court's earlier decision in *Palmer*, it was not apparent. The Court of Appeals made no mention of the case. It ultimately decided for the plaintiff on the ground that the plaintiff had proven a racially discriminatory effect. In reversing, the Supreme Court reaffirmed its holding in *Davis* that a racially discriminatory effect is insufficient to establish an equal protection violation.

instructive, however, because it communicates with such clarity how very depraved a mindset must be shown to establish a discriminatory purpose. The legislators who voted for the statute when it was first enacted in 1896, or who subsequently voted for any of the various amendments between 1919 and 1968 to expand its coverage, could not help but be aware that they were voting for a law that would be a boon for many, many men and almost uniformly a disadvantage for women. In competing for civil service positions, women would lose out repeatedly to men simply because the men were veterans. It may well be that, in voting for the law, few, if any, legislators counted the disadvantage to women as a plus, but it does not seem a stretch to charge the law's supporters in the legislature with a fair amount of insensitivity. In Professor Brest's terms, the legislators may well have regarded the disadvantage to women as a cost, but probably not nearly as much of a cost as they should have seen it.[80]

At a minimum, rather than give veterans a virtually absolute preference, the legislators could have opted for any of various types of veterans' preferences having less of a negative impact on women.[81] Under the *Davis–Arlington Heights* conception of discriminatory purpose, however, the legislators had no obligation whatsoever to give less drastic measures a moment's thought. Under that conception, the legislators could not fairly be charged with a discriminatory purpose in enacting the Massachusetts veterans' preference law because they were

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80. Professor Siegel has underlined the incongruity of the Court's approach in light of empirical studies of racial and gender bias:

> In defining discriminatory purpose, the Court did not consult sociological or psychological studies of racial bias. Had it done so, it would have encountered . . . studies demonstrat[ing] that many white Americans now view overt racism as socially unacceptable and mute expression of their racially biased opinions in public settings. . . . And an even larger body of literature demonstrates that white Americans who embrace principles of racial equality manifest *unconscious* forms of racial bias in diverse spheres of social life. In sum, the sociological and psychological literature demonstrates that (1) racial bias remains the norm among white Americans; but that (2) they are strongly inhibited in expressing the racial attitudes they consciously hold, and often are wholly unaware of the extent to which their conscious judgments are unconsciously race based. Thus, the form of discriminatory purpose the Court asked plaintiffs to prove in *Feeney* . . .is one that the sociological and psychological studies of racial bias suggest plaintiffs will rarely be able to prove. . . .[129]
>
> 129. For similar reasons, many forms of gender bias will elude detection under the *Feeney* framework, as well. . . .

Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136–37 & n.129 (1997).

81. *See Feeney*, 442 U.S. at 285 & n.2 (Marshall, J., joined by Brennan, J., dissenting) (discussing "the range of less discriminatory alternatives available to assist veterans").

not trying to make women suffer. As far as the *Davis–Arlington Heights* approach is concerned, the fact that the Massachusetts legislature, which not coincidentally ranged in composition from all-male at the time of the statute's adoption to nearly all-male at the time it was last amended before *Feeney*,[82] may have been rather oblivious to women's needs in enacting and retaining the veterans' preference law was constitutionally beside the point.

B. The Sensitivity of the Charge

Although the Court in *Palmer* gave more weight to the sensitivity of motive inquiries than that factor deserves, it was right to recognize that in conducting motive inquiries, courts need to take the sensitivity of those inquiries into account. It is no small thing for a court to charge a state legislature with enacting a law for the purpose of disadvantaging racial minorities. Such a charge is nothing less than an accusation that a significant proportion of the legislators who voted to adopt a law are such wretched individuals that they look for legislative opportunities to make the lives of racial minorities miserable. For a court to level such a charge against the legislature, which is essentially what a judicial finding of a racially discriminatory purpose does, can't help but have some negative effect on the legislature. It also can't help but place some strain on the relation between the two institutions: When the court is a state court, the strain is on the relation between coordinate branches in the state system, and when the court is a federal court, the strain is on federal–state relations. *Palmer* to the contrary notwithstanding, that is no reason for a court to avoid motive inquiries altogether, but it is a reason for a court not to level such a charge unless it is very certain that the charge is warranted.

As Professor Bickel captured so well years ago with his term, "the counter-majoritarian difficulty,"[83] there is always some strain on the system when a court strikes down legislation as unconstitutional. Some invalidations for unconstitutionality, however, are worse than others,

82. When the veterans' preference statute was enacted in 1896, the election of the first women to serve in the Massachusetts legislature was still more than twenty-five years away. *See History of Women in Massachusetts Government*, MASS. CAUCUS OF WOMEN LEGISLATORS, http://www.mawomenscaucus.com/history-of-women-in-massachusetts-government (last visited Mar. 1, 2020). In 1968, when the statute was last amended prior to *Feeney,* women made up less than three percent of the Massachusetts legislature. *See* Steve Koczela & Jake Rubinstein, *How the Mass. Legislature Can Get Closer to Gender Balance*, WBUR NEWS, Dec. 6, 2017, https://www.wbur.org/news/2017/12/06/beacon-hill-women-representation ("From 1970 to 2002, women made remarkable gains, from less than 3 percent of lawmakers to 26 percent in 2002.").

83. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962).

and invalidating a law because it was a product of a racially discriminatory legislative purpose is about as bad as it gets. By way of contrast, consider, for example, the Court's invalidation years ago of a New York state law limiting voting in school district elections to individuals who own or lease taxable real property in the district or have children who attend school in the district.[84] The law was challenged under the Equal Protection Clause by an individual ineligible under the statute to vote in school district elections in the district in which he lived. In its opinion, the Court asked whether "the exclusion" effected by the legislation was "necessary to promote a compelling state interest,"[85] analyzed whether that standard was met by the state's argument in terms of an interest of limiting voting to individuals " 'primarily interested' in school affairs,"[86] and ultimately concluded that it was not.[87] Although the New York legislature surely was not pleased to have its law struck down as unconstitutional by the Court, the Court said nothing suggesting that the legislature was populated by any but honorable people. A holding of unconstitutionality predicated on a finding of a racially discriminatory legislative purpose unmistakably sends a message of a very different, and much more negative, sort.

C. A Blueprint for Avoiding Detection

Prior to *Davis*, racist lawmakers were more apt to make their racist purposes explicit when doing so would be politically expedient. In his article on unconstitutional motive, Professor Brest observed about the pool closings that led to the litigation in *Palmer v. Thompson*: "Almost everyone in Jackson, Mississippi, knew that the city closed its public swimming pools solely to avoid integration."[88] One reason that the city's racially discriminatory motive was such a matter of common knowledge in Jackson is that Jackson's mayor had been so vocal about his opposition to racially integrated public pools. Faced in May 1962 with a federal court order to desegregate the city's public pools, the mayor had stated publicly that "we are not going to have any intermingling."[89] A

84. Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).

85. *Id.* at 630.

86. *Id.* at 631 (quoting argument by appellees).

87. *Id.* at 633 ("The requirements of [the statute] are not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise to appellant and members of his class.").

88. Brest, *supra* note 46, at 95.

89. The mayor's statement was quoted in a newspaper article in the *Jackson Daily News*, and the article ultimately was made part of the record in the Supreme Court.

year later, having made no effort to desegregate the pools, the mayor was no less transparent about his motives. According to a front-page newspaper article in May 1963, the mayor "said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation."[90] If the Court in *Palmer* had not refused categorically even to consider whether the city had closed its pools for a racially discriminatory purpose, it would have had no real choice except to invalidate the closings based on a finding that the city indeed had closed its pools for invidious reasons. The facts at hand were truly that overwhelming.

Davis and *Arlington Heights* made clear that racist lawmakers announce their racist purposes at their peril. Under the *Davis–Arlington Heights* approach, laws that would not have been adopted but for a racially discriminatory purpose must fall, and statements by lawmakers that are as overtly racist as the Jackson mayor's remarks are smoking guns that can spell a law's doom. Thus forewarned by *Davis* and *Arlington Heights* (or at least by legislative counsel familiar with *Davis* and *Arlington Heights*), racist lawmakers needn't be especially savvy to recognize that, however politically expedient it may seem to speak openly about their racist purposes, such candor easily can prove a law's undoing. By taking care to speak for the record in a much less transparent, and much more race-neutral, way than the Jackson mayor had spoken, racist lawmakers present a much more difficult target for a discriminatory purpose challenge.

With its enumeration of "subjects of proper inquiry,"[91] *Arlington Heights* makes proof of a racially discriminatory purpose more elusive in another way. Very simply, that enumeration serves as a useful don't-do list for racist lawmakers. Be careful, for example, to avoid "[d]epartures from the normal procedural sequence," and be mindful in drafting minutes of meetings and committee reports that they may be scrutinized at a later time for damning "legislative or administrative history."[92]

In short, it is no accident that the highwater mark for prevailing in the Supreme Court based on proof of a racially discriminatory purpose

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Citing to the record, Justice White quoted the statement in his dissent. *Palmer,* 403 U.S. at 250 (White, J., joined by Brennan and Marshall, JJ., dissenting).

90. This article, like the one mentioned *supra* note 89, appeared in the *Jackson Daily News*, became part of the *Palmer* record in the Supreme Court, and was cited as such and quoted in Justice White's dissent. *Palmer,* 403 U.S. at 250 (White, J., joined by Brennan and Marshall, JJ., dissenting).

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

92. *Id.* at 267–68.

came in two cases, *Rogers v. Lodge*[93] in 1982 and *Hunter v. Underwood*[94] in 1985, in which the evidence of such purpose predated *Davis* and *Arlington Heights*. In *Rogers v. Lodge*, the Court sustained an equal protection challenge to an at-large system of elections that a Georgia county had instituted in 1911. The Court held that, even though the system may not have been instituted to dilute black residents' voting power, it had been maintained for that racially discriminatory purpose.[95] In so holding, the Court relied heavily on the federal district court's "detailed findings of fact."[96] Notably, although the Court decided *Rogers* six years after *Davis*, the suit was filed in 1976—the year that *Davis* was decided and a year before *Arlington Heights*—and virtually all of the evidence cited in those findings went back a number of years.

The evidence of racially discriminatory purpose that the Court found dispositive in *Hunter* all dated back further than any of the evidence in *Rogers*—to be precise, to 1901, when the Alabama Constitutional Convention adopted the particular constitutional provision at issue in *Hunter*. The provision expanded the list of specific offenses for which an individual would be disenfranchised if convicted and added a catchall provision for crimes "involving moral turpitude."[97] Unlike *Rogers*, which was decided by a 6-3 vote, *Hunter* offered evidence of racially discriminatory purpose so overwhelming that the same group of Justices found such a purpose without dissent. Writing for the Court, then-Justice (soon-to-be Chief Justice) Rehnquist—one of the *Rogers* dissenters—underlined the multitude of evidence of racially discriminatory purpose coming from the mouths of the delegates to the Alabama Constitutional Convention. As he explained:

> The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: 'And what is it that we want to do? Why it is, within the limits imposed by the Federal Constitution, to establish

93. 458 U.S. 613 (1982).

94. 471 U.S. 222 (1985).

95. *Rogers*, 458 U.S. at 626-27.

96. *Id.* at 616. The Court emphasized that under the Federal Rules of Civil Procedure, the trial court's findings of fact had to be accepted unless clearly erroneous, and the Court made clear that the findings of fact to be given such deference included the trial court's ultimate finding of a racially discriminatory purpose as well as "subsidiary findings of fact." *Id. at* 622–23.

97. *Hunter*, 471 U.S. at 226 (quoting the Alabama provision).

> white supremacy in this State.' . . . [Z]eal for white supremacy ran rampant at the convention.[98]

Whatever racist legislators may be thinking to themselves, we can't expect them after *Davis* and *Arlington Heights* to be nearly as forthcoming about their racially discriminatory purposes as the Alabama Constitutional Convention delegates were in 1901.

D. Lawmakers' Ever-Increasing Abilities to Camouflage Racially Discriminatory Purposes

In some ways, it is difficult not to look back with a certain degree of nostalgia on the days of *Gomillion v. Lightfoot*,[99] when lawmakers were apt to implement their racially discriminatory purposes by means that did not keep those purposes particularly well hidden. In *Gomillion*, a 1960 decision, the Supreme Court had before it a challenge to an Alabama statute of 1957 that redrew the boundaries of Tuskegee. According to the complaint, which the federal district and appellate courts below had dismissed for failure to state a claim on which relief could be granted, the Alabama legislature had changed the shape of Tuskegee from a square to a twenty-eight-sided figure, and the change had the effect of disenfranchising from city elections all but a handful of the four hundred blacks previously eligible to vote in Tuskegee elections and none of the whites.[100] In an opinion for a unanimous Court reversing the judgment below and remanding for trial, Justice Frankfurter explained that if the challengers could prove their allegations at trial:

> the conclusion would be irresistible, 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 so as to deprive them of their pre-existing municipal vote.
>
> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens . . . .[101]

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98. *Id.* at 229.

99. 364 U.S. 339 (1960).

100. *Id.* at 341.

101. *Id.* at 341–42. In summarizing the challengers' allegations, Justice Frankfurter memorably described Tuskegee's shape after the 1957 statute as "an uncouth

As documented in the lengthy report that the U.S. Commission on Civil Rights released in 2018, lawmakers seeking to disadvantage racial minorities have been able to take advantage of advances in data collection and analysis to craft less obvious, better disguised, means of disenfranchising racial minorities or reducing the impact of their votes.[102] Writing in 1994 for a Supreme Court majority that included Chief Justice Rehnquist—someone whom no one would be tempted to describe as reflexively pro-plaintiff in race discrimination cases—Justice Souter noted the "demonstrated ingenuity of state and local governments in hobbling minority voting power"[103] and quoted the finding in a 1982 Senate report that various "jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength."[104] Particularly because lawmakers have "easier access" than any would-be challengers "to data and analysis regarding the impact of a particular change,"[105] the superficially race-neutral barriers that some states and localities have developed are much more difficult to attack for discriminatory purpose than the older, cruder means. A political scientist's description of the barriers that disproportionately kept racial minorities from voting in the 2018 Georgia gubernatorial election, which pitted former Georgia House Minority Leader Stacey Abrams against then-Secretary of State Brian Kemp, makes clear how varied and effective such barriers can be:

> [Kemp] had created such an obstacle course of discrimination, no one can really say that the election was fair. As secretary of state during the campaign, he held 53,000 voter registrations hostage under the exact match law, which penalized typos, missing hyphens and other tiny things. Seven out of 10 of those registrations came from black voters, who made up only around 30 percent of eligible voters. He purged rolls, reduced the number of polling machines and did many other things to limit the impact of black voters in the state. . . .[106]

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twenty-eight-sided figure" and "a strangely irregular twenty-eight-sided figure." *Id.* at 341.

102. In particular, see chapters 3 ("Recent Changes in Voting Laws and Procedures That Impact Minority Voters") and 6 ("Findings and Recommendations") in U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10.

103. Johnson v. De Grandy, 512 U.S. 997, 1018 (1994).

104. *Id.*

105. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10, at 279.

106. Melanye Price, *Stacey Abrams Is Playing the Long Game for Our Democracy*, N.Y. TIMES (Aug. 15, 2019), http://nytimes.com/2019/08/15/opinion/stacey-abrams-elections.html.

The products of this "evolution of voting discrimination into more subtle second-generation barriers"[107] are not always so resistant to an attack predicated on an alleged racially discriminatory purpose. As illustrated, however, by *North Carolina State Conference of NAACP v. McCrory*[108]—one of the rare cases in which a facially race-neutral barrier has fallen to a discriminatory purpose attack—a high level of unwitting transparency and downright bumbling on the part of lawmakers is almost a prerequisite for such an attack to succeed. North Carolina was one of various jurisdictions that for decades had been bound by the coverage formula of the Voting Rights Act to make no changes in its voting procedures without first receiving federal approval ("preclearance"). When the Supreme Court in 2013 in *Shelby County v. Holder*[109] held that the Act's coverage formula could no longer constitutionally be applied and that the jurisdictions coming within that formula were freed of the Act's preclearance requirement, the North Carolina legislature wasted no time swinging into action. "[O]n the day after the Supreme Court issued *Shelby County v. Holder*," Judge Motz recounted for a unanimous Fourth Circuit panel:

> a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an "omnibus" election law. Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.
>
> In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. . . .[110]

Among the eye-opening "historical background evidence"[111] discussed by the court in support of its conclusion that the various changes put in

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107. Shelby Cty. v. Holder, 570 U.S. 529, 593 (2013) (Ginsburg, J., dissenting).

108. 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

109. 570 U.S. 529 (2013).

110. *N.C. State Conf. of NAACP*, 831 F.3d at 214.

111. *Id.* at 227. As the court had noted, *id.* at 220, the "historical background" of the law under review was one of the factors that the Court in *Arlington Heights* had identified

place by the North Carolina legislature were all traceable to a discriminatory racial intent was the justification that the state had argued before the district court for the provision in the act shortening the early voting period from seventeen days to ten. Judge Motz's description of the state's purported justification captures the high level of bumbling on the part of the state that enabled the challengers to succeed even though the typical challenger seeking a discriminatory purpose invalidation faces insurmountable hurdles to success:

> As "evidence of justifications" for the changes to early voting, the State offered purported inconsistencies in voting hours across counties, including the fact that only some counties had decided to offer Sunday voting. The State then elaborated on its justification, explaining that "[c]ounties with Sunday voting in 2014 were disproportionately black" and "disproportionately Democratic." In response, [the Act] did away with one of the two days of Sunday voting. Thus, in what comes as close to a smoking gun as we are likely to see in modern times, the State's very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.[112]

III. THE NARROWNESS AND INCOMPLETENESS OF THE *DAVIS–ARLINGTON HEIGHTS* APPROACH

In and of itself, the fact that the *Davis–Arlington Heights* approach under the Equal Protection Clause to laws having a disproportionate racial impact does little to root out racial bias in lawmaking does not necessarily mean that the approach fails to give the clause its due. However, in light of the historic national commitment to racial equality reflected in the Equal Protection Clause,[113] racial bias in lawmaking is sufficiently problematic that the approach's very limited utility in rooting out such bias should lead one to question whether the approach

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as an important factor for a court to consider in deciding whether or not a racially discriminatory purpose had been proved.

112. *Id.* at 226 (citations omitted).

113. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (discussing "the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"); Strauder v. West Virginia, 100 U.S. 303, 307 (1880) ("What is this [the Fourteenth Amendment] but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?").

does justice to the clause. I maintain below that the approach cannot overcome any such doubts.

As discussed in Part I, the Court in *Davis* and *Arlington Heights* assumed that the constitutionality under the Equal Protection Clause of the governmental action under review turned entirely on whether the action was traceable to a purpose of discriminating against racial minorities. I have no difficulty with the Court's asking in both cases whether the government action was based on a racially discriminatory purpose. I also have no difficulty with its answer in both instances that a racially discriminatory purpose had not been proven to be a motivating factor. I part ways with the Court, however, on the validity of limiting its analysis in both cases to discriminatory purpose. The disproportionate racial impact that the challengers in both cases made the centerpiece of their claims had independent importance that the Court's single-minded focus on discriminatory purpose wrongly denied. In essence, the Court erred in treating a *sufficient* condition for invalidation under the Equal Protection Clause as a *necessary* one.

A. The Question Addressed

In the article that the Court cited, and relied upon heavily, in fashioning its *Davis–Arlington Heights* approach,[114] Professor Brest masterfully argued that a law should be struck down if it would not have been enacted but for the lawmaker's treating an unconstitutional purpose as a reason for enactment. As indicated by Professor Brest's express mention of *Palmer v. Thompson* in the article's title, *Palmer*—the Jackson, Mississippi swimming-pool desegregation case discussed earlier[115]—was the immediate impetus to his writing the article. *Palmer* plainly involved government action that disproportionately disadvantaged racial minorities: Although the city's closure of its public swimming pools in response to a court order to desegregate them deprived all of Jackson's residents, whatever their race, of the opportunity to swim in an integrated public swimming pool, it stigmatized only Jackson's African American residents. As Professor Brest simply, but memorably, stated in the opening line of his article, "Almost everyone in Jackson, Mississippi, knew that the city closed its public swimming pools solely to avoid integration."[116]

Although Professor Brest used *Palmer* as a springboard to a broader discussion of, and proposed approach to, the problem of

114. Brest, *supra* note 46.

115. *See supra* Part I.

116. Brest, *supra* note 46, at 95.

unconstitutional purposes, his focus, unlike the Court's in *Davis* and *Arlington Heights*, was not what significance to give to disproportionate racial impact. Instead, it was the very different question raised by the Court's refusal in *Palmer* even to consider the possibility that the government action was the result of an unconstitutional purpose. In setting forth his approach, Professor Brest made clear in the first of the approach's four steps that his topic was not disproportionate racial impact, but rather unconstitutional purpose, and that the range of unconstitutional purposes that his approach was intended to address was not limited to racially discriminatory purposes, but rather included unconstitutional purposes of any kind: "1. Governments are constitutionally prohibited from pursing certain objectives—for example, the disadvantaging of a racial group, the suppression of a religion, or the deterring of interstate migration."[117]

In short, in fashioning its approach to challenges based on a law's disproportionate racial impact, the Court in *Davis* and *Arlington Heights* drew heavily on an approach fashioned to resolve challenges of an entirely different kind—ones based on a law's alleged roots in an unconstitutional purpose. To be sure, there was nothing wrong with the Court's asking whether the governmental action in *Davis* and *Arlington Heights* should be struck down on the basis of an unconstitutional purpose. For the reasons discussed in Part II, it would have been quite remarkable if the Court in either case had invalidated the governmental action on that basis or even proceeded past the threshold inquiry of whether the challengers had shown that an unconstitutional purpose had been a motivating factor. Nonetheless, the fact that the Court was very unlikely to conclude that a constitutional attack based on unconstitutional purpose deserved to prevail certainly did not mean the Court was wrong to consider the possibility, even if only to dismiss it with relative ease. The Court erred neither in considering the possibility nor in rejecting it, but in taking so narrow a view of the protections guaranteed to racial minorities by the Equal Protection Clause.

Before turning to the broader protections that the clause offers and that the Court in *Davis* and *Arlington Heights* ignored, I should underline how very narrow the inquiry framed by the *Davis–Arlington Heights* approach really is. In particular, although it may be tempting to understand the approach as reflective to some extent of the concern with racial discrimination that lies at the heart of the Equal Protection Clause, the approach reflects nothing of the sort. In fact, it is fully divorced from any special sensitivity to matters of race. To explain why

117. *Id.* at 116.

this is so, I need to turn briefly to a question that the Court did not address in *Davis* or *Arlington Heights* and, to the best of my knowledge, is yet to address explicitly with any degree of care: What makes a purpose unconstitutional?

Professor Brest's identification, noted above, of "the disadvantaging of a racial group" and "the suppression of a religion" as examples of unconstitutional purposes points the way to an explanation. Both examples have strong intuitive appeal as obviously correct, and I believe they do because they treat as desirable—as something the government would do well to achieve—an outcome that is totally at odds with a core commitment made by a constitutional prohibition or guarantee.[118]

Consider the purpose of "the disadvantaging of a racial group." At the most basic level the Equal Protection Clause, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[119] means that it is unconstitutional for a state to have as its *objective* the unequal treatment of some persons. The state can treat groups unequally—better or worse than one another—as a means to some legitimate end, but it cannot treat some people worse than others because it sees unequal treatment as a good thing, in and of itself. From that perspective, it makes no difference whether the state is claiming that its purpose is to disadvantage blacks, poor whites, gays and lesbians, hippies, gun owners, or billionaires. Whatever the group, the state cannot consistently with the Equal Protection Clause have as its purpose to disadvantage them.[120]

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118. The explanation is mine, not Professor Brest's. As perhaps some indication either that he did not regard offering an explanation as essential to his project or that he had not yet formulated an explanation he felt comfortable exposing to critical scrutiny in the text, Professor Brest relegated his explanation to a footnote, where he briefly stated:

> These particular objectives are proscribed because their pursuit is detrimental to society at large, or because it is unjust to disadvantage persons for possessing certain attributes, or for both reasons. A decision made for the purpose of disadvantaging a particular racial, ethnic, or religious minority, moreover, inflicts a stigmatic injury distinct from the operative consequences of the law: the act of adoption is itself an official insult to the minority.

Id. at 116 n.109. For now, suffice it to say that I see no reason to press my disagreement with his explanation. To avoid possible confusion as to my own conception of what counts as an unconstitutional purpose, I only note that although I fully agree with his identification of "the disadvantaging of a racial group" as an example of an unconstitutional purpose, I disagree with his apparent suggestion in the footnote quoted above that "the disadvantaging of a racial group" is only an unconstitutional purpose if the racial group is a racial minority.

119. U.S. CONST. amend. XIV, § 1.

120. As Justice Brennan explained for the Court in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), "[I]f the constitutional conception of 'equal protection of

the laws' means anything, it must, at the very least, mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." In *Moreno* the Court struck down a 1971 amendment to the Food Stamp Act of 1964 that limited participation in the food stamp program to households whose members are all related to one another. In the course of discussing whether the amendment had the rational basis required to satisfy the demands of equal protection (which, in this case involving *federal* governmental activity, applied by virtue of the Fifth Amendment's Due Process Clause, *see supra* note 32), Justice Brennan made clear that the government could not constitutionally defend the amendment in terms of the purpose suggested by the "little legislative history . . . that does exist"—a purpose "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Moreno*, 413 U.S. at 534.

Believe it or not, a purpose of disadvantaging poor whites was raised as a *defense* in *Hunter v. Underwood*, 471 U.S. 222 (1985), to an argument that the law at hand—one disenfranchising anyone convicted of a crime "involving moral turpitude"—should be struck down because it was enacted for the purpose of disadvantaging blacks. As the Court explained, the state essentially conceded that a purpose of disadvantaging blacks was a "motivating factor" for adopting the law, but maintained that "the existence of a permissible motive for [the law], namely, the disenfranchisement of poor whites, trumps any proof of a parallel impermissible motive." *Id.* at 231–32. Without expressly rejecting the state's characterization of a purpose of disenfranchising poor whites as legitimate, the Court held that the state's attempt to use that purpose as a defense necessarily failed because it was "beyond peradventure" that a purpose to disadvantage blacks "was a 'but-for' motivation for the enactment." *Id.* at 232. *Hunter* is discussed more fully *supra* Part II.C. For an interesting recent dissection of the Court's opinion in *Hunter*, see Andrew Verstein, *The Jurisprudence of Mixed Motives,* 127 YALE L.J. 1106, 1144–49 (2018) (using the Court's opinion in *Hunter* to illustrate the need for courts in cases requiring analysis of mixed motives to employ a "precise descriptive vocabulary" of the sort proposed in the article).

Most obviously, a purpose of disadvantaging gays and lesbians lay at the heart of the Court's invalidation in *Romer v. Evans,* 517 U.S. 620 (1996) and *United States v. Windsor*, 570 U.S. 744 (2013) of, respectively: a Colorado constitutional amendment nullifying any Colorado state or local law protecting gays and lesbians from discrimination; and a section of an Act of Congress (the Defense of Marriage Act) establishing that, as used in any federal law, "marriage" refers only to a legal union of an opposite-sex couple and "spouse" refers only to one's partner in an opposite-sex marriage. According to Justice Kennedy, writing for the Court in both cases, each provision under review was explicable only in terms of a purpose of disadvantaging gays and lesbians and that purpose was unconstitutional. For a critique of the Court's resting its decision in *Windsor* on that purpose and the view that it should have relied on the Establishment Clause instead, see Gary J. Simson, *Religion's Role in Bans on Same-Sex Marriage*, NAT'L L.J., Apr. 14, 2014, at 34.

Finally, as should be apparent, I do not draw on particular precedent in identifying a purpose of disadvantaging gun owners or billionaires as unconstitutional. Given the relative political power of gun owners and billionaires, it would be surprising, to say the least, for any lawmaker to legislate to the disadvantage of gun owners or billionaires out of a deep-seated desire to do them harm. In fact, it is precisely the very minimal likelihood that lawmakers in legislating would count disadvantage to gun owners or billionaires as a plus in and of itself that prompts me to name gun owners and billionaires in my list. If and when a lawmaker ever decides to legislate out of animus

Professor Brest's use of "the suppression of a religion" as another example of an unconstitutional purpose is so apt for similar reasons. The First Amendment's Free Exercise Clause, "Congress shall make no law . . . prohibiting the free exercise [of religion],"[121] tells us at a minimum that people's freedom to practice their religion is valued and that a lawmaker cannot treat the diminution of that freedom as a good thing. In certain instances, a legislature may be able to justify diminishing that freedom in some way as a *means* to a legitimate end. However, it cannot have as its *objective* to diminish some people's autonomy to practice their religion.

In short, the Court in *Davis* and *Arlington Heights* was correct to treat a purpose of disadvantaging racial minorities as unconstitutional, but its treating that purpose as unconstitutional had nothing to do with any sense that disadvantaging racial minorities calls for special scrutiny. Instead, it simply followed from the fact that a purpose of disadvantaging any particular group, like a purpose of diminishing religious exercise, abridging freedom of speech, or fostering unreasonable searches and seizures, contradicts the core meaning of a constitutional prohibition or guarantee.

B. The Question Ignored

Under the *Davis–Arlington Heights* approach, a law's disproportionate impact on racial minorities may be used to help prove a racially discriminatory purpose, but it has no independent importance in and of itself. If the law cannot be shown to be the product of a racially discriminatory purpose, the disproportionate racial impact is beside the point. To put it somewhat differently, the fact that a law disproportionately disadvantages racial minorities has no more inherent constitutional importance than the fact that a law may disproportionately disadvantage lawyers, car dealers, or coin collectors. If that seems surprising in light of what the Supreme Court long ago called "the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the State,"[122] it should. If it seems even more surprising in light of the Court's inference from that historical fact and other sources that classifications disadvantaging racial minorities should be treated as suspect, it should as well.

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toward gun owners or billionaires, those groups will be no less protected from such an unconstitutional purpose than groups much more likely to be the target of such invidious lawmaking.

121. U.S. CONST. amend. I.

122. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

Strictly speaking, of course, a law that disproportionately disadvantages racial minorities is not a racial *classification* and therefore does not automatically trigger the "strict scrutiny" that the Court has demanded when racial classifications are under review. In holding that racial classifications should be treated as suspect, the Court has made clear that its focus is laws that explicitly use race as a basis for treating some people better than others. Although the Court has gravitated to the position that all racial classifications are suspect and call for strict scrutiny regardless of whether they explicitly disadvantage or advantage racial minorities[123]—a position with which a number of Justices and commentators, including myself, have disagreed[124]—the doctrine of race as a suspect classification plainly originated with judicial review of laws classifying to the disadvantage of racial minorities. For purposes of clarity and simplicity, I will discuss the implications of suspect classification doctrine for laws having a disproportionate racial impact with the paradigm case of racial classifications disadvantaging racial minorities foremost in mind.

Lawmakers routinely classify—treat people differently in order to serve the legislative goal.[125] With rare exception, lawmakers do not attempt to serve their goal with precision. To do so would often cost more in individualized decisionmaking than they believe serving the goal is worth, or it might give more discretion than they think advisable to a court or other decisionmaker vested with enforcing the law.

In deciding whether a legislative classification comports with the Fourteenth Amendment's command to deny no one the "equal protection of the laws," the courts have long deferred to these legislative realities and given lawmakers great latitude to classify imprecisely. As long as the classification bears a rational relationship to the lawmaker's objective, the courts will almost always allow the law to stand, and the measure of rationality is comparative generalization: Is a member of the group disadvantaged by the classification at all more likely than a member of the group advantaged by the classification to contribute to the problem that the law seeks to eliminate or diminish?

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123. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223–27 (1995).

124. *See, e.g.*, *id.* at 243–49 (Stevens, J., joined by Ginsburg, J., dissenting); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 356–62 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination,* 71 U. CHI. L. REV. 723 (1974); Gary J. Simson, *Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 454–55 & nn. 60 & 61 (2005).

125. For a still-unrivaled discussion of equal protection and the classification process, see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343–53 (1949).

To use a classic example:[126] Many years ago, in an effort to cut down on traffic distractions, New York City adopted an ordinance that prohibited any truck from carrying advertisements on the outside of the truck for businesses other than the truck owner's. Although some truck owners advertising their own businesses may well create more of a traffic distraction than some truck owners advertising other people's businesses, the Supreme Court was willing to let the classification stand. As explained most clearly in a concurring opinion, the rational basis for the classification apparently lay in the comparative generalization that "in a day of extravagant advertising," a truck owner advertising other people's businesses would be apt to create a greater distraction than a truck owner only advertising his or her own business.[127]

When the Supreme Court developed the doctrine of suspect classification and recognized racial classifications as suspect, it established a standard of review that turned the usual judicial deference to legislative classification on its head. Under that "strict scrutiny" standard, a court deciding the constitutionality of a racial classification must not display the customary tolerance for imprecision in classification. Rather, it must strike down the classification if the state could have pursued its objective more precisely. In addition, even a precise classification must fall unless the objective pursued is of compelling importance.[128]

Although the Court has never stated definitively what, in its view, makes a classification suspect,[129] the two factors that it appears to treat

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126. Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949). To illustrate the operation of the traditional rational basis test and the great deference that the test affords to lawmakers, *Railway Express* is a favorite of constitutional law casebook authors. *See, e.g.,* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 741–43 (5th ed. 2017); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 1333–35 (12th ed. 2015).

127. *Ry. Express*, 336 U.S. at 117 (Jackson, J., concurring). At the time *Railway Express* was decided, the Supreme Court was still more than twenty years away from holding in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), that commercial advertising is a form of speech entitled to significant First Amendment protection. Under *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), commercial advertising fell outside the scope of the Free Speech Clause, and laws regulating it were treated as simply economic regulations.

128. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505, 514 (2005); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984); Loving v. Virginia, 388 U.S. 1, 11 (1967).

129. In explaining whether a particular type of classification is suspect or not, the Court typically has mentioned one or more factors as influencing its determination of suspectness. Although the factor(s) it has mentioned as influencing one determination often overlap with the factor(s) mentioned as influencing another, the factor(s) mentioned do vary to some extent from case to case. *Compare* McLaughlin v. Florida, 379 U.S. 184,

as most important both seem to derive their importance from their impact on the trustworthiness of the classification process. One factor, the disadvantaged group's relatively limited political power,[130] raises doubts about the fairness and objectivity of the classification process because, with little to lose from unfairly disadvantaging such a group and often with little occasion and incentive to get to know members of that group well, legislators are much more likely than usual to legislate on the basis of unfairly negative stereotypes about the group. The other factor that appears to figure most prominently in the Court's calculus of what makes a classification suspect is intense societal prejudice against the disadvantaged group.[131] The reason it should fuel skepticism about the fairness of a legislative process that produces a classification disadvantaging the group is even more apparent. If legislators are apt to form unfair negative stereotypes about a group with relatively limited political power, they are apt to form even more negative

191–92 (1964), *with* Plyler v. Doe, 457 U.S. 202, 216–17 n.14 (1982). The Court's single most illuminating statement on the factors it sees as important to a determination of suspectness is probably its opening statement in the lengthy footnote in *Plyler* that I just cited: "Several formulations *might* explain our treatment of certain classifications as 'suspect.' " *Id.* (emphasis added). For the Court to say about its *own* determinations of suspectness that several factors "might" explain what it has been doing seems to me a very definitive statement that the Court has every intention of keeping its options open and avoiding a commitment to one or more factors as necessary or sufficient or both.

130. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971); Gary J. Simson, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1245–58 (1974). In calling in the latter Note for an inquiry into the disadvantaged group's political power, I saw the inquiry as a logical extension of Professor Ely's "we-they" theory and the suspicion-of-process theme underlying it, as set forth in John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933–35 & n.85 (1973), and in an earlier unpublished paper by Professor Ely. *See* Simson, Note, *supra*, at 1245 n.37. To determine whether laws disadvantaging a particular group merit the exacting judicial review afforded suspect classifications, I suggested that the key should be whether the disadvantaged group is "a prototype of the 'discrete and insular minorities' of which Mr. Justice Stone speaks in his famous *Carolene Products* footnote." *Id.* at 1254 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)). Drawing heavily on Justice Stone's characterization, I identified four criteria as "particularly relevant" to the determination. *Id.* at 1255–57 ("whether the group has the right to vote," "whether the group is a minority in the general population," "how insular the group is," and "whether the group has been repeatedly disadvantaged . . . by legislative classifications"). For a later application of the approach, see Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate,* 40 UC DAVIS L. REV. 313, 370–72 (2006) (maintaining that classifications on the basis of sexual orientation should be treated as suspect).

131. *See, e.g.*, Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440, 443 (1985); *Plyler*, 457 U.S. at 216–17 n.14.

stereotypes about a group that many of their constituents, and presumably many of themselves, regard with animus.[132]

If the essence of the Court's treatment of racial classifications as suspect is a distrust of the legislative process when legislators classify to the disadvantage of racial minorities, a question naturally arises when legislators pass laws that, on their face, do not classify on the basis of race but that foreseeably have a disproportionate adverse effect on racial minorities: Even if the reasons that spark suspicion of the lawmaking process when lawmakers explicitly classify on the basis of race may not apply *as* strongly in this context, don't they continue to apply with substantial force? I maintain that they do and that respect for the Court's recognition long ago that racial classifications should be treated as suspect calls for the Court to revise its approach in *Davis* and *Arlington Heights* and begin treating disproportionate racial impact as a matter of independent constitutional importance.

Treating disproportionate racial impact as constitutionally important in and of itself is not only a logical extension of the recognition of race as a suspect classification. It is also much more psychologically realistic than an approach, like the Court's in *Davis* and *Arlington Heights*, that insists that disproportionate racial impact is worthy of attention only insofar as it may shed light on whether the lawmaker, in enacting the law under review, counted the law's adverse effect on racial minorities as a positive reason for enactment. The *Davis–Arlington Heights* approach treats racial bias on the part of lawmakers as a problem only when such bias takes truly virulent form: The lawmaker in weighing the costs and benefits of adopting a particular law consciously puts "disadvantages racial minorities" in the benefits column. Racial bias may figure into lawmakers' thinking, however —as it may figure into the thinking of other members of society—in more subtle, but still very troubling, ways.

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132. Two other factors also figure prominently in the Justices' discussions of what makes a basis for classification suspect: whether there is a history of laws discriminating against the disadvantaged group, *see, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam); Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973) (plurality opinion); and whether the basis for classification is an unchangeable characteristic, *see, e.g.*, *Plyler*, 457 U.S. at 217 n.14; *Frontiero*, 411 U.S. at 686 (plurality opinion). A history of discrimination may figure in the Court's thinking primarily as an indicator of lack of political power. *See* Simson, Note, *supra* note 130, at 1257. Unchangeable characteristic appears to be the factor that the Court has assigned the least significance in determining suspectness. Most obviously, alienage and religion—two of the four bases for classification that the Court has called suspect, *see* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (listing race, religion, and alienage as suspect); *Graham*, 403 U.S. at 371–72 (listing race, nationality, and alienage as suspect)—are changeable. The three other factors are met by all four bases for classification.

Thanks to the ever-growing literature on "implicit bias" (also often called "unconscious bias"),[133] it is now a matter of common knowledge that we all perceive the world through individual lenses shaped to some extent by preconceived notions of which we are often unaware. Some of those preconceived notions, even if not entirely accurate, may be relatively innocuous, but preconceived negative notions about members of races other than our own hardly meet that description. As a result of implicit bias, a lawmaker weighing a proposed law's costs and benefits may put "disadvantages racial minorities" in the cost column but count it as less of a negative than a more objective observer would. Or perhaps the lawmaker may treat "disadvantages racial minorities" as a matter of indifference—neither a cost nor a benefit. Either way, *Davis* and *Arlington Heights* to the contrary notwithstanding, the lawmaker's racially biased determination deserves to be treated as a serious equal protection problem.[134] In Part IV, which follows, I propose more specifically the form that such treatment might take.

IV. A PROPOSED APPROACH TO DISPROPORTIONATE RACIAL IMPACT

If a law expressly treats people differently on the basis of race to the disadvantage of racial minorities, there is no room for debate as to

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133. *See, e.g.*, MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

134. *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317, 322–23 (1987):

> [A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.
>
> There are two explanations for the unconscious nature of our racially discriminatory beliefs and ideas. First, Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.
>
> Second, the theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. . . .
>
> . . . .
>
> . . . The equal protection clause requires the elimination of governmental decisions that take race into account without good and important reasons. Therefore, equal protection doctrine must find a way to come to grips with unconscious racism.

whether the lawmakers were aware of the negative consequences of their lawmaking for racial minorities. Clearly they were. By the same token, in such instances, there is also no room for debate as to whether in crafting the law the legislators proceeded on the basis of comparative generalizations about racial minorities and the racial majority. Clearly they did. In calling for strict scrutiny of racial classifications, the Supreme Court indicated its exceptionally high degree of distrust of the fairness of a legislative process in which lawmakers engage in comparative generalizations about racial groups and arrive at a result that singles out racial minorities for disadvantage. In effect, the Court has told courts to assume that the legislators acted on the basis of unfair stereotypes unless the state can show that the classification serves a state interest of the highest order as precisely as possible.

If a law does not classify along racial lines but disproportionately disadvantages racial minorities, it is not so clear that the legislators in adopting the law were aware of its adverse consequences for racial minorities and proceeded on the basis of comparative generalizations about racial groups. If they in fact were unaware of the negative consequences for racial minorities when they adopted the law, there is no reason to think that they engaged at the time in comparative generalizations about racial groups; and if they were not engaged in comparative generalizations about racial groups, the concern about unfair stereotyping and an unfair legislative process that I believe are central to the Court's treatment of racial classifications as suspect also does not come into play. Under the circumstances, the disproportionate racial impact would not justify requiring that the law have more than the minimal level of reasonableness that any law must have to survive.

If, however, the legislators were aware that a law would have a disproportionate impact on racial minorities and enacted it nonetheless, there is good reason to think that in enacting it they engaged, consciously or subconsciously, in comparative generalizations about racial groups that probably reflected unfair stereotypes. Under the circumstances, more than rational basis review is warranted, even if not the strict scrutiny that is warranted when the legislators explicitly classify on the basis of race and mete out advantages and disadvantages entirely along racial lines.

I suggest the following as an approach to disproportionate racial impact that gives disproportionate racial impact the independent importance and weight it deserves:

> 1. A party bringing an equal protection challenge to a law[135] on the basis of an alleged disproportionate racial impact bears the burden of proving that the law in operation disadvantages racial minorities in one or more respects[136] at a substantially higher rate than nonminorities. If the challenger fails to carry that burden, the equal protection challenge fails.
>
> 2. If the challenger is able to carry the burden prescribed in step 1, the challenger prevails unless the government can prove that either:
>
> > a. The lawmaker at the time of adopting the law did not foresee, and with due diligence could not reasonably have foreseen, a substantial disproportionate racial impact; or
> >
> > b. The law bears a substantial relationship to an important governmental interest.

In formulating the above approach, I resolved several matters in the way that seemed most reasonable to me but that I readily concede could reasonably be resolved differently. For present purposes, I will not attempt to explain my thinking in resolving each of those matters as I did, but my resolution of two in particular seems to call for at least brief explanation.

First, before settling on the single standard of review that is now Step 2(b), I seriously considered whether the approach should instead provide for enhancing the standard of review to something closer to strict scrutiny if the challenger is able to prove a disproportionate racial impact so substantial that it comes close to the type of impact produced by a racial classification. Ultimately, however, I decided that asking judges to determine more than whether the disproportionate racial impact is "substantial" probably invites them to draw more distinctions than they can draw with reasonable objectivity.[137]

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135. As should be apparent from my use of "law" throughout this Article, I use it here broadly to refer to government action in any form.

136. I include the phrase, "in one or more respects," to make clear that under my approach a law may have a disproportionate racial impact even if the law in some way harms racial minorities and nonminorities alike. The pool closings at issue in *Palmer v. Thompson*, 403 U.S. 217 (1971), discussed in detail *supra* Part I, illustrate the point. The pool closings deprived everyone in Jackson, Mississippi of the opportunity to swim in a public pool, but as Justice White underlined in dissent, Jackson's black population also experienced a distinctive disadvantage. The pool closings were, in White's words, "a pronouncement that Negroes are somehow unfit to swim with whites," and as an expression of "the official view of Negro inferiority," the closings "stigmatized" Jackson's black population alone. *Id.* at 268 (White, J., joined by Brennan and Marshall, JJ., dissenting).

137. Professor Perry has argued that the standard of review for a law having a disproportionate racial impact needs to be "flexible" and that "the degree of disproportion

Second, before deciding that the government should bear the burden of proof on the issue of foreseeability in Step 2(a), I gave a fair amount of thought to whether that burden should rest on the challenger instead. Ultimately, however, I decided for two reasons that placing the burden on the government is most reasonable. It is more in keeping with the seriousness of the constitutional wrong—racial bias in lawmaking—that the disproportionate racial impact indicates probably occurred. In addition, it seems more appropriate in light of the government's typically greater access to relevant evidence on the foreseeability issue.[138]

V. IMPLICATIONS OF THE PROPOSED APPROACH FOR TODAY'S LEGAL BARRIERS TO VOTING

Near the end of his discussion rejecting the challengers' equal protection claim, Justice White wrote for the Court in *Davis*:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[139]

By "compelling justification," I assume Justice White was referring to the necessary-to-a-compelling-governmental-interest test that the Court had been applying, and continues to apply, to laws explicitly treating people differently on the basis of race. If that assumption is correct,

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in the impact" is one of four "factors" a court should "weigh" in deciding constitutionality. Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination,* 125 U. PA. L. REV. 540, 559–60 (1977). (The other three factors that he named are "the private interest disadvantaged," "the efficiency of the challenged law in achieving its objective and the availability of alternative means having a less disproportionate impact," and "the government objective sought to be advanced." *Id.* at 560.)

138. As discussed above, I believe that unfair stereotyping and an unfair legislative process are not a concern when the lawmaker at the time of adopting a law truly did not foresee a substantial disproportionate racial impact. Nonetheless, my approach requires the government to prove that the lawmaker not only did not foresee such an impact but also could not reasonably have foreseen it with due diligence. I include the second, reasonableness prong in part as a check to help ensure that the lawmaker's claimed failure to foresee is real and not simply something that the government can bear its burden of proving because of its advantage over the challenger in access to relevant evidence. In addition, I include a reasonableness prong to avoid inviting willful ignorance on the part of lawmakers.

139. Washington v. Davis, 426 U.S. 229, 248 (1976).

then I readily concede that Justice White was right to warn that adoption of the "rule" he described would have undesirable effects. It indeed would "raise serious questions about, and perhaps invalidate," a host of laws. As discussed below, however, in terms of the challenge before the Court in *Davis*, Justice White's warning was beside the point. For similar reasons, that warning has no more bearing on the viability of the approach to disproportionate racial impact that I proposed in Part IV.

The warning was irrelevant to the challenge before the Court in *Davis* simply because it addressed the implications of applying a standard of review that was not at issue in the case. In essence, Justice White erected a straw man and then knocked it down. As noted in Part I, the challengers were asking the Court to carry over to the constitutional realm the standard of review that the Court several years earlier in *Griggs* had applied to federal statutory claims of employment discrimination. Though considerably more demanding than the customary default standard in equal protection cases—the extremely indulgent "rational basis" test—the standard of review sought by the *Davis* challengers was considerably less demanding than the "compelling justification" standard that Justice White invoked in warning of "far-reaching" consequences.

For two reasons, Justice White's warning is also irrelevant to my proposed approach. Most obviously, my approach, like the one advocated by the challengers in *Davis,* calls for a standard of review significantly less demanding than the "compelling justification" standard invoked by Justice White. In addition, unlike the approach advocated by the *Davis* challengers, my approach affords the government an unforeseeability defense that would enable it to avoid some of the adverse consequences that would follow from application of the strict scrutiny hypothesized by Justice White.

In short, there is no reason to see my approach as the sort of engine of destruction described by Justice White. On the contrary, one would anticipate that even if a challenger can prove that a law has a substantial disproportionate racial impact, the government often will be able to defend the law successfully by demonstrating either unforeseeability under Step 2(a) or the law's satisfaction of the Step 2(b) standard of review. Concededly, the Step 2(b) standard of review is considerably more demanding than the rational basis test traditionally applied. However, the rational basis test is *so* undemanding that asking

the government to meet a significantly more demanding standard does not mean setting the bar so high that law after law is doomed to fail.[140]

That is not to say, however, that adopting my approach would not have *profound* consequences in certain areas of law—in particular, areas in which facially race-neutral legal constraints typically and, at the time of adoption, foreseeably have a substantial disproportionate racial impact and typically rest on little more than a rational basis. For a prime example of one such area, look no further than the area of voting rights. The legal impediments to voting that have become more and more prevalent in recent years epitomize the kind of laws that would be highly vulnerable to attack under my proposed approach.

The 2018 report by the U.S. Commission on Civil Rights discussed earlier[141] is very telling as to both the impact of, and justifications for, contemporary legal barriers to voting. After 275 pages of heavily footnoted discussion and analysis of minorities' access to, and exercise of, voting rights, the report has seven pages of findings. As the unanimous findings of an independent, bipartisan federal agency,[142] those findings have a strong claim to objectivity and expertise, and they paint a stark and powerful picture of a nation in which a wide variety of facially race-neutral legal barriers to voting all too often have had a substantial disproportionate racial impact that was foreseeable at the time of adoption. Among the most pertinent findings are the following:

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140. Consider, for example, the fate of sex classifications in the Supreme Court in the years since the Court in *Craig v. Boren*, 429 U.S. 190 (1976), settled on a middle-tier standard of review between rational basis and strict scrutiny. According to the Court in *Craig*, sex classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. To avoid any intimation that I am trying to propose a middle-tier standard that places the bar somewhat higher or lower than the Court's, I described the requisite governmental interest and means-end relationship in the same terms as the Court used in *Craig*. Although I question whether the Court has been entirely consistent in its application of the *Craig* standard of review, I suggest that it is quite possible to generalize about the rigor with which that standard has been applied and that doing so offers a good sense of the rigor with which I anticipate my proposed Step 2(b) would be applied. In particular, *compare* United States v. Virginia, 518 U.S. 515 (1996), *and* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (invalidating sex classifications), *with* Nguyen v. INS, 533 U.S. 53 (2001), *and* Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding sex classifications). For more on the middle-tier review used to decide the constitutionality of sex classifications, see Simson, *supra* note 124.

141. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10.

142. *See* 42 U.S.C. § 1975(b) (2020) (Commission to consist of eight members, with no more than four at any time of the same political party and with four to be appointed by the president, two by the president pro tem of the Senate, and two by the speaker of the House); *id.* § 1975(c) (members serve six-year terms); *id.* § 1975(e) (the president may only remove a member "for neglect of duty or malfeasance in office").

> In states across the country, voting procedures that wrongly prevent some citizens from voting have been enacted and have a disparate impact on voters of color and poor citizens, including but not limited to: voter ID laws, voter roll purges, proof of citizenship measures, challenges to voter eligibility, and polling place moves or closings.
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> Documentary proof of citizenship voter registration requirements disparately prevent people of color from registering to vote. Moreover, because these requirements force some citizens to pay fees to replace lost proof-of-citizenship documents, documentary proof of citizenship requirements impose a disparate cost on people of color.
>
> As applied, "strict" voter ID laws that limit the acceptable forms of proof of identity to a narrow list of documents correlate with an increased turnout gap between white and minority citizens.
>
> Voter roll purges often disproportionately affect African-American or Latino-American voters.
>
> Polling place changes can be used to impose barriers on minority voters.
>
> In some states, cuts to polling places resulted in decreased minority voter access and influence.
>
> When states cut early voting, they can create unduly long lines and limit minority citizens' access to voting. In some places where early voting was reduced, minority citizens had disproportionately utilized early voting.[143]

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143. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10, at 278, 282–83. For recent findings along the same lines from a respected nongovernmental institute, see the following excerpt from an analysis of the results of a poll conducted by the Public Religion Research Institute and *The Atlantic*. The poll was conducted in June 2018 and asked people primarily about their voting experiences in the November 2016 election:

> The real extent of voter suppression in the United States is contested. As was the case for poll taxes and literacy tests long ago, restrictive election laws are often, on their face, racially neutral, giving them a sheen of legitimacy. But the new data [from the poll] suggest that the *outcomes* of these laws are in no way racially neutral. . . . They indicate that voter suppression is commonplace, and that voting is routinely harder for people of color than for their white counterparts.
>
> The new data support perhaps the worst-case scenario offered by opponents of restrictive voting laws. Nine percent of black respondents and 9 percent of Hispanic respondents indicated that, in the last election, they (or someone in their household) were told that they lacked the proper identification to vote. Just 3 percent of whites said the same. Ten percent of black respondents and 11 percent of Hispanic respondents reported that they were incorrectly told

The findings in the 2018 report include only one specifically addressing the justifications offered for legal impediments to voting that disproportionately disadvantage minorities. "Study after study," the finding states, "including from the Republican National Lawyers Association and a News21 analysis, confirm that voter fraud is extremely rare in the United States."[144] Read in isolation, that finding may appear to be of rather limited importance. It may seem to do no more than cast doubt on the cogency of a justification—fraud-avoidance—underlying a particular type of legal barrier to voting. Read together, however, with the following paragraph, which begins the section of the report entitled "Voter Fraud and Other Arguments," the finding assumes much greater importance. It becomes clear that the finding drives a stake in the heart of the justification that, in one form or another, is by far the primary justification offered for the array of legal barriers to voting that disproportionately disadvantage racial minorities:

> The prominent argument championed by supporters of voter ID laws and similar measures is that they prevent voter fraud. Voter fraud includes allegations of: in-person voter fraud, noncitizen voting, double voting, and voter registration rolls that are "bloated" and contain ineligible voters who should be removed. Each of these allegations arose during the Commission's national briefing on minority voting rights as reasons for strict voter ID laws and other measures discussed in this chapter (these include: cuts to early voting, requiring documentary proof of citizenship to register, challenges to voter eligibility, and purges of voter registration rolls). . . .[145]

If the justifications for the various legal voting barriers that disproportionately disadvantage racial minorities are as flimsy as the

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> that they weren't listed on voter rolls, as opposed to 5 percent of white respondents. In all, across just about every issue identified as a common barrier to voting, black and Hispanic respondents were twice as likely, or more, to have experienced those barriers as white respondents.
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> . . . .
>
> These results add credence to what many critics of restrictive voting have long suspected. First, voter-ID laws and other, similar statutes aren't passed in a vacuum, but rather in a country where people of color are *significantly less likely to be able to meet the new requirements.* Whether intended to discriminate or not, these laws discriminate in effect. . . .

Vann R. Newkirk, II, *Voter Suppression Is Warping Democracy,* THE ATLANTIC, July 17, 2018, https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/.

144. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10, at 282.

145. *Id.* at 102.

2018 report maintains, a question naturally arises: Would those barriers be able to survive judicial review even if the Court doesn't abandon its existing approach to disproportionate racial impact and adopt one along the lines that I propose? After all, wouldn't those barriers fail even the rational basis test that every law at a minimum must pass? In the abstract, it may seem that the answer to that question can't help but be "yes." The Court's case law on the application of the rational basis test, however, leaves no real doubt that today's legal barriers to voting would survive rational basis review. Under that case law, asking for a rational basis is asking for very, very little: A rational basis exists as long as the justification is one that a reasonable lawmaker plausibly or conceivably may hold. As the Court explained in a classic statement of the rational basis test, "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[146]

Are strict voter ID laws that disproportionately keep racial minorities from voting rationally related to preventing voter fraud even though "[s]tudy after study," according to the 2018 report, "confirm that voter fraud is extremely rare in the United States"?[147] Almost certainly "yes." Are such laws "substantially related," as my proposed approach requires, to that important government objective? Almost certainly "no."[148]

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146. Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88 (1955). It is beyond the scope of this Article to address the validity of *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and other decisions in which the Supreme Court has upheld voting barriers in the face of a constitutional challenge based on the fundamentality of the right to vote. For now, suffice it to say that I seriously question the majority's determination in *Crawford*, *see id.* at 202–03 (Stevens, J., joined by Roberts, C.J. and Kennedy, J., announcing the judgment of the Court); *id.* at 209 (Scalia, J., joined by Thomas and Alito, JJ., concurring in the judgment), that the challengers had not made an adequate showing of burden on the right to vote to warrant invalidating the photo identification law at hand. In addition, and more basically, I seriously question whether the majority's *method* of analysis—one that predates *Crawford, see, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992)—gives equal protection principles and the fundamental right to vote recognized in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), their due. For a methodology that I suggest fits far better with those principles, see Gary J. Simson, *A Method for Analyzing Discriminatory Effects under the Equal Protection Clause,* 29 STAN. L. REV. 663, 678–81 (1977), and for the application of that methodology to *Harper* and a number of other early voting rights cases decided by the Court, see *id.* at 682–90.

147. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10, at 282.

148. I do not think it is overly optimistic to believe that judges can meaningfully draw distinctions of this sort, but I recognize that some observers may be more skeptical. *See, e.g.*, Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a*

VI. CONCLUSION

In closing, I would like to underline that, although I have framed my proposed approach as addressed to the Supreme Court and as a logical implication of doctrinal developments under the Equal Protection Clause, I also regard the approach as entirely relevant to state courts' interpretation of the equality provisions in their state constitutions. A Supreme Court that in 2013 in *Shelby County v. Holder*[149] dealt a major blow to minority voting rights when it struck down the preclearance formula in the Voting Rights Act may not be the ideal audience for an approach like mine that holds the potential for expanding minority rights in voting and other areas.[150] I am hopeful, however, that in time, if not in the near future, the Court will revise its approach to disproportionate racial impact to bring it into sync with the Court's longtime treatment of racial classifications as suspect. Until then, those challenging the constitutionality of laws having disproportionate racial impacts would do well to tap into the readiness of many state courts to exercise leadership in constitutional interpretation by the thoughtful development of state constitutional law.[151]

Post-Truth World, ST. LOUIS U.L.J. (forthcoming 2020), https://www.ssrn.com/sol3/papers.cfm?abstract_id=3418427 (revised draft of Nov. 7, 2019). According to Professor Hasen:

> The Justices live in the real, and polarized, contemporary United States. It is worth a pause to note that one of the Justices' spouses frequently touts unsupported voter fraud claims on social media and considered actions at polling places aimed at stopping purported non-citizen voter fraud. This certainly must affect this Justice's world views of the facts at issue.
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> . . . .
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> Facts should matter to these Justices, as facts always should matter when courts decide cases of social and political importance. But in an increasingly post-fact society, where political tribalism rules and is amplified by social media, and Justices are the product of the world around them, what hope do we have for reasoned deliberation and rational decisionmaking? Very little, as the already frayed line between law and politics stands ready to collapse.

Id. at 32–33 (footnote omitted citing an article discussing Justice Thomas's wife's "anti-fraud campaign").

149. 570 U.S. 529 (2013).

150. There have been two changes in the Court's composition since *Shelby County*: Justice Scalia died and was replaced by Justice Gorsuch, and Justice Kennedy retired and was replaced by Justice Kavanaugh. In my view, those changes do not suggest that today's Court is apt to be any more protective than the *Shelby County* Court of minority voting rights. Instead, if anything, they suggest that it is apt to be less protective.

151. For brief discussion of both the opportunity in general presented to litigants by state constitutional law and one successful effort to spur the development of state constitutional law, see Gary J. Simson, *Reflections on Free Exercise: Revisiting* Rourke v. Department of Correctional Services, 70 ALB. L. REV. 1425 (2007).