Intent and Incoherence

Sheila R. Foster

*Fordham University School of Law, sfoster@law.fordham.edu*

Follow this and additional works at: [https://ir.lawnet.fordham.edu/faculty_scholarship](https://ir.lawnet.fordham.edu/faculty_scholarship)
Intent and Incoherence

Sheila Foster*

In this Article, Professor Sheila Foster dissects the intent standard in equal protection jurisprudence, filtering it through the lens of democratic process theory. Most legal scholars and commentators writing in this area continuously restate, and critique, the “rule” of intent as a uniform standard in constitutional law. However, it is clear from the Supreme Court’s jurisprudence (and that of the lower federal courts) that different levels of consciousness can satisfy the discriminatory intent standard, and hence violate the Equal Protection Clause. Exactly what explains these disparate, and seemingly incoherent, levels of intent is the subject of this Article. Professor Foster identifies a set of criteria that explains the application of these different levels of intent, using democratic process theory and its offspring, motive review theory. She then sets out to “cohere” the intent doctrine according to democratic process principles. As her analysis demonstrates, conceptualizing the different levels of intent along a continuum according to democratic process principles provides a coherent account of the intent doctrine. Moreover, the account of the intent doctrine offered in the Article also provides a framework in which to assess the Court’s fidelity to its normative and doctrinal commitments. Using this framework, Professor Foster identifies two areas—administration of facially neutral laws and legislative redistricting—where judicial review raises problematic questions about the Court’s fidelity to its commitments. Both areas illustrate a new type of incoherence in equal protection jurisprudence: that between the Court’s treatment of certain types of incoherence in equal protection jurisprudence: that between the Court’s treatment of certain types of governmental decisions and the normative justifications underlying such treatment.

* Associate Professor of Law, Rutgers School of Law-Camden. B.A., University of Michigan, J.D., University of California at Berkeley. I would like to express my sincere gratitude to the following people for reading and commenting on this Article at various stages of its development: Roger Dennis, Michael Dorf, David Frankford, Ann Freedman, Angela Harris, Earl Maltz, Nancy Moore, Daniel Ortiz, Rand Rosenblatt, Reva Siegel, and Alan Stein. Thanks to Elizabeth Linette for her continued support throughout the process of writing this Article. This Article also benefited tremendously from the expert research assistance of Glendia Scott. I dedicate this Article to my mother, Rosebud Foster, for instilling in me the importance of excellence.
I. INTRODUCTION .......................................................................................................................... 1067
II. INTENT AND INCOHERENCE ................................................................................................. 1073
   A. Incoherence from the Beginning ......................................................................................... 1073
      1. Davis and the Totality of the Circumstance ............................................................... 1075
      2. Arlington Heights and the Objective Evidentiary Scheme ........................................ 1077
      3. Castaneda and the Impact-Inference Standard ............................................................ 1079
      4. Feeney and the Subjective Inquiry .............................................................................. 1082
   B. The Different Levels of Intent ............................................................................................. 1084
      1. Requiring Specific Intent ............................................................................................. 1086
      2. Accepting General Intent ......................................................................................... 1089
      3. Accepting Unconscious Intent ................................................................................... 1094
   C. An Explanation .................................................................................................................... 1097
III. MOTIVE REVIEW AND THE PROCESS TRADITION ............................................................. 1100
   A. Validating the Democratic Process: Motive Review as Process-Corrective ................ 1101
   B. Institutional Competence Limitations: Avoiding the Costs of Inappropriate Restraint ......................................................................................................................... 1105
      1. The Dangers, and Inadequacy, of an Outcome Standard ............................................. 1107
      2. The Suspect Classification Doctrine as Precedent ........................................................ 1108
      3. Ensuring Appropriate Restraint .................................................................................. 1110
   C. The Outcome-Process Link: Overcoming Evidentiary Obstacles in Ascertaining Motive ................................................................................................................................. 1112
      1. The Connection Between Outcomes and Motive ....................................................... 1112
      2. The Difference that the Process Makes ........................................................................ 1116
   D. Twin Strands of One Tradition: The Interaction of Process and Substantive Values ................................................................................................................................. 1118
IV. COHERING INTENT .................................................................................................................. 1121
   A. Super Restraint: Requiring Specific Intent ........................................................................ 1122
      1. Legislative and Executive Decisions and Other Majoritarian Processes: The Fear of Democratic Invalidation and Deference to Respective Institutional Competencies ......................................................................................... 1122
      2. Evaluating the Burden on Substantive Rights ............................................................. 1125
   B. Intermediate Restraint: Accepting General Intent ............................................................ 1127
      1. Administrative Agency Policy Decisions: Decreased Democratic Validation Concerns ................................................................................................................................. 1128
      2. Legislation Burdening a Political or Fundamental Right ............................................. 1131
C. **Minimal Restraint: Accepting Unconscious Intent**

1. Prosecutorial Peremptory Challenges: A Functional Approach to Institutional Competence .......................................................... 1134
2. Low Level Administrative Actors ........................................ 1136
   a. The Absence of Institutional Process Concerns .................. 1136
   b. Statistical Inferences of Bias ........................................... 1138
   c. Relevant Factors in Shifting the Burden ........................... 1140

V. **A Final Challenge: Doctrinal Coherence and Racial Equality** ................................................................. 1143

A. **Discriminatory Administration of Facially Neutral Laws: McCleskey v. Kemp** ............................................. 1144
1. Statistical Inferences, Judicial Competence, and Jury Decisionmaking .................................................. 1146
   a. Process Distortions ....................................................... 1148
   b. Statistical Truths and Judicial deference ......................... 1152
2. Justifying Super Restraint .................................................. 1154
   a. The Fear of Democratic invalidation: The Jury as a Majoritarian Institution? .................................. 1155
   b. Assessing Institutional Accountability ............................... 1157
3. Is Death Really Different? .................................................... 1159

B. **The “Racial” Gerrymander Cases** ........................................ 1161
1. Paying Lip Service to Judicial Restraint ............................... 1163
2. Assessing Judicial Competence ............................................ 1167
3. Is Judicial Intrusion Justified by the Substantive Right? ...... 1171

VI. **Conclusion** ................................................................. 1175

I. **Introduction**

The judicial posture toward facially racial governmental action appears to be well settled for now. Any express use of racial criteria is constitutionally suspect, regardless of the race of those benefited or burdened by such classification. What is more complex is the judicial posture toward governmental decisions that are racially neutral on their face, but suspected of being racially discriminatory. Our definitions of race discrimination, and judicial searches for a coherent

---

concept, seem to be plagued by the tension between "outcome" and "process" norms of constitutional interpretation. In doctrinal terms, these norms are expressed as the "impact" standard versus the "intent" standard. On the one hand, discrimination can be solely characterized by the consequences or effects resulting from an official action or practice. Thus, it is said that discrimination can be detected by the end result of an otherwise facially neutral action. On the other hand, discrimination can be determined by what is in the heart and minds of the decisionmakers. This approach is inward-looking and regards race discrimination as a psychological phenomenon and hence tries to identify discrimination by uncovering evidence of illicit motivation.

After a period of uncertainty between these two extremes, the United States Supreme Court announced in 1976 that governmental action would not be deemed racially discriminatory absent evidence of discriminatory purpose or intent. This landmark case, Washington v. Davis, was a watershed in equal protection jurisprudence for the very


3. For instance, evidence that the decision has a disproportionately negative impact on a suspect group, like racial minorities, is said to define the concept of discrimination. See generally Charles R. Lawrence, III, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 319 (1987) (noting that "injury of racial inequality exists irrespective of the decisionmakers' motives"). This outcome-oriented view of race discrimination is not concerned with a decisionmaker's conscious or unconscious attitudes, but rather with the injury that the racially disparate result signals to others—for instance negative cultural messages, see id. at 324 (advocating a "cultural meaning" test for actions that result in racially disproportionate impact that would "evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance"), or stigma, see, e.g., Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (referring to the harm of racial discrimination as a stigmatic harm, in that it results in "practically a brand upon them ... an assertion of their inferiority"). See also Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 29 (1976) [hereinafter Brest, Antidiscrimination Principle] ("The accumulation of suspected but unproved race-dependent conduct ... may systematically deprive minorities of important benefits.").

4. This view of race discrimination is said to be rooted in deep-seated and/or unconscious prejudice that motivates or causes a perpetrator to act in a discriminatory manner. See, e.g., Alan Freeman, Antidiscrimination Law: The View From 1989, 64 Tul. L. REV. 1407, 1412 (1990) (describing the "perpetrator" perspective, concerned with "eradicating the behaviors of individuals who have engaged in 'prejudicial' discriminatory practices"); Lawrence, supra note 3, at 345-49 (describing "process" theorists and the nature of "unconscious racism").

5. I will use the terms "intent" and "purpose" interchangeably throughout this Article, because the Court has used them interchangeably despite their arguably different meanings. See, e.g., Marjorie J. Weinzeig, Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem, 1 LAW & INEQUALITY J. 277, 307-08 (1983) (noting the different possible uses of the concept of intent, some of which may overlap with the concept of purpose).

reason that it repudiated the notion that disparate impact or unequal outcomes alone would invalidate facially neutral governmental action. On its face, Davis seems to have settled on a universal standard for reviewing facially neutral governmental decisions.

However, despite the equal protection doctrine's "universalist ambitions," the Court's application of the discriminatory intent requirement has been far from coherent. Though it adopted what has been described as a "process" norm, the Court in Davis and its progeny has nevertheless clung to the notion that the outcomes—the disproportionate effects—of official actions continue to play an important, and sometimes determinative, role in identifying the requisite discriminatory intent. As Justice Stevens correctly predicted in his Davis concurrence, "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume." Indeed, the evidentiary requirements for proving intent do vary widely over different contexts. In some contexts, impact is virtually irrelevant, as are other objective, circumstantial factors. In other

---

8. The intent standard has been referred to as a "process" standard because it is said to be focused on legislative inputs, versus their outputs. See, e.g., Barbara J. Flagg, Enduring Principle: On Race, Process and Constitutional Law, 82 CAL. L. REV. 935, 950 (1994) [hereinafter Flagg, Enduring Principle] (analyzing process theorists' view of discrimination law); Michael Klarman, An Interpretive History of Modern Equal Protection, 90 MICH. L. REV. 213, 284 (1991) (noting that the intent standard "directs judicial review towards purging legislative decisionmaking of certain considerations rather than guarding against particular substantive outcomes").
9. In Davis, the Court hinted at the possibility of a multifarious intent standard. Consistent with its pre-Davis equal protection jurisprudence, the Court explained that in some cases, particularly those involving jury selection, disparate impact evidence alone was indicative of a discriminatory purpose. See Davis, 426 U.S. at 241 ("It is . . . clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an unequal application of the law . . . as to show intentional discrimination.") (quoting Akins v. Texas, 325 U.S. 398, 404 (1945)). In other cases, the Court implied, much more demanding evidence would be required to prove discriminatory purpose. See id.
10. Id. at 254 (Stevens, J., concurring).
11. As Justice Stevens explained this variation: Although it may be proper to use the same language [discriminatory purpose] to describe the constitutional claim . . . the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts. Id. at 253 (Stevens, J., concurring).
contexts, impact plays a central role in finding a discriminatory purpose.

Nevertheless, more than evidentiary variation is at stake in the Court’s application of the intent requirement. While courts and commentators continually restate the “rule” of intent—that discriminatory purpose is required to invalidate official action under the Fourteenth Amendment—it is clear that various levels of intent are accepted and/or required in different contexts. The variation in how much of a role impact has in demonstrating the required intent can be drastic from context to context. With these varying degrees of evidentiary demands come varying degrees of consciousness that can violate the Equal Protection Clause. This consciousness can range from a specific desire to harm the affected group, to general knowledge that harm is substantially certain to occur, to an unconscious bias towards the affected group. The Court has yet to articulate what considerations or factors drive these different levels of intent.

Exactly what explains these disparate approaches to intent is the subject of this Article. I identify a set of criteria that explains the application of these different levels of intent. As many others have noted, the intent doctrine reflects the dominance of a very influential strand of constitutional theory, widely referred to as democratic “process theory,” in adjudicating difficult constitutional interpretation issues. The criteria that I identify are linked to various democratic process considerations that underlie a more specific theory, “motive review,” credited with the Court’s adoption of the intent requirement. My purpose is to show not only how process principles shaped the adoption of the intent requirement, but also how they continue to shape its application to different types of governmental activity in

12. See id. (Stevens, J., concurring).
13. Process theory counsels judicial deference towards, and precludes courts from second-guessing the substance of, decisions made by other governmental actors. See, e.g., Gayle Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 403-04 (describing the Court’s “preoccupation” with process-based theories); Flagg, Enduring Principle, supra note 8, at 936 (describing the “impact of a particular constellation of process-oriented values on the development of constitutional race discrimination law”); see also Klarman, supra note 8, at 284, 298 (also noting distinction with “political process theory” that “identifies particular subject matter areas—such as voting rights and race discrimination—as appropriate for judicial intervention based on the likelihood that the political process has been subverted, either through franchise restrictions or prejudice directed against ‘discrete and insular minorities’”); Sklansky, supra note 7, at 1299 (noting the remarkable influence that process theory has had on equal protection jurisprudence); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1063 (1980) (noting that the Court measures constitutionality of decisionmaking processes by its view of democracy and corresponding values).
different contexts. A closer look at the Court’s reasoning reveals how these principles shape, and hence cohere, the jurisprudence of intent. The difficulty of satisfying the intent standard is directly linked to the very factors that cohere the Court’s jurisprudence. However, by continuing to perpetuate the “myth”\(^\text{14}\) of one static intent standard, the current doctrine both reveals its facial incoherence and conceals the range of its potential for identifying racial (and other forms of) discrimination.

To be sure, the intent standard itself has been rightly criticized by many as an ineffective means to identify racial discrimination.\(^\text{15}\) The intent requirement has also had a deterrent effect on those subjected to racial discrimination, left by the perceived futility of proving their claim.\(^\text{16}\) Some have gone so far as to suggest that the time has come to recognize that the judicially created concept of “discrimination” has outlived its usefulness in the effort to remedy racial (and other forms of) inequality.\(^\text{17}\) On the whole, I concur with these sentiments, and, in a perfect world, the Court would have heeded to them. Unfortunately, it has not. For this reason, I do not want to add myself to the list of abolitionists of the intent standard. Given the intractable nature of the intent doctrine in equal protection jurisprudence, it is important to make clear that the intent requirement is neither as inflexible in its definitional construction nor as unattainable in its evidentiary requirements as critics suggest. Instead, I hope to bring to the forefront certain values that serve as guiding criteria underlying judicial review in this arena. By unmasking these criteria, I also provide a basis for judging the Court’s adherence to its own normative commitments. When the Court strays from these commitments, as I argue that it has in recent cases, the result has been to create an even

---

15. Some of the main criticism includes: the intent standard ignores the existence of white race consciousness, see Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 980-81 (1993) [hereinafter Flagg, White Race Consciousness]; it ignores the real cause of racial discrimination—unconscious racism, see Lawrence, supra note 3, at 322; and the injury of racial inequality exists irrespective of the decisionmaker’s motive; see Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36, 48-49 (1977); Weizsäcker, supra note 5, at 336.
17. See, e.g., George Rutherglen, Discrimination and Its Discontents, 81 Va. L. Rev. 117, 117 (1995) (suggesting a need to look beyond the concept of discrimination for other concepts that can provide better remedies for persistent forms of inequality in the workplace).
deeper incoherence. This new brand of incoherence not only creates dissonance with its theory of judicial review, but also results in doctrinal instability and a retrenchment in the Court’s commitment to racial equality.

In Part I, I trace the incoherence in the development of the intent doctrine and the requirement and/or acceptance of different levels of intent throughout its application across various contexts. Specifically, I argue that there are three levels of intent—specific, general, and unconscious—that can violate the Equal Protection Clause. In this Part, I also consider one commentator’s explanation for the intent doctrine’s facial incoherence. This explanation posits that the doctrine can be understood as allocating individual and governmental burdens of proof, and levels of intent, according to the substantive right at issue. I conclude that, while the Court is sensitive to the nature of the right at issue in applying the intent requirement, substantive concerns are only one part of a larger gestalt approach to judicial review of facially neutral actions. Substantive concerns must be viewed in conjunction with institutional process concerns in order to make sense of the different evidentiary frameworks and the accepted levels of intent that can invalidate governmental action.

Part II articulates the process and substantive criteria that drive the Court’s posture toward various types of facially neutral governmental action suspected of being discriminatory. Specifically, I contend that there is a direct link between the judicial concerns underlying the adoption of the intent requirement and their corresponding precepts in motive review theory. I also identify the connection between institutional process considerations underlying judicial motive review and the Court’s sensitivity to particular subject matter areas—like voting rights. These two strands can be seen as part of the same tradition, because they both direct judicial review toward ensuring an unfettered democratic process. In Part III, I reexamine the Court’s application of various levels of intent to different government actions and substantive contexts in light of the democratic process considerations articulated in Part II. I argue that the intent doctrine coheres when viewed through the lens of these institutional process and substantive concerns.

Part IV then explores two recent areas where the Court has jeopardized this seeming coherence. The first area is its review of alleged discriminatory administration of facially neutral laws in McCleskey v. Kemp. There, the Court refused to scrutinize a claim

that the Georgia death penalty had been discriminatorily applied to a black defendant charged with killing a white victim.\footnote{19} Faced with sophisticated and comprehensive statistical evidence demonstrating racially disparate patterns of death penalty administration, the Court attempted to distinguish cases in its intent jurisprudence that might have mandated closer judicial scrutiny of McCleskey’s sentence.\footnote{20} I argue that the Court’s rejection of McCleskey’s claim poses troubling questions about its willingness to adhere to a coherent intent jurisprudential framework. The second area involves judicial review of alleged racial gerrymanders resulting in the creation of majority black voting districts responsible for a substantial increase in the number of black representatives elected. In 1993, with Shaw v. Reno,\footnote{21} the Court began to scrutinize these facially neutral redistricting plans without proof of discriminatory intent on the part of the state legislatures adopting them. I argue that the criteria to which the Court has committed itself in reviewing facially neutral legislative decisions, and the definition of harm that it has embraced before invalidating those decisions, weigh in favor of far more restraint than the Court exercises in these cases. In particular, the absence of an “intent” requirement as a barrier to judicial scrutiny of the legislative process is conspicuous here, and even more so because of the interests at stake.

In both instances, the Court has potentially created a different type of incoherence—that between its treatment of certain types of decisions and the normative justifications underlying such treatment. This incoherence comes with a high cost to the legitimacy of the Court and to racial equality. I conclude the Article urging the Court to adhere to a coherent intent jurisprudence consistent with the democratic process principles embraced throughout its jurisprudence. By doing so, I believe that the Court can both be faithful to its normative commitments and live up to the promise of equal protection.

II. INTENT AND INCOHERENCE

A. Incoherence from the Beginning

In four cases, the Court set out to change the course of equal protection doctrine regarding facially neutral governmental action that has a disparate effect on an identifiable group. Prior to these cases, the judicial posture toward this class of governmental decisions appeared

\footnote{19. See id. at 295.}
\footnote{20. See id.}
\footnote{21. 509 U.S. 630 (1993).}
uncertain. Specifically, the Court seemed to imply that governmental actions would be constitutionally problematic by reference to their outcomes alone. However, in *Washington v. Davis*, the Court expressed the fear that adjudging the constitutionality of a decision solely by its outcomes would seriously call into question a host of official regulations that burdened one group over another. Based partly on this fear, the Court unabashedly rejected the notion that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." In a subsequent case, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court detailed the type of evidentiary scheme that a challenger could employ to prove the requisite discriminatory purpose. This scheme relied primarily on circumstantial and objective evidence of events surrounding the challenged decision. It built upon the Court's mandate in *Davis* that intent be determined by "the totality of the circumstances."27

Despite the Court's move toward a universal standard and evidentiary scheme, the application of the intent doctrine began to defy the consistency that seemingly characterized it. The Court in both *Davis* and *Arlington Heights* sent a strong, unmistakable message expressing the indeterminacy of disparate impact evidence, and the desire for other circumstantial evidence, in demonstrating discriminatory intent. However, this framework did not cohere when applied to various types of governmental decisionmaking. Within two years after *Arlington Heights*, the intent doctrine barely resembled the framework established in that case. In *Castaneda v. Partida*, the Court allowed an inference of intent based almost solely on evidence of disparate impact—contrary to its stated repudiation of the prominence of such evidence to the core constitutional inquiry. Shortly thereafter, in *Personnel Administrator of Massachusetts v. Feeney*, the

22. See Palmer v. Thompson, 403 U.S. 217, 225 (1971); Paul Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 SUP. CT. REV. 95, 99 (1971) [hereinafter Brest, Legislative Motive] (describing Palmer as "the latest addition to one of the most muddled areas of our constitutional jurisprudence").
23. 426 U.S. 229, 248 (1976) (rejecting a disproportionate impact test because it would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes").
24. Id. at 242.
26. See id.
27. Id. at 265-66.
Court settled on a very narrow definition of discriminatory intent.29 Under this rendering of intent, evidence of disparate impact is virtually irrelevant to a finding of intent, as are other objective indicia.30

1. *Davis* and the Totality of the Circumstance

Facing the ambiguity created by its precedents,31 the Court in *Washington v. Davis* acknowledged that these precedents could be interpreted as extending a disparate impact standard beyond the statutory context.32 However, it quickly declared that the disparate impact standard "is not the constitutional rule."33 In supporting this conclusion, the Court found in some of its past decisions a requirement of discriminatory purpose and disavowed those cases that seemingly contradicted that view.34 It then resolved the facial contradictions of its precedent by sternly holding that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."35

Nevertheless, for all its sternness in requiring a showing of discriminatory intent as a prerequisite for judicial invalidation, the

30. *See id.*
31. The Court had already held that, as to private sector decisions, the governing standard of discrimination was outcome-oriented. In *Griggs v. Duke Power Co.*, the Court held that, under Title VII of the 1964 Civil Rights Act, disproportionate racial impact without discriminatory intent could establish a violation of the statute's prohibition against employment discrimination. 401 U.S. 424, 430-31 (1971). Upon a showing of impact, the Court in *Griggs* held that the burden of proof shifts to the defendant to show that the disputed employment practice, a test in that case, "bear[s] a demonstrable relationship to successful performance of the jobs for which it [is] used." *Id.* at 431.
33. *Id.*
34. The Court found support in the language of its earlier discriminatory legislation cases such as *Wright v. Rockefeller*, 376 U.S. 52 (1964), and *Keyes v. School District No. 1*, 413 U.S. 189, 240 (1973), both of which had predicated judicial scrutiny upon a finding of discriminatory purpose. *See Davis*, 426 U.S. at 240. It disavowed *Palmer v. Thompson*, 403 U.S. 217 (1971), as being inconsistent with the other cases and cited *Keyes* as evidence that *Palmer* was not understood "to have changed the prevailing rule." *Davis*, 426 U.S. at 243.
35. *Davis*, 426 U.S. at 239. The Court reiterated this sentiment a few more times throughout its opinion. For instance, it stated that "[d]isproportionate impact ... is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution" and "[s]tanding alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 242 (citation omitted). Later on, addressing the facts of the case, the Court proclaimed: "[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person ... equal protection of the laws' simply because a greater proportion of [blacks] fail to qualify than members of other racial or ethnic groups." *Id.* at 245.
Court never defined exactly what "discriminatory purpose" encompassed or exactly how one could prove it. Moreover, the Court ultimately left a mixed message about the relevance of disparate impact evidence to this inquiry. Holding that disparate outcomes were not "irrelevant" to the central constitutional inquiry of intent, the Court created a wide opening for "inferring" discriminatory intent from the "totality of the relevant facts." Indeed, it left the impression that discriminatory purpose could be inferred, in some contexts, solely by reference to the disproportionate outcomes of a governmental decision.

Davis involved a challenge to various District of Columbia Police Department recruiting policies that were alleged to be racially discriminatory because of their disparate effects on potential black police officers. The sole issue on appeal to the United States Supreme Court was the Department's adoption of a written personnel test, "Test 21," developed by the Civil Service Commission, that excluded a disproportionately high number of blacks. The Court had to decide what weight to assign to the racially disparate results—that more blacks than whites failed Test 21—considering the facial neutrality of the test. Applying its loosely defined requirement of discriminatory intent, the Court found that Test 21 was not adopted as "a purposeful device to discriminate against [blacks]." To the contrary, the Court found such an inference impossible in light of "the affirmative efforts of the ... Police Department to recruit black officers [and] the changing racial composition of the recruit classes and of the force in general," as well as "the relationship of the test to

36. Id. at 242. The Court warned: "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination." Id. at 241.
37. Specifically, it stated:
Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact ... that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of [blacks] from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

Id. at 242.
38. See id. at 232-33.
39. See id. at 235.
40. See id. at 245.
41. Id. at 246.
the training program." The totality of the Department's actions, including its recent recruiting, served to defeat any inference of discriminatory purpose.

2. Arlington Heights and the Objective Evidentiary Scheme

As explained, Davis was less than clear in its delineation of exactly what type of evidence a challenger needed to produce to satisfy the discriminatory purpose inquiry. One year after Davis, the Court seized the occasion to clarify the motive inquiry, and its requisite proof, in Village of Arlington Heights v. Metropolitan Housing Development Corporation. Arlington Heights paved the way for a more consistent approach to finding discriminatory purpose, delineating exactly how a plaintiff could produce evidence of a decisionmaker's actual motivation behind a particular decision. In doing so, the Court rendered evidence of disparate impact peripheral to the central constitutional inquiry and stressed the need to look to other types of circumstantial evidence. The evidentiary scheme that the Court adopted assumed that the relevant mental state would be connected to objective factors, relying on the historical and social context of the decision to infer the decisionmaker's intent.

The Supreme Court began its opinion in Arlington Heights reaffirming the central holding of Davis, but adding an important caveat: a discriminatory purpose need only be one of many motivating factors in adopting the challenged official decision or practice to invoke heightened judicial scrutiny of the decision. Turning to the means by which a challenger can demonstrate a showing of illicit motive, the Court carefully emphasized that the outcome of an official action, "whether it 'bears more heavily on one race than another,'" is only marginally relevant in identifying whether

42. Id. The district court found that, in the three or four years prior to the Davis litigation, 44% of new police force recruits had been black. See id. at 235. Moreover, the figure "represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated." Id.
44. See id. at 265-66.
45. See id. at 266-67.
46. See id. at 265-66. Nor does it have to be the "dominant" or "primary" motivation behind an official decision. See id. at 266 ("Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.").
discriminatory intent was a motivating factor in the decision. Such outcomes provide only "an important starting point." Instead, the Court stressed the need to look beyond evidence of disparate impact to other evidence that could determine whether the decisionmakers were actually motivated by bias toward the group in question. The search for a discriminatory purpose, the Court reasoned, "demands a sensitive inquiry into [all available] circumstantial and direct evidence." Such an inquiry could include the following factors: (1) the historical background of the decision, particularly if it reveals a series of actions by the decisionmaker taken for invidious purposes; (2) the specific sequence of events leading up to the challenged decision, which may shed light on the decisionmaker's purposes; (3) departures from the normal procedural sequence that demonstrate improper motives played a role in the decision; (4) substantive departures by the decisionmakers, particularly if factors usually considered important by the decisionmakers strongly favor a decision contrary to the one reached; and (5) legislative and administrative history behind the challenged decision, such as contemporary statements by decisionmakers.

At issue in Arlington Heights was a predominantly white suburban community's decision to deny a rezoning request to a developer seeking to build townhouse units for low- and moderate-income tenants. The decision essentially required the Village of Arlington Heights' Plan Commission to make a policy decision regarding whether or not to change the zoning status quo in the village. The existing policy was to preserve most of the village's land for single-family homes. After a series of town meetings where the issue was hotly debated, the village denied the request of the Metropolitan Housing Development Corporation (MHDC) to rezone a fifteen-parcel area from single-family to multiple-family classification. This rezoning would have enabled the construction of the proposed units. MHDC brought a lawsuit alleging that the denial was racially discriminatory in violation of the Fourteenth

---

47. Id. at 266 (quoting Davis, 426 U.S. at 242).
48. Id. The Court did note that in "rare" cases, such as Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Yick Wo v. Hopkins, 118 U.S. 356 (1886), evidence of impact alone may be determinative. See Arlington Heights, 429 U.S. at 266.
49. See id. at 266-68.
50. Id. at 266.
51. See id. at 267-68.
52. See id. at 255-57.
53. See id. at 257.
54. See id.
Amendment. Applying the type of evidentiary factors that it deemed would be indicative of discriminatory purpose, the Court found no evidence that the decisionmakers were actually motivated by racial prejudice in their refusal to grant the developer’s rezoning request. Because the challengers had failed to carry their burden of proving that discriminatory purpose was a motivating factor in the village’s decisions, the Court concluded that “[t]his ... ends the constitutional inquiry” and “[t]he ... finding that the Village’s decision carried a discriminatory ‘ultimate effect’ is without independent constitutional significance.”

3. Castaneda and the Impact-Inference Standard

In the same year that Arlington Heights mandated the need to look beyond evidence of disparate impact in discerning the existence of discriminatory intent, the Court signaled that such evidence would nonetheless be sufficient by itself in some contexts. In Castaneda v.

55. See id. at 256. The district court denied relief, finding that the decision was neither motivated by racial discrimination nor would it have a racially discriminatory effect. See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974), rev’d, 517 F.2d 409 (7th Cir. 1975), rev’d, 429 U.S. 252 (1977). But the court of appeals reversed, finding that the “ultimate effect” of the denial of the developer’s request was racially discriminatory and that the refusal to rezone therefore violated the Fourteenth Amendment. See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 444 (7th Cir. 1975), rev’d, 429 U.S. 252 (1977). In finding the village’s decision to be racially discriminatory, the court of appeals relied upon the fact that the village’s decision would have a disproportionate impact on blacks, in that blacks constituted 40% of those Chicago area residents who were eligible to become tenants of the proposed development, and upon the historical context of the decision and its impact on the high degree of residential segregation in that community. See Arlington Heights, 429 U.S. at 259-60. The court of appeals also noted that, while the county was enjoying rapid growth in employment opportunities and population, the community of Arlington Heights continued to exhibit and indeed exploit the high degree of residential segregation by allowing itself to become nearly all white. See id. at 260. The court held that the community could not simply ignore this problem. See id. The court of appeals rendered its decision before the Court’s opinion in Washington v. Davis. See Arlington Heights, 517 F.2d 409 (7th Cir. 1975), rev’d, 429 U.S. 252 (1977).

56. See Arlington Heights, 429 U.S. at 269-70. Though it conceded that the impact bore more heavily on racial minorities, the Court found that there was little about the historical and contextual evidence, or totality of the circumstances, that supported an inference of discriminatory purpose. See id. Specifically, the Court was persuaded by the evidence that: (1) the area had always been zoned in the same particular manner since the inception of its zoning map, (2) the community was committed to single-family homes, (3) the rezoning request progressed according to the usual procedures, (4) statements by the decisionmakers, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the decision (versus racial criteria), (5) the current zoning policy that it chose to keep in place has been consistently relied upon in board decisions over time, and (6) the testimony of the board member called to testify evinced no illicit motivation. See id.

57. Id. at 271.
Partida, the Court scrutinized the application of Texas’ statutory "key-man" system of grand jury selection based upon an evidentiary framework similar to its early jury cases. As in these early jury cases, the Court overturned the conviction of a black defendant convicted by an all white jury based upon evidence of total, or near total, exclusion of a racial group over a period of time from the venires from which individual jury panels were chosen. This "rule of exclusion" formed the core of a race discrimination claim in the early jury cases, giving rise to an inference of unconstitutional governmental action. As in Castaneda, the fact that a selection procedure is susceptible of abuse, or contains excessive discretion, bolsters the inference of race-dependency raised by the statistical showing. This standard has been referred to as the "impact-inference" standard because of the Court's willingness to allow inferences of discriminatory intent with proof close to a showing of mere disparate impact.

Pursuant to the Castaneda framework, evidence of disparate impact is central to the intent inquiry. A prima facie case of discriminatory purpose is demonstrated where the defendant establishes that: (1) the group to which he belongs is a "recognizable,

59. This system uses "key" persons, "citizens of good standing, [who] recommend to the court people in the community who will make responsible jurors." Ortiz, supra note 14, at 1120 & n.75 (noting that, as of 1977, 16 states still used the key-man system). Potential jurors are then brought in for further evaluation by the court and lawyers and are required to meet certain criteria. See Castaneda, 430 U.S. at 484-85. For example, a grand juror, in addition to being a citizen of the state and of the county in which he is to serve and a qualified voter in the county, must be "of sound mind and good moral character, ... literate, have no prior felony conviction, and be under no pending indictment 'or other ... accusation.'" Id. at 485.
60. The grand jury is distinct from the regular "petit" jury in that a relatively large amount of jurors are impaneled (as many as 23 as compared to 12). See Black's Law Dictionary 596 (6th ed. 1991).
61. The venire is the group of people summoned from which the actual jury is selected. See id. at 1079.
62. See, e.g., Carter v. Texas, 177 U.S. 442, 447-48 (1900) (holding that total exclusion of otherwise qualified blacks from serving as grand jurors is impermissible race discrimination). Accord Pierre v. Louisiana, 306 U.S. 354, 362 (1939) (rejecting systematic exclusion where all but one black on jury, even though many blacks called for jury service are qualified pursuant to neutral criteria); Norris v. Alabama, 294 U.S. 587, 589 (1935) (rejecting systematic and long-continued exclusion); Neal v. Delaware, 103 U.S. 370, 397 (1880) (rejecting total exclusion).
63. Hernandez v. Texas, 347 U.S. 475, 480 (1954) (designating this standard the "rule of exclusion").
64. See id. at 477-78.
65. See id. at 479.
distinct class, singled out for different treatment under the laws, as written or as applied;" (2) the group has been underrepresented in the grand jury process, demonstrated by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors over a significant period of time; and (3) the selection procedure is susceptible of abuse. Once evidence of disparate impact is shown and is coupled with evidence of excessive discretion in the administration of a jury selection procedure, the court then compels the decisionmaker to put forth race-neutral reasons for the decision. The state must demonstrate that permissibly neutral selection criteria and procedures produced the results. If the decisionmaker fails to put forth an explanation, or does so inadequately, the court can allow the inference of discriminatory purpose to stand. As in the early jury cases, an unrebutted prima facie case violates the Equal Protection Clause whether or not it was a conscious decision on the part of any individual jury commissioner and "whether accomplished ingeniously or ingenuously."

Applying this scheme to the facts in Castaneda, the Court first noted that the group to which the challenger belonged, Mexican-Americans, was "a clearly identifiable class" subject to various social "disadvantages." Moreover, the statistical evidence demonstrated that, over an eleven-year period, 39% of those summoned for grand jury service were Mexican-Americans in a county that was 79%.

68. See id. at 494-95.
69. See id. at 500.
70. See id.
71. Smith v. Texas, 311 U.S. 128, 132 (1940). Moreover, in these cases, a finding of race discrimination was not mitigated by the fact that the commissioners charged with administering the facially neutral law and process testified that they had not "intentionally, arbitrarily or systematically discriminated against [black] jurors" and failed to select blacks because "they did not know the names of any who were qualified" or were "not personally acquainted with any member of the [black] race." Id. at 131-32. The Court held that "[w]here jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no [blacks] as well as from commissioners who know but eliminate them." Id. at 132. Accord Hill v. Texas, 316 U.S. 400, 404 (1942). Likewise, the Court in Castaneda held that the state was compelled to go beyond a "simple protestation from a [jury] commissioner that racial considerations played no part in the selection [process]" in rebutting the prima facie case. Castaneda, 430 U.S. at 498 n.19 (relying upon Alexander v. Louisiana, 405 U.S. 625, 632 (1972); Hernandez v. Texas, 347 U.S. 475, 481-82 (1954); Norris v. Alabama, 294 U.S. 587, 598 (1935)).
72. Castaneda, 430 U.S. at 495. The Court cited past discrimination against Mexican-Americans in Texas and current social disadvantages such as poverty-level incomes, less desirable jobs, substandard housing, and lower levels of education. See id. at 486-87.
Mexican-American.\textsuperscript{73} These statistics were enough, the Court said, to
give rise to an inference of a discriminatory selection process in the
county at issue.\textsuperscript{74} However, the inference was further bolstered by the
fact that the "Texas system of selecting grand jurors is highly
subjective."\textsuperscript{75} Based upon this evidence, the burden of proof shifted to
the state to explain its selection of the jurors in the challenger’s case on
race-neutral grounds. However, the State offered no evidence either
attacking the reliability of the statistics or rebutting the inference of
discrimination.\textsuperscript{76} This failure caused the Court to conclude that the
selection process was racially discriminatory. As a result, the
defendant’s conviction was overturned.\textsuperscript{77}

4. \textit{Feeney} and the Subjective Inquiry

One year after \textit{Castaneda}, the Court made an abrupt shift from
the impact-inference in \textit{Castaneda} to a much narrower conception of
discriminatory purpose and the evidence required to satisfy it. In \textit{Personnel Administrator of Massachusetts v. Feeney},\textsuperscript{78} the Court
articulated a definition of intent that requires proof of a
decisionmaker’s subjective desire to harm the affected group.
Moreover, the \textit{Feeney} standard suggests that proof of discriminatory
impact can never be central to a finding of intent. Instead, the adverse
consequences of a decision must have been a specific goal of the
decisionmaker. Contrary to \textit{Arlington Heights}, the plaintiff must
demonstrate the existence of a mental occurrence separate from the
objective factors that might infer intent. \textit{Feeney} embraced a standard
of intentional action that can fairly be equated with malice, requiring a
specific desire to harm the affected group.

\textit{Feeney} involved a gender-based equal protection challenge to a
Massachusetts veterans’ "absolute lifetime” preference statute that
operated overwhelmingly to the advantage of males, who constituted
the majority of veterans.\textsuperscript{79} The female plaintiff alleged that the

\textsuperscript{73} \textit{See id.} at 495. "Statistical analysis of the grand jury lists during the 2\textsuperscript{1/2}-year
tenure of the State District Judge who selected the [jury] commissioners in [the challenger’s]
case [also] reveal[ed] that a significant disparity existed over this time period as well." \textit{Id.} at
496 n.16.

\textsuperscript{74} \textit{See id.} at 496.

\textsuperscript{75} \textit{Id.} at 497.

\textsuperscript{76} \textit{See id.} at 488.

\textsuperscript{77} \textit{See id.} at 501.

\textsuperscript{78} 442 U.S. 256, 278-79 (1979).

\textsuperscript{79} \textit{See id.} at 259, 270-71. The preference applied to all civil service positions in
Massachusetts and became applicable only after applicants had taken and passed competitive
examinations. Applicants were then ranked by their test results, training, and experience and
placed on an "eligible list." The preference requires, however, that veterans and family
absolute preference formula contained in the statute "inevitably operates to exclude women from consideration for the best Massachusetts civil service jobs" and thus unconstitutionally discriminates against women because of their gender. Specifically, the plaintiff argued that the legislature "intended" the natural and probable consequences of its actions, because it was undoubtedly aware that the statute would have the inevitable effect of "cutting off" women's opportunities.

Reviewing the challenged legislation, the Court agreed that the legislature had acted "intentionally" to advantage veterans and consequently must have been aware that such an advantage would disadvantage nonveterans, who were disproportionately women. The legislature's decision to grant a preference to veterans was "intentional," in the sense that its adverse impact on women was both "volitional" and "foreseeable." The Court rejected the argument that intent in the constitutional context was tantamount to intent in the criminal and civil law context. "Discriminatory purpose," the Court reasoned, "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." In order to meet this standard, the Feeney plaintiff needed to demonstrate that the veteran classification 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."

The effect of Feeney is to sever the objective from the subjective, the sociological from the psychological. Unlike Arlington Heights' epistemology of intent, in Feeney objective factors may be "signs" or

members of veterans be ranked above all other candidates, in order of their respective scores. See id at 263. The challenger, a female nonveteran who ranked second and third on two different civil exams, subsequently brought this action asserting that the veterans' preference operated to bar her from getting on certified eligible lists despite her test scores. See id at 259. Because of the preference, she was ranked sixth behind five male veterans on one list for dental examiners and placed in a position on another list behind 12 male veterans, 11 of whom had lower scores. See id at 264.

80. Id at 259.
81. See id at 278. The district court, despite applying Davis's discriminatory intent standard, agreed that the consequences of the absolute preference formula for the employment opportunities of women were too "inevitable" to be "unintended," hence finding the statute discriminatory and unconstitutional. See id at 260-61.
82. See id at 278.
83. See id.
84. See id at 278-80.
85. Id at 279 (emphasis added).
86. Id (emphasis added).
“symptoms,” but not alone constitutive of intent.\(^{87}\) Proving intent here requires an “isolated ‘inner’ mental event” separate from the social and historical context in which the action arises.\(^{88}\) Conceding that what a legislature is “up to” may be reasonably inferred by the results that its actions achieve, the Court made clear that something more subjective is required. Even where the adverse consequences of a law upon an identifiable group are “as inevitable as the gender-based consequences of [the veterans’ preference statute and] a strong inference that the adverse effects were desired can reasonably be drawn,” such an inference is “a working tool, not a synonym for proof.”\(^{89}\) This inference “fails to ripen into proof” if the disparate results are an unavoidable consequence of an otherwise legitimate policy and if the statutory history indicates no express discriminatory purpose.\(^{90}\) Couched in these terms, the Court easily found a lack of discriminatory purpose motivating the decision to adopt the veterans’ preference.\(^{91}\)

B. The Different Levels of Intent

Subsequent cases applying the intent doctrine affirm this early history. A close look at the intent doctrine reveals not only that different evidentiary schemes are employed to ascertain intent, but also that different levels of consciousness can satisfy the discriminatory intent standard—and hence violate the Equal Protection Clause. The term discriminatory intent is “hardly self-defining,” as its meaning can range anywhere from unconscious bias to conscious bias to conscious

\(^{87}\) See id. at 294. As one commentator astutely noted:

The Supreme Court majority [in Feeney] viewed intent as an event separate from, and not necessarily to be implied from, “objective” factors such as the statute’s impact on a particular group or the history of state action with respect to that group. . . . A separate, additional inference is required to establish the existence and nature of the intent itself. No connection necessarily exists between the symptoms and the true subjective event—the intent: the intent might not be discriminatory no matter how strong the evidence of discrimination provided by the symptoms.

Weinzeig, supra note 5, at 293-94 (emphasis in original).

\(^{88}\) Feeney, 442 U.S. at 303. “The social context which must be included in the characterization of the action will necessarily include the immediate, inevitable and foreseeable consequences of . . . an action in that context. Choice of action in a given situation depends upon the alternatives available.” Id. at 302.

\(^{89}\) Id. at 279 n.25.

\(^{90}\) Id.

\(^{91}\) See id. at 280-81. Indeed, the Court found the legislative history to indicate, “[t]o the contrary,” that the “benefit of the preference was consistently offered to ‘any person’ who was a veteran.” Id.
desire to harm. Though the Court in Feeney set out to define the meaning of discriminatory purpose, as the following cases illustrate, adherence to the Feeney conception of intent has been selective. In some cases, the Feeney standard is explicitly invoked and relied upon by the Court. In other cases, this narrow conception of intent is virtually ignored.

Those decisions invoking Feeney require a showing that the decisionmaker was motivated by a specific discriminatory intent. I refer to the Feeney standard as specific intent because it requires a special mental state above and beyond general discriminatory intent. A specific intent exists where the decisionmaker consciously desired the adverse consequences of its action on a particular group. Other cases, relying explicitly on the Davis/Arlington Heights framework, accept a showing that the decisionmaker was motivated by a more general discriminatory intent. A general intent exists when the decisionmaker has actual or constructive knowledge of the adverse consequences substantially certain to result from the decision. General intent can exist regardless of whether the decisionmaker subjectively desired to accomplish the harmful result. General intent can be proven by objective, circumstantial evidence indicating what facts were known or knowable by the decisionmaker at the time of the decision. Still another set of cases accepts a showing that the decisionmaker was motivated by an unconscious bias against the affected group. These cases explicitly rely upon the Castaneda framework, often finding a discriminatory purpose based primarily upon disparate impact evidence. Like earlier jury cases, the ultimate

93. See discussion infra Part II.B.1.
94. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 223-24 (2d ed. 1986) (describing common usage of term "specific intent"); see also BLACK'S LAW DICTIONARY 973 (6th ed. 1991) (stating that "most common usage ... is to designate a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime").
95. See 21 AM. JUR. 2D Criminal Law § 130 n.18 (1981).
96. See discussion infra Part II.B.2.
97. See Weinzweig, supra note 5, at 307 ("One can know that a certain event will occur as a result of one's actions, or even aim at bringing about that action, without desiring that it occur."). See generally LAFAVE & SCOTT, supra note 94, at 224 (describing general intent as the mental element requiring general knowledge and awareness); BLACK'S LAW DICTIONARY 559 (6th ed. 1991) (defining intent broadly as a state of mind that presupposes knowledge).
98. See discussion infra Part II.B.3.
determination of intent thus takes place "whether or not it was a conscious decision on the part of [the decisionmaker]."

1. Requiring Specific Intent

In the following cases, the Court specifically invokes and applies the Feeney specific intent standard. Many of the Arlington Heights circumstantial factors, or other objective indicia, won't suffice to demonstrate intent in these cases. As in Feeney, the Court "restrict[s] the scope of historical and social inquiry in determining" intent. Moreover, evidence of disparate impact from the decision is virtually irrelevant to the discriminatory purpose inquiry. Neither the degree of impact nor knowledge of the inevitability or foreseeability of harm resulting from the decision will garner any significant judicial scrutiny.

The Court severely limited the relevance of historical and statistical evidence to demonstrating a specific discriminatory intent in McCleskey v. Kemp. There, the Court rejected a challenge to Georgia's death penalty statute relying upon a sophisticated, comprehensive statistical study performed by Professors David Baldus, Charles Pulaski, and George Woodworth (hereinafter the "Baldus study"). The Baldus study demonstrated racial disparities in the imposition of the death sentence in Georgia based on both the race of the victim and, to a lesser extent, the race of the defendant. McCleskey wanted the Court to infer from the statistical evidence that the state legislature acted with discriminatory purpose in adopting the capital sentencing statute and in allowing it to remain in force despite its discriminatory administration. To bolster the inference suggested by the statistical evidence, McCleskey also offered historical evidence of Georgia criminal laws in force during and just after the Civil War.

---

100. Weizweig, supra note 5, at 289.
102. See id. at 297.
103. See id. at 286-87. According to the Court, the Baldus study demonstrated that even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants ... who kill white victims have the greatest likelihood of receiving the death penalty.

Id.
that expressly differentiated between crimes committed by and against blacks and whites.\footnote{Id. at 298 n.20; see also id. at 329-34 (Brennan, J., dissenting) (summarizing the history of Georgia's criminal laws and making the argument that they bolster the statistics).}

Despite its acceptance of the statistical validity of the Baldus study, the Court rejected McCleskey's challenge to the legislation,\footnote{McCleskey's second claim, involving discriminatory administration of the death penalty, is discussed infra Part IV.} relying on the failure of the statistical evidence alone to demonstrate the requisite legislative intent.\footnote{Id.} The Court summed up its view of the relevance of this evidence succinctly: "Apparent disparities in sentencing are an inevitable part of our criminal justice system."\footnote{See McCleskey, 481 U.S. at 312.} The type of historical background of the decisionmakers that the Court found indicative of intent in Arlington Heights and Davis was deemed irrelevant in this context unless it was reasonably contemporaneous with the decision.\footnote{Id.} The historical evidence, the Court reasoned, was too attenuated from the decision to support an inference of discriminatory intent. Citing Feeney, the Court concluded that the evidence had failed to prove that "the Georgia Legislature enacted or maintained the death penalty statute because of" either an anticipated racially disparate effect or the racial disparity suggested by the multiple regression study.\footnote{See id. at 298 n.20; Arlington Heights, 429 U.S. at 269 (relying on the history of the village's previous zoning decisions); Davis, 426 U.S. at 235 (relying on the history of number of people on the force and the Department's pattern of recruitment).} Notably, as I discuss later, the Court did not apply the Feeney standard to McCleskey's second claim, that his sentence was part of a pattern of discriminatory administration of the death penalty.\footnote{McCleskey, 481 U.S. at 298.}

Similarly, in Wayte v. United States,\footnote{470 U.S. 598 (1985).} the Court held that selective prosecution claims are subject to the discriminatory intent standard of Feeney. There, the plaintiff challenged a prosecutorial policy of "passive enforcement," under which the Selective Service System would investigate and prosecute young male citizens who failed to register for the draft during a specified week.\footnote{See discussion infra Part V.A.} Plaintiff fell within the class of people who did not register and was prosecuted. He claimed that "he and the other indicted nonregistrants were 'vocal' opponents of the registration program who had been impermissibly targeted ... for prosecution on the basis of their exercise of First
Amendment rights."\textsuperscript{113} The Court held that, in order for a plaintiff to prevail, he must "show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."\textsuperscript{114} The plaintiff failed in his claim, the Court reasoned, because even if the passive policy had a discriminatory effect the plaintiff failed to show that the Government specifically intended such a result.\textsuperscript{115} At most, the evidence demonstrated only that the Government was "aware" that the passive enforcement policy would result in prosecution of vocal objectors and that they would probably make selective prosecution claims.\textsuperscript{116} Such general knowledge and awareness was not enough to satisfy the specific intent \textit{Feeney} standard. Quoting the \textit{Feeney} standard, the Court concluded that the plaintiff "has not shown that the Government prosecuted him \textit{because of} his protest activities."\textsuperscript{117}

The specific intent standard was satisfied in \textit{Washington v. Seattle School District No. 1}\textsuperscript{118} by direct evidence of discriminatory purpose. \textit{Seattle School District} involved a challenge to a statewide initiative terminating the use of mandatory busing to achieve racial integration in public schools.\textsuperscript{119} Because racial integration was deemed to primarily serve the interests of racial minorities, the initiative's demise was thought to disparately affect African-Americans.\textsuperscript{120} The Court found that it was beyond reasonable dispute "that the initiative was enacted "because of," not merely "in spite of" its adverse effects upon' busing for integration."\textsuperscript{121} This conclusion was based upon statements by sponsors of the initiative emphasizing the fact that the challenged initiative prohibited busing only for purposes of

\textsuperscript{113} \textit{Id.} at 604 (footnote omitted). Like race, selective prosecution on the basis of other protected categories—such as religion or the exercise of statutory or constitutional rights—can violate the Equal Protection Clause. \textit{See id.} at 608.

\textsuperscript{114} \textit{Id.} at 608.

\textsuperscript{115} \textit{See id.} at 610.

\textsuperscript{116} \textit{See id.}

\textsuperscript{117} \textit{Id.} This specific intent standard has been subsequently upheld in \textit{United States v. Armstrong}, 116 S. Ct. 1480, 1487 (1996), in the context of a racially selective prosecution claim. The Court's opinion dealt primarily with the discovery threshold in selective prosecution cases. It held that a claimant must produce credible evidence that "similarly situated" defendants of other races could have been prosecuted but were not. \textit{See id.} at 1487-88. The Court reasoned that the rigorous standard of proof adopted in \textit{Wayte} for these claims demands a correspondingly rigorous standard of discovery. \textit{See id.} at 1488.

\textsuperscript{118} 458 U.S. 457 (1982).

\textsuperscript{119} \textit{See id.} at 461-64.

\textsuperscript{120} \textit{See id.} at 474.

\textsuperscript{121} \textit{Id.} at 471 (quoting Personnel Adm'r of Mass. v. \textit{Feeney}, 442 U.S. 256, 279 (1979)).
Thus, perceiving clear its processes integration (1982). Thus, the Court concluded, "there is little doubt that the initiative was effectively drawn for racial purposes." 125

2. Accepting General Intent

As opposed to the specific intent standard of the above cases, in the following cases discriminatory intent was demonstrated by evidence that the decisionmaker knew, or should have known, that adverse consequences were substantially certain to result from its decisions. Such knowledge is imputed to the decisionmaker from evidence of what actually happened, informed by the social and historical context. Tellingly, nowhere is the Feeney standard mentioned or relied upon in these cases. Instead, the Court more loosely applies the Arlington Heights totality of the circumstances framework. Pursuant to that framework, disparate impact evidence is not central to the inference of intent. However, when taken together with other socio-historical evidence, it can provide powerful circumstantial evidence of discriminatory intent. Unlike the above cases, historical evidence need not be contemporaneous with the decision to be probative of discriminatory intent. Thus, the history of past decisions made by the decisionmaking entity, as well as evidence of past and present social conditions that may be in the decisionmaker's knowledge, are highly probative of discriminatory

---

122. See id.
123. See id. (quoting Seattle Sch. Dist. No. 1 v. State, 473 F. Supp. 996, 1008 (W.D. Wash. 1979), aff'd in part, rev'd in part, 633 F.2d 1338 (9th Cir. 1980), aff'd, 458 U.S. 457 (1982)). The Court went on to state:

[T]he text of the initiative was carefully tailored to interfere only with desegregative busing. Proponents of the initiative candidly 'represented that there would be no loss of school district flexibility other than in busing for desegregation purposes'. . . . Initiative 350 in fact allows school districts to bus their students 'for most, if not all' of the nonintegrative purposes required by their educational policies.

Id.

124. Id. "The Washington electorate surely was aware of this, for it was 'assured' by CIVIC officials that '99% of the school districts in the state'—those that lacked mandatory integration programs—'would not be affected by the passage of 350.'" Id. (quoting Seattle, 473 F. Supp. at 1008-09). This fact also led the Court to apply the rule of Hunter v. Erickson, 393 U.S. 385 (1968), supporting the conclusion that the initiative restructured the political processes along racial lines. See Seattle, 458 U.S. at 467-70.
125. Seattle, 458 U.S. at 471.
intend. And courts readily exercise their interpretive judgments in finding a discriminatory intent based upon the sociology of the decision and its impact.

Knowledge and awareness of the adverse consequences flowing from the adoption of a voting scheme were enough to invalidate state legislation in Rogers v. Lodge. The Court invalidated an at-large legislative electoral system, finding that the scheme, while "neutral in origin," was nevertheless "maintained for invidious purposes." There, black citizens of Burke County, Georgia alleged that the county's system of at-large elections unconstitutionally diluted the voting power of blacks in electing the governing Board of Commissioners. Citing Davis and Arlington Heights, the Court was careful to point out that "discriminatory intent need not be proved by direct evidence," but can be shown by various types of circumstantial evidence. Then, relying on earlier, pre-Davis vote dilution cases, the Court adopted a standard that took into account an aggregate of various historical and social factors from which it could infer that the "system was 'conceived or operated as [a] purposeful devic[e] to further racial ... discrimination.'" Purposeful discrimination in the vote dilution context can be demonstrated if the evidence indicates that "blacks have less

126. See Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (allowing inquiry into the historical background of the challenged decision as well as other past decisions made by the decisionmaking body); see also Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979) (holding that Keyes v. School Dist., 413 U.S. 189 (1973), supports the legal understanding that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose").

127. See Lawrence, supra note 3, at 369-76 (explaining courts' competence to make interpretive judgments in assessing the cultural meaning of actions having a racially disparate impact).


129. Id. at 622-23 (holding that the lower courts' factual findings were not clearly erroneous).

130. See id. at 615. Plaintiffs also alleged that the system violated various other constitutional and statutory rights. See id.

131. Id. at 618.

132. Id. at 619 (alteration in original) (quoting City of Mobile v. Bolden, 446 U.S. 55, 661 (1980) (quoting Whitcomb v. Chavis, 403 U.S. 14, 149 (1971))). The Court was forced to review what appeared to be a distinct standard for vote dilution claims applied by the lower courts, in accordance with pre-Davis vote dilution cases. See id. at 619-22. This standard allowed a finding of discriminatory intent based on an "aggregate" of evidentiary factors. See id. at 620 (relying on Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973)). The Court upheld the validity of the so-called Zimmer factors, noting that the very same court (the Fifth Circuit) had later upheld them against the background of Davis and it progeny, deeming them relevant to the ultimate inquiry— "whether the districting plan under attack exist[ed] because it was intended to diminish or dilute the political efficacy of that group." Id. at 621 (quoting Nevett v. Sides, 571 F.2d 209, 226 (5th Cir. 1978)).
opportunity to participate in the political processes and to elect candidates of their choice.\textsuperscript{133} The evidence in this case demonstrated that no black had ever been elected in Burke County, Georgia, although blacks accounted for 53.6\% of the population and 38\% of those required to vote.\textsuperscript{134} As in earlier cases, the Court in Rogers relied upon a combination of historical discrimination in other areas of life that affected low voter registration among blacks,\textsuperscript{135} the presence of block racial voting, the unresponsiveness and insensitivity of elected officials to the needs of the black populace,\textsuperscript{136} and the current depressed socioeconomic conditions that created barriers to blacks' participation in the political system.\textsuperscript{137} That the officials were aware, or should have been aware, that the current system would result in these barriers to the political process was clear. The same elected county officials who had been "unresponsive and insensitive to the needs of the black community" were the ones who had chosen to maintain the system that ""minimized the ability of Burke County Blacks to participate in the political system."\textsuperscript{138} As such, the Court affirmed the lower court's conclusion that overwhelming proof

\begin{enumerate}
\item \textsuperscript{133} \textit{Id.} at 623-24. This standard was later adopted in the amendments to section 2 of the Voting Rights Act (42 U.S.C. § 1971) in 1982, which embraces an "effects" standard. This standard is similar to the one articulated in \textit{Rogers}, requiring a showing that blacks have less opportunity to elect representatives of their choice.
\item \textsuperscript{134} \textit{See id.} at 614-15. This evidence alone, however, was not enough absent the other social and historical evidence. Though this evidence of exclusion bore "heavily on the issue of purposeful discrimination," the Court nevertheless conceded that such disparate impact evidence was "insufficient" in and of itself, absent "proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice." \textit{Id.} at 623-24.
\item \textsuperscript{135} Historical discrimination, the Court reasoned, was particularly relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.
\item \textit{Id.} at 625.
\item \textsuperscript{136} \textit{See id.} at 623, 625. For instance, this evidence included infrequent appointment of blacks to county boards and committees; the overtly discriminatory pattern of paving county roads; the reluctance of the county to remedy black complaints ... and the role played by the County Commissioners in the incorporation of an all-white private school to which they donated public funds for the purchase of band uniforms.
\item \textit{Id.} at 626.
\item \textsuperscript{137} \textit{See id.} at 626.
\item \textsuperscript{138} \textit{Id.} at 625-26; \textit{see also id.} at 625 n.9 (noting that "unresponsiveness is an important element but only one of a number of circumstances a court should consider in determining whether discriminatory purpose may be inferred").
\end{enumerate}
demonstrated that the at-large system was maintained for a discriminatory purpose.\textsuperscript{139}

Even when there is direct evidence of a decisionmaker's mental state and that evidence can satisfy the specific intent standard, the Court nonetheless has indicated that a less demanding level of intent applies. With similar reliance on the \textit{Arlington Heights} evidentiary framework, the Court in \textit{Hunter v. Underwood}\textsuperscript{140} easily inferred the existence of discriminatory intent in a portion of the Alabama Constitution from several historical studies, proceedings of the constitutional convention, and the testimony of two expert historians.\textsuperscript{141} At issue was a provision of the Alabama Constitution providing for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, but that had disenfranchised disproportionately more blacks than whites.\textsuperscript{142} The Court was ultimately persuaded by the testimony at the time of the provision's adoption.\textsuperscript{143} This testimony and the historical events surrounding the political convention at which it was adopted demonstrated that an explicit purpose of the constitutional provision was to disenfranchise blacks on account of race.\textsuperscript{144} Given this direct and circumstantial evidence of intent, the Court rejected the State's attempt to explain other legitimate purposes motivating adoption of the provision.\textsuperscript{145} Because the inference of intent proved irrebuttable, the Court concluded that the "original enactment was motivated by a desire to

\textsuperscript{139} See \textit{id.} at 616. It should be noted that another post-\textit{Davis} case, \textit{City of Mobile v. Bolden}, 446 U.S. 55 (1980), also wrestled with applying the intent standard in a vote dilution context. However, though the Court agreed that the intent standard applied to such claims, no majority agreed on how intent could be demonstrated or whether it was present in that case. See \textit{id.} at 65-74, 95-103 (White, J., dissenting).

\textsuperscript{140} 471 U.S. 222 (1985).

\textsuperscript{141} \textit{See id.} at 229.

\textsuperscript{142} \textit{See id.} at 226-27 (citing evidence that the statute had disenfranchised ten times as many blacks as whites).

\textsuperscript{143} \textit{See id.} at 233.

\textsuperscript{144} \textit{See id.} at 229 (citing the president of the convention's statement that the purpose was to "establish white supremacy in this State" and the fact that this "zeal for white supremacy ran rampant at the convention" (quoting 1 \textit{OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA}, May 21, 1901 to Sept. 3, 1901, p.8 (1940)).

\textsuperscript{145} \textit{See id.} at 232. The State had argued that: (1) the provision did not offend equal protection, because the framers had an additional intention to disenfranchise poor whites in order to prevent a resurgence of populism and (2) the overall purpose of denying the franchise to those convicted of crimes of moral turpitude alone rendered the provision valid given the legitimacy of that purpose. See \textit{id.} at 230-32. The Court rejected the first argument, holding that "an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks." \textit{Id.} at 232. Similarly, it found the second argument unpersuasive, opining that disenfranchising people guilty of crimes of moral turpitude "simply was not a motivating factor." \textit{Id.} at 232.
discerning factors in discerning the requisite discriminatory intent. See Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); see also Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986) (following Eleventh Circuit decisions). Revising the Arlington Heights framework slightly, the Eleventh Circuit employs the following factors in determining discriminatory intent: (1) the nature and magnitude of the disparity—the disparate impact, (2) the foreseeability of the disparate impact of the official action, (3) the legislative and administrative history of the decisionmaking process, and (4) the knowledge that the action would cause the disparate impact. See Ammons, 783 F.2d at 988. Courts have found constructive knowledge where "[a] brief visit to the black community makes obvious the need for street paving and storm water drainage control." Id. at 988 (quoting Dowdell v. City of Apopka, 511 F. Supp. 1375, 1383 (M.D. Fla. 1981), aff'd in part, rev'd in part, remanded in part, 698 F.2d 1181 (11th Cir. 1983)).

Each of the cases involved extremely stark disparities in the provision of services, sufficient to give rise to an inference of discriminatory purpose. See Ammons, 783 F.2d at 985 n.2 (noting that the city spent 90% of its street resurfacing funds in the white community and only 10% in the black community); Dowdell, 698 F.2d at 1185 n.3 (noting that 42% of the streets in the black community remained unpaved compared to 9% in the white community; 60% of the streets in the white community had curbs or gutters, whereas the city provided none for the black community); Baker, 645 F. Supp. at 581 (see table comparing the provision of street paving services to whites and blacks). The history of the legislative and administrative practices, as well as the history of racial discrimination in the municipality, provided sufficient historical support for the finding of discriminatory purpose. See id. at 587-88. Unlike the Feeney standard, here the history need not be contemporaneous with the challenged decision at issue. For instance, in Dowdell, the court held that the legislative and administrative pattern of decisionmaking, covering nearly a half century, "indicate[d] a deliberate deprivation of services to the black community." Dowdell, 698 F.2d at 1186. In making this judgment, the court considered various historical facts, such as the underrepresentation of blacks in government and a municipal ordinance that remained in force until 1968 segregating the black community to the south side of the railroad tracks. See id. Similarly, in Ammons and Baker, the courts took into account the histories of race discrimination in every aspect of city life, from municipally enforced segregation to maldistributed municipal services. See Baker, 645 F. Supp. at 588; Ammons v. Dade City, 594 F. Supp. 1274, 1279-85 (M.D. Fla. 1984).

In each of these cases, the Eleventh Circuit concluded that, when a city knowingly allocates greater resources to white communities with the foreseeable outcome of depriving black communities of the same resources, that constitutes a discriminatory purpose sufficient to violate the Equal Protection Clause. "When it is foreseeable ... that the allocation of greater resources to the white residential community ... will lead to the 'foreseeable outcome of a deprived black residential community' then a discriminatory purpose ... is properly shown." See id. at 988 (quoting Ammons, 594 F. Supp. at 1302 (footnote omitted) (citation omitted)); Dowdell, 698 F.2d at 1186 ("T[he continued and systematic relative deprivation of the black community was the obviously foreseeable outcome of spending nearly all revenue sharing monies received on the white community in preference to the visibly underserviced black community.").
3. Accepting Unconscious Intent

In another set of cases, involving jury selection, the Court has specifically invoked and applied the Castaneda evidentiary framework. This framework, as explained below, allows unconscious bias to satisfy the discriminatory purpose standard. Disproportionate exclusion of members of an identifiable group is central to the inference of discriminatory purpose. Relying upon earlier jury cases, the Court has continued to adhere to the proposition that "[p]roof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.'"147 Once the prima facie case is established, the decisionmaker must justify the challenged decision or decisions. After this explanation, it is up to the trial court to determine whether the requisite discriminatory purpose exists based upon its observation of the entire proceedings and consideration of all relevant circumstantial evidence.148 If the decision goes unexplained or is insufficiently explained, the trial court is free to find a discriminatory purpose based upon the prima facie case—consisting primarily of evidence of disparate impact.149

In Batson v. Kentucky,150 the defendant objected to the prosecutor's use of peremptory challenges151 to strike all four black persons on the venire panel, resulting in a jury composed only of white persons.152 Using the same "combination of factors" as in Castaneda, the Court held that an inference of discrimination could be based upon a prima facie showing of a "'pattern' of strikes against black jurors."153 This inference was strengthened, the Court reasoned, when coupled with the assumption that the highly discretionary peremptory challenge "permits 'those to discriminate who are of a mind to

148. See id. at 96-98. For instance, the prosecutor's questions and statements during voir dire examination can be relevant to the intent inquiry. See id. at 97.
149. See id. at 93-98.
151. This a procedural mechanism used by attorneys in a trial that gives them the unfettered right to challenge a juror without assigning a reason for the challenge. See BLACK'S LAW DICTIONARY 787 (6th ed. 1991) (citing FED. R. CRIM. P. 24). In most states, each party has a specified number of such challenges. See id. Once the party has used all of its peremptory challenges, he can only challenge subsequent jurors for cause. See id.
152. See Batson, 476 U.S. at 83.
153. See id. at 96-97. The pattern of strikes is but one indicium of intent, albeit a predominant one. The Court left it up to trial judges "experienced in supervising voir dire ... to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." Id. at 97. Other facts that trial judges could rely upon would include the prosecutor's questions and statements during voir dire. See id.
discriminate."^154 Once this prima facie case is established, the burden shifts to the prosecutor to rebut the inference of discriminatory purpose by putting forth a racially neutral explanation. Though the explanation need not rise to the level of justifying a challenge for cause, it must be "clear and reasonably specific," "legitimate," and "related to the particular case to be tried."^155 The prosecutor cannot rebut the prima facie case by merely stating "that he challenged jurors of the defendant’s race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."^156 Nor can a prosecutor satisfy his burden by "denying that he had a discriminatory motive or by merely affirming his good faith."^157

Peremptory cases following Batson continue to employ this evidentiary framework in finding discrimination in jury selection.^158 Evidence of a "pattern" of strikes invariably gives rise to an inference of discriminatory intent.^159 In the end, the trial court has a duty to determine if the proffered prosecutorial reasons are actually race-neutral or pretextual.^160 The trial court can choose to reject the explanation, either on the basis of the prosecutor's credibility or the substance of the explanation.^161 It is at this stage of the Batson inquiry

154. Id. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
155. Id. at 98 & n.20. Ultimately, the Court remanded this case back to the trial judge for such an assessment. See id. at 100. But see Purkett v. Elem, 514 U.S. 765, 768 (1995) (noting that reason need not be “persuasive, or even plausible”).
156. Batson, 476 U.S. at 97; see, e.g., Johnson v. Love, 40 F.3d 658 (3d Cir. 1994). In Johnson, the prosecutor struck from jury selection a young African-American woman in the trial of a young African-American male accused of killing a white man. The prosecutor explained that he believed that young African-American women would be less likely to convict an African-American defendant of the murder of a white man. The court held that the explanation was not race-neutral, because it was based upon the assumption that African-American women's objectivity would be impaired because they were African-American. See id. at 668-69.
159. See Hernandez v. New York, 500 U.S. 352, 358 (1991) (finding a prima facie case of racial discrimination satisfied by evidence that the prosecutor challenged the only three prospective jurors with definite Hispanic surnames); see also United States v. Valley, 928 F.2d 130, 135-36 (5th Cir. 1991) (finding three strikes against African-Americans sufficient to establish prima facie case); United States v. Roberts, 913 F.2d 211, 214 (5th Cir. 1990) (finding four of seven strikes against African-Americans sufficient to establish prima facie case); United States v. Thompson, 827 F.2d 1254, 1256-57 (9th Cir. 1987) (finding strikes of all four African-Americans sufficient to establish prima facie case).
161. See Purkett, 514 U.S. at 769-70 (upholding state court's finding of no racial motive, "which turned primarily on an assessment of credibility").
where unconscious bias can violate the Equal Protection Clause. As the Court has recently confirmed, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."\(^{162}\) If this happens, the inference of discriminatory purpose survives, often made solely on evidence of a "pattern of strikes," without any demonstration that the decisionmaker was either aware of or desired the discriminatory consequences.\(^{163}\)

However, even if a court believes the prosecutor’s explanation, the court may still decide that the explanation is not sufficient. Here, the court can uphold the inference of discriminatory purpose based upon unconscious bias in a number of ways. For instance, the court can look to the face of the prosecutor’s asserted reason and determine that it rests on stereotypical assumptions about the group.\(^{164}\) Or, the court can conclude, based upon its observation of the voir dire proceedings, that the reasons given for excluding members of the cognizable class were not relied on to exclude non-class members.\(^{165}\) Lastly, courts can decide that a facially neutral criterion used to exclude jurors is in fact a surrogate for racial bias or correlates with

\(^{162}\) Id. at 768.

\(^{163}\) But see Hernandez, 500 U.S. at 360. Revising its Batson framework, the Court in Hernandez cited Feeney and required a showing that the prosecutor be motivated by a specific intent to discriminate, versus unconscious bias against the group. See id. at 360-62. In evaluating the prosecutor’s explanation, the Court held that “[n]othing in the prosecutor’s explanation shows that he chose to exclude jurors who hesitated in answering questions about following the interpreter because he wanted to prevent bilingual Latinos from serving on the jury.” Id. at 362. This citing of Feeney, and the specific intent standard, appears to be inconsequential as the Supreme Court has subsequently affirmed that a trial court may choose to disbelieve the prosecutor’s stated reasons based on an assessment of credibility and determine that the justification is a pretext for purposeful discrimination. See id. As numerous lower court cases confirm, the Batson framework easily allows a finding of unconscious intent by the trial court. See Howard v. Moore, 131 F.3d 399 (4th Cir. 1997); United States v. Bishop, 959 F.2d 820 (9th Cir. 1992). Moreover, applying the Feeney standard here is erroneous, given the reasons for increased judicial intrusion in these cases. See infra Part III.

\(^{164}\) For instance, one court has held that the "invocation of residence" under the facts of the particular case "both reflected and conveyed deeply ingrained and pernicious stereotypes." Bishop, 959 F.2d at 825. The Ninth Circuit found pretextual a prosecutor’s claim that he did not strike an African-American panelist because of her race but rather "because she lived in Compton, a poor and violent community whose residents are likely to be 'anesthetized to such violence' and 'more likely to think that the police probably used excessive force.'” Id.

\(^{165}\) This was the reasoning of the Eight Circuit in Davidson v. Harris, 30 F.3d 963 (8th Cir. 1994). There the court held that counsel’s explanation for striking an African-American was pretextual, because whites with the same characteristics were not stricken. See id. at 965-66.
race. Moreover, there is no showing that the actor was even aware that he was treating others differently because of their group characteristic. More often than not, a finding of discriminatory purpose is made regardless of the actor’s state of consciousness.

C. An Explanation

The Court’s incoherence has not gone unnoticed. The most thorough critique and explanation of the Court’s intent jurisprudence has been offered by Professor Daniel Ortiz, who opines that “[t]he Supreme Court has developed the intent requirement so unevenly that it now fails to fit either its name, the Court’s description of it, or the theory its champions and opponents alike claim gave it birth.” His critique is that the Court’s application of intent is largely inharmonious with the democratic process theory from which it arose, in that it fails in most instances to assess the inputs to governmental decisionmaking

166. In Hernandez, for example, the Supreme Court left open the possibility that excluding jurors because they speak a foreign language could serve as a surrogate for racial hostility. As the Court explained:

Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept or race should be defined for equal protection purposes.

Hernandez, 500 U.S. at 371; cf. Bishop, 959 F.2d at 825 (“To strike black jurors who reside in [poor, predominantly black] communities on the assumption that they will sympathize with a black defendant rather than the police is akin to striking jurors who speak Spanish merely because the case involves Spanish-speaking witnesses.”).

To be sure, the application of Batson has been inconsistent and unpredictable in the lower courts. Attorneys have offered, and courts have accepted, explanations that either correlate with race or have obvious racial overtones. See, e.g., United States v. Maseratti, 1 F.3d 330, 335 (5th Cir. 1993) (allowing a prosecutor to strike an Hispanic woman juror because “experience in Hispanic culture” told him that women are used to doing “what the male in the species is telling her to do”); United States v. Payne, 962 F.2d 1228, 1233 (6th Cir. 1992) (finding race-neutral that African-American potential jurors were members of black “activist groups”); see also Albert W. Alscher, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts, 56 U. CHI. L. REV. 153, 175 (1989) (noting that the Court’s acceptance of racial surrogates evades the goal of Batson). Nevertheless, that does not negate the fact that the Batson framework can be, and has been, used to find a discriminatory purpose based upon unconscious bias. If anything, it argues for more sensitivity by courts to the use of racial surrogates and purported race-neutral reasons as a cover (unconscious or conscious) for racial bias.

167. See Strauss, supra note 92, at 960 (“[U]nconscious bias exists when a person honestly believes that he is treating blacks and whites alike but is in fact treating them differently.”).

168. Ortiz, supra note 14, at 1134.
processes. Rather, the intent doctrine actually more consistently evaluates the outcomes of governmental decisionmaking to assess its constitutionality.

Ortiz offers a "positive theory" of the Court's jurisprudence by filtering it through the lens of classical liberal theory. He views the intent doctrine as serving to allocate burdens of proof between the individual and the state depending upon the substantive context and the nature of the individual right at issue. Specifically, he argues, the doctrine allocates these burdens in a manner that balances the individual and state interests in accordance with the ideology of traditional liberalism. The intent doctrine thus distinguishes between two types of goods. The first kind, which it fairly aggressively protects, consists primarily of political, criminal, and educational rights. The second kind, over which it allows the state much control, consists of "ordinary" social and economic goods, like jobs and housing. In making this distinction, intent doctrine reflects our prevailing political ideology—liberalism—which is a system of values rooted in the belief that the state should allow every individual to pursue his own conception of the good.

Ortiz observes that, in accordance with where the individual interest or right falls on classical liberalism's "hierarchy of value," the intent doctrine either requires a plaintiff to show current actual discriminatory motivation behind the decision at issue or it allows the plaintiff to show something less stringent than subjective motivation before the governmental decisionmaker must explain its reasons for its decision. In other words, "[t]he nature of the case makes all the

169. See id. at 1134-42.
170. See id.
171. See id.
172. See id. at 1107.
173. Id. at 1141-42. Moreover, since such an aim requires the state to remain neutral between competing conceptions of the good, the state can legitimately act only to allow individuals more fully to pursue their own private conceptions.... Like [its most extreme form,] libertarianism, liberalism aggressively protects those basic rights, like voting, education, and freedom from unwarranted physical restraint, which are necessary for a person to be able to choose her own ends. And, like libertarianism, liberalism also relegates most remaining social behavior to the market. Liberalism does, however, differ from libertarianism in permitting the state to interfere somewhat in the market—certainly to overcome market failure and also to ensure a certain minimum level of dignity and welfare to all individuals.

Id. at 1141-42 (footnote omitted).
174. See id. at 1135-37. For example:

In the housing and employment cases, the plaintiff must show current, actual discriminatory motivation; in the others, current disparate effects plus some other
difference.”\textsuperscript{175} For instance, examining the \textit{Davis} and \textit{Arlington Heights} decisions, Ortiz concludes that the intent doctrine is most loyal to its origins in employment and housing cases, in that “it allocates to individuals the burden of producing evidence of discriminatory motivation; if this is shown, it then shifts the burden of proof to the state to show legitimate reasons for the disparate treatment.”\textsuperscript{176} In contexts other than housing and employment, such as jury selection and voting, Ortiz demonstrates that the intent doctrine “fails to test for impermissible motivation” by allowing “individuals to establish [inferences of discrimination] with something less than motivation—in some cases, in fact, with something close to a showing of mere disparate impact” and by allowing “the state to rebut an inference of discriminatory motivation with something partially irrelevant to purpose.”\textsuperscript{177}

However, what seems like doctrinal incoherence, Ortiz believes, is actually the Court aggressively protecting those rights and liberties that enable the individual to pursue her own version of the good life.\textsuperscript{178} Hence, the Court is permissive in its supervision of government intervention in traditional economic and social markets:

Where (as in housing and employment) this ideology either relegates decisionmaking to markets or allows the state much leeway in allocating goods, intent makes judicial supervision of decisionmaking difficult. On the other hand, where liberal ideology insists on particular types of nonmarket allocation (as in voting, jury selection, and sometimes education), intent makes judicial intervention more likely.\textsuperscript{179}

\begin{itemize}
\item Showing—at most of motivation in the past or in decisions unrelated to the one under consideration—suffice. Not only is it much more difficult to prove intent in the housing and employment cases, but, more interestingly, they involve a completely different kind of inquiry.
\end{itemize}

\textit{Id.} at 1137.

\textsuperscript{175} \textit{Id.} at 1107.

\textsuperscript{176} \textit{Id.} at 1110-15, 1135.

\textsuperscript{177} \textit{Id.} at 1119. Thus, in the jury selection cases [like \textit{Castaneda} and \textit{Batson}], the doctrine places on individuals the burden of showing adverse impact on an identifiable group and the susceptibility of the selection procedure to manipulation; if this is met, it then shifts the burden to the state to show that valid reasons underlie the selection of particular jurors.

In the voting cases [like \textit{Roger v. Lodge}], intent requires that the individual show adverse impact in voting plus discrimination in other areas of life, and then shifts the burden to the state to offer a compelling reason for the electoral discrimination.

\textit{Id.} at 1135.

\textsuperscript{178} See \textit{Id.} at 1142.

\textsuperscript{179} \textit{Id.} at 1107.
Ortiz is right that judicial intervention is more liberal in some areas and significantly less so in others. Ortiz is also right that in some cases the Court requires actual, conscious motivation while in others something less than conscious motivation suffices. However, as the previous section demonstrates, even where the Court requires "actual" or conscious motivation, different levels of consciousness are required in different cases. Ortiz also persuasively demonstrates that substantive concerns influence the Court's posture, or level of deference, towards a challenged decision. Nevertheless, as I will demonstrate, substantive concerns are only one part of a more gestalt-like approach to judicial review of facially neutral decisions.

There is a set of concerns that the Court is equally, if not more, responsive to when reviewing an official decision. That set of concerns is rooted in democratic process theory and the related theory of motive review. A closer look at the Court's intent jurisprudence reveals that the Court is openly responding to concerns underlying process theory when reviewing different types of challenged government decisions and actors. Process theory provides both a fuller account of the intent doctrine and corresponds to the Court's openly stated normative commitments. However, Ortiz's demonstration of the Court's sensitivity to substantive concerns is not preempted by the process explanation. In fact, there is a significant degree of interaction between these concerns. This overlap is not surprising, given that the dual concerns stem from different aspects of the same philosophical tradition. In Part II, I will articulate these process concerns and their interaction with the substantive considerations illuminated by Professor Ortiz.

III. MOTIVE REVIEW AND THE PROCESS TRADITION

The doctrine of intent in equal protection is a direct descendant of process-based constitutional theories. The intent doctrine has its roots in democratic process theory—theoretical thought expanding from the early twentieth century to the present.\textsuperscript{180} I focus my analysis primarily on the more specific theory of "motive review." As with its broader antecedent, motive review theorists adhered to the principle of judicial restraint toward other government actors. This restraint was "based on a conception of democracy that prefers majoritarian forms of societal

\textsuperscript{180} For a very fine summary of the various strands of "process" theory and their influence on constitutional decisionmaking, including motive review, see Flagg, Enduring Principle, supra note 8, at 940-49 (discussing the first, second, and third generation process theories). See generally Gary Peller, Neutral Principles in the 1950s, 21 Mich. J.L. Reform 561 (1988).
decisionmaking . . . [and] then proceed[ed] to find a justification for judicial review in an analysis of institutional competence." Motive review proponents proposed an exception to this rule of judicial restraint, taking into account democratic process concerns underlying judicial restraint. Paul Brest and John Ely were the earliest, and remain the most influential, motive review proponents. Both Brest and Ely argued for judicial review of facially neutral decisions to ensure that unconstitutional motives, particularly those based on racial prejudice, have not been pursued in the course of governmental decisionmaking.

In this Part, I will uncover the core principles underlying democratic process theory and their corollary premises in motive review theory. A closer look at the doctrinal development of the intent requirement reveals a significant reliance upon these tenets. Moreover, I will demonstrate that substantive concerns—the individual right at stake—interact with institutional process principles in a way that reinforces democratic process theory. Making these principles and premises explicit, and uncovering their influence in shaping the intent doctrine, is critical to my thesis that these principles contain guiding criteria for understanding the application of the intent standard to various forms of governmental decisionmaking.

A. Validating the Democratic Process: Motive Review as Process-Corrective

One of the main principles of democratic process theory that has clearly influenced motive review theory is that of “judicial restraint.” This principle comes out of the preference for democratic processes of decisionmaking and respect for other branches and levels of government. In its preference for majoritarian forms of decisionmaking, process theory counsels that judicial review is relatively undemocratic. Particularly with respect to constitutional issues, the judiciary is seen as a “counter-majoritarian” institution—

181. Flagg, Enduring Principle, supra note 8, at 949.
182. See Brest, Legislative Motive, supra note 22, at 115-18; JOHN HART ELY, DEMOCRACY AND DISTRUST 136 (Harvard 1980).
183. Some have contended that the link between motive review theory and the Court’s jurisprudence in this area is unclear. See Flagg, Enduring Principle, supra note 8, at 959 (arguing no direct connection evidenced by the lack of discussion in the Davis opinion of process theorists’ work and lack of any mention of the institutional factors that counsel against motive review, but conceding that the abrupt change of heart by the Court must have been precipitated by something and the most plausible candidate would be appearance of process-based arguments). However, as I will demonstrate, both the Davis and Arlington Heights opinions demonstrate significant reliance on these principles.
less responsive and accountable to majority will than either executive or legislative bodies. Hence, when reviewing the work of more representative branches, courts are urged to exercise judicial restraint so as not to upset their policy decisions. Because policymaking often involves "controversial value judgments," its task is best left to the "laboratory of democracy"—except where the policymaker has violated a clear and determinative constitutional provision. Any other course would render the Court no more than a "naked power organ," freely substituting its policy preferences for those of other, more representative and accountable actors and calling into question its own legitimacy.

Doctrinally, in constitutional law, this judicial restraint is translated into a highly deferential standard—rational basis—when approaching a challenged legislative or executive action. The theory behind this deference is that "even improvident decisions will eventually be rectified by the democratic process." However, there are exceptions to this deference. In antidiscrimination law, the paradigm exception is express racial classifications, which supply a reason to infer antipathy. Judicial scrutiny can also be justified for facially neutral decisions when it is found that governmental decisionmakers pursued illicit motives.

In accordance with process theory, motive review proponents positioned the Court as a corrector of democratic process defects. More particularly, judicial review could justifiably cleanse the political process of the effects of majoritarian prejudice on minorities. Where illicit factors, like prejudice, "materially" influence either legislative or administrative policy choices, both Brest and Ely concluded that "due process of lawmaking is denied." Even if the illicit motivation was not the "but for" or sole or even dominant cause of the decision,
judicial review was nevertheless warranted because the political process had been distorted by the faulty judgment of policymakers and thus they had failed to rationally and accurately assess the costs and benefits of their decision.\(^{189}\)

The political process breaks down, according to Ely, when “prejudice,” a “lens that distorts reality,” lurks in the hearts and minds of policymakers.\(^{190}\) As a “nation of minorities,” the political process depends on “the ability and willingness of various groups to apprehend [the] overlapping interests that can bind them into a majority on a given issue.”\(^{191}\) Prejudice blinds policymakers to the “overlapping interests that in fact exist,” unites groups “that have little else in common than their antagonism for the racial minority,” and thus provides the majority with that “common motive to invade the rights of other citizens that Madison believed improbable in a pluralistic society.”\(^{192}\) Judicial scrutiny is reserved, in particular, for prejudice towards minority groups who are “barred from the pluralist’s bazaar and thus keep[] finding [themselves] on the wrong end of the [policymaker’s] classifications.”\(^{193}\) Because such groups are often the objects of majoritarian prejudice, policymakers are likely to rely on stereotypes that reflect “us” and “them” social categories and are employed in legislation to benefit “us.”\(^{194}\)

To be sure, neither Ely nor Brest focused exclusively on the elected branches in justifying motive review. Both also explicitly

\(^{189}\) See Ely, supra note 182, at 155-57. Ely went on to state:

It is inconsistent with constitutional norms to select people for unusual deprivation on the basis of race, religion, or politics, or even simply because the official doing the choosing doesn’t like them. When such a principle of selection has been employed, the system has malfunctioned: indeed we can accurately label such a selection a denial of due process. Perhaps a properly functioning system would have generated the same result, perhaps it wouldn’t. But that typically is true when due process has been denied, and the remedy, save only in cases of clearly nonprejudicial error, is to reject the product of the malfunctioning process and start over.

\(^{190}\) See id. at 153.

\(^{191}\) Id.

\(^{192}\) Id. (quoting Frank Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 CAL. L. REV. 275, 313 (1972)).

\(^{193}\) Id. at 152 (noting that, while “of course the pluralist model does work sometimes, and minorities can protect themselves by striking deals and stressing ties that bind the interests of other groups to their own,” the fact remains that the pluralist model of democracy often breaks down—most notably in the case of African-Americans).

\(^{194}\) See id. at 159; accord Paul Brest, Reflections on Motive Review, 15 SAN DIEGO L. REV. 1141, 1143-44 (1978) [hereinafter Brest, Reflections]; see also Flagg, Enduring Principle, supra note 8, at 948 (noting problems that occur when courts fail to recognize shared interests).
referred to "administrative" motivation, out of recognition of the tripartite functions performed by many administrative actors. That is, they concur with others in the view that "daily, the [different governmental] departments each perform legislative, executive, and judicial function." Indeed, the principle of legislative supremacy has been destabilized, resulting in both the Court and commentators "reimagining [administrative actors] as bastions of politics, democratically superior to courts." As such, the Court and process theorists have similarly counseled judicial deference in reviewing the policy choices of those actors, particularly when such choices are authorized by legislative delegation. The net result has been that administrative bodies, with respect to their policymaking capacity, are increasingly seen as possessing similar, though not the same,


196. Victoria Nourse, Toward a "Due Foundation" for the Separation of Powers: THE FEDERALIST PAPERS as Political Narrative, 74 TEX. L. REV. 447, 448 (1996). For instance, the original conception of administrative agencies as technically specialized bodies that could apply their expertise to statutory interpretation and execution is now only partly descriptive of the functions of those agencies. See, e.g., Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669 (1975) (analyzing the historical and contemporary order of administrative agencies); Cass Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 59-68 (1983) (discussing the interaction between interest groups and administrative agencies).


198. The Court set forth this rationale in one recent case upholding its deference to an administrative agency's reasonable interpretation of an ambiguous statute:

Judges . . . are not part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984); accord Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983); see also Schacter, supra note 197, at 614 ("By relinquishing the interpretive authority over ambiguous statutes that the court would otherwise enjoy by default, and by giving that authority to an executive agency that enforces the disputed statute, the court ensures that an assertedly accountable actor . . . makes the policy choice and thereby vindicates democracy.").
deliberative capacity and majoritarian influence as legislatures. As such, the Court is properly hesitant to upset their policy choices without evidence of a decisionmaking process defect—like prejudice.

This democratic validation approach to legislative and administrative policymaking has been echoed by the Court as part of its rationale for adopting the discriminatory purpose rule. In Arlington Heights, the Court, as motive review proponents had done, accommodated the need for judicial restraint underlying democratic process theory while carving out a role for judicial review of illicitly motivated policy decisions:

Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision... judicial deference is no longer justified.

Judicial scrutiny thus serves to remedy a malfunctioning democratic process and preserve the Madisonian ideal of democracy in a pluralistic society.

B. Institutional Competence Limitations: Avoiding the Costs of Inappropriate Restraint

A corollary principle of process theory that influenced motive review is the notion of "institutional settlement." The idea behind

199. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (footnote omitted) (emphasis added) (citing Brest, Legislative Motive, supra note 22, at 116-18); accord Washington v. Davis, 426 U.S. 229, 247 (1976) (explaining that the disparate impact standard "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed").


[T]he central idea of law... is the principle of institutional settlement... When the principle... is plainly applicable, we say that the law "is" thus and so, and brush aside further discussion of what it "ought" to be. Yet the "is" is not really an "is" but a special kind of "ought"—a statement that... a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind "ought" to be accepted as binding upon the whole society unless and until it has been duly changed.
this concept is that certain institutions are more competent, and hence appropriate, to make certain types of decisions than others. The implications of this principle meant that the legislature, by virtue of its representative character, is deemed the "ultimate authority" over substantive decisionmaking and policymaking vis-à-vis other institutions—courts, administrative agencies, and private parties. Administrative agencies, relying on their particular "expertise," were best at implementing broad standards to carry out the more general policies of elected officials. Courts were best at "reasoned elaboration" ... a sense of craft within which the judiciary could elaborate principles and policies contained within precedent and legislation to reach a reasoned, if not analytically determined, result in particular cases. In reaching a result in constitutional law in particular, courts were urged to adhere to apolitical, "neutral principles." If the issue could not be resolved through reasoned elaboration according to neutral principles, and instead involved mere "preference" or "sheer guesswork," arguably it was beyond a court's competence to decide the issue.

In making the case for motive review, its proponents had to overcome objections regarding the institutional impropriety of judicial inquiries into the motives of legislative bodies and executive officials. Motive review proponents were mindful of the limited institutional competence of courts, particularly in assessing legislative decisions. In focusing on the relationship between legislatures and

---

Id. at 4-5; see also Peller, supra note 180, at 568-72 (describing the principle of "institutional settlement" as developed after the advent of Hart and Sacks' work).

201. Hart and Sacks explained the theory of institutional settlement in terms of the competence that distinguished each institution's unique place in a democratic government. See HART & SACKS, THE LEGAL PROCESS, supra note 200, at 3. For instance, "the special competence of the legislature lay in its ability to resolve general questions of substantive value in a democratic manner; the competence of administrative agencies was found in the notion of agency expertise, and so forth." Flagg, Enduring Principle, supra note 8, at 944.

202. See Peller, supra note 180, at 571.

203. See HART & SACKS, THE LEGAL PROCESS, supra note 200, at 1092-1143; Peller, supra note 180, at 597.

204. Peller, supra note 180, at 595 (citing HART & SACKS, supra note 200, at 193).

205. See Wechsler, supra note 186, at 2-10.

206. See Peller, supra note 180, at 595 (citing HART & SACKS, supra note 200, at 123).

207. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977) ("This Court has recognized, ever since Fletcher v. Peck, [10 U.S. (6 Cranch) 87, 130-31 (1810)] that judicial inquiries into legislative or executive motivation represent substantial intrusion into the workings of other branches of government."); see also Brest, Legislative Motive, supra note 22, at 128-30 (discussing impropriety as an argument against judicial review of motivation).

208. See Brest, Reflections, supra note 194, at 1142 ("If the motives underlying an administrative decision or a legislative enactment should be insulated from judicial review, it
courts, they acknowledged the limited competence of the judicial process to assess the policymaking process and argued against a standard of motive review that would grant judicial license to easily intrude into the legislative process. Moreover, they warned of the institutional costs of inappropriate judicial restraint toward democratically superior actors.

1. The Dangers, and Inadequacy, of an Outcome Standard

Ely, along with Brest, rejected the notion that courts could adequately assess defects in the policymaking process solely by reference to its outcomes. In assessing policy decisions by democratically superior actors, courts were urged to be tolerant of statistically valid generalizations in the policymaking process. Using legislatures as the paradigm policymakers, Ely argued that “[l]egislation on the basis of ‘stereotype’ is thus legislation by generalization, the use of a classification believed in statistical terms to be generally valid without leaving room for proof of individual deviation.” As such, legislative generalizations cannot be “intelligibly evaluated simply in terms of the number or percentage of false-positives they entail.”

To be otherwise intolerant of stereotypical generalizations would impose an “unbearable cost” on the policymaking process by requiring government to create “procedures for deciding every [issue] on its individual merits.” Thus, even though statistical generalizations are often both under- and overinclusive, the court does not require a policymaker to achieve a “perfect fit,” which would undoubtedly involve some added cost. Instead, the Court “ordinarily, and rightly, refuses to second-guess the legislative cost-benefit balance.”

The Court in Feeney echoed the relative institutional competencies between legislatures and courts and the need for judicial tolerance of legislative generalizations:

The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. Most laws classify, and may affect certain groups unevenly, even though the law itself treats

must be for institutional rather than jurisprudential reasons—courts cannot properly undertake the inquiry or act on its findings.”).

209. ELY, supra note 182, at 155.
210. Id. at 156.
211. Id. at 155. Indeed, “[a] mode of review geared to whether the incidence of counterexample is ‘too high’ is thus indistinguishable from the unacceptable theory that courts should intervene in the name of the Constitution whenever they disagree with the cost-benefit balance the legislature has struck.” Id.
212. Id. at 156.
them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification.213

The Court has also been up-front about the costs of an outcome-based standard, such as disparate impact, in judging the cost-benefit balance involved in lawmaking. From a process perspective, an outcome-based standard is a slippery slope, disrupting institutional roles and power in our democratic system.214 As the Court in Davis articulated, a disparate impact standard might be “far reaching,” raising “serious questions” and “perhaps invalidat[ing]” a range of statutes and regulations that burdened one group over another.215 Later, in Arlington Heights, the Court was even more precise about the significance of disparate policy outcomes to the ultimate constitutional inquiry. Such outcomes, the Court curtly summed up, reflect nothing more than the “the heterogeneity of the Nation’s population.”216

2. The Suspect Classification Doctrine as Precedent

In making the case for judicial review of unconstitutional motives, the longstanding suspect classification doctrine provided a useful precedent. It was precedent both for the propriety of judicial inquiry into legislative motives and for illustrating the relationship between the legislative product and the process that generated it. The doctrine reflects a “generic suspicion” that certain classifications are

---


214. As one scholar summed up:

[A]pplying strict scrutiny in all disparate impact cases would engage the courts too extensively in overseeing social policy. Such activity arguably would be institutionally inappropriate solely by virtue of the volume of decisions involved; it is not seemly for the Court to appear to have a hand in managing such a wide range of policy choices. From the process perspective, an “effects test” would contravene the principle favoring limited use of the power of judicial review.

Flagg, Enduring Principle, supra note 8, at 952-53.

215. See Washington v. Davis, 426 U.S. 229, 248 (1976). In accordance with this deference and fear of intrusion on legislative prerogatives, the Court also reserved the ultimate policy question of whether to extend the disparate impact rule “beyond those areas where it is already applicable by reason of statute” for “legislative prescription.” Id.

motivated by prejudice. In requiring a perfect fit between the suspect classification and a constitutional state goal, the doctrine is aimed at flushing out unconstitutional motivations such as racial prejudice. Hence, review under the suspect classification rule was one example of the Court already engaging in motive review, albeit indirectly.

Bolstering the case for the propriety of motive review, in light of institutional competence limitations, is the fact that motive review is "intrinsically less intrusive than substantive judicial review" per the suspect classification doctrine. That is, the suspect classification doctrine, with its focus on the legislative product as the trigger for an inquiry into legislative motives, involves a "direct (and problematic) inquiry into the integrity of the decisionmaking process." Unlike motive review, heightened judicial scrutiny under the suspect classification doctrine is not contingent upon a finding of illicit motivation; rather, it is the criterion itself that initiates the demand for an "extraordinary" justification from the decisionmaker. Once invoked, judicial scrutiny pursuant to the suspect classification doctrine permits a complete judicial reassessment of the legislative cost-benefit analysis. This reassessment occurs when the Court places on the legislative body a heavy burden of justification.

217. See Brest, Reflections, supra note 194, at 1145; see also Brest, Legislative Motive, supra note 22, at 109 (noting the view that it is "highly probable that a racial classification reflects prejudice on the decisionmaker's part"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494-95 (1989) (restating the rule that the proper standard of review is not affected by the race of those protected or discriminated against).

218. See Croson, 488 U.S. at 493 (noting that racial classifications carry the danger that they are based on group stereotypes; "[a]bsent searching judicial inquiry ... there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics"); Klaman, supra note 8, at 256 (describing suspect classification rule as containing the virtue of "purg[ing] the legislative process of racial hostility and stereotypes").

219. See Ely, supra note 182, at 146. The suspect classification rule "lacks the proof problems of a more direct inquiry [into motivation] and into the bargain permits courts (and complainants) to be more politic, to invalidate (or attack) something for illicit motivation without having to come right out and say that's what they're doing." Id. Thus, the argument goes, for the same reasons that overt and covert racial classifications are subject to judicial scrutiny, courts should likewise be able to inquire "whether impermissible criteria or objectives played a role in the decisionmaking process when the same result might have been achieved by the consideration of legitimate criteria or justified in terms of legitimate objectives." Brest, Legislative Motive, supra note 22, at 115.

220. Brest, Reflections, supra note 194, at 1143.

221. Brest, Antidiscrimination Principle, supra note 3, at 15.

222. See Brest, Legislative Motive, supra note 22, at 108 (noting that this burden of justification "requires the court to reassess the legislative decision by balancing the benefits accruing to the government against the costs imposed on those adversely affected by the law").
Substantive review per the suspect classification doctrine hence allows “courts to second-guess other agencies’ judgments and orderings of social facts and values.” Moreover, if the court decides that the wrong balance was struck, the decision is rendered “substantively, and hence permanently, invalid.”

3. Ensuring Appropriate Restraint

In order to ensure that judicial review would not inappropriately intrude upon the policymaking process, motive review proponents had to be careful about defining the type of process defect that could justify judicial review. Ely was up-front about the need to focus on the “psychology of the decision.” In Ely’s terminology, before requiring a lawmaker to justify its decision, judicial review would need to identify instances of discreditable “legislative misapprehension.” A legislative misapprehension is a policy generalization whose incidence of counterexamples is not merely “too high,” but is actually significantly higher than the decisionmaker appears to have thought it was. The difference between these two standards is that the first focuses simply on “the legislative product” and the second rightly focuses on the “process that generated it” to identify some “factor or factors that suggest the likelihood” of prejudice. In order to identify those generalizations that are the product of prejudice, Ely would go beyond the outcomes and investigate the history of the decision and the particular interests motivating the decisionmaker. He would thus investigate “where [the generalization] came from—who came up with it and whether it is one that serves their interests.”

223. Brest, Reflections, supra note 194, at 1143-44.
224. Id. at 1144.
225. See, e.g., Ely, supra note 182, at 153 (focusing on the “psychology of [the] decision, possesses the additional virtue of relating rather directly to what we found to be the functional significance of a theory of suspect classifications, one of flushing out unconstitutional motivations”).
226. See id. at 157.
227. See id. Similarly, Brest described an “illicitly motivated” policymaker as one who “treats as a desirable consequence [a goal] to which the lawfully motivated decisionmaker would be indifferent or which he would view as undesirable.” Brest, Legislative Motive, supra note 22, at 116.
228. Ely, supra note 182, at 157.
229. Id. at 158. He further explained:

Thus generalizations to the effect, say, that whites in general are smarter or more industrious than blacks, men more stable emotionally than women, or native-born Americans more patriotic than Americans born elsewhere, are likely to go down pretty easily—and in fact we know they have—with groups whose demography is that of the typical American legislature. Few will suppose there aren’t
political losses because of that misapprehension, resulting in policies that disadvantage "them" while protecting "us," intrusion into the otherwise sacrosanct legislative process is justified.

*Feeney* solidified the unique, psychologically oriented inquiry that accompanies motive review of facially neutral legislation. This highly subjective standard virtually dictates that facially neutral laws will rarely be heavily scrutinized by the Court. Footnote 230 Motive review is thus a way of uncovering unconstitutional motives without the intrusion—judicial redoing of the cost-benefit balance—of the suspect classification doctrine. Facially neutral laws will not garner the strict scrutiny allowed by the suspect classification doctrine, absent "a reason to infer antipathy." Footnote 231 In this way, motive review is responsive to considerations of democratic invalidation and relative institutional competencies underlying process theory. Footnote 232 Motive review avoids an unnecessary intrusion into the political process and a concomitant lack of proper respect for the government's chief policymaking agencies. However, even where an illicit motive is found, the policymaker can save the decision from invalidation by demonstrating that the same decision would have been made absent that motive. Footnote 233 By doing so, motive review ultimately "cedes" the cost-benefit balance to the political agencies. Footnote 234 The judiciary's only role vis-à-vis motive review is "to assure that, in the process of accommodating competing counterexamples, but the overall validity of such a generalization is likely to be quite readily accepted. By seizing upon the positive myths about the groups to which they belong and the negative myths about those to which they don't, or for that matter the realities respecting some or most members of the two classes, legislators, like the rest of us, are likely to assume too readily that not many of "them" will be unfairly deprived, nor many of "us" unfairly benefited, by a classification of this type. Generalizations of the opposite sort, which attribute superiority to a group to which most legislators do not belong-say... that Jews are better students-are a different matter. A generalization of this sort may occasionally find grudging acceptance, but here we can be sure that the imperfect, statistical nature of the claim will be well appreciated, and in addition that there will be explanations... that will prevail in the legislature to assure an individualized test or at least that the statutory presumption will be rebuttable.

*Id.* at 159.

Footnote 230. See generally Binion, supra note 13, at 408 ("The intent rule itself would not reflect judicial restraint unless it significantly reduced either the opportunity or the need for judicial intervention in the policymaking process.").


Footnote 234. See Brest, Reflections, supra note 194, at 1144.
interests, these agencies do not commit the constitutional accounting error of treating the infringement of a constitutional right as a benefit rather than as a cost.\textsuperscript{235}

C. The Outcome-Process Link: Overcoming Evidentiary Obstacles in Ascertaining Motive

The other side of the institutional competence coin is the ability of courts to discern the motives of policymakers. The inquiry into motive involves detailing how a court can assess the policymaking process while maintaining the judicial restraint that is the hallmark of process-based theories of constitutional review. Both Brest and Ely embraced a clear "processual" approach to identifying unconstitutional motives.\textsuperscript{236} However, both Ely and Brest also acknowledged that the outcomes, or distributional patterns, of the policymaking process could yield extremely persuasive evidence of the likely nature of that process.\textsuperscript{237} Though rejecting an outcome-based approach to defining the constitutional harm, the relationship between decisionmaking outcomes and the content of a decisionmaking process are not as severable on an evidentiary level. In fact, their relationship is even more inseparable when various types of governmental decisionmaking processes—that is, other than policymaking—are examined for impermissible motives.

1. The Connection Between Outcomes and Motive

In addressing the evidentiary difficulty of making a direct judicial inquiry into motive, motive review proponents conceded that direct

\textsuperscript{235} \textit{Id.} Moreover, even where the policymaker fails to adequately justify an illicitly motivated decision, institutional competence reasons prevent the Court from completely invalidating the underlying substantive issue, once again affirming the primacy of the policymaker. \textit{See} Brest, \textit{Legislative Motive}, supra note 22, at 115 ("A legislative decision held invalid because it was impermissibly motivated may in theory be made again, in identical form, provided only that it is made for licit reasons."); Brest, \textit{Reflections}, supra note 194, at 1144 (stating that, even where "a court invalidates a law on the ground that the process was affected by an illicit motive, the court in effect reaffirms the primacy of the policymaker by remanding to allow the agency to reconsider the underlying policy issue.").

\textsuperscript{236} \textit{See} Brest, \textit{Legislative Motive}, supra note 22, at 111 (noting that motive inquiry "focuses on the process by which a rule was adopted"); \textit{ELY}, supra note 182, at 136 ("The constitutionality of most distributions . . . cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question.").

\textsuperscript{237} \textit{See ELY, supra} note 170, at 136; \textit{see also} Brest, \textit{Legislative Motive}, supra note 22, at 121 (noting that the content of a rule, as well as its merits, are critical factors in identifying motive).
evidence of motive would be rare for obvious reasons.\textsuperscript{238} As such, Brest recognized that the "chief method" of ascertaining motive involved making inferences about a decisionmaker's true objectives.\textsuperscript{239} This assessment would be based on drawing inferences from the decisionmaker's conduct, as viewed "in the context of antecedent and concurrent events and situations."\textsuperscript{240} This inference could be based upon a number of factors, which the Court in \textit{Arlington Heights} eventually saw fit to adopt, relying on Brest's groundbreaking work on motive review.\textsuperscript{241}

One of the primary factors Brest that argued would aid courts in drawing inferences about a decisionmaker's motives was the content of the decision as reflected by its outcomes.\textsuperscript{242} Brest drew a distinction between two inquiries. The first inquiry asks: "Why did the decisionmaker make a particular decision?"; whereas the second inquiry asks: "What (if any) operative rule is the decisionmaker systematically employing?"\textsuperscript{243} The second inquiry is concerned with uncovering the "content" of a rule or decision itself.\textsuperscript{244} Like the suspect classification inquiry, it is concerned with the end state of affairs.\textsuperscript{245} In contrast, the first inquiry seeks to ascertain the "objectives" or "purposes" behind a rule or decision—"the state of affairs or effects that the decisionmaker seeks to establish or retain by promulgation of the rule."\textsuperscript{246} It is a direct inquiry into "the process by which the rule or decision was made; it asks what criteria or objectives the decisionmaker took into account."\textsuperscript{247} This second processual inquiry is the classic inquiry into motive.

\begin{itemize}
\item \textsuperscript{238} See Brest, \textit{Legislative Motive}, supra note 22, at 124 (citing "the ease with which one can lie successfully about one's motives, ... the costs of obtaining the testimony of the members of multimember decisionmaking bodies" and "legal doctrines that immunize legislators and high executive officials from having to account for their decisions").
\item \textsuperscript{239} See id. at 120-21.
\item \textsuperscript{240} Id.
\item \textsuperscript{241} See \textit{Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.}, 429 U.S. 252, 266 n.12 (1977) (referring to Brest's work as a "scholarly discussion of legislative motivation"); see also id. at 267-68 (using the same factors advocated in Brest, \textit{Legislative Motive}, supra note 22, at 120-24).
\item \textsuperscript{242} See Brest, \textit{Legislative Motive}, supra note 22, at 111-12.
\item \textsuperscript{243} Id. at 111.
\item \textsuperscript{244} See id. at 104-05. The content of the rule can, and many times does, involve a fixed set of "operative criteria" that the decisionmaker is employing. See id. at 105.
\item \textsuperscript{245} See \textit{Washington v. Davis}, 426 U.S. 229, 242 (1976) (stating that sometimes an indisputable pattern emerges from the effect of state action that is not subject to explanation on grounds other than race); see also Brest, \textit{Legislative Motive}, supra note 22, at 114 n.104 ("[T]he methodology for establishing that a decisionmaker is covertly employing an illicit operative rule or criterion has been basically that of statistical analysis.").
\item \textsuperscript{246} Brest, \textit{Legislative Motive}, supra note 22, at 104.
\item \textsuperscript{247} Id. at 115.
\end{itemize}
Brest argued, and the Court has concurred, that the connection between the content of a rule and its motive explains many of the pre-
Davis cases. In some of these earlier cases, the unconstitutionality of
c facially neutral official decisions was ascertained through an inference
based upon their content, determined from the outcomes of the
decisions. In Gomillion v. Lightfoot,248 for instance, "the probability
that a nonracially motivated [legislative] delineation of Tuskegee's
boundaries would have the [racially exclusionary] effect it did is so
minimal that, even without knowledge of the racial attitudes prevalent
in Alabama, one could not but conclude that the law was designed to
exclude [blacks] from the city."249 Similarly, in Yick Wo v. Hopkins,250
"[t]he Supreme Court inferred from the San Francisco Board of
Supervisors' pattern of granting and denying laundry permits that the
board was systematically denying permits to Chinese applicants
because of their nationality."251 The early jury cases are also examples
of the use of content analysis to ascertain motive.252 When there is the
type of total exclusion indicated in those cases, the line between
discriminatory purpose and effect is significantly blurred.253

By first inquiring into a decision's content, the suspect
classification doctrine's evidentiary methodology also proved to be a
"handmaiden" for motive review analysis but without the substantive
intrusion that characterizes that doctrine. That is, requiring an

249. Brest, Legislative Motive, supra note 22, at 121 (footnote omitted).
250. 118 U.S. 356 (1886). In Yick Wo, the plaintiff, a Chinese resident of
San Francisco, was convicted of violating a local ordinance prohibiting operation of laundries
located in wooden buildings without a permit issued by the board of supervisors of San
Francisco. See id. at 357. When laundry operators applied for permits to resume operation,
all but one of the white applicants received permits, but none of the over 200 Chinese
applicants were successful. See id. at 359. The Court unanimously reversed Yick Wo's
conviction and found the stark racial disparity to require the conclusion that the racially
neutral law had been discriminatorily applied. See id. at 374.
251. Brest, Legislative Motive, supra note 22, at 112.
252. The Court, explaining its reasoning in one early jury case, assessed the
evidentiary significance of the total exclusion of a racial minority group from the jury pool as
follows:

Circumstances or chance may well dictate that no persons in a certain class will
serve on a particular jury or during some particular period. But it taxes our
credulity to say that mere chance resulted in their being no members of this class
among the over six thousand jurors called in the past 25 years. The result bespeaks
discrimination, whether or not it was a conscious design on the part of any
individual jury commissioner.

("[W]hen the disproportion is as dramatic as in Gomillion v. Lightfoot or Yick Wo v. Hopkins,
it really does not matter whether the standard is phrased in terms of purpose or effect." (citations omitted)).
explanation from a decisionmaker on the basis of the legislative "product," or outcomes, is another way to ascertain motive, but without reassessing the cost-benefit balance. An inference that an illicit "covert" criterion is being systematically employed can be determined by its outcomes.\(^{254}\) Once a covert criterion or rule has been discovered, it "should trigger the same demand for a defense that would be triggered by an overt rule [or criterion] having the same content."\(^{255}\) The explanation, however, is not like the "extraordinary justification" (compelling state interest) required under the suspect classification doctrine. It is much less intrusive, requiring only a rebuttal of the inference of race-dependency. If the decisionmaker rebuts the inference, that signals the end of judicial scrutiny. If he does not, the inference stands and the content of the decision is deemed to be the decisionmaker's true motive.\(^{256}\) Hence, in Gomillion, the original inference of illicit motive based on the outcomes of the legislative decision easily survived where the legislature failed to explain the outcomes at all.\(^{257}\)

Not surprisingly, the Court has sought to limit this method of inferring motive. Both Yick Wo and Gomillion are cited in the Court's contemporary jurisprudence as the "rare cases in which a statistical pattern of discriminatory impact [alone] demonstrated a constitutional violation."\(^{258}\) Only when the pattern of outcomes is as "stark" as it was in those cases is "the evidentiary inquiry" deemed "relatively easy."\(^{259}\) At the same time, the Court has excepted one class of cases

\(^{254}\) See Brest, Legislative Motive, supra note 22, at 111 ("That the rule is made manifest only through systematic application does not make it less 'real'-or less harmful-than an overt regulation.").

\(^{255}\) Id. at 111 n.90.

\(^{256}\) See id. at 118. From there, the nature of judicial review will depend upon the nature of the motive inferred from the decisionmaker's conduct. If the motive behind a particular decision is found to be illicit—for instance, a purpose to exclude blacks—the decision is rendered invalid altogether. See id. If the motive is found to be "constitutionally suspect"—for instance influenced by racial considerations—the decisionmaker must offer a compelling state interest justifying the use of a suspect rule or operative criteria. See id. If a compelling state interest can justify the use of the suspect criterion under the circumstances, then the decisionmaker's motivation is licit. See id. If the justification is not compelling enough, "the decisionmaker's motivation should invalidate the decision—for the same reasons that his consideration of an objective that is illicit per se should invalidate it." Id.

\(^{257}\) See Gomillion v. Lightfoot, 364 U.S. 339, 342, 347-48 (1960). It was indeed crucial to the Court's scrutiny of that statute that the state legislature "never suggested, either in [its] brief or in oral argument, any countervailing [purpose] which [the statute] is designed to serve." Id. at 342.

\(^{258}\) McCleskey v. Kemp, 481 U.S. 279, 293 n.12 (1987); see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (noting that the statistical patterns in Gomillion and Yick Wo were "stark" and "rare").

\(^{259}\) Arlington Heights, 429 U.S. at 266.
from this "rare" category and even expanded the content-motive inquiry in these cases. In the jury selection cases, something less than a "stark" disparity can support an inference that a particular decision was unconstitutionally motivated. Because of the "nature of the jury-selection task," the Court has "permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of Yick Wo or Gomillion."260

Indeed, as earlier jury cases confirm, "the total or seriously disproportionate exclusion of [blacks] from jury venires" is enough to make an inference of racial content sufficient to demand a justification from the decisionmaker.261

2. The Difference that the Process Makes

The Court has never expressly explained what is different about the "nature of the jury selection task" that allows a less than extreme statistical pattern to satisfy the threshold for judicial intrusion. The answer to the "special nature of the jury selection task" may lie in an important point that Brest made. Unlike a one-time, "ad hoc" policy decision—like the decision to adopt a rule of general applicability—the jury-selection decision occurs within the context of a pattern of similar decisions.262 As Brest explained, "[s]tatistical techniques generally are of less assistance in explaining the basis for a particular decision than in explaining the basis for a pattern of decisions."263 Such a pattern of decisions yields a better quality of evidence from which to infer whether an illicit criterion is being applied by the decisionmaker.264

260. Id. at 266 n.13.
262. See Brest, Legislative Motive, supra note 22, at 114 (noting that "[r]ules themselves are seldom, if ever, generated by higher-level . . . rules. Rather they are adopted through an ad hoc process in which the decisionmaker considers and weighs a large variety of factors.").
263. Id. at 115 n.104.
264. The court thus hypothesizes the illicit rule ("reject Blacks"), [or] posits other factors . . . that could conceivably explain the decisionmaker's pattern of conduct, and assesses the likelihood that one or another factor—or randomness—accounts for the decisionmaker's behavior. In testing a hypothesized operative rule one usually can identify a relevant datum . . . and enough events often have occurred to allow control for other possible explanatory variables.
Id. at 114 n.104; see also City of Mobile v. Bolden, 446 U.S. 55, 72 n.17 (1980) ("[T]he racially exclusionary jury cases . . . typically have involved a consistent pattern of discrete official actions that demonstrated almost to a mathematical certainty that [Blacks] were being excluded from juries because of their race.").
It is more difficult to infer the content of a rule from the outcome of a unique, one-time legislative (or other official policy) decision than it is from a pattern of similar decisions applying the same rule or policy. Thus, “it often is not clear what events count as salient data for the inference, the sample is likely to be small, and the data are likely to consist of events so lacking in similarity so as to preclude systematic analysis.”

Indeed, as earlier cases indicate, absent a total or stark disparity, the Court will not easily infer existence of an unconstitutional motive from outcomes of a legislative decision.

Where there is a pattern of similar decisions with racially exclusionary outcomes, courts have been willing to infer from the outcomes alone that a decisionmaker was most likely employing a covert illicit rule or criterion. From there, courts will infer that a specific challenged decision is an application of that rule and shift to the decisionmaker “the burden of proving that a particular [challenged] decision . . . was not an instance of the application of an impermissible rule.” It is in the process of this explanation that the motive inquiry

265. Brest, Legislative Motive, supra note 22, at 115 n.104.
266. See, e.g., Wright v. Rockefeller, 376 U.S. 52 (1964). Four years after Gomillion, the Court was once again solely concerned with actual motivation in a similar type of racial gerrymandering claim. In Wright, the New York legislature had reapportioned the state's congressional districts according to the 1960 decennial census. Plaintiffs, a class of nonwhite and Puerto Rican origin citizens, challenged the concentration of black voters in three Manhattan congressional districts and their exclusion from other districts. See id. at 53-54. Even though, as in Gomillion, there was a statistical disparity (the three challenged districts were made up predominantly of nonwhites) and the district boundaries were irregularly drawn, the Court rejected the challengers' equal protection claims. Because the disparity had not been as stark as it was in Gomillion, the Court concluded that the disparity was open, at best, to conflicting inferences regarding the existence of race discrimination. See id. at 56-57. Indeed, as the Court in Wright explained: "[T]he concentration of [nonwhite] voters in one area in the country made it difficult . . . to fix districts so as to have anything like an equal division of these voters among the districts." Id. at 57; see also Shaw v. Reno, 509 U.S. 630, 644-47 (1993) (explaining the significance of the legislation in Gomillion as so "bizarre on its face" that it was "unexplainable on grounds other than race"). Hence, the evidence failed to rise to an unmistakable conclusion either that the New York Legislature was "motivated by racial considerations" or that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." Wright, 376 U.S. at 56, 58. Wright thus illustrated the difficulty of determining from legislative outcomes whether the decisionmaker purposefully distinguished between voters on the basis of race.

267. That is, courts will assume that the "cases coming within the terms of the rule must be controlled by it . . . . All other things being equal, the fact that a decisionmaker is known to follow a rule lends support to the inference that a particular decision consistent with the rule was generated by it." Brest, Legislative Motive, supra note 22, at 112-13.

268. Id. at 113; see also Washington v. Davis, 426 U.S. 229, 241 (1976) (noting that in the early jury cases the burden "shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result"") (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).
takes place.\textsuperscript{269} As in the jury selection cases, if the decisionmaker's reasons fail to dispel the inference that the specific decision is an instance of the application of the covert criterion, the court is free to assume that the challenged decision was motivated by an impermissible purpose.

This "type of decision" distinction adequately explains the difference between \textit{Gomillion}, or legislative enactments, and the early jury cases. However, it does not suffice to differentiate the early jury cases from \textit{Yick Wo}, both of which involve systematic administration of a policy or rule, versus the one-time ad hoc adoption of a general rule or policy. The Court continues to cite \textit{Yick Wo} as the "rare" case in which outcomes from a pattern of administrative decisions will give rise to an inference of motive.\textsuperscript{270} Yet, it continues to liberally infer illicit motives from less-than-stark outcomes in the administration of jury selection procedures. The one difference between the two cases, the fact that \textit{Yick Wo} involves distributing laundry permits as opposed to selecting jurors, seems inconsequential to all of the aforementioned institutional concerns underlying process theory. However, this contextual difference is significant according to another factor. The "rareness" of the increased judicial intrusion in cases like \textit{Yick Wo}, and the corresponding frequency with which judicial intervention occurs in jury cases, can be explained by the substantive right at issue.

\textbf{D. Twin Strands of One Tradition: The Interaction of Process and Substantive Values}

Process theorists, including motive review proponents, successfully positioned the Court to police the democratic process. Part of that policing function was to ensure that certain rights critical to the proper functioning of that process were not unnecessarily burdened by governmental action. These rights are deemed political rights in that they are essential to individual participation in the democratic process. More often than not, these rights are also constitutionally guaranteed. When these political rights have been burdened, they pose the same threat as does prejudice, or other illicit considerations, to the proper functioning of the democratic process. Hence, the substantive right affected by the allegedly invidious decision is important to motive review, even if indirectly. Judicial intrusion can be properly heightened without reducing the institutional legitimacy of the court

\textsuperscript{269} I thank Michael Dorf for this insight.
\textsuperscript{270} See supra note 48 and accompanying text.
where those interests essential to individual participation in the
democratic process are at stake.

In making the case for judicial review of facially neutral actions, Ely argued that motive review was particularly justified where the decision affected "constitutionally gratuitous" rights and benefits—
rights that are not explicitly guaranteed by the language of the
Constitution. Legislation that burdens "fundamental" rights historically has been presumed unconstitutional absent a compelling
governmental interest. However, where a state law does not impair a
right or liberty protected by the Constitution, there is no occasion to
"depart[] from the settled mode of constitutional analysis of
[legislation] involving questions of economic and social policy." As
Professor Ortiz has explained, rights involving economic and social
goods, such as employment and housing, are considered
constitutionally gratuitous because they are left to market allocation.
Constitutionally guaranteed and "political" rights involve such
activities as voting and jury service. These rights are not only
explicitly guaranteed by the Constitution, but are "critical to the
functioning of an open and effective democratic process."

The paradigm of active judicial review for political rights is in the
First Amendment context, where the Court is heavily involved in
scrutinizing impediments to free speech. Unlike constitutionally
gratuitous rights, here "false-positives" must not be tolerated and
"[c]ourts must police inhibitions on expression and other political
activity because we cannot trust elected officials to do so: ins have a
way of wanting to make sure the outs stay out." Similarly, any
blockages to the voting process, like denial of the right to vote, are
actively scrutinized. The right to vote "includes the right to have the
vote counted at full value without dilution or discount." Hence,

271. See Ely, supra note 182, at 136.
273. See supra Part II.C.
274. Ely, supra note 182, at 105.
275. Id. at 105-06 ("Judicial review in this area must involve, at a minimum, the
elimination of any inhibition of expression that is unnecessary to the promotion of a
government interest.").
276. See id. at 117. Because, like free speech, "[w]e cannot trust the ins to decide who
stays out," it is "incumbent on the courts to ensure not only that no one is denied the vote for
no reason, but also that where there is a reason ... it had better be a very convincing one." id. at 120.
U.S. 276, 279 (1950) (Douglas, J., dissenting)); see also Allen v. State Bd. of Elections, 393
U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well
as by an absolute prohibition on casting a ballot.").
claims involving "malapportionment" or "vote dilution" garner significant judicial scrutiny. Malapportionment occurs where districting practices have the effect of making an individual's vote in a heavily populated district less significant than an individual's vote in a smaller district.278 Vote dilution occurs where individuals of a particular group are effectively excluded from participation such that the political processes are not equally open to participation by the group in question.279 The propriety of judicial review in this area is buttressed by the judicial manageability of the "one person, one vote" principle, a violation of which forms the basis of vote dilution claims.280

Likewise, the right to serve on a jury involves a potential juror's "participat[ion] in the administration of justice,"281 and hence in the democratic process. Quoting Alexis de Tocqueville, the Court has forcefully reasoned that jury service "preserves the democratic element of the law" in that it "invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government."282 As such, a potential juror's exclusion not only violates the right of a criminal defendant to a trial by a jury of his peers, guaranteed under the Sixth Amendment, but equally as importantly "forecloses a significant opportunity [for the excluded jurors] to participate in civic life."283

That substantive concerns, or the right at issue, affect the Court's motive review modus operandi has been persuasively argued by

278. This type of claim is to be distinguished from one in which districting only affects "the political strength of various groups that compete for leadership in a democratically governed community." City of Mobile v. Bolden, 446 U.S. 55, 83 (1980) (Stevens, J., concurring).


280. See ELY, supra note 182, at 122-24. Adding to the propriety of judicial review are recent constitutional amendments "extend[ing] the franchise to persons who previously had been denied it... reflecting a strengthening constitutional commitment to the proposition that all qualified citizens are to play a role in the making of public decisions." Id. at 123.


282. Id. at 406-07 (quoting ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 334-37 (Schocken ed., 1st ed. 1961)).

283. Id. at 409; see also Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 CORNELL L. REV. 203 (1995) (arguing that "jury service was conceived of as a political right").
Professor Ortiz. However, the argument that these concerns alone dictate the application of intent to the exclusion of institutional "process" values is incomplete.

Instead, as I will demonstrate below, these substantive concerns interact with institutional process principles to cohere the Court's application of various levels of intent.

IV. COHERING INTENT

The intent doctrine coheres when viewed through the lens of democratic process principles. In this Part, I apply the institutional process and substantive considerations discussed above to the judicial posture toward different governmental actors and actions. Specifically, the degree of judicial restraint depends upon: (1) the actor making the decision (democratic validation), (2) the type of decision made (institutional competence), and (3) the substantive right affected by the decision. The degree of judicial restraint is linked, in turn, to the ability of disparate impact evidence to trigger the demand for a justification from the decisionmaker. In other words, as the reasons for judicial deference decline, the relevance of disparate impact to the intent inference escalates. This evidentiary variation, in turn, significantly determines the degree of consciousness—or level of intent—that can violate the Equal Protection Clause. As a result, the intent doctrine can be conceptualized along a continuum, instead of a

284. See supra Part II.C. Juridical distinctions between "political" and other rights—such as social and civil rights—have strong historical roots, arguably perpetuated in the Court's intent jurisprudence. See Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status—Enforcing State Action, 49 Stan. L. Rev. 1111, 1119-29, 1138-39 (1997).

285. See Ortiz, supra note 14, at 1136-37. Ortiz argues that the Court follows a familiar hierarchy [that it] employs in the fundamental rights strand of equal protection in deciding what level of scrutiny to accord various kinds of interests. In that area voting and certain criminal process rights, along with the right to travel, receive heightened scrutiny; education receives somewhat elevated scrutiny . . . and traditional economic interests receive reduced scrutiny.

Id. (footnotes omitted).

286. See id. at 1106-07. Ortiz argues that process theory presents an intelligible explanation for an intent requirement, but not the intent requirement actually in use. Instead, the doctrine coheres only as a way of "judging substantive outcomes . . . by allocating burdens of proof between the individual and the state . . . differently in different contexts."

Id.

287. To be fair, Ortiz seems to admit some interaction between these two strands when he argues that the "seemingly disparate strands" of equal protection doctrine—the "fundamental rights" and "suspect classification" doctrines—meet in the Court's intent jurisprudence. See id. at 1137. Nevertheless, in the end, he insists on characterizing the Court's modus operandi as solely based upon the right at issue. See id. at 1139-42.

288. See supra Part II.B.
bright line, separating the decision’s impact from the decisionmaker’s intent.

A. Super Restraint: Requiring Specific Intent

On one end of the continuum are policy decisions made by legislative and executive actors that do not substantially affect the challenger’s political or fundamental rights. These decisions receive the highest degree of judicial deference. The Court exercises “super restraint” toward these decisions, refusing to reassess the cost-benefit calculation absent evidence of specific intent. As such, judicial intrusion is virtually precluded by a presumption of regularity attached to the decisions. The challenger has an extremely heavy burden to demonstrate that the decisionmaker was motivated by a specific desire to harm the group adversely impacted by the decision. Judicial inquiry ends once the Court is satisfied that the decision, or the policy underlying the decision, is rationally based.

1. Legislative and Executive Decisions and Other Majoritarian Processes: The Fear of Democratic Invalidation and Deference to Respective Institutional Competencies

Both democratic validation and institutional competence considerations drive the judicial posture toward the most majoritarian actors and decisionmaking processes. The paradigm exercise of super judicial restraint is in the context of legislative policy decisions. Like *Feeney*, challenges to legislation invoke the most fundamental institutional process concerns arising from judicial interference in other branches’ policymaking. Courts will refuse to inquire beyond the basic rationality of the policy absent clear and convincing reasons to inquire further into the decisionmaking process. The Court in *McCleskey*, for instance, reflected the appropriate level of judicial restraint in rejecting a challenge to Georgia’s capital sentencing legislation. The Court deferred to the “wide discretion” that legislatures have “in the choice of criminal laws and penalties” and the presumptively “legitimate reasons” for adoption and maintenance of the capital punishment statute. Absent a showing of specific intent, the Court refused to scrutinize the policy any further for fear of significant democratic validation costs.

290. *See id.* at 315 (fearing that “if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty”).
Moreover, the Court was careful to articulate the respective institutional competence boundaries in resolving challenges to facially neutral legislation:

McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures are also better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." 291

The Court conceded, however, that its function was to "determine on a case-by-case basis whether these laws are applied consistently with the Constitution." 292 As I will argue later, the Court's adjudication of McCleskey's second claim, involving discriminatory application of the death penalty in his case, illustrated its reluctance to live up to a task it is competent to perform. 293

Executive decisions—for instance, those made by prosecutors—receive the same level of restraint as legislatures when a "core power" is challenged. 294 Selective prosecution claims, like that brought in Wayte v. United States, 295 invoke similar institutional process concerns. Specifically, such challenges "ask[] a court to exercise judicial power over a 'special province' of the Executive." 296 Prosecutors are entrusted with broad discretion to enforce the nation's criminal laws through their power to prosecute and to charge appropriately. 297 Judicial supervision of these decisions involves significant democratic validation costs: "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." 298

291. Id. at 319 (citations omitted) (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972), and Gregg v. Georgia, 428 U.S. 153, 186 (1976)).
292. Id.
293. See infra Part V.A.
297. See id. The Court noted that federal prosecutors "are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" Id. (quoting U.S. CONST. art. II, § 3)).
298. Wayte, 470 U.S. at 607.
Institutional competence considerations also weigh in favor of the highest degree of deference for prosecutorial charging decisions. Specifically, the relative competence of prosecutors and courts in this area demands a high threshold of judicial deference. As the Court succinctly explained in Wayte: "Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." Absent "clear evidence to the contrary," that is a showing of specific intent to harm the group in question, a "presumption of regularity" attaches and the courts assume that prosecutors have properly discharged their duties.

Like challenges to legislative and executive officials exercising core constitutional duties, a presumption of regularity also accompanies challenges to forms of direct democracy—such as the initiative process. As the Seattle School District case illustrates, courts give broad leeway to initiatives passed by a majority of the electorate for the same democratic validation reasons underlying super judicial restraint toward other majoritarian processes. In the absence of a clear constitutional violation, the Court reasoned in Seattle School District, policy decisions covered by an initiative are

299. Id.
300. Selective prosecution claims require the challenger to demonstrate the Feeney standard of specific discriminatory intent, as well as to demonstrate that the policy has a discriminatory effect. See id. at 608-09. If the challenger is claiming racially biased prosecutorial selection, the "effect" requirement can only be satisfied by showing that similarly situated individuals of a different race were not prosecuted. See Armstrong, 116 S. Ct. at 1487.
301. See Armstrong, 116 S. Ct. at 1486. The Court stated that, "'[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Id. (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).
302. An initiative is an electoral process whereby designated percentages of the electorate may initiate legislative or constitutional changes through the filing of formal petitions to be acted on by the legislature or the total electorate. (It involves the power of the people to propose bills and laws, and to enact or reject them at the polls, independent of legislative assembly.
BLACK'S LAW DICTIONARY, 540 (6th ed. 1991). See, e.g., Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 462 n.4 (1982) (quoting WASH. CONST. art. 2, § 1, which gives the people "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature" and requires 8% of state voters to sign a petition).
303. In Seattle School District, the initiative at issue passed with 66% of the statewide vote. See Seattle School District, 458 U.S. at 463.
properly resolved "through the political process."\textsuperscript{304} Initiatives that allocate governmental decisionmaking power according to "neutral principles" are not "subject to equal protection attack," even though they may make it more difficult for minorities to achieve favorable results.\textsuperscript{305} So long as the political majority places obstacles in the path of everyone seeking to secure the benefits of governmental action, the resulting disproportionate burden on one group is constitutionally unproblematic. However, a "non-neutral" action by the political majority, such as "explicitly using the racial nature of a decision to determine the decisionmaking process," constitutes the type of process defect that justifies judicial intervention.\textsuperscript{306} Because the initiative in Seattle School District clearly and explicitly was motivated by a specific desire to harm African-Americans, judicial intrusion was fully justified.\textsuperscript{307}

2. Evaluating the Burden on Substantive Rights

The above analysis assumes that the challenged legislative and executive actions do not burden the challenger's political or constitutionally guaranteed rights. This assumption may be too hasty. In both McCleskey and Wayte, the substantive right at issue arguably could have favored more aggressive judicial review. In Wayte, the challenger claimed that the prosecutorial charging policy directly burdened his First Amendment rights, as it targeted vocal nonregistrants of the draft.\textsuperscript{308} In McCleskey, the legislation did not involve a political right per se. Nevertheless, McCleskey's claim did affect a substantive interest that the Court has carved out as justifying increased judicial scrutiny. The Court's Eighth Amendment

\textsuperscript{304} Id. at 474. Here, the initiative overturned a school district policy mandating busing for desegregation purposes. However, initiatives that seek to amend state constitutions may appropriately require more than a majority vote. See Lynn A. Baker, \textit{Constitutional Change and Direct Democracy}, 66 U. COLO. L. REV. 143, 152-58 (1995) (exploring a "super-majority" requirement for constitutional amendments by initiative).

\textsuperscript{305} Seattle School District, 458 U.S. at 470 ("Because such laws make it more difficult for every group in the community to enact comparable laws, they provid[e] a just framework within which the diverse political groups in our society may fairly compete.") (quoting Hunter v. Erickson, 243 U.S. 385, 393 (1919)).

\textsuperscript{306} Id.

\textsuperscript{307} That is, [s]tate action of this kind . . . "places special burdens on racial minorities within the governmental process," thereby "making it more difficult for certain racial and religious minorities . . . to achieve legislation that is in their interest." Such a structuring of the political process [is] "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others.

\textsuperscript{308} See Wayte v. United States, 470 U.S. 598, 603-04 (1985).
jurisprudence has repeatedly confirmed that "death is different." However, in both cases the Court was careful to explicitly rule out any significant threat to these rights. In doing so, any argument for increased judicial scrutiny on the basis of the substantive right, and hence a lower level of intent, was resolved by the Court itself.

In Wayte, the Court was openly dismissive of the challenger's claim that the prosecutorial policy infringed upon his right to political speech. At most, the Court ruled, the only right burdened was the "asserted 'right' not to register" for the draft, a right that was "without foundation either in the Constitution or the history of our country." Nevertheless, even if the policy arguably posed an "incidental restriction" on the challenger's fundamental right, increased scrutiny would still not be appropriate where, as here, the government placed no more limitation on speech than was necessary to ensure registration, and the policy was the only effective interim solution available to carry out the government's interest.

The McCleskey Court likewise carefully articulated the limitations of its "death is different" principle. When applied to legislative challenges, this principle is designed to ensure that capital sentencing legislation provides procedures for fairly imposing the
death penalty on individual defendants.\textsuperscript{313} Once the Court is satisfied that these particularized procedural requirements have been met, the judicial inquiry ends. The legislature has done all that it can to ensure against an arbitrary capital sentencing determination and that defendant’s sentence rests on an individualized inquiry.\textsuperscript{314} In \textit{McCleskey}, the Court held that the Georgia legislation satisfied these procedural requirements.\textsuperscript{315} Hence, the “death is different” principle did not justify further scrutiny of the adoption of the Georgia legislation. However, whether the capital sentencing legislation has been fairly administered by the jury goes to the heart of individual cases like McCleskey’s. Though the constitutional inquiry into the challenged legislation is limited to the procedures by which a death sentence is imposed, the “death is different” principle is also employed by the Court to “probe[] the application of statutes to particular cases.”\textsuperscript{316} In reviewing McCleskey’s discriminatory administration claim, the Court was thus presented with another opportunity to closely review the fairness of the capital sentencing determination, pursuant to the “death is different” principle. As discussed later,\textsuperscript{317} the manner in which the Court adjudicated this task invokes different considerations than were at issue in McCleskey’s discriminatory legislation challenge.

\textbf{B. Intermediate Restraint: Accepting General Intent}

The normal mode of “super” restraint toward legislative and executive actors can be tempered when either democratic validation or institutional competence concerns are decreased, or where the decision threatens to burden a political or fundamental right of the challenger.

\textsuperscript{313} For instance, this includes channeling discretion, narrowing the range of eligible defendants to cases in which at least one aggravating circumstance is found beyond a reasonable doubt, and requiring a particularized individual determination. \textit{See} McCleskey \textit{v. Kemp}, 481 U.S. 279, 302-03 (1987).

\textsuperscript{314} In Georgia, the statute provides for automatic appeal to the state supreme court, which is required to assess whether a sentence is “imposed under the influence of passion or prejudice, whether the evidence supports the jury’s finding of a statutory aggravating circumstance, and whether the sentence is disproportionate to sentences imposed in generally similar murder cases.” \textit{Id.} at 303. Additionally, the trial court aids the reviewing court by answering a questionnaire about the trial, “including detailed questions as to ‘the quality of the defendant’s representation [and] whether race played a role in the trial.’” \textit{Id.} (quoting Gregg \textit{v. Georgia}, 428 U.S. 153, 167 (1967)).

\textsuperscript{315} \textit{See id.} at 302 (noting that, among other things, the statute “bifurcates [the] guilt and sentencing proceedings ... narrows the class of murders subject to the death penalty ... [and] allows ... any relevant mitigating evidence that might influence the jury not to impose a death sentence”).

\textsuperscript{316} \textit{Id.} at 304-05.

\textsuperscript{317} \textit{See} discussion \textit{infra} Part V.A.
When one of these factors is present, the Court has a tendency to exercise "intermediate restraint." Because of the existence of these factors, more aggressive judicial review poses less risk of undermining the Court's institutional legitimacy. Practically speaking, intermediate restraint reflects an easier evidentiary burden on the challenger to trigger closer judicial scrutiny of the decision. This increased scrutiny translates into greater judicial willingness to look beyond the stated legislative or administrative rationale to the social and historical context of the decision. This broader evidentiary approach in turn allows general intent to violate the Equal Protection Clause. A finding of general intent will render the decision presumptively unconstitutional, requiring a justification from the decisionmaker. In deference to the relative democratic superiority of the actor, however, the decisionmaker can save the decision from invalidation by demonstrating that the same decision would have been made absent any discriminatory intent.318

1. Administrative Agency Policy Decisions: Decreased Democratic Validation Concerns

Democratic validation concerns are decreased if the policymaker is not a legislative body or high level executive official. Policy decisions by administrative bodies, as in Davis and Arlington Heights,319 thus receive less judicial restraint than if the same decision would have been made by a legislature or more accountable executive actor. Decisions made by administrative bodies lack the level of direct accountability that would otherwise accompany a similar legislative decision. Moreover, these bodies often act pursuant to broad discretion and with very little direct supervision from more accountable political actors.320 This discretion, coupled with the lack


319. In Arlington Heights, the zoning policy was adopted by the village's Plan Commission and the Board of Trustees. See Arlington Heights, 429 U.S. at 257-58. In Davis, the decision to adopt Test 21 was made by the Police Commission in conjunction with the Civil Service Commission. See Washington v. Davis, 426 U.S. 229, 234-35 (1976). Both of the cases involved challenges to a policy decision made by the administrative body. For instance, in Davis, the challenge was to the Washington, D.C. police department's decision to adopt a criterion, Test 21, for admission to the department based upon its determination that communication skills were important to the quality of its workforce. See id. Similarly, in Arlington Heights, the city council made a decision not to rezone a portion of land to accommodate a development that did not conform to the city's existing zoning ordinance only after weighing the various interests of its constituents and the future impact it would have on them. See Arlington Heights, 429 U.S. at 254-58.

320. Ely summarized the role of administrative bodies as follows:
of accountability, provides enough of a rationale to allow courts to police administrative policymaking to "ensure not only that administrators follow . . . legislative [and executive] policy directions that do exist . . . but also that such directions are given." Courts thus take a "hard look" at administrative bodies’ decisionmaking processes, encouraging "reasoned decisionmaking" and bringing to public view the considerations underlying administrative policy decisions, as well as checking for fidelity to the governing statute or other policy directive. Particularly where there is no legislative directive, judicial review ensures that administrative policy decisions are based on objective fact-finding and consideration of all relevant factors and policy options.

This "hard look" approach has, not surprisingly, spilled over to judicial review of administrative policy decisions alleged to be in violation of the Equal Protection Clause. The totality of the

Much of the law is . . . effectively left to be made by the legions of unelected administrators whose duty it becomes to give operative meaning to the broad delegations the statutes contain. The point is not that such "faceless bureaucrats" necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are. (In the federal executive, of course, the only elected officials are the President and the Vice President.

ELY, supra note 182, at 131; see also KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 7.9, at 351 (Little Brown, 3d ed. 1994) (noting that, because of the lack of legislative or executive guidance, "it is increasingly difficult to identify a source of political and constitutional legitimacy for most [agency] policy decisions").

321. ELY, supra note 182, at 133.


323. The Supreme Court has developed a two-step analytical approach for addressing administrative agency interpretations of statutory law:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (footnotes omitted). This is called the "Chevron doctrine." Judicial deference under this doctrine applies only where there is congressional delegation of administrative authority. See Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990). Where there is no legislative delegation, the court is even less deferential towards agency action.

324. See State Farm, 463 U.S. at 42-43 (finding that a reviewing court must satisfy itself that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action").
circumstances approach articulated in Davis and further developed in Arlington Heights suggests a cautious, but thorough, inspection of administrative bodies’ policymaking processes. For example, key factors at issue in Arlington Heights were the consistency with which the local administrative body relied upon and applied various policy considerations to deny the plaintiffs’ rezoning request and any procedural irregularities in the decisionmaking process.\textsuperscript{325}

A similar degree of scrutiny of a legislative decision would be unthinkable; courts would not go beyond ensuring the rationality of the stated objective.\textsuperscript{326} However, if a court is skeptical of the predicate facts or reasoning underlying an administrative body’s policy decision, the Arlington Heights “hard look” framework allows omissions or inconsistencies in the administrative record to support an inference of general intent—that the decisionmakers were substantially certain of, even if they did not desire, the harmful consequences of their actions.\textsuperscript{327} The Arlington Heights evidentiary framework thus enables courts to walk a fine line between deference to largely unaccountable


For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of [petitioner’s] plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

Id. (footnote omitted).

\textsuperscript{326} The most the Court will do in reviewing a legislative decision is to look at the statutory history to determine the rationality of the legislature’s stated reasons for the classifications at issue. See Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 279-80 (1979); see also 1 DAVIS & PIERCE, supra note 320, § 7.5, at 322 (“Legislatures and courts are not required to provide any evidentiary support for the facts on which they predicate rules of law. Courts often require agencies to provide some evidentiary support for the legislative facts that provide the predicate for agency rules. . . .”).

\textsuperscript{327} This mode of review toward administrative bodies similarly explains many lower courts’ application and liberal interpretation of Arlington Heights’ evidentiary scheme to the local administrative decisions challenged under the Equal Protection Clause. Lower courts have applied the Arlington Heights framework to administrative action that was found to be intentional based upon its disparate impact, the foreseeability of the impact, and the knowledge that the decision would cause the impact. See supra note 146 (discussing Eleventh Circuit cases finding discriminatory intent in the racially disparate provision of municipal services); see also R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1147-49 (E.D. Va. 1991) (applying the same framework to challenged discriminatory sitings of solid waste landfills by municipal agencies), aff’d, 977 F.2d 571, 573 (4th Cir. 1992); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 677-81 (S.D. Tex. 1979) (applying the Arlington Heights framework to allegations that the State Department discriminated against plaintiffs in a decision choosing the site of a solid waste facility), aff’d without opinion, 782 F.2d 1038 (5th Cir. 1986).
administrative bodies and closer scrutiny of the administrative policy process with little or no cost to its institutional legitimacy.

2. Legislation Burdening a Political or Fundamental Right

The normal mode of "super restraint" toward legislative and executive decisionmaking processes can also be tempered by the existence of a substantive right affected by the challenged decision. The Court’s increased intrusion in Rogers v. Lodge\textsuperscript{328} can be explained by this factor. In that case, the multimember voting scheme was challenged as discriminatory in large part because it “diluted” the vote of a minority group.\textsuperscript{329} Claims of vote dilution involve violation of the “one person, one vote” principle, granting each voter the right to “have his vote weighted equally with those of all other citizens.”\textsuperscript{330} In Rogers, the Court was openly concerned that the districting scheme used to elect local officials effectively excluded minority voters from equal participation in the electoral process.\textsuperscript{331} Consequently, the Court demonstrated its willingness to look beyond the legislative history pertaining to the challenged at-large election system in concluding that the system was maintained for discriminatory purposes.\textsuperscript{332} Evidence of disparate impact plus historical discrimination against blacks in other aspects of life allowed the Court to impute a general intent to the legislature, thus establishing the legislative’s knowledge, and the likelihood, of the adverse consequences of maintaining the voting scheme.\textsuperscript{333}

Moreover, the Court is far less deferential to legislative rationales where political or fundamental rights are burdened. In Hunter v. Underwood,\textsuperscript{334} the State sought to justify a disenfranchisement

\textsuperscript{328} 458 U.S. 613 (1982).
\textsuperscript{329} As the Court explained:

At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority’s voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines.

\textit{Id.} at 616.

\textsuperscript{330} Reynolds v. Sims, 377 U.S. 533, 576 (1964). In Reynolds, the Court recognized that a voter’s right to have “an effective voice” in the election of representatives is impaired where representation is not apportioned substantially on a population basis. \textit{See id.}

\textsuperscript{331} \textit{See Rogers}, 458 U.S. at 623-26.
\textsuperscript{332} \textit{See id.} at 624-27.
\textsuperscript{333} \textit{See id.}
\textsuperscript{334} 471 U.S. 222 (1985).
provision in the Alabama constitution by asserting its "legitimate" interest in denying the franchise to those convicted of select crimes. Unlike in McCleskey, the Court refused to defer to the normally broad discretion given to the legislature in choosing appropriate criminal penalties. In Hunter, the penalties had a direct burden on the right to vote by denying that right to persons covered by the statute, and this effect seemed to make all the difference in the Court's posture toward the legislative rationale. Relying on historical evidence, the Court concluded that the State's interest in denying the franchise to those convicted of crimes involving moral turpitude was "simply not a motivating factor" in light of other evidence suggesting that race heavily influenced the decision to adopt the challenged provision. This conclusion was buttressed by the fact that, in addition to the general phrase "crimes involving moral turpitude," the suffrage committee selected other crimes that "were thought to be more commonly committed by blacks." Like Rogers, the Court was willing to look beyond stated legislative rationales to the social and historical contexts in determining whether the decision reflected a discriminatory purpose. Thus, the Court makes clear that legislative bodies have a higher burden to meet when their policy decisions burden fundamental rights.

C. Minimal Restraint: Accepting Unconscious Intent

On the other end of the impact/intent continuum, courts exercise "minimal restraint" toward a governmental decision. A combination of two or more institutional processes or substantive right considerations decrease the threat to judicial legitimacy arising from closer scrutiny of the decisionmaking process. The cases falling under this category, namely Castaneda and the prosecutorial peremptory challenge cases, involve decisions burdening the right of citizens to participate in civic life by sitting on a jury. No less important, they implicate a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community. Both types of decisions are also administrative in nature and thus present lessened institutional adjustment.

335. See id. at 232.
336. See id. at 229-33.
337. Id. at 232.
338. Id.
339. I refer to "administrative" in this context to describe the process of decisionmaking as opposed to the nature of the actor. Specifically, "administrative" describes a process of administering a policy or law to specific individuals or applying it to specific factual situations. This is to be compared with what I have described throughout the Article.
competence concerns. Moreover, unlike challenges to prosecutorial decisionmaking, judicial scrutiny of the decisionmaker in Castaneda does not pose a threat of democratic invalidation. Because of the combination of these three mitigating factors in Castaneda, unconscious bias more easily violates the Equal Protection Clause than in the peremptory challenge context, where only two factors weigh against super judicial restraint.

This minimal restraint means that a challenger need only make a very minimal showing in order to trigger the demand for a justification from the decisionmaker. This minimal showing generally consists of disparate impact evidence coupled with excess administrative discretion. Unlike the decision to adopt a one-time, unique policy decision, the cases here involve a pattern of decisions administering a facially neutral rule to specific individuals. This trail of decisions often provides enough evidence to enable courts to draw reliable inferences about the content of the challenged decision. Additionally, as the Court has long recognized—beginning with Yick Wo—the existence of unchecked discretion in administering facially neutral laws bolsters the case for judicial scrutiny of the challenged decision. Where suspicious outcomes exist, heightened judicial

as "policymaking," the ad hoc process by which general rules or policies are adopted by legislative and executive actors.

The distinction between the policymaking process and the administrative process is theoretically akin to the administrative law distinction between the administrative agency processes of "rulemaking" and "adjudication." Rulemaking is the agency process by which an agency issues a prescriptive rule or course of action "designed to implement, interpret, or prescribe law or policy." Administrative Procedure Act, 5 U.S.C. § 551(4)-(5) (1997). Administrative rulemaking is akin to the legislative political process whereby all competing considerations are canvassed, a range of parties and interests are assessed, and cost/benefit analysis is considered before crafting a rule. Adjudication, on the other hand, generally involves an agency determination of whether an individual party has conformed with, or fits within, a rule. See id. § 551(6)-(7). Adjudication involves fact-finding and the application of a preexisting policy to particular facts. Thus, the essence of the difference between rulemaking and adjudicating is that the former must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it, whereas the latter generally operates concretely upon individuals in some type of enforcement proceeding. Though these two distinctions can seem theoretically obscure, indeed with much potential for overlap, there is rarely any practical confusion between the two. One process is akin to the what legislatures do, while the other is akin to what judges do. See ALFRED C. AMAN & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 101-03 (West 1993); DAVIS & PIERCE, ADMINISTRATIVE LAW TREATISE, supra note 320, § 7.5, at 321-33.


341. In Yick Wo, the fact that all 200 Chinese applicants were denied permits to operate their businesses with no stated reason, except the mere "will and consent of the supervisors," and at the same time 80 non-Chinese applicants were permitted to operate their businesses under similar conditions, led the Court to conclude that discrimination had taken place regardless of the intent of the ordinance as adopted. See id. at 368, 374.
review properly serves as a check on these decisionmaking processes to ensure that they are not influenced by prejudice and bias.

1. Prosecutorial Peremptory Challenges: A Functional Approach to Institutional Competence

The peremptory challenge cases offer two reasons for minimal judicial restraint. In addition to the substantive right at issue, the nature of peremptory challenges also pose different, and lessened, competency issues than a "core" prosecutorial function like the charging decision. Unlike a prosecutor's charging decision, the administration of the peremptory challenge procedure involves a process not particularly within the prosecutor's special competence, nor one which courts are incompetent to assess. As explained above, judicial review of prosecutorial charging decisions threatens to intrude upon a specialized policy decision of another branch. As to other types of prosecutorial decisions, however, judicial review has not been so formalistic. The Court has recognized the need to draw process distinctions when deciding on the level of judicial review of decisions by governmental actors who perform a variety of functions.

For example, a unanimous Court settled on a "functional approach" in deciding whether to grant absolute immunity, versus the more general standard of qualified immunity, to a prosecutor's decisions. This approach recognizes that the level of judicial restraint should not follow from the identity of the actor, but rather from the type of decision. The Court distinguishes between a prosecutor's quasi-judicial functions and her administrative or

---

Central to the Court's holding in *Yick Wo*, and a rarely noted aspect of the case, was the fact that the process of administering a facially neutral law was defective by reason of the unusual "naked and arbitrary" discretion to grant permits for operating the laundries vested in the supervisors by the ordinance. *See id.* at 366. The Court was, in the first instance, disturbed that the ordinance conferred on its administrators "not a discretion to be exercised upon a consideration of the circumstances of each case," but rather arbitrary power to grant the permits without "guidance nor restraint." *Id.* The Court explained:

[The ordinance] does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure.

*Id.* at 368.

investigatory functions in determining the appropriate level of immunity from litigation that is conferred on a prosecutor. A prosecutor's traditional functions of initiation and pursuit of a criminal prosecution—including presentation of a case for trial—garner absolute immunity, because such functions are "intimately associated with the judicial phase of the criminal process." These functions deserve special protection, above and beyond the norm of qualified immunity, for the same reasons that judges need protection to perform their public duties. In contrast, the further a prosecutorial act is from the judicial process of trial and its preparation, and the closer it gets to investigatory or administrative functions, the less immunity is accorded to the prosecutor. Hence, under this functional approach, the actions of a prosecutor are not absolutely immune just because they are performed by a prosecutor. Because qualified immunity is the norm for administrative officers, a prosecutor only receives qualified immunity when a challenge is brought to one of his administrative functions.

Similarly, many prosecutorial decisions other than the charging decision do not present the same reasons for judicial restraint in reviewing them for racial or other bias. Courts are not asked to second-guess the amorphous process of weighing the costs and benefits of a charging decision. Rather, they are called upon to evaluate a series of decisions administering the same policy to specific individuals. This is a process that courts are competent to evaluate. The Court in Batson expressed confidence in a trial court's ability, based on its "experience in supervising voir dire," to "decide if the circumstance concerning the prosecutors' use of peremptory challenges creates a prima facie case of discrimination against black

---

343. See id. at 270-71.
345. See id. at 422-23 (discussing common law immunity of prosecutor as based upon same considerations that underlie common law immunity of judges—including concerns of "harassment by unfounded litigation" and undermining independence of judgment required of public servants).
346. See Fitzsimmons, 509 U.S. at 270-71 (refusing to draw a strict line, but recognizing a continuum).
347. See id. at 273.
348. See id. (finding prosecutor's alleged misconduct while endeavoring to determine source of bootprint at crime scene was an investigatory/administrative function, and fact that prosecutor later called grand jury to consider allegedly false evidence from the investigation did not retroactively transform that work from administrative into prosecutorial); see also Burns v. Reed, 500 U.S. 478, 490, 492-96 (1991) (finding act of prosecutor giving legal advice to police on hypnotizing a suspect and on whether probable cause existed to arrest a suspect is entitled to qualified immunity; in contrast, prosecutor's act of participating in probable cause hearing entitled to absolute immunity).
jurers." 349 Though the prosecutor is endowed with complete discretion in using the limited number of such challenges, courts are essentially bystanders in the jury selection process and hence more competent to detect potential bias:

During jury selection, the entire res gestae take place in front of the trial judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a "pattern" of singling out members of a single race for peremptory challenges. He is in a position to discern whether a challenge to a black juror has evidentiary significance; the significance may differ if the venire consists mostly of blacks or of whites. Similarly, if the defendant makes out a prima facie case, the prosecutor is called upon to justify only decisions made in the very case then before the court. The trial judge need not review prosecutorial conduct in relation to other venires in other cases. 350

Moreover, because of the trial court's unique position in relation to the administration of peremptory challenges, its determination regarding the "ultimate question of discriminatory intent" is "accorded great deference on appeal." 351 Thus, a trial court's determination that a prosecutor was motivated by unconscious bias will likely be undisturbed by appellate courts.

2. Low Level Administrative Actors
   a. The Absence of Institutional Process Concerns

In Castaneda, three factors weigh in favor of decreased judicial deference and greater intrusion into the official decisionmaking process. In addition to the existence of the substantive right, here both democratic validation and institutional competence considerations are virtually nonexistent, or at least at a minimum. Unlike challenges to prosecutorial peremptory challenges, democratic invalidation fears are reduced, because the decision is being made by a few select citizens who are not politically accountable.

Under the key-man system of jury selection, appointed jury commissioners select between fifteen and twenty "key" persons, citizens from different portions of the county. 352 These key person

351. Hernandez v. New York, 500 U.S. 352, 364 (1991). This deference is also due in part to the fact that the trial court's determination involves an evaluation of credibility.
352. Under the statutory "key man" procedure, potential juror qualifications are not tested until each is summoned before the district court. See Castaneda v. Partida, 430 U.S. 482, 484-85 (1977). The procedure was described by the Court in Castaneda as follows:
panels are given complete discretion in choosing individuals for the list from which the actual jury is to be composed. As in the peremptory challenge cases, the Court was willing to require jury commissioners to testify to the procedures under which key persons chose the jurors from the community.\textsuperscript{353} This willingness arose from the fact that the statutory process left complete and unguided discretion both to jury commissioners and to key persons. Discretion here is even more of a reason for judicial scrutiny because of the nature of the actor. Unlike prosecutors, individual administrators are largely unaccountable and their decisions are completely unchecked by other political actors. Judicial scrutiny thus provides the necessary accountability that more visible official decisionmakers receive elsewhere.

As in the peremptory challenge cases, institutional competence concerns are lessened in \textit{Castaneda} because of the administrative nature of the decisions. However, unlike the peremptory challenge cases, courts’ increased ability to assess those decisions are not due to the trial court’s contemporaneous observation of the process. Rather, the type of decisionmaking process involved in choosing the venire leaves behind a “pattern” of similar decisions sufficient to allow appropriate statistical inferences of discrimination from which an inquiry into motive can be made. Specifically, when analyzed through accepted statistical methods, courts are able to infer whether race has influenced the administration of an otherwise facially neutral policy. In making an inference of race-dependency, courts assume that the racial criterion applied over time has been applied in the challenged decision. Once an inference of racial content is made from this pattern, courts shift the burden to the decisionmaker to explain the

\begin{footnotesize}
The procedure begins with the state district judge’s appointment of from three to five persons to serve as jury commissioners. The commissioners then “shall select not less than 15 nor more than 20 persons from the citizens of different portions of the county” to compose the list from which the actual grand jury will be drawn. When at least 12 of the persons on the list appear in court pursuant to summons, the district judge proceeds to “test their qualifications.” The qualifications themselves are set out in [Texas Code of Criminal Procedure] Art. 19.08: A grand juror must be a citizen of Texas and of the county, be a qualified voter in the county, be “of sound mind and good moral character,” be literate, have no prior felony conviction, and be under no pending indictment “or other legal accusation for theft or of any felony.” Interrogation under oath is the method specified for testing the prospective juror’s qualifications. The precise questions to be asked are set out in Art. 19.23, which for the most part, tracks the language of Art. 19.08. After the court finds 12 jurors who meet the statutory qualifications, they are impaneled as the grand jury.

\textit{Id.} (citations omitted).

\textsuperscript{353} See \textit{id.} at 497-98.
\end{footnotesize}
challenged decision. The decisionmaker must then rebut the inference as to the particular challenged decision, arguing that the particular decision was not an instance of the application of the racial criterion. If the decisionmaker fails to demonstrate the race-neutrality of the decision, then the Court assumes from the inference of race-dependency and the exclusionary outcomes that the decision was illicitly motivated.

b. Statistical Inferences of Bias

As motive review proponents correctly noted, evidence of decisionmaking outcomes can be indicative of whether decisionmakers employed a covert racial criterion in administering an otherwise facially neutral law.\textsuperscript{354} Statistical analysis of the type accepted in Castaneda is widely known as “inferential statistics.”\textsuperscript{355} Using a pattern of past similar decisions, inferential statistics allow the fact-finder to analyze quantitative data to determine whether such data supports or fails to support an inference of the existence of certain factors in the administration of a decisionmaking system.\textsuperscript{356} The primary manner in which inferences are drawn from a pattern of past decisions is by “hypothesis testing.” For example, in order to test the hypothesis “Decisionmaker X is employing race as a criterion in the decisionmaking process,” the fact-finder must reject or accept an antecedent null hypothesis, such as “Decisionmaker X is not employing race as a criterion in the decisionmaking process.”\textsuperscript{357} To reject the null hypothesis requires the fact-finder to formulate and deny a “consequent” assumption,\textsuperscript{358} which describes the range of likely outcomes if the null hypothesis were true.\textsuperscript{359} Statistical analysis, using

\textsuperscript{354} See supra Part III.C.2.
\textsuperscript{356} See Neil B. Cohen, Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge, 60 N.Y.U. L. Rev. 385, 390-91 (1985) (describing the fundamental agreement by legal commentators on the theoretical and conceptual application of probability or inferential theory to the legal proof process); id. at 394 (describing the argument that “the preponderance of the evidence standard employed in civil litigation . . . is satisfied by demonstrating that the probability of the existence of the facts supporting liability exceeds 0.5”).
\textsuperscript{358} As one commentator explains, the “hypothesis is tested by following the logical form of denying the consequent (or modus tollens): If X is true (the antecedent), then Y is true (the consequent). Y is not true. Therefore X is not true.” Id. at 2-10 (citing Irving M. Copi, Introduction to Logic 202-03 (3d ed. 1968)).
\textsuperscript{359} For instance, in an employment discrimination case where 20% of the applications received were from blacks, it might be said that the consequent assumption
adequate data, is crucial in formulating this consequent assumption. Certain types of decisions provide the necessary data to perform this analysis, enabling a reliable consequent assumption to be formulated in order to reject the null hypothesis. Specifically, where there is a pattern of similar previous decisions that can be analyzed, this enhances the quality of data necessary to render a confident judgment denying or granting the consequent assumption. Once the actual results disprove the consequent assumption, then the fact-finder can reject the null hypothesis.

In Castaneda, for instance, the Court relied upon this statistical method to test the hypothesis that race became a criterion in the process of summoning potential grand jurors. The antecedent or null hypothesis of random selection first had to be rejected before inferring that the hypothesis was true. In order to reject the null hypothesis, the fact-finder had to formulate a reliable consequent assumption: that, in the absence of racial considerations, the racial makeup of people summoned to be grand jurors would roughly mirror the racial makeup of a random selection of people in the population from which the jurors were drawn. This consequent assumption was determined by a statistical analysis that analyzed various data from the outcomes of the process. First, the analyst had to posit other factors

means that the proportion of blacks hired out of 100 hires would be quite close to 20. Further, applying the generally accepted standard deviation range, the consequent would be that, in the absence of race discrimination, the number of blacks hired will be between 12 and 28. See id. at 2-11 to 2-12.

360. For instance, in employment discrimination cases, the consequent assumption is based on the criteria necessary to render a potential employee eligible for the position at issue. The consequent is generally that, in the absence of discrimination, an employer’s work force will tend to be representative of the population from which the employer hires—either the general population or some other defined population (e.g. actual applicant data or the availability of qualified persons in the work force). See id. at 2-11; see also DAVID C. BALDUS & JAMES W.L. COLE, STATISTICAL PROOF OF DISCRIMINATION § 4.11 (1980) (discussing the “general presumption in favor of actual applicant data”).

361. See Cohen, supra note 356, at 397-98 (noting that confidence in the accuracy of statistical judgments differs dramatically due to the difference in the amount of data upon which they were based).

362. This would translate into the following null hypothesis testing in the employment hypo, see supra note 359, assuming that 10 blacks were hired:

If it is true that Employer A is not discriminating [the antecedent or null hypothesis], then it should also be true that the number of [blacks] hired by A will be between 12 and 28 [the consequent]. The number of [blacks] hired by A [10] does not fall between 12 and 28. Therefore, it is not true that Employer A is not discriminating and, as a result, an inference of discrimination is appropriate.

PAETZOLD & WILLBORN, supra note 357, at 2-12 (footnote omitted); see also THAD R. HARSHABARGER, INTRODUCTORY STATISTICS: A DECISION MAP 196 (2d ed. 1977) (discussing the basics of hypothesis testing).

that could account for the results, using the statutory criteria—which defined the relevant pool of people who were eligible to be summoned.364 Next, these factors were compared to the racial makeup of the eligible people actually summoned by the decisionmakers over a representative period of time.365 Finally, a statistical procedure was employed—"binomial distribution"366—that enabled the analyst to determine the range of likely outcomes if the process were a product of chance or randomness. Comparing the actual outcomes from the data with past selection patterns, the Court was able to reject the null hypothesis and infer that the hypothesis was true in the case at hand.367

c. Relevant Factors in Shifting the Burden

To be sure, the fact-finder's information at this point only provides data on the probability that the disparity between the expected and observed outcomes occurred by chance.368 This leaves

364. Under the Texas method of selecting grand jurors, qualifications are not tested until the persons are summoned to appear before the district court. See supra note 352 (describing the procedure for choosing jurors under the key-man system).
365. This information was gathered from the county grand jury records over an 11-year period. See Castaneda, 430 U.S. at 495. "[T]he degree of under-representation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time." Id. at 494.
366. See id. at 496-97 n.17.
367. The Court's reasoning was as follows:

If the jurors were drawn randomly from the general population, then the number of Mexican-Americans in the sample could be modeled by a binomial distribution. Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339. Of course, in any given drawing some fluctuation from the expected number is predicted. The important point, however, is that the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value. The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). Thus, in this case the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist. The 11-year data here reflect a difference between the expected and observed number of Mexican-Americans of approximately 29 standard deviations. A detailed calculation reveals that the likelihood that such a substantial departure from the expected value would occur by chance is less than 1 in 10.

Id. (citations omitted).
368. That is, the inference chain used in inferential statistics is a weaker form of the prior logical version as it depends on probability claims: "If X is true, then Y is probably true. Y is not true. Therefore X is probably not true, and, as a result, the assumption that X is true
the hypothesis of race-dependency open to alternative hypotheses. In *Castaneda*, the rejection of the null hypothesis was based upon a statistical judgment of the *unlikelihood* that chance or randomness caused the shortfall of summoned Mexican-Americans. Because the logic of statistical analysis operates *negatively* by rejecting factors,\(^\text{369}\) eliminating randomness (the null hypothesis), it leaves open a host of other possibilities and explanations that could account for the outcomes.\(^\text{370}\) To justify the inference of race-dependency, other plausible explanations ideally should be tested in the same manner in order to reject the likelihood that they explain the pattern of decisions.\(^\text{371}\) That is, "[b]y eliminating chance as an alternative causal explanation and by showing that there is a weak relationship between other [factors] and the outcome,"\(^\text{372}\) the inference of race-dependency would be more defensible. Making the inferential jump from rejection of one null hypothesis to inferring the hypothesis—here, that the pattern of decisions are race-dependent—undoubtedly involves a risk of error.\(^\text{373}\)

However, as the *Castaneda* Court recognized, the issue is more appropriately which party should bear this risk of error.\(^\text{374}\) In *Castaneda*, two factors provided guidance in answering this question. The first factor was discretion—the lack of specificity or detail guiding the selection process—leaving the process open to impermissible criteria being employed by the decisionmaker. This lack of guidance strengthened the inferential jump from the rejection of the null hypothesis of randomness to the acceptance of the hypothesis of race-dependency. In the Court's own words: "Supporting this conclusion [of race-dependency] is the fact that the Texas system of selecting grand jurors is highly subjective . . . . [and] is susceptible of abuse as

\(^{369}\) See BARNES, supra note 355, at 3.

\(^{370}\) See BARNES, supra note 355, at 31; PAETZOLD & WILLBORN, supra note 357, at 2-12. Therefore, because the logic of this type of statistical analysis operates negatively by rejecting possible causative factors, the statistics can never affirmatively prove discrimination. See id.

\(^{371}\) See BARNES, supra note 355, at 31; PAETZOLD & WILLBORN, supra note 357, at 2-15.

\(^{372}\) BARNES, supra note 355, at 31; see also PAETZOLD & WILLBORN, supra note 357, at 2-12.

\(^{373}\) "In rejecting the hypothetical assumption of no discrimination, one can never be certain that the correct inference is made; a chance of error results from the small probability . . . that [the] [decisionmaker] was not discriminating . . . ." PAETZOLD & WILLBORN, supra note 357, at 2-13.

\(^{374}\) See Castaneda, 430 U.S. at 488 n.8.
The risk of error is hence placed on the decisionmaker, who must expose the error or demonstrate that the challenged decision at issue was in fact race-neutral. Where excessive discretion is left to the decisionmaker and the factors influencing the decision are not known or obvious, it is only fair to put the risk of inferential error on the party with the most information about the decisionmaking process—especially because the challenger lacks the needed information to submit other explanations to hypothesis testing. As the Court in Castaneda concluded, when the decisionmaking process is subject to abuse, it is the decisionmaker who is in the best position to explain to the fact-finder the method of selection employed and the reasons behind the selection. On the other hand, where the decisionmaking process involves objective, identifiable constraints and guidelines, the risk of error should fall more on the challenger, requiring him to resent the factors most likely to influence the outcome.

The second factor influencing the allocation of the risk of error is the size of the disparity. The larger the difference between the expected and actual outcomes, the less likely it becomes that the actual outcomes have occurred by chance. Hence, the Court in Castaneda concluded: "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related

---

375. See id. at 497.
376. The majority rejected the suggestion that the statistical analysis was insufficient because it failed to test for educational differences that could have explained the discrepancy between the percentage of Mexican-Americans in the total population and the percentage on the grand jury lists. See id. at 488-89 n.8. In refusing to accept this challenge to the statistical analysis, the Court cited the lack of any criteria in the policy defining, in terms of education, the eligibility of the summoned population, and hence the need to place the burden of persuasion on the decisionmaker applying the policy: [U]nder the Texas method of selecting grand jurors, qualifications are not tested until the persons on the list appear in the District Court. Prior to that time, assuming an unbiased selection procedure, persons of all educational characteristics should appear on the list. If the jury commissioners actually exercised some means of winnowing those who lacked the ability to read and write, it was incumbent on the State to call the commissioners and to have them explain how this was done. In the absence of any evidence in the record to this effect, we shall not assume that the only people excluded from grand jury service were the illiterate.

Id. at 488 n.8.

377. For instance, multiple regression analysis has been embraced by courts as an effective way to test the influence of various independent variables on the decisionmaking process. See Bazemore v. Friday, 478 U.S. 385, 400-01 (1986) (Brennan, J., concurring); see also discussion supra Part IV.C.
factors entered into the selection process.” 379 Moreover, the eleven-year sample further buttressed this conclusion, because increasing the sample size correspondingly reduces the probability of inferential error. 380

Once the inference of bias has been made by the fact-finder, the burden rightly shifts to the decisionmaker to demonstrate the race-neutrality of the decision being challenged. 381 That is, the inference that the decisionmaking process, a pattern of similar decisions, has been based on race also supports the inference that the challenged decision at issue was likely based on race. If the decisionmaker fails to put forth a convincing race-neutral explanation, then the inference of motive, whether conscious or unconscious, should stand. 382

V. A Final Challenge: Doctrinal Coherence and Racial Equality

I have argued that conceptualizing the different levels of intent on a continuum according to various institutional process and substantive criteria provides a coherent account of the intent doctrine. The account that I have offered also provides a framework in which to assess the Court’s fidelity to its normative and doctrinal commitments. In this Part, I identify two areas where judicial review of facially neutral laws raises problematic questions in this regard. The first area involves the discriminatory administration of facially neutral laws. In McCleskey v. Kemp, the Court refused to apply its Castaneda/Batson

380. See Cohen, supra note 356, at 398-400; Paetzold & Willborn, supra note 357, at 2-14 n.23.
381. See Castaneda, 430 U.S. at 497-98 (noting that “[t]he showing made by [the challenger] therefore shifted the burden of proof to the State to dispel the inference of . . . discrimination”); see also Barnes, supra note 355, at 31 (“The opposing attorney’s task is then to show that there is little connection between the events, that there are innocent explanations for the relationships observed, or that the circumstantial evidence offered as proof by the other party is unpersuasive.”).
382. In Castaneda, the decisionmaker failed to offer an explanation regarding the method of selection. See Castaneda, 430 U.S. at 498. Consequently, the Court resolved the inference of motive in the defendant’s favor:

Without some testimony from the grand jury commissioners about the method by which they determined the other qualifications for grand jurors prior to the statutory time for testing qualifications, it is impossible to draw any inference about [the qualifications of] literacy, sound mind and moral character, and criminal record from the statistics about the population as a whole. These are questions of disputed fact that present problems not amenable to resolution by an appellate court. We emphasize, however, that we are not saying that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case.

Id. at 498-99.
evidentiary framework to a claim by a black defendant that Georgia’s death penalty statute had been discriminatorily administered. Had the Court followed the evidentiary framework established in these cases, it would have been virtually impossible to reject McCleskey’s claim.\footnote{383. See McCleskey v. Kemp, 481 U.S. 279, 352-59 (1987) (Blackmun, J., dissenting) (applying Castaneda/Batson test and concluding that McCleskey’s evidence made out a prima facie case under that standard).}

Though acknowledging these precedents, the Court declined to apply them, citing three reasons. These reasons invoke the very criteria that I have argued provide guidance in determining the level of, and evidentiary framework for, the application of intent to various types of government action. As judged against these criteria, the Court failed to adequately justify its infidelity to its Castaneda/Batson evidentiary framework.

The second area involves judicial review of facially neutral redistricting legislation. In these cases, the Court has invalidated legislation having the effect of creating “majority-minority” districts. These districts have been largely responsible for increasing African-American political representation and participation in the political process. The Court has yet to adequately justify its level of intrusion into this highly political fray. Moreover, I argue, its current “predominant motive” standard for strict judicial scrutiny puts it on a collision course with its previously articulated institutional process constraints. Both areas arguably illustrate a new type of incoherence in equal protection jurisprudence. Despite well-established principles underlying judicial restraint toward some actors and appropriate judicial scrutiny toward other actors and types of decisions, the Court nonetheless pushes the boundaries of fidelity to its precedent and normative commitments. The result has been increased skepticism toward the Court’s institutional legitimacy in policing the boundaries of state-enforced racial inequality.

A. Discriminatory Administration of Facialy Neutral Laws:
McCleskey v. Kemp

As explained earlier, the Court easily dismissed McCleskey’s discriminatory legislation claim, relying on the failure of the statistical evidence to demonstrate specific discriminatory intent.\footnote{384. See discussion supra Part II.B.1.} McCleskey made a second claim, alleging racial bias in the administration of the legislation. McCleskey was convicted in Fulton County, Georgia, of robbing a furniture store and killing a white police officer during the
course of the robbery. A jury including only one black juror sentenced McCleskey to life imprisonment and death. Pursuant to the Georgia death penalty statute, the jury considered various mitigating and aggravating circumstances surrounding McCleskey’s conduct before recommending the death sentence. McCleskey sought to overturn his death sentence, arguing that the Georgia capital sentencing process had been administered in a racially discriminatory manner. Specifically, he alleged that persons who murder whites were more likely to be sentenced to death than persons who murder blacks and that black murderers are more likely to be sentenced to death than white murderers. Thus, as a black defendant convicted of murdering a white victim, McCleskey claimed that he was discriminated against because of his race and because of the race of his victim.

The Court’s rejection of McCleskey’s discriminatory administration claim did not come easily. McCleskey had two lines of Supreme Court precedent in his favor. The first was the long line of cases, ranging from Smith v. Texas to Batson v. Kentucky, alleging racial discrimination in the administration of highly discretionary jury selection procedures. In those cases, the Court readily inferred the existence of discriminatory purpose from statistical disparities much less sophisticated than those presented by McCleskey. The second line of precedent affirmed the ability of a multiple regression analysis, like that presented by McCleskey, to isolate the effect of race. This line of precedent involved allegedly discriminatory employment decisions challenged under Title VII of the Civil Rights Act of 1964. While

386. See id. at 377 n.15.
387. See id. at 346.
388. The jury found two aggravating circumstances to exist beyond a reasonable doubt: the murder was committed during the course of an armed robbery, and the murder was committed upon a peace officer engaged in the performance of his duties. See McCleskey, 481 U.S. at 284-85. McCleskey offered no mitigating evidence. See id. at 285.
389. See id. at 286. Although the defendant in McCleskey submitted statistical evidence challenging as racially biased the prosecutor’s decision to seek the death penalty, the Court focused on the validity of the empirical evidence in challenging the jury’s decision to impose the death penalty. See id. at 287-91. Nevertheless, in addition to McCleskey’s evidence regarding the actual imposition of death sentences by juries, a study he also submitted found that prosecutors sought the death penalty in 70% of cases involving black defendants and white victims, 32% of cases involving white defendants and white victims, 19% of cases involving white defendants and black victims, and 15% of cases involving black defendants and black victims. See id. at 287.
390. See, e.g., Bazemore v. Friday, 478 U.S. 385, 400-01 (1986) (Brennan, J., concurring) (concluding that statistical disparity of salaries paid to blacks as compared to
these "pattern and practice" cases did not involve an explicit requirement of discriminatory purpose, the Court nevertheless had to determine the appropriate relationship between statistical outcomes and the independent effect of race in producing those outcomes.

The Court's refusal in *McCleskey* to make the statistical presumption of bias, as it had in the long line of jury selection cases, was based partly on the claimed incompetence of statistical analysis to support similar inferences in the capital sentencing process. The Court summarized its reasoning as follows: the "nature" of the capital sentencing decision at issue in *McCleskey*, and the "relationship of the statistics to that decision," are "fundamentally different from the corresponding elements in the venire-selection or [employment] cases."591 Hence, "the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or [employment] case."592 These claims are factually questionable, as I argue below.

More importantly, however, the Court's reasoning indicates that it may have misconstrued both the effectiveness of statistical analyses that it has accepted in previous cases and the relationship of those statistics to the nature of jury decisionmaking.

1. Statistical Inferences, Judicial Competence, and Jury Decisionmaking

At the heart of both of McCleskey's equal protection claims was a statistical study performed by Professors David Baldus, Charles Pulaski, and George Woodworth. The Baldus study data was derived from an examination of over 2,000 murder cases that occurred in Georgia during the 1970s.593 Consistent with conclusions reached by various other studies,594 the Baldus study demonstrated racial disparities in the imposition of the death sentence in Georgia, based

---

592. Id. at 294-95.
593. See id. at 286.
both on the race of the victim and, to a lesser extent, on the race of the defendant.\textsuperscript{395}

To isolate the effect of race, McCleskey presented various multiple regression analyses contained in the Baldus study, which took into account some 230 nonracial variables that could have explained the stark disparities on nonracial grounds.\textsuperscript{396} One of the models that the Baldus study used adjusted for thirty-nine nonracial statutory and nonstatutory aggravating and mitigating circumstances that it regarded as potentially influential in explaining which defendants ultimately received a death sentence.\textsuperscript{397} Even after controlling for the thirty-nine nonracial variables, this model concluded that someone like McCleskey, charged with killing a white person, was 4.3 times more likely to be sentenced to death than a defendant charged with killing an African-American.\textsuperscript{398} This data was supplemented with evidence specific to Fulton County; though based upon smaller samples, this county data was as revealing as the statewide data.\textsuperscript{399}

\textsuperscript{395} See McCleskey, 481 U.S. at 286-87. For instance, as to the race-of-the-victim disparity, the raw data indicated that defendants charged with killing white persons were 10 times more likely to receive the death penalty than defendants charged with killing blacks. See id. A smaller disparity was found as to the race of the defendant. There, the study demonstrated that 4\% of the black defendants received the death penalty, as compared to 7\% of the white defendants. See id. When the race of the victim and race of the defendant were combined, however, the study concluded that the death penalty was assessed in 22\% of the cases involving black defendants and white victims; 8\% of the cases involving white defendants and white victims; 3\% of the cases involving white defendants and black victims; and 1\% of the cases involving black defendants and black victims. See id. at 286.

\textsuperscript{396} See id. at 287.

\textsuperscript{397} The aggravating and mitigating circumstances adjusted for included whether the murder occurred during a rape or robbery, whether the murderer had a prior criminal record, or whether more than one victim was killed. See David C. Baldus et al., \textit{Reflections on the “Inevitability” of Racial Discrimination in Capital Sentencing and the “Impossibility” of its Prevention, Detection, and Correction}, 51 WASH. & LEE L. REV. 359, 365 (1994) [hereinafter Baldus, \textit{Reflections}] (describing their study); see also David Baldus et al., \textit{Law and Statistics in Conflict: Reflections on McCleskey v. Kemp, in Handbook of Psychology and Law} 251, 259 nn.4-5 (D.K. Kagehiro & W.S. Laufer eds., 1992) (explaining that the factors they considered “conceptually important” are those that are “widely recognized by criminologists, courts, prosecutors, and legislators as significant determinants of death-sentencing outcomes”; and the factors they considered “statistically important” were those variables that in fact “strongly correlated with the likelihood of a death sentence”).

\textsuperscript{398} See McCleskey, 481 U.S. at 287. “[A]mong black-defendant cases with a level of criminal culpability comparable to McCleskey, white-victim cases resulted in death sentences in approximately 34\% of the cases, while similar black-victim cases resulted in death sentences in only 17\% of the cases.” Baldus, \textit{Reflections}, supra note 397, at 366.

\textsuperscript{399} The data indicated that the death sentencing rate in white-victim cases was 47\%, compared to 13\% in black-victim cases—a 34-point disparity. After adjustment for the different levels of criminal culpability, the race-of-victim disparity in the Fulton County cases was 28 percentage points. In the category where McCleskey’s case was located, the race-of-victim disparity was 40 points. See Baldus, \textit{Reflections}, supra note 397, at 387 n.29 Table 1.
a. Process Distortions

The Supreme Court accepted the statistical validity of the Baldus study, as had the court of appeals below.400 However, the Court was forced to find institutional process reasons for rejecting the hypothesis of a race-dependent decisionmaking process established by the study. One of the elements that made statistical evidence less probative in this case, the Court explained, was the fact that the statistics relate to fewer decisionmaking entities in the jury selection context than in the capital sentencing context. The fundamental issue, as the Court saw it, was that it was “incomparably more difficult” in the capital sentencing context to “deduce a consistent policy” of the decisionmakers.401 The Court reasoned that, because “the decisions of a jury commissioner [as in Castaneda] ... over time are fairly attributable to the commission ... [a] statistical discrepancy can be said to indicate a consistent policy of the decisionmaker.”402 On the other hand, in the capital sentencing context, the Court deemed it “incomparably more difficult” for a statistical analysis like the Baldus study to “deduce a state ‘policy’ by studying the combined effects of the decisions of hundreds of juries that are unique in their composition.”403

The Court’s distinction between the number of entities reflected in Castaneda and McCleskey seems to misunderstand the nature of the decisionmaking process in Castaneda. As a factual matter, the challenged decisions were the decisions of numerous “key” person panels, selected by jury commissioners over a significant period of time and across numerous cases. Similarly, at issue in McCleskey was the pattern of decisions made by numerous petit jury panels, selected by prosecutors over a significant period of time and across numerous cases. In neither case is it easy to discern a state “policy” in a system of decisionmaking that relies upon numerous actors. More importantly, however, it is not necessary to deduce such a policy. The Court’s distinction indicates a fatal misconception of the nature and function of statistical analysis reflecting the type of administrative decisionmaking processes at issue in both cases. Inferential statistical analysis properly focuses on identifying factors that have influenced a decisionmaking process. A multivariate analysis’ purpose is not, as the Court characterizes it, to identify a “policy” of the

400. See McCleskey, 481 U.S. at 291 n.7.
401. See id. at 295 n.15.
402. Id.
403. Id.
decisionmaker. Rather, it seeks to determine the likelihood that a criterion has influenced the decisionmaking process. This identification properly takes place in the type of multiple regression analysis contained in the Baldus study. The Baldus study, as with similar types of statistical analysis accepted by the Court, identified the likelihood that racial bias influenced the capital sentencing decisionmaking process in Georgia and in the county where McCleskey was convicted. As in Castaneda, neither the number of decisionmakers involved nor the presence or absence of coordination between decisionmakers in a system has any effect on the ability of a multivariate regression analysis to accomplish this task.

As the Court recognized, however, the ability of statistical analysis to identify influential decisionmaking criteria does depend upon the application of a uniform, common standard in the decisionmaking process. In McCleskey, the Court seized on this crucial element as its second reason for refusing to draw an inference of race-dependency from the statistical study. It reasoned that, in addition to the statistics' relating to fewer entities in the jury selection process, they also relate to "fewer variables":


405. As the Court has acknowledged in the employment context, the "very purpose of a regression analysis is to organize and explain data that may appear to be random" and control for permissible factors that may explain a pattern of outcomes. Bazemore v. Friday, 478 U.S. 385, 403 n.14 (1986) (Brennan, J., concurring). Moreover, in order to isolate the effect of impermissible considerations such as race, an effective multiple regression analysis need not include every conceivable variable that a decisionmaker could have taken into consideration, as long as it includes those variables that account for the major factors that are likely to influence decisions. See Fisher, supra note 404, at 705-06.

406. As one commentator has explained:

[T]he capacity of a multivariate statistical analysis to identify factors that are influencing a decision-making system is not a function of the number of decision-makers in the system. If decision-makers apply similar selection criteria, a well-constructed regression analysis will identify those criteria no matter how many people participate in the processing of each case and no matter how many different cases each participant handles. A multiple regression analysis has the same ability to identify commonly applied selection criteria in a system that requires a series of people to handle each case and that limits each person's participation to only a single case, as it has in a system that requires the same person to process each case in a single decision. Moreover, the presence or absence of coordination between decisions-makers in the system has no effect on the capacity of statistical analysis to identify the underlying criteria used to make decisions. In the other areas, the criteria that the decision-makers believed they were applying ... has not been determinative. The ultimate concern was with the criteria that, in fact, were applied, which is precisely what a properly designed multivariate statistical analysis can reveal.

Paetzold & Willborn, supra note 357, at 11-26 to 11-2 (footnotes omitted) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)).
In [jury]-selection cases, the factors that may be considered are limited, usually by state statute. . . . These considerations are uniform for all potential jurors, and although some factors may be said to be subjective, they are limited and, to a great degree, objectively verifiable. . . . In contrast, a capital sentencing jury may consider any factor relevant to the defendant's background, character, and the offense. There is no common standard by which to evaluate all defendants who have or have not received the death penalty.407

Notably, this alleged distinction goes against the well-established institutional constraint on jurors in capital sentencing cases. The Court has required specificity in death penalty and other sentencing guidelines, thereby channeling jury discretion and narrowing the range of eligible defendants.408 In Georgia, as in other states, the jury is guided by an objective, common standard, pursuant to Supreme Court precedent.409 Nevertheless, it is true that the capital sentencing process leaves ample discretion in applying the statutory criteria. However, as the Court acknowledged, "while some jury discretion still exists [in the Georgia capital sentencing process], 'the discretion to be exercised is controlled by clear and objective standards."410 Hence, though the capital jury is "called upon to make a highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves,'"411 the jury has no authority to create and follow

---

407. McCleskey, 481 U.S. at 295 n.14 (citations omitted). The Court attempted to make a similar distinction with respect to employment decisions:

While employment decisions may involve a number of relevant variables, these variables are to a great extent uniform for all employees because they must all have a reasonable relationship to the employee's qualifications to perform the particular job at issue. Identifiable qualifications for a single job provide a common standard by which to assess each employee.

Id.


409. See discussion of McCleskey supra Part IV.A.2; Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) ("No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.").

410. McCleskey, 481 U.S. at 302-03 (quoting Coley v. State, 204 S.E.2d 612, 615 (1974)). The same can be said for the guidelines governing the jury selection process, which usually involve specific and objective minimal eligibility requirements for jury service. See Ortiz, supra note 14, at 1144 n.201 (citing the Texas statute at issue in Castaneda, which "did not guide, let alone limit, key persons' discretion in selecting for the venire," but noting that "[i]t did, however, set out somewhat detailed minimal qualifications.").

nonprescribed factors in imposing the death penalty.\textsuperscript{412} This narrowing of discretion further heightens the ability of a sophisticated multivariate analysis to identify racial factors in the decisionmaking process. In the final analysis, the capital sentencing determination is no more subjective than the jury selection determination in \textit{Castaneda}.\textsuperscript{413}

Lastly, the Court decried that “[h]ere, the State has no practical opportunity to rebut the Baldus study,” whereas, in the jury selection context, “the decisionmaker has an opportunity to explain the statistical disparity.”\textsuperscript{414} This objection once again seems to misconceive the role of statistical inferences from past decisions and their relationship to the challenged decision. Statistical inferences of factors influencing a decisionmaking process, taken from a pattern of past decisions, need no rebuttal. As the Court has said in the jury selection context, explaining or rebutting the statistical disparity evidence is unnecessary, and even futile. That is, the “self-serving testimony of actors in the system that they did not rely on racial factors is given limited weight;” and the “state’s inability to present such testimony would appear to be of little consequence since, even if allowed, it would do little more in the great majority of cases than result in a general denial of racial motivation.”\textsuperscript{415}

\textsuperscript{412} That is,

\begin{itemize}
  \item if, in fact, no common standard could be discerned in the operation of Georgia’s capital sentencing system, the system would have been in direct conflict with the Supreme Court’s ruling in \textit{Furman}, which condemned a death sentence imposed in Georgia because there was “no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.”
\end{itemize}

\textit{Paetzold \& Willborn, supra} note 357, at 11-28 (quoting \textit{Furman} v. Georgia, 408 U.S. 238, 313 (1972)) (alterations in original).

\textsuperscript{413} As one commentator has explained:

\begin{itemize}
  \item State law usually does not meaningfully limit the factors that key persons may consider in selecting the venire, although state law usually sets fairly specific and objective minimal eligibility requirements for jury service, just as it sets more specific criteria for eligibility for death sentencing. In fact, a discretionless standard would prove incompatible with the key-man system’s aim of choosing civically responsible adults for jury service, for “good citizenship” cannot be measured objectively. In the end, no matter how the state expresses it, the standard of civic responsibility guiding the selection of jurors is no less subjective and discretionary than the standards which guide the jury’s determinations in death sentencing.
\end{itemize}

\textit{Ortiz, supra} note 14, at 1144.

\textsuperscript{414} \textit{McCleskey}, 481 U.S. at 296.

\textsuperscript{415} \textit{Paetzold \& Willborn, supra} note 357, at 11-29. The Court has held that a key person’s testimony that he was not influenced by race cannot rebut a prima facie case. See \textit{Batson} v. Kentucky, 476 U.S. 79, 98 (1986) (same standard for prosecutors); \textit{Castaneda} v. \textit{Partida}, 430 U.S. 482, 498 n.19 (1977); Alexander v. \textit{Louisiana}, 405 U.S. 625, 632 (1972);
The only relevant explanation to the motive inquiry is the one pertaining to the decision at hand. Once it is established that race became a covert criterion in the administration of a facially neutral procedure, the court will infer that it likely influenced the challenged decision. This inference of intent can establish motive if the decisionmaker in the case at hand fails to sufficiently explain the decision by race-neutral criteria. It is in the explanation that the fact-finder is then able to assess whether the reason reflects a conscious or unconscious racial bias. As in Castaneda and Batson, courts are quite competent to make this assessment by determining whether the explanation has any relationship to the specifics of the case or is based upon factors that are surrogates for racial bias. The state thus needs only to explain the reasons for imposing the death penalty in McCleskey's case to rebut the inference of illicit motive made from past decisions of the State.\footnote{416} The Court's fear that the State will be called to defend decisions often years after they were made is simply not germane to the statistical inquiry.\footnote{417}

b. Statistical Truths and Judicial Deference

Despite its acceptance of the statistical validity of the Baldus study, the Court was nevertheless inclined to limit its conclusion to the narrowest possible interpretation. The Court correctly stated that "[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions."\footnote{418} It then went on to pronounce:

Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia. Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a \textit{risk} that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision.\footnote{419}

\textit{see also} Ortiz, supra note 14, at 1145 (noting that, "although a court may be more willing to explore the mind of a key person than the mind of a juror or prosecutor, it will not likely find anything there to explain away a statistical disparity").

\footnote{416}{This task was made even easier in McCleskey's case because in Georgia, as in most states, death penalty legislation requires jury to "designate in writing ... the aggravating or mitigating circumstances which it found beyond a reasonable doubt." \textit{See Georgia Code Ann. §§ 17-10-30 (1997)}.}

\footnote{417}{\textit{See McCleskey}, 481 U.S. at 296.}

\footnote{418}{\textit{Id.} at 308.}

\footnote{419}{\textit{Id.} at 291 n.7. Later the Court pointed out: "Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions." \textit{Id.} at 308 (footnote omitted).}
This reduction of the Baldus statistical findings to a truism in statistical theory—that such analysis can only show a likelihood of influential factors—is inconsequential. The issue is more appropriately who should bear the burden of the risk of error of these findings.

The two factors that the Castaneda court identified as relevant in shifting the risk of statistical error to the state were present in McCleskey. The first factor involves unchecked discretion in the decisionmaking process. A very significant aspect of the Baldus study involved its observation that the most significant racial disparities occurred where the most discretion lay in the capital sentencing decisionmaking process. In this context, that meant that the most dramatic racial disparities in capital sentencing were in the so-called "mid-range" of cases,420 where the decisionmakers have a real choice as to whether to impose the death penalty or not.421 In the most aggravated cases, the study found that decisionmakers impose the death sentence regardless of racial variables. Likewise, in the least aggravated cases, decisionmakers forego imposing the death sentence on the defendant regardless of racial variables. It was based on the disparities in the middle range cases that Baldus concluded, in his testimony, that "'[i]f there's room for the exercise of discretion, then the [racial] factors begin to play a role."422 This part of the study, and Baldus' corresponding testimony, was extremely significant in the case, because Baldus concluded that McCleskey's case fell in the mid-range of aggravated homicide cases, where racial factors play a significant role.

The second factor in favor of shifting the burden to the State was the size of the disparities in this discretionary range. Baldus found that 14.4% of the black-victim mid-range cases received the death penalty and 34.4% of the white-victim cases received the death penalty.423 Moreover, the study concluded that race was as powerful an influence in the imposition of the death penalty as formal statutory criteria—if not more. For instance, the race of the victim was a variable nearly as influential as a prior conviction for armed robbery, rape, or even

420. See id. at 287 n.5. "Baldus' 230-variable model divided cases into eight different ranges, according to the estimated aggravation level of the offense." Id.
421. See id. These cases were those "in which the facts neither called out strongly for life (as in a drunken brawl among acquaintances), nor for death (as in a torture murder or multiple slaying case)." Baldus, Reflections, supra note 397, at 366.
422. McCleskey, 481 U.S. at 287 n.5.
423. See id.
murder. Additionally, the race-of-the-victim variable proved more influential in the imposition of the death penalty than whether the defendant was a prime mover in the homicide, a statutory aggravating factor. Given that McCleskey's case fell within the range of discretion where racial factors heavily influence the imposition of the death penalty, and given also the size of the disparities in this range, the argument for shifting the burden to the state based upon the Baldus study was quite formidable.

2. Justifying Super Restraint

In deciding whether to shift the burden to the state to justify its decision in McCleskey's case, the Court was forced to squarely face its posture toward jury decisions in the capital sentencing context. Specifically, in determining what degree of deference to accord the decisions reflected in the Baldus study, the Court had to decide whether to treat the jury more like a prosecutor or more like the individual citizens administering the statute in Castaneda. The Court justified its super restraint toward jury decisions by analogizing to its reasons for super restraint toward prosecutorial decisions. The Court reasoned that the "policy considerations behind a prosecutor's traditionally 'wide discretion'" in seeking the death penalty similarly suggest the "impropriety" of requiring juries to defend their decisions administering the death penalty. Hence, akin to the deference that it would give a prosecutorial charging or sentencing decision, the Court ended the judicial inquiry upon a finding of rationality. It simply proclaimed that, "absent stronger proof, it is unnecessary to seek such a rebuttal [from the jury], because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey

424. The study found that a prior conviction for armed robbery, rape, or murder increases one's odds of being sentenced to death by a factor of 4.9—as opposed to a 4.3 increase for murdering a white victim. See id. at 355 nn.9-10 (Blackmun, J., dissenting).

425. See id. at 355 n.9.

426. Baldus found that 14.4% of the black-victim mid-range cases received the death penalty and 34.4% of the white-victim cases received the death penalty. See id. at 287 n.5.

427. Id. at 296. In an oblique explanation, the Court reasoned that "'controlling considerations of . . . public policy' dictate that jurors 'cannot be called . . . to testify to the motives and influences that led to their verdict.'" Id. (quoting McDonald v. Pless, 238 U.S. 264, 267 (1915); Chicago, B.& Q. R. Co. v. Babcock, 204 U.S. 585, 593 (1907)). Later, it illuminated this statement with its central concern of intruding on the "discretion [that] is essential to the criminal justice process." Id. at 297. This discretion "counsels against adopting [an inference that the discretion has been abused] from the disparities indicated by the Baldus study." Id. Of course, this begs the question from a democratic process standpoint. Some actors deserve, and receive, more judicial deference for fear of judicial tyranny over their constitutionally delegated powers. The question is where the jury fits within this institutional structure.
committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.\textsuperscript{428} Later, the Court went further by declaring that, "[w]here the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."\textsuperscript{429}

a. The Fear of Democratic Invalidation: The Jury as a Majoritarians Institution?

This level of restraint toward the discretion of jurors assumes a symmetry between the institutional characteristics of the jury and that of elected prosecutors. This symmetry is debatable. The costs to the democratic process of scrutinizing a jury’s decision to impose the death penalty and a prosecutor’s decision charging a defendant with the death penalty arguably are not the same. Judicial deference toward prosecutorial discretion, particularly in their charging and sentencing functions, stems from a concern not to unnecessarily impair the performance of an executive officer in her policymaking capacity. Judicial restraint also stems from the fact that prosecutors are directly accountable either to the local electorate or to the executive branch.\textsuperscript{430}

In contrast, the jury arguably suffers from the countermajoritarian problem. It "lacks any significant form of public accountability . . . [as] its members do not stand for election and cannot be easily removed from office."\textsuperscript{431} The risk that courts will substitute their policy preference for that of an accountable, majoritarian policymaker is significantly lessened. Nor are courts intruding upon another branch’s policy expertise or competence by increased review of jury decisions. Because jurors are “one-time players,” they possess “at best . . . a lay citizen’s speculative sense of the long-term consequences of their

\textsuperscript{428} Id.

\textsuperscript{429} Id. at 313.

\textsuperscript{430} In Georgia, district attorneys are elected by the voters in each county. See id. at 295 n.15.

\textsuperscript{431} Darryl K. Brown, Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrine, 47 Hastings L.J. 1255, 1292 (1996). However, in earlier times, courts and commentators viewed broad jury discretion as more "legitimate because . . . it was assumed to serve as an accurate surrogate for "We the People."") Id. at 1271 n.66; see also Akhil Reed Amar, Sixth Amendment First Principles, 84 Geo. L.J. 641, 684-85 (1996) (arguing that the criminal jury was designed as a representative democratic body—a "political institution embodying popular sovereignty and republican self-government"). Nevertheless, as Brown points out, merely because the jury is deemed "representative" does not mean that it is accountable. See Brown, supra, at 1292.
decisions, but they possess no institutional means to assess decisions over time."\(^{432}\)

The argument for less restraint toward jurors is even stronger in the capital sentencing context, given the institutional constraints on jury decisionmaking. The "overriding concern that reshaped capital sentencing doctrine was the same as that which animates process theory: arbitrary decisions arising from unguided discretion, unchecked by other decisionmakers."\(^{433}\) The jury has been treated as more akin to the individual administrators in *Castaneda* than prosecutors in the capital sentencing context. Where discretion in the jury decisionmaking process does exist, this fact has been more of a reason for closer scrutiny than for greater restraint in checking for conscious or unconscious bias:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected... [A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under [the state's capital sentencing] law... More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.\(^{434}\)

The Court's "impropriety" objection would have been more appropriate as applied to prosecutorial decisionmaking in this context. Because prosecutors have historically enjoyed broad discretion in charging and sentencing decisions, their decisions are unlikely to be disturbed by the courts absent evidence of specific discriminatory intent.\(^{435}\) Such a showing would not be accomplished by the Baldus study alone.\(^{436}\) Bolstering the case for super judicial restraint toward prosecutorial charging and sentencing decisions is the fact that, unlike

\(^{432}\) Brown, *supra* note 431, at 1293 (noting that jurors are "empaneled for a single case and then disbanded").
\(^{433}\) *Id.* at 1302.
\(^{434}\) Turner v. Murray, 476 U.S. 28, 35 (1986). In *Turner*, the Court authorized questioning of jurors in capital sentencing proceedings regarding their racial prejudice. *See id.* at 35-36. Without such questioning, the Court reasoned, a potential unconstitutional risk of undetected racial prejudice would arise and possibly infect the capital sentencing decision. *See id.* at 35-37.
\(^{435}\) *See* discussion *supra* Part IV.A.1.
\(^{436}\) *See* McCleskey v. Kemp, 481 U.S. 279, 295-96 n.15 (1987) (noting the inadequacy of statistics to deduce a consistent policy from the decisions of many prosecutors and hence "any inference from statewide statistics to a prosecutorial 'policy' is of doubtful relevance").
the jury, prosecutorial capital sentencing decisions lack statutory
guidelines and are made with reference to broader policy concerns.\footnote{437} Of course, this lack of guidance could cut both ways. It could as easily be an argument for the need for more stringent legislative procedures in the sentencing decision to improve consistency across cases and to prevent arbitrary or biased prosecutorial decisions.\footnote{438} Nevertheless, the case for increased judicial scrutiny of jury decisionmaking in the capital sentencing context is quite consistent with the Court's institutional process values and doctrinal framework.

b. Assessing Institutional Accountability

There is yet another related institutional concern that arises from the decision whether or not to shift the burden of accountability to the state. Though the Court never addressed this concern directly, any argument in favor of shifting the burden of justification to the State begs the following question: Who is the responsible party for the State, and who is ultimately accountable for decisions administering a law or policy? The issue of official accountability for a decisionmaking process arises when different actors are responsible for a pattern of decisions. In \textit{Castaneda}, the legislature set the policy by statute, the district judge chose the jury commissioners to implement it, and the commissioners in turn chose the key persons who exercised individual judgments in the actual implementation. Because the statute left complete discretion to the key persons to choose potential jurors, their decisions were unguided. Hence, the jury commissioners in the defendant's case were deemed the responsible party, because the key persons acted pursuant to their guidance.\footnote{439} In

\footnote{437. See id. at 295 n.15 (noting that "[s]ince decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations, coordination among district attorney offices across a State would be relatively meaningless").


439. The Court noted that the jury commissioners could rebut the inference of motive by detailing the procedures that they followed to select the jurors. See Castaneda v. Partida, 430 U.S. 482, 498 (1977). Otherwise, [w]ithout some testimony from the grand jury commissioners about the method by which they determined the other qualifications for grand jurors prior to the statutory time for testing qualifications, it is impossible to draw any inference about literacy, sound mind and moral character, and criminal record from the statistics about the population as a whole.

\textit{Id.} at 498-99.
McCleskey, the legislature set the capital sentencing guidelines for jurors to follow. However, it is the prosecutor who selects which defendants to charge with the death penalty and chooses the jurors to administer the sentencing procedure. Further, the prosecutor is the one who guides the jury, through her arguments, regarding which aggravating factors may be present in each case. Hence, like the jury commissioners in Castaneda who choose the individual key persons, the prosecutor would likely be called upon to explain the capital sentencing decision in a particular case.

Requiring the prosecutor to explain the decisions of the jurors potentially raises the same institutional process concerns as if the Court were inquiring into the charging or sentencing decision itself. But there is a difference. While democratic validation concerns are still present, because of the nature of the actor, institutional competency concerns are reduced. The Court is not inquiring into the broad, ad hoc policy choice regarding whether to charge one defendant versus another with the death penalty. This choice is completely within the particular competence of prosecutors and garners the highest judicial deference. Rather, the Court is inquiring into a much more constrained, and less ad hoc, process. At issue in McCleskey are racial disparities in the decisions to impose the death penalty on defendants already convicted of a particular crime. Institutional competency considerations could be properly invoked if the challenge were to racial disparities in the process of charging defendants with the death penalty. However, the actual application of the death penalty is not particularly within the competence of the prosecutor due to the structure of capital decisionmaking. The prosecutor is bound by the same constraints as jurors in imposing the death penalty in a particular case. Neither the jury nor the prosecutor may impose the death penalty for a reason that is not circumscribed in the state statute as a basis for capital punishment.440

Like prosecutorial peremptory challenges, the Court is competent to review the decision applying the statutory requirements to a particular defendant. The process of imposing the death penalty is

440. One commentator stated:

Juries now cannot impose the death penalty for a specific reason—say, that the victim was a police officer or a child, or the murder involved torture or another felony—unless the legislature approves such a consideration as a basis for capital punishment. And appellate courts now review the jury’s determination with greater scrutiny, employing the criteria specified by the legislature; they even have limited authority in certain instances which replicate the jury’s decisional process to double-check the determination.

much like adjudication—applying a rule or policy to specific individuals and factual situations, something courts are particularly competent to assess. Requiring the prosecutor to explain the statutory reasons behind the application of the capital sentencing decision in a particular case does not threaten to "reveal[] the Government's enforcement policy" nor involve the Court in an assessment of the "strength of the case [relative to other defendants], the prosecutions' general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan."\textsuperscript{441} In assessing this case-specific application of the death penalty, appellate courts have specific statutory authority and criteria against which they can check the decision ensuring its competence to assess the decisionmaking process without improperly infringing upon a prerogative of another branch.\textsuperscript{442}

3. Is Death Really Different?

The most revealing answer to the Court's reluctance to shift the burden of accountability on to the State lay elsewhere in its opinion. In a sentiment reminiscent of its "slippery slope" fear in \textit{Davis}, the \textit{McCleskey} majority concluded with the dire prediction that

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . . [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system . . . .

As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.\textsuperscript{443}

This slippery slope fear has been selectively invoked in the Court's intent jurisprudence. In both \textit{Davis} and \textit{McCleskey}, this fear supports a judicial path of least resistance. That is, in both cases, the Court has


\textsuperscript{442}. See Brown, supra note 431, at 1304-05 ("Appellate courts now have more specific statutory law against which they can check (or take a "hard look") at the jury's law-application decision. . . .").

chosen the least demanding institutional role when conceptualizing constitutional norms of racial equality.\textsuperscript{444} Nevertheless, while this fear is justified by democratic process principles in \textit{Davis}, such principles do not legitimate the fear in \textit{McCleskey} to the same extent.

The recurrent slippery slope fear—the concern that courts will be flooded with claims of unjust sentencing determinations—is based upon a variety of democratic process considerations, including the risk of democratic invalidation and relative institutional competence issues. These concerns not only serve to legitimize the fear, but also provide limiting principles that can be used to avoid the resulting parade of horribles from increased judicial intrusion. The \textit{McCleskey} case presented a keen opportunity for the Court to invoke these limiting principles in a case where so much injustice was evident.

The first limiting principle that the Court could have invoked is, as I have argued, lessened institutional process concerns. As in \textit{Batson} and \textit{Castaneda}, both reduced democratic validation and institutional competence principles allow increased scrutiny of the challenged decision without disrupting other institutional roles or calling the Court’s institutional legitimacy into question. Second, it seems clear that the Court “could have avoided sliding down the slippery slope of reviewing sentencing discretion generally” by “restricting \textit{McCleskey} to its context.”\textsuperscript{445} The Court’s adjudication of McCleskey’s sentence occurred within a context, involving the “death is different principle,” that requires special attention to the imposition of the death penalty on individual defendants. Indeed, it could have invoked its own words in so limiting the scope of its scrutiny:

The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. “The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”\textsuperscript{446}

The Court’s refusal to create even a rebuttable presumption of racial bias, conscious or unconscious, in the face of gross sentencing disparities and a sophisticated multivariate analysis may reveal an

\textsuperscript{444} See, e.g., Strauss, supra note 92, at 939-44 (arguing that \textit{Washington v. Davis} “tamed” the Court’s decision in \textit{Brown v. Board of Education} by choosing the most conservative approach to defining discrimination, despite the fact that alternative conceptions like stigma, subordination, and second-class citizenship were available to the Court and had significant support in precedent).

\textsuperscript{445} Ortiz, supra note 14, at 1146.

even deeper fear: "a fear of too much justice." The Baldus study is one of many studies that document the impact of racial bias at all levels of the criminal process and across various types of decisions. Coupled with this empirical reality is the perception by many African-Americans that officials in the criminal justice system are racially biased. This perception itself threatens to undermine the sanctity of the criminal process that the Court so heralds, as African-American citizens protest in their own ways in an effort to bring about racial justice in the system. These realities and perceptions must be juxtaposed against the fact that no defendant has succeeded on a claim of racially selective prosecution or sentencing in federal court in over one hundred years. This juxtaposition also exposes the irrationality of both the slippery slope fear and the fear of too much justice. McCleskey was an opportunity to enforce a norm of racial equality in the criminal justice system without falling into the threatened abyss of the slippery slope—allowing everything that disparately impacts racial minority groups to constitute an equal protection violation. The Court’s failure to take such a modest step forward in its equal protection jurisprudence inevitably adds to the impression that the Court has failed in its role as a purveyor of equality values. This impression, along with the perception of widespread racism, undermines the democratic process far more than if the Court had accepted McCleskey’s claim that, as a black man, he was discriminated against in our criminal justice system.

B. The “Racial” Gerrymander Cases

The Court has not, since Feeney, suspended its super restraint toward a facially neutral legislative decision involving constitutionally gratuitous rights absent a specific intent to harm an identifiable group. Recent decisions by the Court scrutinizing gerrymandered voting

448. See generally Angela J. Davis, Benign Neglect of Racism in the Criminal Justice System, 94 Mich. L. Rev. 1660 (1996) (discussing the existence of racial bias in the criminal justice system and proposing changes); Developments in the Law—Race and the Criminal Process, supra note 438, at 1525-32 (discussing various empirical studies).
450. The last reported federal case in which a defendant succeeded on such a claim was Yick Wo v. Hopkins, 118 U.S. 356 (1886). See also United States v. Armstrong, 116 S. Ct. 1480, 1487 (1996) (relying on Yick Wo as an example of the fact that selective prosecution claims are not “impossible to prove”); Kennedy, supra note 394, at 1402 (“[N]o defendant in state or federal court has ever successfully challenged his punishment on grounds of racial discrimination in sentencing.”) (emphasis omitted)).
districts present an exception to this pattern. At the outset, it is important to highlight what these cases do not involve. The challengers in recent gerrymandering cases do not claim that the facially neutral reapportionment decisions were adopted with a discriminatory purpose. That is, there is no claim that district lines have been redrawn specifically to disenfranchise a particular ethnic or gender group. Nor do the claimants assert that the gerrymandering has affected their right to vote or otherwise diluted their vote. Instead, claimants in these cases assert that race-conscious redistricting violates their right to participate in a "color-blind" electoral process and causes so-called "representational" harms—that is, the redrawn districts "convey the message that political identity is, or should be, predominantly racial."

The Court treats these redistricting decisions like explicit racial classifications, rendering them constitutionally "suspect," once a threshold requirement of "race as the predominant motive" has been met. Based on the "suspect" nature of the decision, the Court demands a compelling justification from the state. Like explicit racial classifications, it seeks to "flush out" any unconstitutional motives in the strict scrutiny process. However, even in flushing out motive, something less than a specific discriminatory intent will suffice to invalidate the legislative classification. Where a legislative body cannot justify the classification as "narrowly tailored" to advance a "compelling state interest," the Court will invalidate the decision as unconstitutional based upon predominant race-consciousness.

To be sure, the Court is quite open in these cases about the danger to the democratic process from judicial intrusion in this area. It has

451. In fact, as Justice O'Connor poignantly points out, the challengers did not even identify themselves as a racial group—"[t]hey did not even claim to be white." Shaw v. Reno, 509 U.S. 630, 641 (1993); see also Bush v. Vera, 116 S. Ct. 1941, 1978-79 n.9 (1996) (Stevens, J., dissenting) ("[T]he 'motive' with which we are concerned is not per se impermissible. [] For that reason, this case is very different from ... Arlington Heights ... in which the plaintiffs alleged that the defendant's action was motivated by an intent to harm individuals because of their status as members of a particular group.").

452. See Shaw, 509 U.S. at 641.


454. See Shaw, 509 U.S. at 653; see also Bush, 116 S. Ct. at 1963 ("We subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign ... or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification.").

455. See Shaw, 509 U.S. at 653.

456. See Miller v. Johnson, 515 U.S. 900, 915 (1995). There the Court stated:

Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions ... electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political
acknowledged that the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race."457 However, despite its own admission of limited competence to assess redistricting decisions and the perils of intruding into these highly political decisions, the Court nevertheless continues to intrude into the redistricting process. In doing so, the Court has opened itself to proper attack and has cast doubt on its fidelity to established democratic process principles.

1. Paying Lip Service to Judicial Restraint

The Court began its recent intrusion into the area of legislative redistricting in Shaw v. Reno.458 The Shaw cause of action allows the Court to draw an inference of race-based legislative decisionmaking based primarily upon the shape of a challenged district. However, though the Court wants to treat facially neutral redistricting cases that "appear" race-based the same as cases involving express racial classifications,459 it knows that it cannot. As the Court acknowledges, premising judicial scrutiny upon an outcome-oriented standard is a risky endeavor. On the one hand, gerrymandering appears to be a context where "appearances do matter."460 On the other hand, it is very difficult to discern "from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race," absent other evidence indicating improper purposes.461 Shaw sought to balance this evidentiary tension by articulating a more Gomillion-like standard as a threshold to judicial scrutiny. Invoking Gomillion, the Court ruled that a district so "bizarre" or "highly irregular" that it "cannot be understood as anything other than an effort to 'segregat[e] ... voters' on the basis of race" would give rise to an
inference of race-based decisionmaking. Absent a sufficient justification from the legislature, the facially neutral redistricting plan would be invalidated.

Shaw’s piggybacking on the Court’s ruling in Gomillion was fraught with danger from the start. Having already declared Gomillion the “rare” case in which judicial intrusion into facially neutral legislative action would hinge on outcomes alone, the Shaw standard seemed to contravene the level of restraint that the Court has committed itself to in reviewing such challenges. The Court justified its intrusion in Gomillion in large part because the outcomes were unexplained by the State. Crucial to the determination that judicial scrutiny of the statute was appropriate in Gomillion was that the state legislature “never suggested, either in [its] brief or in oral argument, any countervailing [purpose] which [the statute was] designed to serve.” Gomillion thus represents the paradigmatic “easy” case of judicial scrutiny of a facially neutral legislative act solely on evidence of legislative outcomes. It was “easy,” however, only because the line from the stark racial outcomes to an invidious legislative purpose appeared to be clear, unobstructed, and unrefuted.

462. Id. at 646-47 (quoting Gomillion, 364 U.S. at 341). At issue in Gomillion was a statute passed by the Alabama Legislature that redefined the boundaries of the city of Tuskegee. According to the complaint filed by black residents of the city, the statute transformed the city from one whose municipal limits formed a square into one which took on the shape of a “strangely irregular” 28-sided polygon for the purpose of denying black residents their voting rights. See Gomillion, 364 U.S. at 340. As a result, the complaint alleged, “[t]he essential inevitable effect of this redefinition . . . is to remove from the city all save only four or five of its [black] voters while not removing a single white voter or resident.” Id. at 341.

463. Id. at 341-42 (reiterating that the allegations were “uncontradicted” and “unqualified”); see also Wright v. Rockefeller, 376 U.S. 52, 56-57 (1964) (refusing to draw conclusions from the outcomes of allegedly racially gerrymandered legislation where such outcomes at best give rise to conflicting inferences).

464. However, the Court in Feeney rejected this Gomillion-type showing, because the outcomes were explained by a legitimate legislative purpose. Before addressing the motive review inquiry, the Court in Feeney held that “[t]he question whether [the legislation] establishes[d] a classification that is overtly or covertly based upon gender must first be considered.” Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 274 (1979). However, the Court easily rejected the challenger’s argument that the facial distinction between veterans and nonveterans was in fact a pretext for a gender classification. This argument was based upon the evidence of the outcomes of the distinction—that men disproportionately benefited from the preference, because most veterans are men. The Court declined to interpret the distinction as a pretext for a gender classification, however, ruling that the evidence of its gendered impact/effect could not “plausibly” indicate that it can be explained only as a gendered classification. See id. at 275. Something more than impact/effects is needed to infer content from facially neutral action:

Apart from the facts that the definition of “veterans” in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is
More fundamentally, the Court's scrutiny of the gerrymandering legislation in *Gomillion* was dependent upon allegations of a discriminatory purpose. The Court notably drew a connection between the unexplained evidence of virtual total exclusion of African Americans from the voting rights and the "real" purpose behind the legislation—to deny the plaintiffs their voting rights on the basis of race.\(^{465}\) *Gomillion* thus is consistent with a requirement of demonstrating specific discriminatory purpose before judicial scrutiny of facially neutral redistricting legislation.\(^{466}\) Despite its attempt to transform the *Shaw* claim into something more illicit akin to the *Gomillion* legislation,\(^ {467}\) reflecting a purpose to harm the disaffected racial group, it is too much of a stretch to reconcile the two cases on that basis.\(^ {468}\) At most, the only aspect that the *Shaw* claim shares with *Gomillion* is legislative race-consciousness in the redistricting process.

However, even a finding of legislative race-consciousness would not be enough to justify heightened scrutiny in this context. The Court's stringent scrutiny of express racial classifications partly rests not a ... gender-based classification.... Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected by [the legislation] to permit the inference that the statute is but a pretext for preferring men over women.

*Id.*


466. The Court reasoned that, if the allegations were proven, "the conclusion [is] irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and [black] voters by fencing [black] citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.* at 341.

467. The Court observes that districting that "includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries ... bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647.

468. As one Justice has persuasively argued, any effort to turn the *Shaw* claim into a *Gomillion* claim is sorely misguided and patently offensive, as it turns the very notion of apartheid on its face in a bout of historical myopia:

Although the Court used the metaphor of "political apartheid" as if to refer to the segregation of a minority group to eliminate its association with a majority that opposed integration, talk of this sort of racial separation is not on point here. The *de jure* segregation that the term "political apartheid" brings to mind is unconstitutional because it emphatically implies the inferiority of one race. *Shaw* I, in contrast, vindicated the complaint of a white voter who objected not to segregation but to the particular racial proportions of the district. Whatever this district may have symbolized, it was not "apartheid." Nor did the proportion of its racial mixture reflect any purpose of racial subjugation .... It obviously conveys no message about the inferiority or outsider status of members of the white majority excluded from a district.

on the presumption that race should be largely "irrelevant" to legislative decisionmaking.469 In contrast, in the racial gerrymandering context, a majority of the Justices agree that race is not only "relevant" to the legislative decision here, but that legislatures may "intentionally" create minority-majority districts without invoking judicial scrutiny.470 Hence, because of the complex nature of the redistricting decision,471 race-consciousness does not automatically prove constitutionally problematic.

The Court recently acknowledged the difficulties in treating facially neutral redistricting decisions that "appear" racial as the equivalent of racial classifications by adopting a more demanding threshold standard.472 In Miller v. Johnson, the Court clarified that strict scrutiny would only be triggered where "race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district."473 This standard requires more than a showing that the legislature "substantially neglected traditional districting criteria" or that "it was committed from the outset to creating majority-minority districts" or that "it manipulated district lines" to accomplish this purpose.474 The predominant motive standard instead requires a demonstration that traditional districting criteria were "subordinated to race" and that race

469. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06 (1989) (expressing the constitutional aspiration "of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement"); see also id. at 518-19 (Kennedy, J., concurring); id. at 520 (Scalia, J., concurring).

470. In Bush, a majority of the Court agreed that strict scrutiny does not apply to "all cases of intentional creation of majority-minority districts." Bush, 116 S. Ct. at 1951-52; see also id. at 1976-78 & n.8, 1985 (Stevens, J., dissenting); id. at 2007, 2011 (Souter, J., dissenting).

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

[Redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

Id.

472. See Bush, 116 S. Ct. at 1951 ("Electoral districts lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'") (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 250 (1995)).


474. Bush, 116 S. Ct. at 1953 (noting that, although these factors "weigh in favor of the application of strict scrutiny," none of them is "independently sufficient to require strict scrutiny").
was the legislature's predominant and controlling factor in drawing a particular district.\textsuperscript{475}

In moving from "bizarreness" as a threshold showing to "predominant motive," the Court once again conflicts with its institutional process commitments. Indeed, the Court has regressed to its pre-\textit{Davis} quandary regarding judicial inquiry into legislative motives. Unlike \textit{Washington v. Davis} and its progeny, the \textit{Miller} standard requires a showing that racial considerations are more than "a" motivation behind a challenged redistricting decision. Requiring only that racial considerations be "a" motive, the Court admits, would involve too low a threshold for judicial intrusion into the permissibly race-conscious redistricting process.\textsuperscript{476} On the other hand, as the Court has repeatedly acknowledged, ascertaining a legislative body's \textit{primary} or \textit{dominant} motive can be difficult or impossible.\textsuperscript{477} This difficulty rests, in part, on institutional competence grounds—the fact that legislatures are often motivated by a variety of considerations that cannot be parceled out by primacy without significant judicial intrusion.\textsuperscript{478}

2. Assessing Judicial Competence

One way in which the Court has sought to overcome its relative incompetence to assess redistricting decisions is to say, as it does with respect to the jury cases, that there is something about the nature of the type of decision that increases its competence to assess it.\textsuperscript{479} Unlike the otherwise "ad hoc" legislative decisionmaking process, the gerrymandering process proceeds along generally accepted traditional districting criteria that are presumably race-neutral.\textsuperscript{480} The existence

\textsuperscript{475} See \textit{Miller}, 515 U.S. at 916.
\textsuperscript{476} See id.
\textsuperscript{477} See \textit{Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.}, 429 U.S. 252, 265 n.11 (1977) ("The search for legislative purpose is often elusive enough without a requirement that primacy be ascertained.") (citation omitted) (quoting \textit{McGinnis v. Royster}, 410 U.S. 263, 276-77 (1973)); \textit{Palmer v. Thompson}, 403 U.S. 217, 225 (1971) (stating that it is "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators").
\textsuperscript{478} See \textit{Arlington Heights}, 429 U.S. at 265. The Court stated:

Rarely can it be said that a legislature . . . operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

\textit{Id.}
\textsuperscript{480} See id.
of such "objective factors" gives the Court a benchmark by which to determine whether the outcomes reflect racial considerations or other race-neutral criteria. Therefore, before the Court begins to reassess the legislative cost-benefit balance, the decisionmaker has an opportunity to rebut the inference of "suspectness" by pointing to one or more of these objective factors as the "predominant" motivating factor underlying its decision. However, the "special nature" of the districting decision, as the court acknowledges, cuts both ways. As easily as it can be an argument for heightened judicial competence, it can be an argument for heightened judicial incompetence. At the same time that the Court invokes objective factors to guide its determination of predominant motive, it also demands sensitivity in assessing legislative rationales in light of the highly political and complex nature of the decision. The legislature's redistricting "calculus" involves a "complex interplay of forces" that makes the distinction between being aware of racial considerations and being motivated by them particularly elusive. In addition to "traditional districting criteria" such as contiguity, compactness, and respect for political subdivision, other factors make the redistricting balance difficult to assess. A legislature is often concerned about complying with the Voting Rights Act, protecting incumbency, as well as ensuring mathematically equal populations in each district. Moreover, individuals are appropriately classified, and treated, by group characteristics in the legislature's redistricting calculus. Given the likely confluence of these various factors, the

481. See id. ("We emphasize that these criteria are important not because they are constitutionally required . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.").

482. See Miller v. Johnson, 515 U.S. 900, 916 (finding that, where traditional districting criteria and other race-neutral considerations are the basis for redistricting legislation and are not "subordinated to race," a state can defeat an inference of gerrymandering on racial lines).

483. See id. at 915-16.

484. See id. at 916 (noting that "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make").


486. As Justice Ginsburg explained:

In adopting districting plans . . . States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors. Rather, legislators classify voters in groups—by economic, geographical, political or social characteristics—and then "reconcile the competing claims of [these] groups."

Id. at 947 (Ginsburg, J., dissenting) (quoting Davis v. Bandemer, 478 U.S. 109, 147 (1986)).
job of ascertaining the "predominance" of any one factor influencing a legislature's redistricting is an arduous task, akin to looking for a needle in a haystack.\footnote{487}

Complicating the "interplay" of these forces is the fact that many of these traditional districting criteria "correlate" with race, making it difficult to determine whether a districting decision is truly racial or merely political.\footnote{488} Of course, the degree of judicial interference turns on these very illusive correlative distinctions, whether a district is either "racial" or "political."\footnote{489} In \textit{McCleskey}, the Court refused to sort out the correlations between the racial outcomes and the challenged legislation, citing the inevitability of racial disparities in the criminal justice system.\footnote{490} In \textit{Bush}, a "mixed motive" case, the Court was faced with districts where race along with other traditional factors all played very prominent roles in the legislature's redistricting decisions.\footnote{491} However, this complexity provided the Court with a reason to intrude even more.\footnote{492} In contrast to the Court's stern refusal to intervene in \textit{McCleskey} and in earlier racial gerrymandering cases harming

\footnotetext{487}{As two commentators put it:
Districting plans are integrated bundles of compromises, deals, and principles. To ask about the reason behind the design of any one particular district is typically to implicate the entire pattern of purposes and trade-offs behind a districting plan as a whole. Searching for "the reason" or "the dominant reason" behind a particular district's shape is often like asking why one year's federal budget is at one level rather than another.


488. \textit{See Bush}, 116 S. Ct. at 1954 (noting that "appellants point to evidence that in many cases, race correlates strongly with manifestations of community of interest ... and with the political data that is vital to incumbency protection efforts, raising the possibility that correlations between racial demographics and district lines may be explicable in terms of nonracial motivations"); \textit{id.} at 2005 (Souter, J., dissenting) (noting that "in the political environment in which race can affect election results, many of these traditional districting principles cannot be applied without taking race into account and are thus, as a practical matter, inseparable from the supposedly illegitimate racial considerations").

489. \textit{See id.} at 1954 (noting that "strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subjected political gerrymandering to strict scrutiny").

490. \textit{See McCleskey} v. Kemp, 481 U.S. 279, 312 (1987) ("At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.").

491. \textit{See Bush}, 116 S. Ct. at 1952 (noting that "[t]he record did not show "purely race-based" districting revisions' and that "incumbency protection ... also played a role in the drawing of the district lines").

492. \textit{See id.} at 1954 ("Because it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained.").
blacks, the Court’s response to complex evidentiary inquiries in the gerrymandering context is conspicuously obscure:

If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime. . . .

But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.494

This opaque line-drawing raises more questions than it answers. Is the Court saying that strict scrutiny will be invoked where a legislature, for instance, “assume[s] that a black resident of a particular community is a Democrat if reliable statistical evidence discloses that 97% of the blacks in that community vote in Democratic primary elections[?]”495 Is a legislature’s decision to redraw a district to protect a black incumbent in a district with racial bloc voting “political” or “racial?” In Bush, the Court found one district’s contours “unexplainable in terms other than race” even though they did not “evince a consistent, single-minded effort to ‘segregate’ voters on the basis of race” and even though race was both used to “protect the political fortunes of adjacent incumbents” and to “maximiz[e] the minority population of [the district],” perhaps in pursuit of the goal of incumbency protection.496 Why isn’t the task of untangling whether

493. Compare Wright v. Rockefeller, in which the Court refused to intervene where “conflicting inferences” could be drawn from the evidence:

It may be true . . . that there was evidence which could have supported inferences that racial considerations might have moved the state legislature, but, even if so, we agree that there also was evidence to support [the] finding that the contrary inference was “equally, or more, persuasive.” Where there are such conflicting inferences one group of them cannot, because labeled as “prima facie proof,” be treated as conclusive on the fact finder so as to deprive him of his responsibility to choose among disputed inferences.

376 U.S. 52, 56-57 (1964) (footnote omitted).


495. Id. at 1988 (Stevens, J., dissenting).

496. Id. at 1958. The difficulty of labeling such a gerrymander either “political” or “racial” arises from the fact that consciousness about incumbency and race can overlap and even meld into each such that they are indistinguishable:

By definition, gerrymandering involves drawing district boundaries . . . in order to maximize the voting strength of those loyal to the dominant political faction and to minimize the strength of those opposed to it. In seeking the desired result, legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way. . . .

A prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. Nor, since a
this is a political decision that merely “correlates” with race or a political decision using a racial “proxy” a slippery slope for the judiciary in an area where courts admittedly have limited competence and significant risks are posed to democratic validation principles by attempting to do so? Moreover, given that claimants in these cases constitute the political majority, why couldn’t this alleged harm be alleviated through the democratic process? The failure to seriously address these issues of ascertainment and impropriety, beyond a quick dismissal, threatens to harm the Court’s institutional legitimacy and the democratic process much more than the purported harms threatened by these districts.

3. Is Judicial Intrusion Justified by the Substantive Right?

The Court’s decreased restraint and increased intrusion may be justified by the substantive right at issue. At first glance, the racial legislator’s ultimate purpose in making the prediction is political in character, is it necessarily more invidious or benign than a prediction based on other group characteristics. In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.


497. See Bush, 116 S. Ct. at 1979 n.9 (Stevens, J., dissenting) ("[T]hose in the district could elect a representative who is not a part of their racial group, while the population at large could elect a legislature that refused to rely on racial considerations in the drawing of districts."). The Court also stated:

To the extent that a political prediction based on race is incorrect, the voters have an entirely obvious way to ensure that such irrationality is not relied upon in the future: Vote for a different party. A legislator relying on racial demographics to ensure his or her election will learn a swift lesson if the presumptions upon which that reliance was based are incorrect.

Id. at 1988 n.29.

498. The Court’s only response to these democratic process objections was curtly stated in Bush:

We believe that the dissents both exaggerate the dangers involved, and fail to recognize the implications of their suggested retreat from Shaw I.

As to the dangers of judicial entanglement … [w]e are aware of the difficulties faced by the States, and by the district courts, in confronting new constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the redistricting process, are such that bright-line rules are not available. But we believe that today’s decisions, which both illustrate the defects that offend the principles of Shaw I and reemphasize the importance of the States’ discretion in the redistricting process, will serve to clarify the States’ responsibilities. The States have traditionally guarded their sovereign redistricting prerogatives jealously, and we are confident that they can fulfill that requirement, leaving the courts to their customary and appropriate backstop role.

Id. at 1964 (citation omitted).
gerrymander cases seem to affect, albeit indirectly, complainants' voting rights. A closer look reveals otherwise. Unlike *Gomillion*, the *Shaw* claim does not involve harm to complainants' "voting right," nor an alleged violation of the "one person, one vote" principle as contained in the vote dilution claim.⁴⁹⁹ In *Gomillion*, petitioners claimed a direct burden on their right to vote, as well as a discriminatory purpose to deprive them of that right because of their race:

According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil [black] citizens, and only [black] citizens, of their theretofore enjoyed voting rights.⁵⁰⁰

The alleged harm in the most recent redistricting cases is that the legislation violates the challenger's "constitutional right to participate in a 'color-blind' electoral process."⁵⁰¹ Thus, increased judicial intrusion can be justified if color-blindness itself is crucial to the proper functioning of the political process and a violation of color-blindness harms the democratic process. This type of claim cannot succeed, because, as the Court has acknowledged, whatever right one has to a "color-blind" electoral process, it is neither absolute nor as weighty as impediments to the right to vote.⁵⁰² Because the Court has legitimized the relevance of race to the districting process and the inevitability of race-consciousness guiding that process, the only

---

⁴⁹⁹. See *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993) (noting that "appellants did not claim that the... plan unconstitutionally 'diluted' white voting strength"); see also id. at 652 (describing racial gerrymandering claim as "analytically distinct" from vote dilution claim).


The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 [black] voters while not removing a single white voter or resident. The result of the Act is to deprive the [black] petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections.

*Id.* at 341.


⁵⁰². In *Shaw*, the Court poignantly explained: "Despite their invocation of the ideal of a 'color-blind' Constitution, appellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise: This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances." *Id.* at 642 (citations omitted).
question is how much a legislature can take race into account before it becomes too much—posing a harm to the democratic process.

Most recently, the Court has decided that "[t]he constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." The Court makes a stronger case that a predominantly race-conscious redistricting decision harms the democratic process. Such gerrymandering reinforces racial essentialism in the electoral process—the perception that members of a racial group share the same thinking and political interests—which then exacerbates patterns of racial bloc voting. Moreover, this type of gerrymandering undermines our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.

While appealing on its face, the harm to the democratic process of "predominant" race-consciousness is highly disputable. The reality is that political interests and race are virtually inseparable in a political environment where race more often than not affects election results. The diffuseness of the harm from "predominant" race-consciousness also arises from the difficulty of separating political and racial interests, the intertwining of racial and "traditional districting criteria"—particularly incumbency and uniting communities of interest in a single district, and the historical reality of racial bloc voting:

If, for example, a legislature may draw district lines to preserve the integrity of a given community, leaving it intact so that all of its members are served by one representative, this objective is inseparable from preserving the community’s racial identity when the community is characterized, or even self-defined, by the race of the majority of those who live there. This is an old truth, having been recognized every time the political process produced an Irish or Italian or Polish ward.

Hence, in some circumstances, even "predominant" race-consciousness can actually help the democratic process and the participation of its diverse members in that process.

---

505. See id.
507. See generally T. Alexander Aleinikoff & Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno, 92 Mich. L. Rev. 588, 601 (1993) ("It is only as collective partisans of the same political preference—whether that preference is defined by party or race or any other measure—that voters can assert their right to meaningful participation in the political process.").
More importantly, if predominant race-consciousness threatens to harm the democratic process so fundamentally that it requires increased judicial scrutiny, then the Court should explain why bizarrely shaped "white" districts are not subject to similar scrutiny. The realities of racial bloc voting and political interests shaped by ethnicity is cogently illustrated by the existence of equally "bizarre" and "noncompact" majority-Anglo districts that the Court refuses to seriously review or even acknowledge.\textsuperscript{508} The Court's uncritical stance toward similarly bizarre "Anglo" districts ignores the countervailing harm that may result from its selective foray into this area.\textsuperscript{509} Giving whiteness this type of racial "transparency"\textsuperscript{510} results not only in doctrinal incoherence, but a retreat from the Court's own commitment to keep the democratic process open in order to ensure access by minority groups so that they may participate in the same electoral and political pluralism enjoyed by every other bloc of voters.\textsuperscript{511} If "predominant" colorblindness is crucial to the proper functioning of the democratic process, a highly disputable claim, then at least this "right" should consistently be enforceable toward all the diverse groups in the political process.

\textsuperscript{508} In Bush, for instance, the Court virtually ignored three other majority-white districts that were ranked along with the majority-minority districts as among the oddest in the nation. See Bush, 116 S. Ct. at 1982 (noting that "[f]or every geographic atrocity committed by [a majority-minority district], [a majority-white district] commits its own and more;" and noting that incumbency played a major role in both); see also id. at 1994-97 (Stevens, J., dissenting) (comparing shapes of invalidated black districts with unscrutinized white districts in Appendices A-D).

\textsuperscript{509} As Justice Stevens persuasively noted:

The great irony, of course, is that by requiring the State to place the majority-minority district in a particular place and with a particular shape, the district may stand out as a stark, placid island in a sea of oddly shaped majority-white neighbors. . . . The Court-imposed barriers limiting the shape of the district will interfere more directly with the ability of minority voters to participate in the political process than did the oddly shaped districts that the Court has struck down in recent cases. Unaffected by the new racial jurisprudence, majority-white communities will be able to participate in the districting process by requesting that they be placed into certain districts, divided between districts in an effort to maximize representation, or grouped with more distant communities that might nonetheless match their interests better than communities next door. By contrast, none of this political maneuvering will be permissible for majority-minority districts, thereby segregating and balkanizing them far more effectively than the Districts at issue here, in which they were manipulated in the political process as easily as white voters.

Id. at 1990 (citation omitted).

\textsuperscript{510} See Flagg, White Race Consciousness, supra note 15, at 957 (describing the "transparency phenomenon [as] the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific").

VI. CONCLUSION

As this Article has demonstrated, the intent doctrine in equal protection is multifaceted. Courts and commentators continue to restate, and critique, the "rule" of intent as a uniform, homogenous standard. To the contrary, it is clear from the application of the intent requirement across various contexts that different levels of consciousness can violate the Equal Protection Clause. I have identified three such levels of intent—specific, general, and unconscious—reflected through the different evidentiary frameworks created by the Court in searching for intent. Despite its facial incongruity, the intent doctrine does cohere when viewed through the lens of democratic process values, which the Court has embraced throughout its constitutional jurisprudence. A close look at the Court's reasoning in its intent jurisprudence reflects the influence of reigning democratic process values. Moreover, these values provide criteria from which to judge the Court's adherence to various normative commitments.

This Article is premised upon the notion that a coherent jurisprudence has value apart from the wisdom of the underlying normative considerations that drive the Court's intent jurisprudence. I criticize the Court where it has not adhered to its doctrinal and normative commitments. However, in criticizing the Court, I also answer the frequently asked question: "How can the Court do better?" My answer is fairly straightforward. The Court has embraced certain normative precepts that have guided, and could better guide, its application of the various levels of intent and their evidentiary requirements. By consciously and consistently following these precepts, the Court would accomplish a very important goal in equal protection law. It would increase public confidence in the Court's institutional capacity to mediate the boundaries of racial equality in our racially charged society. At a time when the Court appears to be retreating from its previous commitments to substantive racial equality, a coherent jurisprudence is crucial to its institutional legitimacy.