William & Mary Bill of Rights Journal

Volume 9 (2000-2001)
Issue 3

Article 2

April 2001

Shrinking Domain of Individious Intent

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SHRINKING DOMAIN OF INVIDIOUS INTENT*

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The landmark case of Washington v. Davis *made invidious intent the touchstone of violation of the Equal Protection Clause. In this Article, Professor K.G. Jan Pillai discusses the current state of the doctrine of invidious intent and its evolving role in Supreme Court jurisprudence. In the area of criminal law enforcement, strict application of the doctrine often produces harsh results. Among the existing three-tiered scrutiny standards, the doctrine appears out of place. In recent racial gerrymandering cases, the Supreme Court substantively modified the meaning of the doctrine. Despite the apparent instability of the doctrine, Professor Pillai concludes the solution lies in making the intent doctrine compatible with the neutrality doctrine.*

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INTRODUCTION

Since the Supreme Court's decision in *Washington v. Davis*,[1] the touchstone of violation of the Equal Protection Clause is "invidious discriminatory purpose"[2] or intent[3] ("the *Davis* rule"). In *Davis*, the Court upheld a facially neutral law that produced a racially disproportionate impact on minorities,[4] by invoking "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[5] Although the Court did not define the term precisely, it was clear from the cases it cited as supportive precedents[6] that invidious intent in *Davis* meant that the

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

[2] *Id.* at 242.

[3] The Court consistently used "purpose" and "intent" interchangeably. The Court in *Davis* stated: "The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.* at 240 (quoting Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973)). The Court, in its next decision on the subject, stated: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

[4] *Davis* involved the constitutionality of a written examination administered to applicants for positions as officers in the District of Columbia Police Department; the test had a racially disproportionate impact on African-American applicants. *See* 426 U.S. at 237. The black applicants who failed urged the Court to apply the Title VII disparate impact standard the Court adopted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which would have required the government to show that the examination was job related and justified by business necessity. *See Davis*, 426 U.S. at 236. The Court rejected the disparate impact standard applicable to Title VII stating: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." *Id.* at 239.

[5] *Davis*, 426 U.S. at 240.

[6] The Court cited *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (school segregation); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (racially disproportionate impact of the provisions of the Social Security Act); *Wright v. Rockefeller*, 376 U.S. 52 (1964) (racial gerrymandering); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invidiously discriminatory application of a facially neutral law); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (exclusion of blacks from grand and petit juries in criminal proceedings).

decisionmaker had to have a subjective motivation to disadvantage or inflict harm on racial minorities.[7]

In one of the two subsequent cases, *Arlington Heights v. Metropolitan Housing Development Corp.*,[8] not only did the Court reaffirm the *Davis* rule as the "comprehensive account of discrimination under the Equal Protection Clause,"[9] but it also provided a checklist of factors that might tend to establish invidious discriminatory intent. In *Arlington Heights*, the Court rejected a disproportionate racial impact claim that the village's zoning policy prevented construction of low-cost housing because of the challengers' failure to prove "that discriminatory purpose was a *motivating factor* in the Village's decision."[10] Nevertheless, the Court spelled out some evidentiary aspects of the *Davis* rule—it "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes."[11] Invariably, "a sensitive inquiry" into all available, direct and circumstantial evidence may be necessary to "determin[e] whether invidious discriminatory purpose was a motivating factor."[12] The Court also enumerated a number of factors, including legislative history, sequence of events, patterns of behavior, and departures from normal decisionmaking procedures,[13] as appropriate evidentiary sources to divine invidious intent.

The *Davis* rule was further refined in *Personnel Administrator of Massachusetts v. Feeney*.[14] At issue in the case was the constitutionality of a Massachusetts statute that gave an absolute preference to veterans in civil service jobs. Since over ninety-eight percent of the state's veterans were men,[15] the statute operated overwhelmingly to the disadvantage of women. The plaintiff, a female employee adversely affected by the preference system, claimed that the law was "inherently

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[7] *See* Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 112 (1983). Justice Stevens, in his concurring opinion, argued that the "most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequence of his deeds." *Davis*, 426 U.S. at 253. He also suggested that "the line between discriminatory purpose and discriminatory impact is not nearly as bright . . . as the reader of the Court's opinion might assume." *Id.* at 254.

[8] 429 U.S. 252 (1977).

[9] David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 998 (1989); *see also Arlington Heights*, 429 U.S. at 265.

[10] 429 U.S. at 270 (emphasis added).

[11] *Id.* at 265.

[12] *Id.* at 266.

[13] *See id.* at 266-68.

[14] 442 U.S. 256 (1979).

[15] *See id.* at 270. When the legislation commenced, only 1.8% of the veterans in Massachusetts were female. *See id.* Over one-quarter of the state's population were veterans. *See id.*

nonneutral"[16] and that it discriminated against women in violation of the Equal Protection Clause. Conceding that the legislative goal was to benefit veterans, both male and female, she argued that the legislature should have been aware that the means chosen to achieve the goal inevitably would "freeze women out of all those state jobs actively sought by men."[17] Her argument rested on the common law assumption "that a person intends the natural and foreseeable consequences of his voluntary actions."[18]

The Supreme Court agreed that it would be "disingenuous to say that the adverse consequences of [the] legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable."[19] It also recognized the severity of the law's disproportionate impact on women. But, the Court insisted that there could be no equal protection violation without proof of invidious discrimination or "discriminatory purpose," as required by the *Davis* and *Arlington Heights* cases. The Court explained that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences."[20] Rather, it implies that the "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."[21] Because the plaintiff in the case failed to prove that the legislature enacted the veterans preference law because of its adverse effect on women, the Court ruled that the law reflected no "invidious gender-based discrimination."[22]

Feeney significantly clarified the *Davis* rule. First, the showing required to prove invidious intent in a disparate impact case is not how severe the impact is, but rather that the legislature enacted the law because of its adverse impact on the disadvantaged group. The Court pointedly noted the statement of the district court that in enacting the veterans preference law, "[t]o be sure, the legislature did not wish to harm women."[23] Second, once the invidious intent is established as a motivating factor, the magnitude or intensity of the resulting discrimination would

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[16] *Id.* at 277.

[17] *Id.* at 278 (quoting the district court's concurring opinion, 451 F. Supp. 143, 151 (1978)).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 279.

[21] *Id.*

[22] *Id.* at 274. The Court stated that when a facially gender-neutral statute is challenged on the ground of disproportionate impact, it will engage in a two-fold inquiry: first, whether the statute is indeed gender-neutral, and second, "whether the adverse effect reflects invidious gender-based discrimination." *Id.*

[23] *Id.* at 278 (quoting the district court's concurring opinion, 451 F. Supp. 143, 151).

not be relevant.[24] "Discriminatory intent," the Court said, "is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not."[25] Finally, the Court will entirely forgo the inquiry into invidious intent if the challenged law is premised on facially explicit race or gender classifications. Such classifications "in themselves supply a reason to infer antipathy,"[26] and therefore, are presumptively invalid "regardless of [their] purported motivation"[27] unless justified by "extraordinary"[28] or "exceedingly persuasive" governmental interests.[29]

The *Davis* rule is now firmly embedded in equal protection jurisprudence. The entire expanse of rules governing the doctrine of invidious intent are expounded in the *Davis* trilogy. The Court has never attempted to authenticate the invidious intent doctrine by reference to the text or legislative history of the Equal Protection Clause. Indeed, to pave its way for the adoption of the doctrine, the Court in *Davis* had to abandon some of its important precedents and disagree with sixteen lower court decisions that "impressively demonstrate[d] that there [was] another side to the issue [of invidious intent]."[30] The *Davis* Court adopted the doctrine of invidious intent solely on the premise that a contrary rule "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[31] In subsequent cases, the "Court has treated a simple citation to, or quotation from, [the *Davis* trilogy] as sufficient to justify requiring plaintiffs to prove discriminatory intent in order to show a denial of equal protection."[32]

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[24] *See id.* at 277 ("Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude.").

[25] *Id.*

[26] *Id.* at 272.

[27] *Id.*

[28] *Id.* Racial classification will be upheld only "upon an extraordinary justification." *Id.* In later cases, the Court extended strict scrutiny to racial classification, which would require the government to demonstrate that the classification is narrowly tailored to achieve a compelling interest. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[29] *Feeney*, 442 U.S. at 273. Gender classification must bear a substantial relationship to important governmental objectives. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[30] Washington v. Davis, 426 U.S. 229, 245 (1976). The Court disagreed with decisions of six courts of appeals and several district courts which generally held that disproportionate impact alone, without regard to discriminatory purpose, would suffice to violate the Equal Protection Clause. *See id.* at 244-45. The Court also disregarded its decisions in *Palmer v. Thompson*, 403 U.S. 217 (1971) (warning against grounding decisions on legislative purpose or motivation) and *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972) (holding that racial impact of a law, rather than its discriminatory purpose, was the critical factor). *See id.* at 244.

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

[32] Todd Rakoff, Washington v. Davis *and the Objective Theory of Contracts*, 29 HARV.

It may be argued plausibly that the *Davis* rule reflects the venerable common law tradition of not subjecting a party to liability without establishing causation and culpability, and, therefore, requires no independent justification. Even though it is a substantive limitation on the right to equal protection, the *Davis* rule operates as an evidentiary requirement not much different from analogous rules of criminal law or tort litigation. If the *Davis* rule was applied strictly and consistently to all equal protection challenges to legislative and executive decisions, it could find even a constitutional foundation in the doctrine of separation of powers. Currently, the challengers' burden of proof under the *Davis* rule is so insurmountable that in most cases they cannot establish invidious intent.[33] It is almost impossible to detect, sort out, and quantify the motives of individual legislators who vote for legislation on the basis of their own disparate beliefs, values, interests, and circumstances. It is inaccurate to suggest that there is an ascertainable, unequivocal motivation of the legislature; invariably, legislators are motivated by different reasons even while voting for the same law. Therefore, one who searches for the invidious discriminatory intent of a legislature may well end up "trying to prove something that may be non-existent."[34] To the extent it insulates legislative decisions from judicial scrutiny, the rule of "invidious intent facilitates the Court's recognition of the importance of separation of powers."[35]

This Article is not concerned with either the rationale or the constitutional groundings of the *Davis* rule of invidious intent. It seeks to discern the current state of the doctrine of invidious intent and its role in the prevailing equal protection jurisprudence of the Supreme Court. Following a brief description of the substantive elements of the doctrine, this Article, in Part II, examines the doctrine's harsh effect on claims of equal protection violations in criminal law enforcement. Part III assesses the relevance of the doctrine of invidious intent to equal protection cases under the existing three-tiered scrutiny standards and finds that the doctrine is mostly inconsequential. Part IV describes the substantive overhaul of the doctrine that the Supreme Court found necessary to make the doctrine operational to recent racial gerrymandering cases. Part V demonstrates that, at least in some

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C.R.-C.L. L. REV. 63, 65 (1994).

[33] *See generally* Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397 (1983); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1402 (1988) (observing that "no defendant in state or federal court has ever successfully challenged his punishment on grounds of racial discrimination in sentencing").

[34] L. H. LaRue, *Discriminatory Intent*, 1 RACE & ETHNIC ANC. L. J. 17, 20 (1995).

[35] Jeffery A. Kruse, Note, *Substantive Equal Protection Analysis Under* State v. Russell, *and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791, 1801 (1993).

instances, the courts may have no choice but to discard the invidious intent doctrine in order to enforce the mandate of the Equal Protection Clause. Finally, this Article reaches the unavoidable conclusion that the invidious intent doctrine is hopelessly adrift, having no certainty in meaning or consistency in application. Since it has proven to be a theoretical oddity, hindering principled constitutional adjudication, and has become increasingly redundant in the emerging, neutrality-driven equal protection jurisprudence, this Article suggests that either the doctrine may be phased out or the exact areas of its operation be clearly demarcated.

I. DISSECTING THE *DAVIS* RULE

A. *The Intent or Motivation*

The core of the *Davis* rule is "invidious intent." Since the Supreme Court decisions in the *Davis* trilogy, the Justices have used the term "invidious intent" in eighteen cases.[36] It has been the Court's tradition to express the concept of invidious intent in multiple interchangeable terms[37] such as "discriminatory intent,"[38] "invidious discrimination,"[39] and "purposeful discrimination,"[40] at times using more than one or a combination of these terms in the same case.[41] The federal

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[36] *See e.g.*, Shaw v. Reno, 509 U.S. 630, 677 (1993) (Stevens, J., dissenting); Hernandez v. New York, 500 U.S. 352, 375 (1991) (Stevens, J., dissenting); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 665 (1989) (Stevens, J., dissenting) (interpreting Title VII disparate treatment); McCleskey v. Kemp, 481 U.S. 279, 352 n.5 (1987) (Blackmun, J., dissenting); Davis v. Bandemer, 478 U.S. 109, 172 n.10 (1986) (plurality opinion of Justice White, the author of *Davis*); Batson v. Kentucky, 476 U.S. 79, 93 (1986); *id.* at 332 (Burger, C.J., dissenting); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 (1983) (using the term "discriminatory intent"); *id.* at 645 (Stevens, J., dissenting) (using the term "invidious intent"); Rogers v. Lodge, 458 U.S. 613, 642 (1982) (Stevens, J., dissenting); Connecticut v. Teal, 457 U.S. 440, 446 (1982) (using the terms "racial purpose" and "invidious intent" in a Title VII case); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 472 (1979) (Rehnquist, J., dissenting).

[37] *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 8 (1944) ("Purposeful discrimination,"); *id.* at 7 ("intentional or purposeful discrimination,"); *id.* at 11 ("invidious and purposely discriminatory"); Colgate v. Harvey, 296 U.S. 404, 438 (1935) ("invidious discrimination"); Bindini Petroleum v. Super. Ct., 284 U.S. 8, 19 (1931) ("invidious discrimination"); Barbier v. Connolly, 113 U.S. 27, 30 (1884) ("invidious discrimination").

[38] *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 116 (1997); Bush v. Vera, 517 U.S. 952, 1001 (1996); United States v. Armstrong, 517 U.S. 456, 468 (1996); Miller v. Johnson, 500 U.S. 900, 924 (1995).

[39] Rice v. Cayetano, 528 U.S. 495, 529 (2000); Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 550 (1999).

[40] Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 369 n.15 (2000).

[41] *Bossier Parish*, 528 U.S. at 343 ("discriminatory intent"); *id.* at 369 n.15 ("purposeful discrimination"); M.L.B. v. S.L.J., 519 U.S. 102, 115 n.7, 137, 141 (1996) ("invidious

courts of appeals, as well, have been lavish in using various "invidious intent" terms in equal protection cases.[42]

Irrespective of the variations in the terminology used by the courts, "intent" and "invidiousness" have always been understood as the indispensable components of the *Davis* rule. Both intent and invidiousness are necessary to commit a violation of the Equal Protection Clause. The Supreme Court has not defined clearly the meaning of invidiousness; the meaning seems to fluctuate from issue to issue or simply "has changed over time."[43] But, the Court initially left little room for confusion about the scope and meaning of intent. In *Feeney*, the Court asserted that intent implies more than volition or awareness; it implies that the impugned action was taken not merely "in spite of" but "*at* least in part 'because of'" its anticipated adverse effect on the disadvantaged individual or group.[44] However, during its quarter-century of evolution, the intent requirement of the *Davis* rule has changed fundamentally.

First, the Supreme Court has inextricably linked intent with effect. As explained in more detail in Part III, in *McCleskey v. Kemp*,[45] where a capital sentencing practice was challenged on racial grounds, the Court required the challenger prove not only "the existence of purposeful discrimination,"[46] but also "that the purposeful discrimination 'had a discriminatory effect' on him."[47]

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discrimination"); *id.* at 136 ("purposeful discrimination"); J.E.B. v. Alabama, 511 U.S. 127, 137 (1994) ("invidious discrimination"); *id.* at 155 ("purposeful discrimination"); Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985) ("invidious discrimination"); *id.* at 292, 294 ("purposeful discrimination"); *id.* at 293 ("intentional discrimination"); *Snowden*, 321 U.S. 1, 7 ("intentional or purposeful discrimination"); *id.* at 11 ("invidious and purposeful discriminatory").

[42] *See e.g.*, Preferred Physicians Mut. Risk Retention Group v. Pataki, 85 F.3d 913, 918 (2d Cir. 1996) ("discriminatory intent"); United States v. Casper, 956 F.2d 416, 419 (3d Cir. 1992) ("discriminatory intent" and "invidious intent"); Riddick v. Sch. Bd. of City of Norfolk, 784 F.2d 521, 528, 538 (4th Cir. 1986) ("discriminatory intent" and "invidious intent"); *see also* Carlton v. Mystic Transp. Inc., 202 F.3d 129, 132 (2d Cir. 2000) ("invidious intent to discriminate"); Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1089 (7th Cir. 2000) ("invidious intent"); Lyes v. City of Riviera Beach, 166 F.3d 1332, 1354 (11th Cir. 1999) ("invidious intent" and "invidiously discriminatory animus").

[43] Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 324 (1994); *see infra* section II.

[44] 442 U.S. at 279 (emphasis added).

[45] 481 U.S. 279 (1979).

[46] *Id.* at 292 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

[47] *Id.* (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)). The Court cited the *Davis* and *Arlington Heights* cases to support the requirement of discriminatory purpose. *Id.* at 293-94. The discriminatory effect requirement, described as a "corollary to" the discriminatory purpose principle, came from *Wayte v. United States*, 470 U.S. 598, 608 (1985). *Id.* at 292.

Moreover, in *United States v. Armstrong*,[48] the defendant who alleged racially motivated selective prosecution was required to show not only discriminatory intent and discriminatory effect but also that similarly situated persons of a different race had not been prosecuted.[49] By tying it to discriminatory effect and other appendages, the Court has deprived invidious intent of its independent constitutional significance. Recall that the impetus for the *Davis* rule was to formulate a standard to identify the unfair and unjustifiable disproportionate effect of governmental action that the Equal Protection Clause ought not to condone. Under the *Davis* trilogy, disproportionate effect—not necessarily discriminatory effect—was only one among several in the checklist of factors that might tend to demonstrate invidious intent.[50] Demonstration of disproportionate impact, supported by proof of invidious intent, would have been sufficient to prohibit a governmental action or policy based on the *Davis* rule. According to the Court's changed formula, an equal protection plaintiff is saddled with the burden of showing that an invidiously motivated action or policy is not only disproportionately burdensome, but discriminatory as well.[51]

The second change to the intent prong of the *Davis* rule occurred when the Court made a distinction between simple racial motivation and predominant racial motivation in recent redistricting cases. As race traditionally has been among the unavoidable mix of factors that a legislature considers in making redistricting decisions, the Supreme Court found the *Davis* rule that barred action motivated at least in part to produce an adverse effect was inappropriate to achieve the goal of

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[48] 517 U.S. 456 (1996).

[49] *See generally* Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071 (1997). The defendant in *Armstrong* was only seeking an order of discovery from a U.S. district court. *See* 517 U.S. at 456.

[50] *See Feeney*, 442 U.S. at 275 ("Just as there are cases in which impact alone can unmask an invidious classification there are others, in which—notwithstanding impact—the legitimate noninvidious purpose of a law cannot be missed. This is one.") (citations omitted); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 255, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it 'bears more heavily on one race than another' may provide an important starting point.") (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

[51] In Title VII disparate treatment or intentional discrimination cases, the Court has established a framework for the allocation of burdens and presentation of proof by the parties to prove purposeful employment discrimination. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). In equal protection cases, the plaintiff is not aided by such an orderly framework. That makes the plaintiff's burden to establish invidious intent much more difficult than in Title VII cases, and the imposition of any additional burden unjustifiable.

outlawing racial gerrymandering. Therefore, the Court, in a series of redistricting cases,[52] held that redistricting constitutes unconstitutional racial gerrymandering only when race is "the predominant factor motivating the legislature's [redistricting] decision."[53] The Court had no difficulty in recognizing that redistricting laws, though generally facially race-neutral, involve mixed motives, and that the only feasible way to examine their constitutionality is to subject them to strict scrutiny upon proof of racial motivation.[54] Such proof is ordinarily obvious on the face of laws creating majority-minority districts. Nevertheless, the Court ruled that strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts,"[55] absent a showing that race was the predominant factor in their creation.

B. *Invidiousness*

Traditionally, the invidiousness of a law or governmental action has been a necessary, if not dispositive, condition for an equal protection violation. The premise of the condition is that most laws involve classifications creating varying degrees of inequalities, but not all inequalities trigger equal protection concerns. As the Supreme Court stated, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same,"[56] and "not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another."[57] Such statutory discriminations will be presumed rational unless they are shown to be "invidious and purposely discriminatory."[58] States may make rational distinctions in regulating their economies under their police powers "with substantially less than mathematical exactitude . . . [and] it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."[59]

Despite its constant invocation of "invidiousness" as the sure marker of equal protection violations, the Supreme Court has left the term undefined for decades. The Court's failure to articulate a definition of invidiousness may be attributed either to its inability to encapsulate the contextual adjustments needed to make the term operational in myriad situations, or simply to its belief that the term is self-

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[52] *See* Abrams v. Johnson, 521 U.S. 74, 91 (1997); Bush v. Vera, 517 U.S. 952, 959 (1996); Shaw v. Hunt, 517 U.S. 899, 905 (1996); Miller v. Johnson, 515 U.S. 900, 916 (1995); *see also* discussion *infra* Part V.

[53] *Miller*, 515 U.S. at 916.

[54] *Bush*, 517 U.S. at 959.

[55] *Id.* at 958.

[56] Tigner v. Texas, 310 U.S. 141, 147 (1940).

[57] Snowden v. Hughes, 321 U.S. 1, 8 (1944).

[58] *Id.* at 11.

[59] New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976).

defining. Even without the benefit of a comprehensive definition, the Court has managed to express the meaning of invidiousness in certain contexts through undeviating consistency in application. Racial discrimination is one such context.

One of the earliest Supreme Court decisions that expressed the meaning of invidiousness in memorable language is *Yick Wo v. Hopkins*.[60] The case involved a challenge to the discriminatory administration of certain San Francisco city ordinances which regulated the operation of laundries in wooden buildings. The city authorities denied the applications of over two hundred Chinese applicants to engage in the laundry business, while granting similar applications by eighty non-Chinese applicants. The Court, finding no reason for the disparate treatment of Chinese applicants "except hostility to [their] race and nationality,"[61] held that a law, if "applied and administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[62] The Court distinguished two prior cases[63] in which the same ordinances were upheld, by stating that the cases involved "*no invidious discrimination* against anyone."[64]

Yick Wo's meaning of invidious racial discrimination was reiterated with greater clarity when the Court in *Skinner v. Oklahoma*[65] struck down a statute that provided for the sterilization of habitual criminals for eugenic reasons. While the statute treated grand larceny and embezzlement similarly in every other respect, it only subjected larcenists to sterilization. The Court maintained that even if the statute's purpose of preventing the birth of socially undesirable children to habitual criminal offenders was permissible, the distinction drawn between intrinsically similar crimes was untenable.[66] The Court recognized that the incidence of the penalty of sterilization would fall much more heavily on poor people.[67] Thus, echoing its

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[60] 118 U.S. 356 (1886).

[61] *Id.* at 374.

[62] *Id.* at 373-74.

[63] Barbier v. Connolley, 113 U.S. 27 (1885); Soon Hing v. Crowley, 113 U.S. 703 (1885).

[64] *Yick Wo*, 118 U.S. at 367 (emphasis added).

[65] 316 U.S. 535 (1942).

[66] *Id.* at 538-39.

[67]
> A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Hence, no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized.

Id. at 539; *see also* Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CAL. L. REV. 315, 346 (1998) ("[W]hile a eugenic purpose . . . may be permissible, the goal of eradicating only poor criminals is not.").

statement in *Yick Wo*, the Court held that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[68]

The meaning of invidiousness in racial discrimination is derived from the original purpose of the Fourteenth Amendment. In *Loving v. Virginia*,[69] the Supreme Court declared that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[70] Thus, the Court struck down Virginia's anti-miscegenation law holding that "[t]here [was] patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [the] classification"[71] and that the laws, by prohibiting only interracial marriages involving white persons, demonstrated that it was "designed to maintain White Supremacy."[72]

Literally, the word "invidious" conveys the ideas of animosity, resentment, ill-will, or hostility.[73] When it is used in conjunction with racial discrimination, "invidious" means oppressive, demeaning, and morally reprehensible, tending to disadvantage, or inflict harm on, individuals solely because they belong to a disfavored racial group.[74] Without invidiousness, even intentional racial classifications may not offend the Equal Protection Clause. For instance, in *United Jewish Organizations v. Carey*,[75] the Supreme Court ruled that a state redistricting legislation that "deliberately used race in a purposeful manner" was not violative of the Fourteenth Amendment because it "represented no racial slur or stigma with respect to whites or any other race."[76] The Court's past decisions that approved

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[68] *Skinner*, 316 U.S. at 541.

[69] 388 U.S. 1 (1967).

[70] *Id.* at 10.

[71] *Id.* at 11.

[72] *Id.* The Court added that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination." *Id.* at 12.

[73] "Invidious—tending to rouse ill will, animosity, or resentment; offensive." AMERICAN HERITAGE DICTIONARY 675 (2d. College ed. (1982)).

[74] *See* Adarand Constructors v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority."); *see also* Rice v. Cayetano, 528 U.S. 495, 528, 543 (2000) (Stevens, J., dissenting) (discussing invidious discrimination in action against eligibility requirement for voting for trustees for Office of Hawaiian affairs).

[75] 430 U.S. 144 (1977).

[76] *Id.* at 165. Justice Brennan's concurring opinion underscored the significance of invidiousness, thus: "If we were presented here with a classification of voters motivated by racial animus or with a classification that effectively downgraded minority participation in the franchise, we promptly would characterize the resort to race as 'suspect' and prohibit its use." *Id.* at 169-70 (citations omitted); see also, Rogers v. Lodge, 458 U.S. 613, 622 (1982)

explicit racial classification in affirmative action programs also rested on the rationale of non-invidiousness.[77]

The Court has come closest to clarifying its understanding of invidious intent in *Bray v. Alexandria Women's Health Clinic*,[78] a case brought under 42 U.S.C. § 1985(3) against anti-abortionists who demonstrated at abortion clinics in the Washington, D.C. metropolitan area. Section 1985(3) provides a cause of action for damages against persons who conspire "for the purpose of depriving . . . [a] person or class of persons of the equal protection of the laws."[79] The Court has long required a Section 1985(3) plaintiff to show "that [] some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action."[80] The Court in *Bray* equated the invidiously discriminatory animus requirement of the statute with the equal protection requirement of invidious intent[81] and asserted that the Section 1985(3) plaintiff should prove that the defendants, in this case, persons seeking to prevent abortion in the clinic, had taken their action "at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group."[82] The Court stressed that invidious discriminatory animus or intent implies more than awareness of, or indifference to, the effect of the defendants' actions toward women, rather, it must be shown that they acted with "hatred of, or condescension toward" women specifically to deprive them of their right to have an abortion.[83]

II. THE DRACONIAN APPLICATION

The areas and situations in which the doctrine of invidious intent becomes alive and operational are too numerous and varied to yield any single conclusion about

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(invalidating an at-large scheme of elections, on the ground that the scheme "although racially neutral when adopted, is being maintained for invidious purposes") (citation omitted); Palmer v. Thompson, 403 U.S. 217, 225 (1971) (explaining that racially motivated legislation violates the Equal Protection Clause only when the challenged legislation "affect[s] blacks differently from whites").

[77] *See e.g.*, Metro Broad., Inc. v. F.C.C., 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980).

[78] 506 U.S. 263 (1993).

[79] 42 U.S.C. § 1985(3) (1994). The section was originally enacted as part of the Civil Rights Act of 1871, 17 Stat. 13, § 2, for the purpose of enforcing the Civil War Amendments.

[80] Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

[81] The Court cited two equal protection cases that discussed invidiously discriminatory intent or purpose (Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) and Geduldig v. Aiello, 417 U.S. 484 (1974)) and stated that "[t]he same principle applies to the 'class-based, invidiously discriminatory animus' requirement of § 1985(3)." *Bray*, 506 U.S. at 272.

[82] *Bray*, 506 U.S. at 272 (quoting *Feeney*, 442 U.S. at 279).

[83] *Id.* at 270.

the doctrine's precise impact on the equality interests protected by the Constitution. Without question, the mere existence of the doctrine has had the effect of discouraging victims of racial discrimination from resorting to the judiciary for vindication of their grievances.[84] Because of this chilling effect, *Davis* is now claimed to "rank[] as the most important equal protection case of the last quarter-century."[85] This unenviable status of the invidious intent doctrine of *Davis* derives primarily from its harsh application in undiluted form in certain areas, as illustrated below by its application to criminal law enforcement.

A. *Peremptories:* Batson v. Kentucky

The Supreme Court remains firmly committed to the invidious intent standard for adjudicating claims of racial and gender discrimination in the criminal justice system. The intent doctrine is applied unconditionally to race and gender-based peremptories and to racially discriminatory prosecuting and sentencing practices. Keeping with its original design, invidious intent in the context of abuses in the judicial process focuses on the subjective motivation of errant attorneys—a state of mind that is recognized as difficult to prove. The evidentiary requirements to establish the subjective state of mind of prosecutors are so demanding that their racially prejudicial prosecuting and sentencing decisions are practically impervious to constitutional challenge by aggrieved criminal defendants. Once recognizing that the "crippling burden of proof" placed on defendants has made prosecutors' peremptory challenges "largely immune from constitutional scrutiny,"[86] the Court in *Batson v. Kentucky*[87] established a framework for the allocation of burdens and

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[84] Theodore Eisenberg & Sherri Lynn Johnson, *The Effect of Intent: Do We Know How Legal Standards Work?*, 86 CORNELL L. REV. 1151, 1153 (1991) (showing that a statistical study found that the *Davis* rule of invidious intent really discourages victims of racial discrimination from seeking judicial relief).

[85] Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1832 (2000).

[86] Batson v. Kentucky, 476 U.S. 79, 92-93 (1986). The Court specifically overruled its prior decision in *Swain v. Alabama*, 380 U.S. 202 (1965), which required a criminal defendant to produce "proof of systematic exclusion of African Americans through the use of peremptories over a period of time" to establish denial of equal protection. Georgia v. McCollum, 505 U.S. 42, 47 (1982) (discussing *Swain*). In *Swain*, the Court rejected the defendant's attempt to establish an equal protection claim premised solely on the pattern of jury strikes in his own case. *See id.*

[87] 476 U.S. 79 (1986). In *Batson*, a state prosecutor used his peremptory challenges to remove all African Americans from the jury venire to achieve a small white jury to try an African American indicted on charges of second degree burglary and the receipt of stolen goods. *See id.* at 82-83. The defendant moved to prevent impaneling the jury on the ground that the prosecutor's peremptories violated his rights under the Equal Protection Clause and the Sixth Amendment (the right to have a jury chosen from a cross-section of the

presentation of proof by opposing parties in peremptory challenges.

Batson set forth a three-step procedure for assessing the constitutionality of peremptory challenges. First, the opponent of the peremptory challenge has to make out a prima facie case of purposeful discrimination.[88] Then, the burden shifts to the proponent of the strike to come forward with a race-neutral explanation.[89] Finally, the trial court must decide whether the opponent of the strike has established "purposeful discrimination."[90] The Court made it clear that the trial court's finding of intentional discrimination at the third step is a finding of fact and "largely will turn on evaluation of credibility,"[91] presumably of the neutral explanation of the proponent of the strike.

The constitutional injury the *Batson* Court attempted to redress was threefold. First, purposeful racial discrimination in selection of jurors violates a criminal defendant's constitutional right to a fair trial and "to an impartial jury that can view him without racial animus."[92] Discriminatory selection of jurors directly harms "the accused whose life or liberty they are summoned to try."[93] The Court has even applied the *Batson* framework to prohibit a prosecutor's discriminatory exercise of peremptories to exclude African American jurors in the trial of a white criminal defendant.[94] Second, race-based peremptories deny "the excluded venire-person the honor and privilege of participating in our system of justice,"[95] and thereby "offends [his or her] dignity."[96] The Court, recognizing the equal protection rights of individuals not to be excluded from juries on the basis of race, accorded third-party

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community). *See id.* at 83. The trial court rejected his claim and subsequently convicted him on both counts. *See id.* at 83. He sought certiorari from the Supreme Court after having exhausted his appeals in the state courts. *See id.* at 84.

[88] *See id.* at 93-94. The opponent of the peremptory challenge may establish a prima facie case either by proof of systematic exclusion of members of his race from the venire or "in other ways," such as showing that the opponent's race is "substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing for 'the opportunity for discrimination.'" *Id.* at 95 (quoting Whitus v. Georgia, 385 U.S. 545, 552 (1967)).

[89] *See id.* at 97. The proponent's explanation "need not rise to the level of justifying the exercise of a challenge for cause." *Id.* However, the proponent cannot rebut "the prima facie case by stating merely that [the] challenged jurors of the [opponent's] race," as members of the racial group, are assumed to be inherently biased or unqualified. *Id.* Nor may the proponent rebut the opponent's case "merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'" *Id.* at 98 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

[90] *Id.*

[91] *Id.* at 98 n.21.

[92] Georgia v. McCollum, 505 U.S. 42, 58 (1992).

[93] *Batson*, 476 U.S. at 87.

[94] *See* Powers v. Ohio, 499 U.S. 400 (1991).

[95] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).

[96] *Id.* at 628 (quoting Powers v. Ohio, 499 U.S. 400, 402 (1991)).

standing to criminal defendants[97] and civil litigants[98] to assert the rights of excluded jurors' rights, reasoning that the "barriers to a suit by an excluded juror are daunting."[99] Finally, racially discriminatory exclusion of individuals from juries "casts doubt on the integrity of the judicial process"[100] and "undermine[s] public confidence in the fairness of our system of justice."[101]

In order to devise the *Batson* framework, the Court had to tread on the historical privilege of prosecutors to exercise peremptory challenges "without a reason stated, without inquiry and without being subject to the court's control."[102] There was serious disagreement among the Justices on the desirability of doing so. Then Justice Rehnquist argued in his dissent, that there was "simply nothing 'unequal' about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants"[103] because such strikes are "based upon seat-of-the-pants instincts," even if they are "crudely stereotypical" or "hopelessly mistaken."[104] But Justice Marshall believed that the "'seat-of-the-pants instincts' may often be just another term for racial prejudice."[105]

The dissenting Justices may have overestimated the real impact of *Batson* on the traditional prosecutorial discretion in exercising peremptory challenges. The Court dictated only that peremptories "must not be based on either the race of the juror or the racial stereotypes held by the party."[106] It does not prohibit exclusion of a racially biased juror. The Court has drawn a "distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice."[107] More importantly, a prosecutor "who [is] of a mind to

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[97] *See McCollum*, 505 U.S. at 56.

[98] *See Edmonson*, 500 U.S. at 628-29.

[99] *Powers*, 499 U.S. at 414.

[100] Rose v. Mitchell, 443 U.S. 545, 556 (1979); *see also McCollum*, 505 U.S. at 56 (noting harm extended to the state when its judicial system is undermined); *Edmonson*, 500 U.S. at 630 (extending harms beyond criminal sphere).

[101] Batson v. Kentucky, 476 U.S. 79, 87 (1986). The *Batson* Court stated that, "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Id.* at 99. The Court subsequently has applied the *Batson* framework to peremptories based on gender. *E.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994).

[102] Swain v. Alabama, 380 U.S. 202, 220 (1965). The *Swain* Court stated that, "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." *Id.* at 221.

[103] *Batson*, 476 U.S. at 137 (Rehnquist, J., dissenting).

[104] *Id.* at 138.

[105] *Id.* at 106 (Marshall, J., concurring).

[106] Georgia v. McCollum, 505 U.S. 42, 59 (1992) (Rehnquist, C.J., concurring).

[107] *Id.*

discriminate,"[108] can find built-in loopholes in the *Batson* framework to escape from liability for racially biased peremptory strikes. To begin with, invidious intent, the constitutional trigger for violation of the *Batson* rules, is difficult to establish. An opponent of a peremptory challenge has the burden to prove that the proponent of the challenge is motivated by the invidious intent to strike a prospective juror "because of"[109] her race. The invidious motivation may be "derive[d] from open hostility or from some hidden and unarticulated fear"[110] of the stricken juror's race. In order to ascertain invidious intent, a court will have to engage in "a sensitive inquiry"[111] into all available direct and circumstantial evidence, including evidence of disparate racial impact of the peremptory challenge.[112] Ultimately, the inquiry will entail judicial "evaluation of the [challenger's] state of mind."[113] Undoubtedly, the requirement of proving invidious intent is the Achilles' heel in the *Batson* framework.

Moreover, the efficacy and usefulness of *Batson*'s procedural framework largely depends on the evidentiary significance of race-neutral explanations that the proponents of impugned peremptory challenges are required to proffer. The framework, at least in part, rests on the questionable assumption that race-neutral explanations may provide a window into the striking attorney's subjective state of mind or may at times even play a dispositive role in finding invidious intent, depending on the evidentiary value that a court may place on them. The operation of the evidentiary rules of employment discrimination cases, after which the *Batson* proof framework was patterned,[114] can help to elucidate the probative value of race-neutral explanations.

The Supreme Court originally established the three-step, burden-shifting, proof

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[108] *Batson*, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). The *Batson* Court stated that a criminal defendant using the *Batson* framework of proof is entitled to rely on the fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.*

[109] Hernandez v. New York, 500 U.S. 352, 360 (1991) (Kennedy, J., plurality opinion) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); *see also* McCleskey v. Kemp, 481 U.S. 279, 297-99 (1987) (discussing allegedly discriminatory application of the capital sentencing statute).

[110] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991).

[111] *Batson*, 476 U.S. at 993 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

[112] *Id.*; *see also* Washington v. Davis, 426 U.S. 229, 242 (1976).

[113] *Hernandez*, 500 U.S. at 365 (Kennedy, J., plurality opinion).

[114] The *Batson* Court stated "[o]ur decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules." *See Batson*, 476 U.S. at 94 n.18; *see also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

framework in its opinion in *McDonnell Douglas Corp. v. Green*,[115] with the goal of "progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination"[116] in employment practices under Title VII of the Civil Rights Act of 1964.[117] Under the framework, for step one, the plaintiff must establish, by a preponderance of evidence, a prima facie case[118] which "in effect creates a presumption that the employer unlawfully discriminated against the employee."[119] In the second step, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'"[120] The defendant, by carrying this burden, rebuts the presumption created by the prima facie case of the plaintiff.[121] Nevertheless, in step three, the plaintiff gets "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[122]

The failure of the defendant to come forward with a legitimate nondiscriminatory reason or a race-neutral explanation would ipso facto result in a finding of unlawful discrimination.[123] But, what would be the consequence for a defendant offering a race-neutral reason that ultimately is proved to be false? Until recently, the Supreme Court maintained that a plaintiff who alleges intentional discrimination could succeed "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[124] The Court's position seemed eminently sensible and logical. It is sensible because it recognizes the reality that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"[125] and that, except in the rare instance in which direct "smoking gun" evidence is available, intentional discrimination can be "revealed only through

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[115] 411 U.S. 792 (1973).

[116] *Burdine*, 450 U.S. at 255 n.8.

[117] Title VII provides in relevant part: "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a) (1994).

[118] A prima facie case is established by proving (1) that he (the plaintiff) is black, (2) that he was qualified for the position that he applied for, (3) that he was denied that position, and (4) that the position remained open and was ultimately filled by a white individual with qualifications similar to plaintiff. *See McDonnell Douglas*, 411 U.S. at 802.

[119] *Burdine*, 450 U.S. at 254.

[120] *Id.* at 252 (quoting *McDonnell Douglas*, 411 U.S. at 802).

[121] *See id.* at 254.

[122] *Id.* at 253.

[123] *Id.* at 254. "[I]f the employer is silent in the face of the presumption [created by the plaintiff's prima facie case], the court must enter judgment for the plaintiff." *Id.* at 254.

[124] *Id.* at 256.

[125] United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

circumstantial evidence."[126] This is precisely the rationale of the *McDonnell Douglas* scheme of allocating burdens. It is also logical to draw a "presumption of invidiousness" from the defendant's offering of a false or pretextual explanation in an attempt to rebut the presumption of discrimination created by the plaintiff's prima facie case.[127] The soundness of such an approach was articulated by the Court in *Furnco Construction Corp. v. Waters*:[128]

> [W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.[129]

However, in *St. Mary's Honor Center v. Hicks*,[130] a sharply divided Court fundamentally changed the evidentiary significance of a pretextual race-neutral explanation. In *Hicks*, Justice Scalia's opinion for the majority held that under the *McDonnell Douglas* framework, the defendant has only the burden of production (in step two) which could easily be met by "producing *evidence* (whether ultimately persuasive or not) of nondiscriminatory reasons."[131] It asserted that while a combination of a prima facie case and a finding of pretext may in some cases give rise to an inference of discrimination, a plaintiff may not prevail only by showing that the employer's proffered reasons are pretextual, because "a reason cannot be proved to be a 'pretext for *discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."[132] The majority emphatically maintained that the ultimate burden of proving intentional discrimination "remains at all times with the plaintiff."[133]

Four dissenting Justices, led by Justice Souter, strongly criticized the majority for abandoning the long standing *McDonnell Douglas* framework that was carefully crafted to enable victims of intentional discrimination to prove their cases by

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[126] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 526 (1993) (Souter, J., dissenting).

[127] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1181 (1995).

[128] 438 U.S. 567 (1978); *see also Hicks*, 509 U.S. at 527-28 (Souter, J., dissenting) (citing *Furnco* to make the same point).

[129] *Furnco*, 438 U.S. at 577.

[130] 509 U.S. 502 (1993).

[131] *Id.* at 509.

[132] *Id.* at 515.

[133] *Id.* at 518 (quoting Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

indirect and circumstantial evidence. They predicted that the majority's new evidentiary "scheme would lead[] to the perverse result that employers who fail to discover nondiscriminatory reasons for their own decisions to hire and fire employees not only will benefit from lying, but must lie, to defend successfully against a disparate-treatment action."[134] The dissenters totally rejected the majority's "pretext-plus"[135] scheme as being "unfair to the plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court."[136]

The dissenters' resistance to the pretext-plus approach appears to have vanished when the Court applied it to an age discrimination case in a less rigid manner. In *Reeves v. Sanderson Plumbing Products, Inc.*,[137] a case under the Age Discrimination in Employment Act of 1967,[138] the Court unanimously reaffirmed *Hicks*, holding that the employer's burden of producing a legitimate nondiscriminatory reason is only a burden of production involving "no credibility assessment,"[139] and that a plaintiff's showing that the employer's asserted justification is false "*may permit*" a trier of fact to infer unlawful discrimination, but "*will [not]* always be adequate to sustain a jury's finding of liability."[140] In *Reeves*, the Court concluded that because the plaintiff "established a prima facie case of [age] discrimination, introduced enough evidence for the jury to reject [defendant's] explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that the [defendant] had intentionally discriminated."[141] The Justices seem to be pleased with the pretext-plus-in-waiting approach. Only Justice Ginsburg wrote a two paragraph concurring opinion to emphasize the "commonsense principle" that the defendant's false explanation for its action would give "rise to a rational inference that the defendant could be masking its actual, illegal motivation."[142]

The *McDonnell Douglas* Court explicitly treated a pretext as "a coverup"[143] which "presumably implies a deliberate deception,"[144] sufficient to support an

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[134] *Id.* at 539-40 (Souter, J., dissenting) (footnote omitted).

[135] The dissenters branded the majority's proof formula as the pretext-plus approach. *See id.* at 535-36. ("This pretext-plus approach would turn *Burdine* on its head."). The source of Justice Souter's terminology is the law review article by Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

[136] *Hicks*, 509 U.S. at 533.

[137] 530 U.S. 133 (2000).

[138] 81 Stat. 602, *as amended* 29 U.S.C. §§ 621-634.

[139] *Reeves*, 530 U.S. at 142 (quoting *Hicks*, 509 U.S. at 506 (1993)).

[140] *Id.* at 141 (emphasis added).

[141] *Id.* at 153-54 (Ginsburg, J., concurring).

[142] *Id.*

[143] *McDonnell Douglas*, 411 U.S. at 805.

[144] Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L.

inference of invidious discrimination. Now, after more than a quarter century of evolution of the evidentiary framework, plaintiff's proof that the race-neutral explanation for adverse employment action proffered by the defendant was false would not have the singular and conclusive effect of establishing invidious discrimination. What it takes to win a Title VII disparate-treatment case is proof of pretext plus proof of discriminatory racial animus.[145] As described below, the procedural intricacies in establishing invidious intent in peremptories track the recently hardened proof requirements of Title VII.

B. *Race-Neutral Explanation for Peremptories After* Purkett v. Elem

In *Batson*, the Supreme Court emphatically stated that if general assertions of good faith or lack of discriminatory motive by a prosecutor "were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'"[146] Therefore, the Court insisted that a prosecutor "must articulate a neutral explanation related to the particular case to be tried."[147] In subsequent cases, the Court reiterated its conviction that "[i]n the typical peremptory challenge inquiry, the *decisive question* will be whether counsel's race-neutral explanation for a peremptory challenge should be believed,"[148] stressing the paucity of evidence bearing on the issue of the prosecutor's state of mind in most cases.

REV. 9, 24 (1997).

[145] Under the *Hicks* formula, a fact-finder could reject both the race-neutral reason offered by the employer and plaintiff's proof of real motive and decide the case on an entirely different reason that may lurk somewhere in the record. *See* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 209-10 (1997). The Court in *Hicks* not only discards the *McDonnell Douglas* framework:

> but two of the most basic tenets of American procedure as well—first, that the court is a passive tribunal, not an active player in the construction of arguments and theories; and second, that cases are to be decided solely on the basis of the evidence presented, not the conjecture of the fact-finder.

Id. (footnote omitted).

[146] Batson v. Kentucky, 476 U.S. 79, 98 (1986) (quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)). The Court added that after articulation of a race-neutral explanation by the prosecutor, the trial court must determine whether the defendant had established purposeful discrimination. *See id.*

[147] *Id.*

[148] Hernandez v. New York, 500 U.S. 352, 365 (1991) (emphasis added). The Court in *Hernandez* also stated that "[i]f a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." *Id.* at 363. Thus, even a facially race-neutral explanation could turn out to be race-based if it produces a racially disproportionate impact.

The Court abandoned the *Batson* evidentiary rules, as they relate to race-neutral explanations, in *Purkett v. Elem*,[149] "a law-changing decision."[150] In *Purkett*, the prosecutor struck two African Americans from the jury panel stating that one had "shoulder length, curly, unkempt hair," and both had "mustache[s]," and "goatee type beard[s]" that made them "look suspicious."[151] The criminal defendant claimed that the prosecutor's use of peremptory challenges violated the *Batson* principles. The Eighth Circuit Court of Appeals, reversing the state courts, found that the basis on which the prosecutor struck the prospective jurors had no bearing on their ability to perform as jurors and did not constitute "legitimate race-neutral reasons for striking [a] juror," and that the prosecutor's explanation "was pretextual."[152] In a per curiam opinion, the Supreme Court reversed holding that its "*Batson* jurisprudence"[153] does not "demand [from the prosecutor] an explanation that is persuasive, or even plausible" and that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[154] The Court cited the *Hicks* case to support the proposition that the "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."[155] The Court also asserted that the persuasiveness of "a silly or superstitious reason" proffered by the prosecutor would not become relevant until the fact-finder sets out to decide whether the opponent of the strike had carried the burden of proving purposeful discrimination.[156]

How could the Court rationally permit the prosecutor in *Purkett* to rebut the presumption of racial discrimination created by the defendant's prima facie case with a silly or superstitious reason? As stated by Justice Stevens in his dissent, "[i]t is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, *and* trial related."[157] By treating the prosecutor's explanation as irrelevant, the Court has left the determination of the critical issue of the existence of invidious discriminatory intent entirely to the trial judge. This determination, often made by assessing the "demeanor and credibility" of the

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[149] 514 U.S. 765 (1995) (per curiam).

[150] *Id.* at 770 (Stevens, J., dissenting).

[151] *Id.* at 766.

[152] *Id.* at 767 (quoting decision of appellate court, Elem v. Purkett, 25 F.3d 679, 683-84 (8th Cir. 1994), *rev'd* 514 U.S. 765 (1995)).

[153] *Id.*

[154] *Id.* at 768 (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991)).

[155] *Id.* at 768.

[156] *Id.*

[157] *Id.* at 775 (Stevens, J., dissenting). It is also not too much to remind the prosecutor that a criminal courtroom is not a stage to display his comical talents.

prosecutor,[158] a task that lies "peculiarly within a trial judge's province,"[159] is virtually impossible for an appellate court to reverse.[160]

Justice Stevens complained that the *Purkett* Court's treatment of the prosecutor's explanation as inconsequential "demeans the importance of the values vindicated by [its] decision in *Batson*."[161] If this is true,[162] the Court has not supported its deviation from the *Batson* principles with any rational precedent or cogent justification. The Court only cited *Hicks*[163] to support the deviation in question. Clearly, the *Purkett* principles of peremptory challenges now look identical to the *Hicks* principles of employment discrimination; but, that reveals the flaw of the *Purkett* principles. The Court should have recognized the difference in constitutional magnitude between a race-neutral explanation given for a peremptory challenge and that given as justification for an employment action. First, while the constitutional value at stake in a discriminatory peremptory challenge is personal liberty, the consequence of a discriminatory employment action is mostly economic deprivation.[164] Second, the determination of the accuracy of a race-neutral explanation of a peremptory challenge is based on the trial judge's assessment of the credibility of the proponent of the challenge. In contrast, the veracity of the race-neutral explanation for an employment action is verifiable by testimonial and documentary evidence. Thus, by equating race discrimination in peremptories with

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[158] *See Hernandez*, 500 U.S. at 365. "There will seldom be much evidence bearing on [the] issue [of believability of race-neutral explanations], and the best evidence often will be the demeanor of the attorney who exercises the challenge." *Id.*

[159] *Id.* (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1985)); *see also* Patton v. Yount, 467 U.S. 1025, 1038 (1984).

[160] The Honorable James H. Coleman, Jr., Address at the Chief Justice Joseph Weintraub lecture (March 5, 1996), *The Evolution of Race in the Jury Selection Process*, 48 RUTGERS L. REV. 1105, 1133 (1996) (stating that "the *Purkett* impossible standard may become as ineffective as *Swain* in preventing invidious discrimination in the use of peremptory challenges"). *Batson* overruled *Swain.*

[161] *Purkett*, 514 U.S. at 778 (Stevens, J., dissenting).

[162] It is quite conceivable that the Court has given up step two of the *Batson* framework realizing that the evidentiary procedure is not judicially manageable since the prosecutors routinely evade the neutral explanation requirement. *See* Michael J. Raphael and Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations under* Batson v. Kentucky, 27 U. MICH. J.L. REFORM 229, 266 (1993) (stating that their empirical study of the working of *Batson* over a decade has demonstrated that, "*Batson*'s neutral explanation requirement is, regrettably, a relatively simple hurdle for a prosecutor to clear. Even a prosecutor who has dismissed jurors for racial reasons can concoct a neutral explanation for his actions that the courts will accept as proof that his strikes were not racially motivated.").

[163] 509 U.S. 502 (1993).

[164] Racially motivated employment discrimination sometimes inflicts injury to the dignity and sense of worth of the discriminated individual. But, injuries are compensable with monetary damages. In contrast, discriminatory peremptory challenges always involve the liberty, and sometimes the life, of the accused defendant.

race-discrimination in employment, the Court may just be resuscitating the pre-*Batson* practice of removing veniremen "based on perceived prejudices that do not have a rational relation to the case to be tried"[165]—a practice it should have let expire.

C. *Discriminatory Prosecution and Sentencing*

The doctrine of invidious intent is firmly entrenched in the equal protection jurisprudence of discriminatory prosecution and sentencing. Prosecutorial decisions are inherently discretionary[166] and they traditionally are accorded a presumption of regularity and propriety.[167] Since the decision to prosecute is at the core of the constitutionally assigned function of the Executive,[168] it is generally immune from judicial interference.[169] Nevertheless, the prosecutor's discretion, however sanctimonious, is "subject to constitutional constraints,"[170] and a decision to prosecute cannot be based on "an unjustifiable standard such as race, religion, or other arbitrary classification."[171] But even nominal judicial scrutiny of race-based prosecutorial abuses is rendered difficult by the doctrine of invidious intent.

To adjudicate selective prosecution claims, the Court applies the "ordinary equal protection standards"[172] that require claimants to "demonstrate that the [challenged] prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'"[173] To establish racially discriminatory effect "the claimant must show that similarly situated individuals of a different race

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[165] D. John Neese, Jr., Note, Purkett v. Elem: *Resuscitating the Nondiscriminatory Hunch*, 33 HOUS. L. REV. 1267, 1282 (1996).

[166] *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[167] *See* United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926).

[168] *See* Morrison v. Olson, 487 U.S. 654 (1988) (challenging the constitutionality of the Ethics in Government Act of 1978 which authorized the appointment of independent counsels); Heckler v. Chaney, 470 U.S. 821 (1985) (upholding enforcement discretion of the FDA).

[169] *See Heckler*, 470 U.S. at 832 (discussing discretionary power of agencies to take enforcement actions). The Supreme Court's traditional reluctance to entertain selective prosecution claims is attributable partly to its relative institutional incompetence to review purely discretionary decisions, and partly to its concern for the constitutional principle of the separation of powers.

[170] United States v. Batchelder, 442 U.S. 114, 125 (1979).

[171] United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962) and Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)).

[172] *Id.* at 465 (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

[173] *Id.* (quoting *Wayte*, 470 U.S. at 608).

were not prosecuted."[174]

United States v. Armstrong,[175] the most recent case in which the Court articulated these standards, demonstrates the near impossibility of meeting these high evidentiary requirements. The issue in *Armstrong* was whether a defendant indicted for peddling "crack" cocaine had made the threshold showing that the Government declined to prosecute similarly situated suspects of other races to justify discovery for his selective-prosecution claim.[176] Among the evidence presented by the defendant was a study, "showing that of all cases involving crack offenses that were closed by the Federal Public Defender's Office in 1991, 24 out of 24 involved black defendants,"[177] and an affadavit reporting a statement from an employee of a local drug treatment center "that, in his experience, an equal number of crack users and dealers were caucasian as belonged to minorities."[178] The district court dismissed the case when the Government failed to comply with its discovery order; the en banc panel of the Ninth Circuit Court of Appeals affirmed. The appeals court specifically held that the defendant, to obtain discovery, "may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant."[179]

The Supreme Court reversed the lower courts, maintaining that the threshold "similarly situated" requirement was necessary because it "adequately balance[d] the government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution."[180] The Court faulted the defendant in the case for his failure to identify similarly situated individuals who "could have been prosecuted . . . but were not so prosecuted,"[181] to meet the required evidentiary threshold. It simply dismissed the evidence presented in defendant's affidavits as "hearsay and reported personal conclusions based on anecdotal evidence."[182]

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[174] *Id.* at 465. The Court asserted that the "similarly situated" requirement was established by the Court in its earlier decisions in *Yick Wo*, 118 U.S. at 374 and *Ah Sin v. Wittman*, 198 U.S. 500 (1905). *Armstrong*, 517 U.S. at 466.

[175] 517 U.S. 456 (1996).

[176] *See id.* at 458. The defendant was also indicted for federal firearms offenses.

[177] *Id.* at 480 (Stevens, J., dissenting).

[178] *Id.* at 480-81. The selective-prosecution claim was also based on the allegation that a disproportionate number of black defendants were prosecuted in federal courts which impose longer sentences than the state courts. Justice Stevens noted that the defendant's sentence in the case, if found guilty by the federal court, might be as long as a mandatory life term. *Id.* at 479. However, "[h]ad he been tried in state court, his sentence could have been as short as 12 years, less worktime credits of half that amount." *Id.* at 479 (Stevens, J., dissenting).

[179] *Id.* at 469.

[180] *Id.* at 470.

[181] *Id.*

[182] *Id.*

Even though the Court established the highest criminal discovery standard imaginable and asserted that it would not be an "insuperable task to prove that [similarly situated] persons of other races were being treated differently,"[183] its opinion, written by Chief Justice Rehnquist, is devoid of any guidance or procedure for the defendants to follow.[184] It erroneously assumed that such information is available for the defendants to pursue. It is common knowledge that law enforcement officers do not keep records of individuals who should have been arrested or prosecuted, but were not.[185] Prosecutors are not likely to document their discriminatory reasons for not prosecuting so as not to leave a paper trail for the victims to trace. Prosecutors can always show why one criminal suspect is not similarly situated to another. For these reasons, the best evidence a claimant of selective prosecution could possibly produce is the type presented by the defendant in *Armstrong*. Such evidence was enough to convince the lower courts and Justice Stevens to conclude that "[t]here can be no doubt that [individuals of other races who were treated differently] exist, and indeed the Government has never denied the same."[186]

The most salient feature of the *Armstrong* decision is not that it sets a high standard for discovery, which presumably suggests even higher proof requirements to prevail on the merits, but is its failure to answer two critical questions. The first is whether a defendant who successfully demonstrates discriminatory effect needs to produce additional evidence to prove that the selective prosecution was motivated by discriminatory purpose. An affirmative answer would lead to the exploration of the subjective state of mind of prosecutors, a prospect which the Court generally abhors on legal and policy reasons. The second question that the Court "reserve[d]" for the time being is "whether a defendant must satisfy the similarly situated

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[183] *Id.*

[184] The discovery order of the district court tried to allocate burdens between prosecutors and defendants. The district court

> ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearm offenses, (2) to identify the race of the defendants in those cases, (3) to identify what level of law enforcement were involved in the investigation of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.

Id. at 459. The Supreme Court disapproved of the district court's approach, as well as the concern expressed by the Court of Appeals about the "evidentiary obstacles defendants face." *Id.* at 470 (quoting Court of Appeals decision, 48 F.3d 1508, 1514 (9th Cir. 1995)). The Court also rejected a plea of the defendant to apply an evidentiary standard it adopted in *Batson*. *See id.* at 467.

[185] Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 438 (1997).

[186] *Armstrong*, 517 U.S. at 482 (Stevens, J., dissenting). Justice Stevens argued that the district court had the discretion to take judicial notice of the fact that there were similarly situated individuals. *See id.*

requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose.'"[187] An affirmative answer to either or both of these questions will not only doom a criminal defendant's chance of prevailing in a selective prosecution case, but also demonstrate that the doctrine of invidious intent, in its original conception, is unfailingly fatal.

D. *Capital Sentencing*

The doctrine of invidious intent effectively has rendered the Equal Protection Clause inapplicable to claims of racial discrimination in capital sentencing. The Supreme Court accomplished this remarkable feat in the face of convincing proof that the race of defendants disproportionately influences decisions of prosecutors and jurors to favor death sentences. In 1990, the United States General Accounting Office, after analyzing twenty-eight studies on the subject, found that the pattern of racially biased capital sentencing across the country remained "remarkably consistent."[188] During the past quarter century, "[eighty-five] percent of the cases in which the death penalty has been carried out have involved white victims,"[189] even though fifty percent of the homicide victims have been African American. Apparent indifference of the Court and Congress to such startling statistics has created the perception that "racial discrimination in the administration of [the] death penalty is inevitable and impossible to prevent, detect, and correct."[190]

With the strict interpretation and application of the invidious intent requirement in its decision in *McCleskey v. Kemp*,[191] the Supreme Court put the final nail in the coffin of death penalty challenges on equal protection grounds.[192] In this highly controversial case,[193] an African American man sentenced to death for murdering

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[187] *Id.* at 469, n.3 (quoting Brief for United States at 15). It is troubling that the Court did not answer this question in the negative. If a prosecutor confesses her discriminatory purpose in a selective prosecution case, the Court should consider that the conduct is violative of the Equal Protection Clause.

[188] General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, 5 (February 1990).

[189] Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases*, 21 CHAMPION 19, 19 (Jan.-Feb. 1997). Mr. Bright states: "Capital punishment, a direct descendant of lynching and other forms of racial violence, remains one of America's most prominent vestiges of slavery and racial oppressions." *Id.*

[190] David Baldus et al., *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, 359 (1994).

[191] 481 U.S. 279, *reh'g denied*, 482 U.S. 920 (1987).

[192] *See* 481 U.S. at 291-99 (discussing equal protection argument). In *McCleskey*, the constitutionality of the death sentence was challenged also as cruel and unusual punishment violative of the Eighth Amendment. *See id.* at 299.

[193] *See* Bright, *supra* note 189, at 23 ("And the *McCleskey* decision must be assailed until,

a white police officer in the course of an armed robbery challenged his conviction on the ground that the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the United States Constitution. In support of his claim, the defendant produced statistics generated by "sophisticated multiple-regression analysis"[194] of over two thousand Georgia murder cases, to demonstrate that "murder defendants in Georgia with white victims [were] more than four times as likely to receive the death sentence as [were] defendants with black victims."[195]

A sharply divided Supreme Court rejected the defendant's equal protection claim because he failed to prove that the Georgia Legislature enacted or maintained its death penalty statute "to further a racially discriminatory purpose"[196] and "because of an anticipated racially discriminatory effect."[197] The Court held that the statistical studies proffered by the defendant indicated only a "discrepancy that appear[ed] to correlate with race,"[198] that they did "not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process,"[199] and that they were "insufficient to support an inference that any of the decisionmakers in [defendant's] case acted with discriminatory purpose."[200]

Justice Powell's majority opinion offered several process-based explanations and normative justifications for the Court's decision. First, it emphasized the impropriety of re-examining death sentences meted out by a process in which different layers of decisionmakers such as prosecutors and jurors, individually and collectively, make discretionary decisions after consideration of case-specific variables.[201] Referring to the demonstrated racial disparity in Georgia's capital

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like *Dred Scott v. Sanford, Plessey v. Ferguson*, and *Swain v. Alabama*, it is rejected and replaced with standards that acknowledge and respond to the influence of racial prejudice in the criminal courts in general and in capital cases in particular.").

[194] *McCleskey*, 481 U.S. at 327 (Brennan, J., dissenting); *see also id.* at 286 (discussing defendant's statistical evidence). The statistical analysis, known as the "Baldus study," was prepared by Professor David Baldus and two of his associates.

[195] *Id.* at 320 (Brennan, J., dissenting).

[196] *Id.* at 292.

[197] *Id.* at 298.

[198] *Id.* at 312.

[199] *Id.* at 313.

[200] *Id.* at 297.

[201] *Id.* at 296. Justice Powell noted, for instance, that "the policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.'" *Id.* (citations omitted). Further, "[e]ach jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." *Id.* at 294.

sentencing, Justice Powell asserted that "[t]he Constitution does not require that a State eliminate any demonstrable disparity that correlates with [race] in order to operate a criminal justice system that includes capital punishment,"[202] and that "some risk of racial prejudice influencing a jury's decision in a criminal case" is unavoidable.[203] Moreover, Justice Powell maintained that even if there was a likelihood of race factoring into some decisions,[204] the defendant offered "no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[205] Finally, Justice Powell expressed the fear that acceptance of the claim that racial bias had "impermissibly tainted the capital sentencing decision" in this case would encourage widespread challenges to other sentencing decisions on grounds of racial or other disparities.[206]

Four dissenting Justices vehemently disagreed with the majority and concluded that the defendant had "demonstrated a clear pattern of differential treatment according to race that [was] 'unexplainable on grounds other than race.'"[207] They placed particular credence on the statistics showing that a defendant in a white-victim case was 4.3 times as likely to be sentenced to death as he would have been in a black-victim case,[208] and that even among defendants in white-victim cases, a black defendant was much more likely than white defendants to be sentenced to death.[209] Analyzing the case under the evidentiary framework of *Batson*,[210] the Justices were convinced that the defendant had established purposeful discrimination by showing that the totality of the relevant facts, "including the history of Georgia's racially based dual system of criminal justice,"[211] gave rise to an inference of discriminatory purpose.[212]

The Court in *McCleskey* not only rejected "powerful evidence"[213] of a racial disparity in capital punishment, but also seemed to believe that racial prejudice in criminal sentencing is inevitable. A criminal defendant vulnerable to racially biased sentencing would not be able to challenge her death sentence without proof that she was sentenced because of the racially invidious intent of the prosecutor, jury, or the

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[202] *Id.* at 319.

[203] *Id.* at 308.

[204] Justice Powell observed that "[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions." *Id.* at 308.

[205] *Id.* at 292-93.

[206] *Id.* at 315-16.

[207] *Id.* at 361 (Blackmun, J., dissenting) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1997)).

[208] *See id.* at 355.

[209] *Id.* at 353.

[210] 476 U.S. 79 (1986).

[211] *McCleskey*, 481 U.S. at 359 (Blackmun, J., dissenting).

[212] *See id.* at 351-52 (explaining the requirements for a prima facie case of purposeful discrimination).

[213] *Id.* at 339 (Brennan, J., dissenting).

judge. That kind of direct proof is almost impossible to produce. Under the *McCleskey* standard, "proof of racial discrimination in capital punishment cases is beyond the capacity of virtually all capital defendants."[214] This explains the finding of an empirical study of capital cases, in which claims of racial discrimination were made, that "[i]t is remarkable that in ten years of post-*McCleskey* litigation, not a single claimant has prevailed."[215]

III. BYPASSING INVIDIOUS INTENT

In *Davis*, the Supreme Court simultaneously declared two distinct, but interlocking principles: first, the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race,"[216] and second, "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[217] The Court, in a subsequent case, claimed that it had "repeatedly" reaffirmed the second "principle that an invidious purpose must be adduced to support a claim of unconstitutionality."[218] Despite the judicial declaration of its universality, the doctrine of invidious intent found itself out of focus in the three-tiered standards of equal protection scrutiny.

A. *Invidious Intent in Suspect Classifications*

In its initial encounters with the controversial issue of the constitutionality of explicit racial classifications in federally mandated affirmative action programs, the Court seemed comfortable with using invidious discrimination as the dominant criterion for its decisions. In *Fullilove v. Klutznick*,[219] the Court upheld a ten percent contract set-aside program for minority subcontractors in federally funded construction projects, on grounds that the program was narrowly tailored to accomplish the objective of remedying the present effects of past discrimination.[220] The Court also held:

> There has been no showing in [the] case that Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of

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[214] Baldus et al., *supra* note 190, at 370.

[215] John H. Blume et al., *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1807 (1998).

[216] Washington v. Davis, 426 U.S. 229, 239 (1976).

[217] *Id.* at 240.

[218] City of Mobile v. Bolden, 446 U.S. 55, 63 n.10 (1980) (emphasis omitted).

[219] 448 U.S. 448 (1980).

[220] *See id.* at 480.

> disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the [set-aside] program.[221]

As to the claim of discriminatory effects of the program on non-minority firms, the Court ruled that "[t]he actual burden shouldered by them was relatively light,"[222] and that Congress has unique remedial powers "to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities."[223]

While the majority opinion in *Fullilove*, written by Chief Justice Burger, emphasized the "benign" or non-invidious purpose of the federal program and judicial obligation to accord appropriate deference to determinations of Congress—the coequal branch endowed with comprehensive remedial powers—as the basis for upholding the program, it also made clear that the Court would always be alert to prevent "us[es] of racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination."[224] But, such assurance was not enough to prevent Justices Stewart and Rehnquist from writing a strongly worded dissenting opinion. They argued that the equal protection standard "absolutely prohibits invidious discrimination by government"[225] and that "racial discrimination is by definition invidious discrimination."[226]

The disagreement among the Justices intensified when the Court, by a narrow majority in *City of Richmond v. J.A. Croson Co.*,[227] decided to subject all racial classifications to strict scrutiny, regardless of "the race of those burdened or benefitted by a particular classification."[228] The Court claimed that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[229] The Court invalidated a thirty percent minority contract set-aside program of the City of Richmond because it failed to pass strict scrutiny by demonstrating that the program was narrowly tailored to achieve a compelling governmental interest.

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[221] *Id.* at 486.

[222] *Id.* at 484.

[223] *Id.* at 485.

[224] *Id.* at 486-87.

[225] *Id.* at 523 (Stewart, J., dissenting) ("The equal protection standard of the Constitution has one clean and central meaning—it absolutely prohibits invidious discrimination by government.").

[226] *Id.* at 526 (Stewart, J., dissenting).

[227] 488 U.S. 469 (1989).

[228] *Id.* at 494.

[229] *Id.* at 493.

Again, in *Adarand Constructors, Inc. v. Pena*,[230] a sharply divided Court applied the standard of strict scrutiny to invalidate a federal program that provided a financial incentive to federal prime contractors to select minority subcontractors, declaring that "all racial classifications, imposed by whatever federal, state, or local government actor . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[231] The *Adarand* Court not only undermined the *Fullilove* decision,[232] but also overruled its decision in *Metro Broadcasting v. FCC*[233] that applied the standard of intermediate scrutiny[234] to approve a "benign race-conscious measure[] mandated by Congress"[235] that gave racial minorities a limited preference in broadcast licensing.

Strict scrutiny of explicit racial classifications entirely and unconditionally bypasses the doctrine of invidious intent. The Supreme Court has made clear that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification."[236] Even though the Court started out with a justification in *Croson* that strict scrutiny is necessary to determine "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics,"[237] that reason sounds hollow in the context of affirmative action which, as everyone knows, has a benign purpose, and has nothing left for the strict scrutiny to "smoke out."[238] Realizing this patent fallacy, perhaps the Court abandoned the smoke out justification in favor of a straightforward and enduring rule that all racial classifications are suspect, and therefore subject to strict scrutiny "whether or not the reason for the racial classification is benign or the purpose

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[230] 515 U.S. 200 (1995).

[231] *Id.* at 227.

[232] *Id.* at 235 ("Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to less rigorous standard, it is no longer controlling.").

[233] 497 U.S. 547 (1990).

[234] Under intermediate scrutiny, a gender classification would be constitutional if it serves an important governmental objective and is substantially related to the achievement of the objective. *See* United States v. Virginia, 518 U.S. 515, 530-35 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982), Craig v. Boren, 429 U.S. 190, 197 (1976).

[235] *Metro Broad.*, 497 U.S. at 564. In *Metro Broadcasting*, the Court said that it would approve a race-conscious program even if it is "not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination," if it passes intermediate scrutiny. *Id.* at 565.

[236] Shaw v. Reno, 509 U.S. 630, 643-44 (1993) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

[237] 488 U.S. at 493.

[238] *Id.* Strict scrutiny was indeed "used by the Warren Court as a means to ferret out invidious intent." *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown, *and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 148 (1998).

remedial."[239]

It is even doubtful whether the Court's majority now differentiates between "invidious" and "benign" racial discrimination at all. According to Justice O'Connor, "'"[b]enign" racial classification' is a contradiction in terms,"[240] reasoning that the classification is not benign to a person denied a right or opportunity. Justices Scalia[241] and Thomas take the uncompromising position that "good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race."[242] In contrast, Justice Stevens, in his *Adarand* dissent, argued that while "[i]nvidious discrimination is an engine of oppression" designed to perpetuate a caste system, benign discrimination reflects the opposite impulse—the desire to foster equality, and that there is "no moral or constitutional equivalence" between the two types of discrimination.[243]

These disagreements among the Justices dispel any lingering notion that strict scrutiny is in any way concerned with invidious intent. A government policy or action, invidiously motivated or not, would now pass strict scrutiny so long as it is narrowly tailored to achieve a compelling interest. It is the compelling nature of the government's justification, and not its invidious or beneficent intent, that determines the constitutionality of a contested public act or policy. Therefore, in deciding the constitutionality of explicit racial classification, the doctrine of invidious intent no longer has a meaningful role to play.[244]

This is not to say that strict scrutiny provides a safe haven for laws motivated by invidious discriminatory intent. It plausibly could be argued that strict scrutiny indirectly operates as a mechanism to filter out and exterminate suspect classifications infected with invidious motives. It may be just as awkward for a court to stamp its imprimatur on a law that is shown to have been motivated by discriminatory racial animus as it would be difficult for the law's sponsor to demonstrate a justifying, compelling interest to survive strict scrutiny. Even if all these assumptions are correct, they would not alter the fact that invidious

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[239] Shaw v. Hunt, 517 U.S. 899, 904-05 (1996).

[240] *Metro Broad.*, 497 U.S. at 609 (O'Connor, J., dissenting) (quoting O'Connor's opinion in *Croson*, 488 U.S. 564).

[241] *Croson*, 488 U.S. at 528 (Scalia, J., concurring) (stating that no race-based program is "in accord with the letter" of the Constitution).

[242] Adarand Constructors v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

[243] *Id.* at 243 (Stevens, J., dissenting).

[244] This conclusion obviously contradicts John Hart Ely's theory that the function of strict scrutiny and "in particular its demand for perfect fit, turns out to be a way of 'flushing out' unconstitutional motivation." JOHN HART ELY, DEMOCRACY AND DISTRUST 146 (Harvard Univ. Press 1980). The Supreme Court's affirmative action and redistricting cases and its pronouncements concerning strict scrutiny of explicit racial classification simply show that Ely's theory is wrong.

discriminatory intent is not the ultimate determinant of equal protection violations under the regime of strict scrutiny.

B. *Invidious Intent in Non-Suspect Classifications*

Invidious discriminatory intent is nothing more than a tangential concern in the review of non-suspect classifications under the prevailing relaxed standards of scrutiny.[245] The Supreme Court appears to display an unmistakable proclivity to avoid giving dispositive significance to discriminatory animus even when it constitutes the sole or dominant motivation behind an equal protection violation. The Court tends to pay more attention to the discriminatory effect of unequal treatment engendered by a non-suspect classification than its apparent or subliminal motivation. The Court's widely popular decisions in *United States v. Virginia*[246] and *Romer v. Evans*,[247] decided under two different levels of scrutiny, appropriately illustrate the avoidance of invidious intent-based judicial review.

1. *United States v. Virginia*

In *Virginia*, the Court considered the constitutionality of the all-male admissions policy of Virginia Military Institute (VMI), a military-styled school of higher education. VMI was the only publicly funded single-sex college in the Commonwealth of Virginia. It was established in 1839 to produce citizen-soldiers using its unique "adversative" method of training that emphasizes "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."[248] Because it was originally designed for male cadets housed "in spartan barracks where surveillance is constant

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[245] To trigger strict scrutiny, a law must either be based on a suspect classification such as race, e.g., Korematsu v. United States, 323 U.S. 214 (1944), illegitimacy, *e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968), or implicate a fundamental right, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Gerald Gunther, *The Supreme Court, 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Gender classifications are reviewed under intermediate scrutiny that requires a showing that the classification is substantially related to achieving an important governmental interest. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982). Gender classifications are sometimes designated as quasi-suspect classifications. A law which does not involve suspect, quasi-suspect classifications, or fundamental rights will be reviewed under minimum rationality standard which only requires a showing that the classification is "rationally related to a legitimate governmental purpose." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

[246] 518 U.S. 515 (1996).

[247] 517 U.S. 620 (1996).

[248] *Virginia*, 518 U.S. at 522 (quoting lower court opinion, United States v. Virginia, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

and privacy nonexistent,"[249] the "adversative method," as it pertains to personal privacy and physical education, would have to be modified to make it suitable for women cadets.[250] VMI has a "reputation as an extraordinarily challenging military school"[251] with a network of influential and beneficent alumni who are "exceptionally close to the school."[252] But women never had an opportunity to be a part, or share the benefits, of a VMI education.

The Supreme Court agreed with the Fourth Circuit Court of Appeals that VMI's exclusively male admission policy denied educational opportunity to deserving and competent women, and, therefore, it violated the Equal Protection Clause. But, the Supreme Court rejected the appeals court's conclusion that the constitutional violation could be remedied by establishing a parallel program for women, the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College,[253] because the "VWIL program [was] fairly appraised as a 'pale shadow' of the VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."[254]

The Supreme Court reviewed the VMI policy under a standard alternately designated as "intermediate scrutiny" or "skeptical scrutiny,"[255] which requires a party seeking to defend a gender-based classification to demonstrate an "exceedingly persuasive justification" for that classification.[256] Virginia proffered a two-fold justification for the VMI gender-based policy. First, it asserted that "single-sex education provides important educational benefits" and contributes to

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[249] *Id.*

[250] *See id.* at 524.

[251] *Id.* at 523.

[252] *Id.* (quoting district court opinion, 766 F. Supp. at 1421).

[253] The parallel program, Virginia Women's Institute for Leadership (VWIL) was to be established as a four-year state sponsored undergraduate program located at Mary Baldwin College to accommodate twenty-five to thirty students. VWIL was conceived from the Fourth Circuit's direction in the first phase of the litigation that Virginia may either admit women to VMI or provide substantially equal educational opportunities to them.

[254] *Virginia,* 518 U.S. at 553 (quoting appellate court, 44 F.3d 1229, 1250 (Phillips, J., dissenting)).

[255] *Id.* at 531. Many commentators agree with Justice Scalia's dissent that the Court actually elevated the standard to the strict scrutiny level. *See* Candace Saari Kovacic-Fleischer, United States v. Virginia's *New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 915 (1997).

[256] *Virginia,* 518 U.S. at 530, (quoting J.E.B. v. Alabama *ex rel.* T.B. 511 U.S. 127, 136-37 (1994) and Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). To meet the test, VMI had to show "at least that the [gender-based] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Virginia,* 518 U.S. at 533 (quoting Miss. Univ. for Women, 458 U.S. at 724, and Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

"diversity in educational approaches."[257] Second, it argued that the VMI adversative "method of character development and leadership training" is so male-oriented that it would have to be modified at the risk of losing its uniqueness, to make it suitable for training women.[258]

The Court found Virginia's justifications totally unpersuasive. The Court was convinced that "[n]either recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options."[259] It brushed aside Virginia's portrayal of the prevailing lack of public single-sex higher education for women as "an historical anomaly,"[260] stating that "the historical record indicates action more deliberate than anomalous."[261] The Court held that any notion of diversity that "serves only the Commonwealth's sons, [and] makes no provision for her daughters" did not comport with the idea of equal protection.[262]

While the Court conceded "that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets,"[263] it rejected "[t]he notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school"[264] as an unproven, self-fulfilling prophecy. The Court also intimated that the VMI adversative system itself was based on over-broad generalizations and stereotypical "notions concerning the roles and abilities of males and females."[265] In sum, the Court concluded that VMI's categorical exclusion of "all women from 'citizen-soldier' training for which some are qualified . . . cannot rank as 'exceedingly persuasive'"[266] under the applicable standard of scrutiny.

Clearly, the singular focus of the Supreme Court in *Virginia* was the effect of VMI's exclusionary policy on the equality rights and equal opportunities of women, rather than the invidious discriminatory intent of the Commonwealth of Virginia. As the Court framed it, "the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."[267] The Court's narrative of the

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[257] *Virginia*, 518 U.S. at 534 (quoting Brief of Cross-Petitioners 20).

[258] *Id.* (quoting Brief of Cross-Petitioners 25).

[259] *Id.* at 536.

[260] *Id.* at 538 (quoting Brief of Cross-Petitioners 30).

[261] *Id.* at 538. The Court described Virginia's slow and measured desexualization history thus: "First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation." *Id.* at 538.

[262] *Id.* at 540.

[263] *Id.* That the Court stated that women's admission would necessitate such accommodation is "uncontested." *Id.*

[264] *Id.* at 542.

[265] *Id.* at 541 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

[266] *Id.* at 545 (citation omitted).

[267] *Id.* at 542 (quoting United States v. Commonwealth of Virginia, 52 F.3d at 93 (Motz,

history of VMI and of the gradual, measured desexualization of the Virginia system of higher education was meant solely to refute Virginia's claim that the VMI single-sex policy was a historical aberration and that its continuance promoted educational diversity.[268]

The Court was less interested in uncovering invidious discriminatory intent than in bringing about equal opportunity for women as is apparent from several of its statements. The Court recognized as an uncontested reality that "[s]ingle-sex education affords pedagogical benefits to at least some students,"[269] and it expressed its unwillingness to "question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities."[270] The Court called the inherent physical differences between men and women a "cause for celebration, but not for denigration,"[271] and acknowledged "that most women would not choose VMI's adversative method."[272] Finally, the Court reiterated its position that sex classifications are not per se suspect or presumptively unconstitutional, and that they may be used as a means "to compensate women 'for particular economic disabilities [they have] suffered,'"[273] to "promot[e] equal employment opportunity,"[274] and "to advance full development of the talent and capacities of our Nation's people."[275] These permissive statements also suggest that it would have been difficult for the Court to find invidious discriminatory intent in Virginia's single-sex educational policies even if it had searched for it.

The remedies designed by the Court to assure equal educational opportunities for women were modest and forward-looking. The Court ordered VMI not only to admit women, but also to make "adjustments" and "alterations" to "accommodate" women cadets.[276] The Court even seemed to be willing to accept alternative or

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J., dissenting from denial of rehearing en banc)).

[268] *See id.* at 535 ("But Virginia has not shown that VMI was established, or had been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth."); *see also id.* at 539 ("In sum, we find no persuasive evidence in this record that VMI's male-only admission policy 'is in furtherance of a state policy of "diversity."'") (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992)).

[269] *Id.* at 535.

[270] *Id.* at 534 n.7 (citing Brief for Twenty-six Private Women's Colleges as Amici Curiae 5).

[271] *Id.* at 533.

[272] *Id.* at 542.

[273] *Id.* at 533 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)).

[274] *Id.* (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987)).

[275] *Id.* at 533-34.

[276] *Id.* at 545 n.15. The Court added "it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets." *Id.* at 540.

parallel programs, provided they were substantially and qualitatively equal.[277] Thus, to achieve its paramount objective of gender equity, the Court would even risk sacrificing the venerable equal protection principle that separate but equal is inherently unequal.[278] The remedial options made available to VMI were hardly the types of retroactive or punitive measures befitting an invidious discriminator.

2. *Romer v. Evans*[279]

Amendment 2 to the Colorado Constitution, adopted by a state-wide referendum, provided that no department, agency, or public institution of the state and political subdivisions shall adopt or enforce laws that prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[280] The amendment not only repealed existing anti-discrimination laws to the extent they provided protections against bias to homosexuals, but also prohibited the adoption of such laws "in the future unless the state constitution is first amended to permit such measures."[281] In *Romer*, the United States Supreme Court, after review under the minimum rationality standard, held that the amendment violated the Equal Protection Clause because the state failed to offer a rational justification for singling out homosexuals by a single trait[282] to deny them legal protections readily available to everyone else.[283]

Amendment 2 was an expression of Colorado voters' aversion to, and moral

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[277] *Id.* at 553 ("Virginia, in sum, while maintaining VMI for men only, has failed to provide any 'comparable single-gender women's institution.'").

[278] *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

[279] 517 U.S. 620 (1996).

[280] COLO. CONST. ART. II, § 30b. The Amendment in its entirety reads:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

See also Romer, 517 U.S. at 624 (citing the Colorado constitution).

[281] *Romer*, 517 U.S. at 627.

[282] *See id.* at 633 ("It identifies persons by a single trait and then denies them protection across the board.").

[283] *See id.* at 627 ("The amendment withdraws from homosexuals, but no others, specific legal protection from injuries caused by discrimination . . . ."); *id.* at 635 ("Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

disapproval of, homosexuality.[284] But, as the Court found, the law inflicted "immediate, continuing, and real injuries"[285] on gays and lesbians by depriving them "even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."[286] Therefore, it was not difficult for the Court to hold that the imposition of such a "broad and undifferentiated disability on a single named group"[287] was so unprecedented that the amendment "raise[d] the inevitable inference that the disadvantage imposed [was] born of animosity toward the class of persons affected."[288]

If the Court was convinced, as it claimed, that the amendment was "inexplicable by anything but animus toward the [targeted] class,"[289] and the deprivations and injustices meted out by it were "unprecedented in our jurisprudence,"[290] then why did the Court hesitate to let the law sink by the sheer weight of the unlawful animus alone? The Court easily could have condemned the law by the straight application of the doctrine of invidious discriminatory intent. But, the Court chose to invalidate the law on the alternative grounds of "extreme overbreadth"[291] and lack of a

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[284] *See id.* at 644 (Scalia, J., dissenting) (maintaining that Amendment 2 represented only the "moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.").

[285] *Id.* at 635.

[286] *Id.* at 630.

[287] *Id.* at 632.

[288] *Id.* at 634.

[289] *Id.* at 632.

[290] *Id.* at 633.

[291] Richard F. Duncan, *The Narrow and Shallow Bite of* Romer *and the Eminent Rationality of Dual-Gender Marriage: A Partial Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 165 (1997) ("The constitutional flaw in Amendment 2 was its extreme overbreath, not the identity of the group it adversely affected."); *see also* Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 407 (1997) (stating that "it is Amendment 2's unjustifiable and unprecedented scope, its 'sheer breadth' that distinguishes it not only from other [legitimate] exercises of the state's near-plenary power over its political subdivisions") (quoting *Romer*, 517 U.S. at 632); Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of* Romer, 95 MICH. L. REV. 236, 253-54 (1996) (stating that an "unconstitutional . . . breadth-based theory better explains both the *Romer* Court's decision and the unconstitutionality of Amendment 2 than the theory [that it amounted to a bill of attainder as] proposed by Professor Amar . . . .").

Only Professor Koppelman interpreted the Court's opinion in *Romer* as one based on invidious intent. *See* Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 132 (1997) ("The core constitutional objection to Amendment 2 is that, absent invidious motives, it probably would not have passed."). However, he admits that no other commentators agree with him. *See id.* at 92 ("To my knowledge, however, no one has been willing to suggest that the Court might have meant what it said: that the Amendment was invalid because of its impermissible purpose.").

palatable "public-regarding"[292] justification from the state. There are good reasons to believe or at least to speculate, that the avoidance of the intent doctrine was deliberate.

First, a decision predicated on invidious discriminatory animus in *Romer* would have forced the Court to revisit its infamous decision in *Bowers v. Hardwick*.[293] In *Bowers*, the Court held that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"[294] provided a rational, constitutionally acceptable justification for a law that criminalized homosexual sodomy. According to Justice Scalia, "[i]n holding [in *Romer*] that homosexuality cannot be singled out for disfavorable treatment," the Court contradicted its "unchallenged" decision in *Bowers*.[295] Justice Scalia argued, very logically, that "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct,"[296] and that the only "animus" at issue in both cases is "moral disapproval of homosexual conduct."[297] Instead of confronting and explaining the apparent inconsistency in the two decisions, the *Romer* Court simply ignored the *Bowers* decision by never mentioning it.

Second, despite its fairly laudable statements[298] concerning the evil intent and deleterious effects of Amendment 2, the Court seemed quite unwilling to establish an equal protection rule that invidious discriminatory animus against any group of citizens solely based on their status or sexual preference is, by itself,

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[292] Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996). Sunstein wrote:

> The underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior. The state must justify discrimination on some other, public-regarding ground.

Id.

[293] 478 U.S. 186 (1986).

[294] *Id.* at 196.

[295] *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

[296] *Id.* at 641.

[297] *Id.* at 644.

[298] The Court's opinion begins with the recitation of *Plessy v. Ferguson*, 163 U.S. 537 (1896), invoking the legacy of racial discrimination to underscore the abhorrent nature of Amendment 2:

> One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

Romer, 517 U. S. at 623 (citations omitted) (quoting *Plessy*, 163 U.S. at 559).

unconstitutional. The most sensible way to demonstrate the Court's profound disgust for Amendment 2, which was characterized as unprecedented in our jurisprudence, was to condemn it mercilessly as a per se violation of the constitutional norm against laws motivated by invidious discriminatory intent. In the alternative, the Court could have emulated the Colorado district court that declared that Amendment 2 violated a "fundamental right . . . not to have the State endorse and give effect to private biases."[299] Grounding the *Romer* decision on such a solid and unambiguous constitutional principle would have prevented the likes of Amendment 2 from future enactment anywhere. The consequence of the Court's failure to do so may prove to be a costly mistake.

There is no consensus among commentators about the precise meaning or the jurisprudential underpinnings of the *Romer* decision.[300] Some scholars think that the decision espouses a "pariah principle"[301] or that it "embodies a ban on laws motivated by a desire to create second-class citizenship."[302] But, *Romer* "does not hold that moral disapproval of homosexual conduct is invidious or irrational."[303] The decision would not "preclude proponents of 'traditional family values' from enacting piecemeal a series of statutes or state constitutional amendments that would facilitate equally far-reaching discrimination on the basis of sexual orientation throughout both public and private sectors."[304] But, *Romer* would not have been construed as a facilitator of such retail or piecemeal class-based discrimination, had the decision been grounded on the doctrine of invidious discriminatory intent.[305]

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[299] Evans v. Romer, 60 EMPL. PRAC. DEC. (CCH) ¶ 41,998 at 73,841 (Colo. Dist. Ct. 1993).

[300] *See* Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 73 ("No one can write confidently about what *Romer* 'means' because its ultimate meaning is yet to be determined by future judges and litigants.").

[301] Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 257-58 (1996) (explaining "[t]his principle . . . forbids the government from designating any societal group as untouchable, regardless of whether the group is generally entitled to some special degree of judicial protection").

[302] Sunstein, *supra* note 292, at 63.

[303] Duncan, *supra* note 291, at 165.

[304] Baker, *supra* note 291, at 407.

[305] The reading of *Romer* as permissive of piecemeal discriminatory legislation against gays and lesbians is inescapable in light of the *Romer* Court's failure to acknowledge or distinguish *Bowers*. What the *Romer* Court requires of the legislators is an acceptable rationale for discrimination (not a judicial command not to discriminate).

IV. AUTOTOMIZATION OF INVIDIOUS INTENT

The doctrine of invidious intent, though effectively sidelined by the equal protection standards of scrutiny, is not in any danger of becoming defunct. Besides being strictly applied in the area of criminal law enforcement, the doctrine remains ostensibly relevant to issues of equal protection violations in other contexts. However, the Supreme Court seems to realize that the doctrine as originally envisioned in the *Davis* trilogy is either too rigid to apply uniformly without substantive modifications or that its application is not always conducive to the interests of rendering justice as contemplated by the Equal Protection Clause. Thus, as illustrated by the following segments, the Court has reformulated the doctrine to make it fit in legislative redistricting cases, and has declared the doctrine inapplicable in *M.L.B. v. S.L.J.*[306] in order to avoid an unjust outcome.

A. *Legislative Redistricting*

The Supreme Court has revised fundamentally the core meaning of invidious intent in the context of legislative redistricting. In the revised version, the intent or purpose of a redistricting law need not be invidious to violate the Equal Protection Clause. The Court will treat a redistricting plan as unconstitutional racial gerrymandering if race is shown, directly or inferentially, to be the "predominant factor motivating the legislature's [redistricting] decision."[307] The sole touchstone of constitutional invalidity is the racially motivated "purpose or object."[308] A voter challenging the constitutionality of redistricting legislation is not required to show that the legislature adopted the redistricting plan "because of an anticipated racially discriminatory effect"[309] on any identifiable group, or that she suffered an actual injury by way of denial, dilution, or abridgement of her voting right. This is a radical departure from the Court's "ordinary equal protection standards" which would have required the voter-challenger to demonstrate that the redistricting plan "had a discriminatory effect and that it was motivated by a discriminatory purpose."[310]

The Court has been adhering faithfully to the ordinary equal protection standard of invidious intent, even in review of redistricting legislation, until it abruptly

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[306] 519 U.S. 102 (1996).

[307] Miller v. Johnson, 515 U.S. 900, 916 (1995); *see also* Bush v. Vera, 517 U.S. 952, 959 (1996) (O'Connor, J., plurality opinion) (discussing redistricting plan of the Texas legislature).

[308] *Miller*, 515 U.S. at 913.

[309] McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (emphasis omitted).

[310] United States v. Armstrong, 517 U.S. 456, 465 (1996) (citing Wayte v. United States, 470 U.S. 598, 608 (1985)) (dealing with the constitutional requirements to prove a selective prosecution claim).

changed course in *Shaw v. Reno*[311] and its progeny.[312] In *United Jewish Organizations v. Carey*,[313] for instance, the Court rejected a constitutional challenge to the creation of a majority-minority district because the challengers failed to contend "that the proposed [redistricting] plan was adopted with the intent, or had the effect, of unduly minimizing the white majority's voting strength."[314] Three dissenting Justices in *Shaw* exhorted the Court to follow the precedents and "be consistent in what [it] require[s] from a claimant: proof of discriminatory purpose and effect."[315]

But, it is not difficult to see why the Court was unable to be consistent. As described in detail later, the strict application of the invidious intent standard, requiring credible proof of discriminatory purpose and effect, would not have produced findings of racial gerrymanders in the *Reno* line of cases—findings that were crucial in achieving the Court's avowed objective of outlawing race-domineering redistricting at all costs. The Court has come to the conclusion that overly race-sensitive legislative redistricting is antithetical to the doctrine of colorblindness,[316] which is the centerpiece of its prevailing equal protection jurisprudence.

However, race-conscious legislative redistricting is remarkably different from race-conscious governmental decisionmaking in other settings, such as public employment or contracting. Legislative redistricting is inherently and universally race-dependent. Redistricting legislatures are invariably "aware of racial demographics,"[317] "just as [they are] aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."[318] The Court does not consider "[t]hat sort of race consciousness [to] lead inevitably to impermissible racial discrimination."[319] Thus, it is quite apparent that there is no such thing as

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[311] 509 U.S. 630 (1993).

[312] *See generally* Abrams v. Johnson, 521 U.S. 74 (1997); Shaw v. Hunt, 517 U.S. 899 (1996); *Bush*, 517 U.S. 952; *Miller*, 515 U.S. 900.

[313] 430 U.S. 144 (1977).

[314] *Shaw*, 509 U.S. at 664 (White, J., dissenting) (discussing *United Jewish Organizations*).

[315] *Id.* at 671 (White, J., dissenting).

[316] The Court derived the colorblindness doctrine from the Equal Protection Clause. The "central purpose [of the Equal Protection Clause] is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw*, 509 U.S. at 642. Further, "[i]ts central mandate is racial neutrality in governmental decisionmaking." *Miller*, 515 U.S. at 904; *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding Equal Protection Clause requires strict scrutiny of racial classification). In *Shaw*, the plaintiffs "alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process." 509 U.S. at 641-42.

[317] *Miller*, 515 U.S. at 916.

[318] *Shaw*, 509 U.S. at 646.

[319] *Id.*

color-blind redistricting, and the Court expresses no qualms in accepting that unavoidable reality.[320]

Yet, a majority of the Justices seem convinced that considerations of race in redistricting at times tend to stray beyond the zone of constitutionality. They are unwilling to sanctify the creation of majority-minority districts, even if they represent a power sharing arrangement between the powerful white majority and the historically power-deprived African American minority,[321] or a desire to fulfill the state's obligation to comply with the federal Voting Rights Act.[322] But, its acknowledgment that race-conscious redistricting does not necessarily involve invidious racial classification made it hard for the Court to condemn the creation of majority-minority districts as unconstitutional under the traditional equal protection principles. The Court had to invent a workable alternative formula to bring redistricting within the penumbra of constitutional illegality. What it invented was a formula that determines illegality solely on the basis of a theoretical distinction between being aware of racial consideration and being predominantly motivated by race.[323] The distinction is premised on the flawed assumption that the degree and intensity of racial consideration in redistricting could be measured empirically and recorded on a scale of racial awareness to a racial predominance. The Court has conceded that the distinction is "difficult to make"[324] and the dissenting Justices categorically reject it as "unworkable."[325]

Even though the distinction between racial awareness and suspect racial motivation is grossly fallible as a durable equal protection standard, it served the Court's immediate need to discourage the creation of majority-minority districts, which it despised with hyperbolic metaphors such as segregation and apartheid.

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[320] In *Shaw*, the Court made the following observation: "[d]espite their invocation of the ideal of a 'color-blind' Constitution, [plaintiffs] appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise . . . ." 509 U.S. at 642 (citations omitted).

[321] *See* Bush v. Vera, 517 U.S. 952, 1038 (1996) (Stevens, J., dissenting) (stating that the majority "entirely misapprehended the nature of the harm that flows from" the creation of majority-minority district since they represent "a decision by the majority to *share* political power with the victims of past discriminatory practices").

[322] In *Miller v. Johnson*, the Court was specifically outraged by the practice of the U.S. Department of Justice which "was driven by its policy of maximizing majority-black districts," to insist that the states implement the policy to fulfill their obligation to comply with the Voting Rights Act. 515 U.S. at 924; *see also* Voting Rights Act of 1965, 42 U.S.C. § 1973 (amended 1970).

[323] *See Shaw*, 509 U.S. at 646; *see also Bush*, 517 U.S. at 958, 959 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race . . . [f]or strict scrutiny to apply . . . race must be 'the predominant factor motivating the legislature's [redistricting] decision.'") (quoting *Miller*, 515 U.S. at 916) (emphasis omitted).

[324] *Miller*, 515 U.S. at 916.

[325] Abrams v. Johnson, 521 U.S. 74, 116 (1997) (Breyer, J., dissenting).

Since the overriding racial motivation in the creation of majority-minority districts was so plainly obvious, and the state legislatures generally conceded that fact, the awareness-motivation distinction presented no analytical problem in the *Shaw* line of cases. But, the proposition that the predominant racial motivation of the legislature could render a redistricting law unconstitutional can exist only at the expense of established equal protection principles. The proposition fundamentally deviates from the "general equal protection principle that the 'invidious quality' of the governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.'"[326] In fact, proof of invidious intent is no longer a requirement for a finding of unconstitutional racial gerrymandering.

1. Relativity of Intent

All Justices of the Supreme Court agree that legislative redistricting is a complex and intricate undertaking that implicates a multiplicity of factors and accommodates a myriad of conflicting interests. Even though the Court's majority favors reapportionment based on "traditional redistricting principles" such as compactness, contiguity, and respect for political subdivisions and shared community interests, all Justices recognize that consideration of race is an unavoidable and ubiquitous feature of legislative redistricting. There is no suggestion in any of the cases that simple awareness or consideration of race, without invidiousness, would have any constitutional significance. In the words of Justice Ginsburg, "[t]o offend the Equal Protection Clause, all [Justices] agree, the legislature ha[s] to do more than consider race. How much more, is the issue that divides the Court . . . ."[327]

The Court's majority would cast the blemish of unconstitutionality on redistricting when consideration of race becomes "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[328] This theory provides neither a determinate benchmark of unconstitutionality nor a dependable method to identify instances of legislative overreaching. The theory also suffers from some fundamental weaknesses. First, it discards the long standing equal protection principle that "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[329] The only inquiry relevant to the principle is whether there is a racial classification, not whether the classification is predominantly racial. Second, the Court's theory does not necessarily demand

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[326] Batson v. Kentucky, 476 U.S. 79, 93 (1986) (quoting Washington v. Davis, 426 U.S. 229, 240 (1976)).

[327] *Miller*, 515 U.S. at 935 (Ginsburg, J., dissenting).

[328] *Id.* at 916; *see also Bush*, 517 U.S. at 959; Shaw v. Hunt, 517 U.S. 899, 905 (1996).

[329] Shaw v. Reno, 509 U.S. 630, 643-44 (1993) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

extraordinary justification, even for the intentional racial classification. The Court promises not to "apply [strict scrutiny] to all cases of intentional creation of majority-minority districts."[330] Justices Thomas and Scalia specifically criticized the Court on this point. In their opinion, intentional creation of majority-minority districts is ipso facto racial gerrymandering since they represent "express use of racial classifications" and they are "created 'because of,' and not merely 'in spite of,' racial demographics."[331]

Third, the Court's theory of gerrymandering relies on the questionable assumption that the "mixed motive[s]"[332] that drive redistricting legislatures could be easily unraveled to isolate racial motives. The *Shaw* line of cases themselves reveal "the difficulty of disentangling the tightly woven racial, partisan, incumbent-protective, and particular-candidate-favoring threads that are woven together in a districting plan."[333] The disentangling is made extremely difficult by the high degree of judicial tolerance toward the common practice of drawing irregular district lines for political and incumbency protection purposes. Incumbency protection is recognized "as a legitimate state goal"[334] and political gerrymandering claims "are not justiciable."[335] The Court declared, in no uncertain terms, that political gerrymandering would not be transformed into racial gerrymandering, "no matter how conscious redistricters were of the correlation between race and party affiliation."[336] The Court's solicitude for political gerrymandering and incumbency protection may amount to nothing more than the prudent recognition of the realities of the process of redistricting, but it could easily undercut the goal of banning decisions "to place significant numbers of voters within or without [] particular district[s],"[337] on the basis of race since those decisions could be easily masked under political and incumbency protection rationales.[338]

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[330] *Bush*, 517 U.S. at 958.

[331] *Id.* at 1001 (Thomas, J., concurring).

[332] *Id.* at 959. Note that in *Bush*, the Court characterized the suit as a "mixed motive suit" because the state of Texas conceded that the creation of a majority minority district was designed to achieve multiple goals, including incumbency protection. *Id.*

[333] Richard Briffault, *Race and Representation After* Miller v. Johnson, 1995 U. CHI. LEGAL F. 23, 51-52 (1995); *see also Bush*, 517 U.S. at 1060 (Souter, J., dissenting) (stating that "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"); *id.* at 1058 (doubting the "feasibility of untangling mixed motives").

[334] *Bush*, 517 U.S. at 964.

[335] *Id.*

[336] *Id.* at 968.

[337] Miller v. Johnson, 515 U.S. 900, 916 (1995).

[338] Racial and political rationales for redistricting could be used interchangeably to suit the parties in litigation. *See* Shaw v. Hunt, 517 U.S. 899, 920 (1996) (giving an illustration in which Republican plaintiffs who were represented in Congress by a Democrat preferred to be represented by members of their own Republican party; a racial discrimination claim

Finally, the theory of racial gerrymandering is doctrinally unsound because it is built on the shaky foundation of the relative motivation of the redistricting legislature. To decide that race was the predominant motivating factor in redistricting, a court has to compare that factor with all other motivating factors. Only when the racial motivation dominates or prevails over all other motivating factors can a court rule that a districting decision is violative of the Equal Protection Clause. The constitutional significance of racial motivation is entirely dependent on, and derived from, the relative weaknesses of other competing and interconnected motivations. If other districting considerations "predominated over racial ones," the Court would not subject the districting decision to strict scrutiny.[339] Thus, the comparative strength of competing motivating factors decides the level of dominance of the racial motivation that is required for unconstitutionality.

There is no optimum or established level of suspect racial motivations; the level of suspect motivation is determined not only by the number and types of competing motivations, but also by their relative weights assigned by the judiciary. The Court has long recognized that "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."[340] If so, it should be almost impossible for a court to engage in weighing and ordering each of the relevant multiple motivations according to their perceived significance.[341] Any such effort is fraught with the danger of judicial arbitrariness. In short, the entire concept of relative intent or motivation is ill-conceived and its longevity has to be in doubt.

2. Irrelevance of Invidiousness

In addition to reconstructing the concept of intent, the Supreme Court's redistricting decisions completely eliminated the requirement of invidiousness as a condition for violation of the Equal Protection Clause. Since the districting laws are generally "facially race neutral,"[342] the key to uncovering impermissible racial classification is proof of discriminatory or invidious intent. As observed by Justice Stevens, traditionally the Court would apply strict scrutiny to a state action that

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was used to pursue an unsuccessful claim based on political identity).

[339] *See Bush*, 517 U.S. at 964 (stating "[s]trict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones").

[340] Palmer v. Thompson, 403 U.S. 217, 224 (1971).

[341] The Supreme Court seems to think that weighing the relative strengths and qualities of competing motivations is indeed possible. *See Bush*, 517 U.S. at 969 ("Here, the District Court had ample basis on which to conclude both that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, and that political gerrymandering was accomplished in large part by the use of race as a proxy.").

[342] *Id.* at at 958.

discriminates on the basis of race only if "that discrimination harmed an individual or set of individuals because of their race."[343]

Since the rights created by the Equal Protection Clause are personal rights guaranteed to the individual,[344] "[a] predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of the rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature."[345] It is also a firmly established rule of constitutional adjudication that the Court will grant standing to challenge a racially discriminatory governmental act "only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct."[346] The Supreme Court's theory of racial gerrymandering generally ignores these core equal protection principles, presumably due to the Court's realization that "[d]emonstrating the individualized harm . . . may not be easy in the racial gerrymandering context . . . ."[347]

The four Justices who consistently dissented in the *Reno* line of cases were persistent in their argument that the plaintiffs in each of them suffered no "cognizable injury."[348] They maintained that race-based districting is not necessarily invidious and irrational racial classification since it has neither the intent nor effect of harming any particular group or promoting irrational racial prejudices.[349] Justice Souter reasoned that even in majority-minority districts, "[a]ll citizens may register, vote, and be represented"[350] and no one is denied a right or benefit provided to others. Justice Stevens captured the essence of the dissenters' position when he complained that "[t]he majority fail[ed] to explain coherently how a State discriminates invidiously by deliberately joining members of different races in the same district; why such placement amounts to an injury to members of any race; and,

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[343] *Id.* at 1008 (Stevens, J., dissenting).

[344] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) (Powell, J., plurality opinion).

[345] Reynolds v. Sims, 377 U.S. 533, 561 (1964).

[346] United States v. Hays, 515 U.S. 737, 743-44 (1995) (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)).

[347] *Hays*, 515 U.S. at 744 (attributing the problem to the difficulty in discerning why a particular citizen was put in one district or another).

[348] Shaw v. Reno, 509 U.S. 630, 659 (1993) (White, J., dissenting) ("Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury"); *see also* Miller v. Johnson, 515 U.S. 900, 929 (1995) (Stevens, J., dissenting) ("[A]ppellees have alleged no legally cognizable injury"); Shaw v. Hunt, 517 U.S. 899, 921-23 (Stevens, J., dissenting) ("[T]he injury that these plaintiffs have suffered to the extent that there has been injury at all, stems from the integrative rather than the segregative effects of the state's redistricting plan.") The four dissenting Justices in all the cases were Stevens, Souter, Ginsburg and Breyer.

[349] Bush v. Vera, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting).

[350] *Shaw*, 509 U.S. at 682 (Souter, J., dissenting).

assuming it does, to whom."[351] The dissenters' views mirrored the traditional equal protection doctrine of invidious intent.

Instead of entirely repudiating the precedent-based arguments of the dissenters, the Court seemed to recognize tacitly the continued viability and relevance of invidious intent in redistricting cases. The Court claimed that a reapportionment legislation that classifies and separates voters by race "threatens special harms"[352] by reinforcing racial stereotypes, inciting racial hostility, and by inflicting "representational harms."[353] In *Miller*, the Court made the startling assertion that "the essence of the equal protection claim" arising from the State's use of race as a basis for separating voters into districts is that the "action disadvantag[es] voters of a particular race."[354] The Court has not adequately explained how the mere "disadvantages" to voters of a particular race measure up to the level of invidiousness, as understood in the multitude of equal protection cases.

The most unconvincing aspect of the "special harms" identified by the Court is that they neither constitute harm to the equality rights of individual voters, nor are they special. Race-based districting does not deny, abridge, or dilute the vote of any voter, or deprive any voter of equal right to participation in the political process. The triad of special harms specified by the Court needs to be analyzed to ascertain the extent of their invidiousness. The Court asserted that race-based districting creates the specter of stigmatic harm caused by the "offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls'"[355] and raises the prospect of causing representational harms by sending the misleading signal "to elected officials that they represent a particular racial group rather than their constituents as a whole."[356] The Court also feared balkanization of the society into "competing racial factions" inciting racial hostility as a result of racial gerrymandering.[357] These special harms are the manifestations of the beliefs,

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[351] *Hays*, 515 U.S. 750 (Stevens, J., concurring). In *Hays*, the Court denied standing to the plaintiffs because they failed to live in the district that they claimed racially gerrymandered. Still, the Court failed to articulate the type of injury required to challenge an alleged racial gerrymander. That failure provoked Justice Stevens to write the concurring opinion.

[352] *Id.* at 744.

[353] *Shaw*, 509 U.S. at 649-50.

[354] Miller v. Johnson, 515 U.S. 900, 911 (1995). The Court in *Miller* was referring to the claim recognized in *Shaw*, which identified the "special harms" as the basis of the claim. *Shaw*, 509 U.S. at 631. Therefore, the "special harms" identified in *Shaw* (namely, promotion or perpetuation of stereotypical thinking about race, infliction of representational harm, and incitement of racial hostility) are to be understood as mere "disadvantages" to voters of a particular race. *Id.* at 661 (White, J., dissenting).

[355] *Miller*, 515 U.S. at 912 (quoting *Shaw*, 509 U.S. at 647).

[356] *Shaw*, 509 U.S. at 650.

[357] *Miller*, 515 U.S. at 912 (quoting *Shaw*, 509 U.S. at 657).

attitudes, and perceptions about race that are already prevalent in our society and the creation of majority-minority districts were in part designed to alleviate rather than aggravate those maladies.

If the alleged special harms are serious and real enough to be constitutionally significant, then it should be assumed that the racial and ethnic minorities have been and continue to be at risk of suffering identical harms in the majority-white districts all across the country. The history of the voting rights laws, including the Fifteenth Amendment, and the records in the redistricting cases amply demonstrate that many of the majority-white districts were originally created with the discriminatory intent to deprive minorities of their right to equal participation in the political process. The mere passage of time "is insufficient to purge the taint of an originally invidious purpose."[358] Successive reenactment of the tainted redistricting laws by subsequent redistricting legislatures, consciously preserving the racial demographics of the original districts, could be considered decisions to perpetuate the original invidious purpose.[359] Therefore, the majority-white districts originally created with predominant racial motivation deserve to be treated as racial gerrymanders, having the capacity to generate as many special harms as any newly created majority-minority districts,[360] and the Court's ingenious exonerating devices—such as the

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[358] Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 147 (2000).

[359] The Supreme Court has indicated that subsequent legislative reconsideration of a law originally enacted to achieve a discriminatory goal, may purge the taint of original invidious intent. In *United States v. Virginia*, 518 U.S. 515 (1996), the Commonwealth of Virginia argued that whatever discriminatory purpose, which may have motivated the establishment of the all-male Virginia Military Institute, had been removed by subsequent reconsideration of the purpose in light of the Supreme Court's anti-discrimination decisions, and adoption of the educational diversity rationale for the continuation of the challenged single-sex institution. The Court rejected the argument on the ground that Virginia failed to demonstrate that the continuation of the single-sex institution was to further the claimed diversity interest. *See id.* at 539.

Similarly in *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Court upheld the provisions of the Military Selective Service Act of 1948 that exempted women from compulsory military service. The Court rejected the argument that the constitutionality of the provisions be examined in light of legislative history amassed at the time of the Act's adoption in 1948. Instead, the Court relied on Congress' determination not to change the law in 1980. Finding that Congress "thoroughly reconsider[ed] the question of exempting women from [the Act's] provisions, and its basis for doing so." *Id.* at 75. The Court concluded that the policy was not based on "a traditional way of thinking about females." *Id.* at 74 (citations omitted).

It cannot be said that the redistricting legislatures across the country "thoroughly reconsidered" the issue of transforming originally created majority-white districts into racially integrated districts.

[360] Supreme Court cases generally "recognize the reality that members of the same race often have shared interests." *Shaw*, 509 U.S. at 682. This reality applies to whites and blacks alike. Individuals also tend to vote for candidates of the same race. *See* James B. Zouras,

distinction between racial awareness and racial motivation or the blameless political and incumbency protection gerrymandering—are quite insufficient to mask that reality.[361]

Reasonable people could genuinely disagree about the existence or extent of the special harms that might be caused by the purposeful creation of majority-minority districts, especially if they are created routinely and in large numbers, without compelling justification.[362] But, there could be no disagreement about the nature and

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Shaw v. Reno: *A Colorblind Court in a Race Conscious Society*, 44 DEPAUL L. REV. 917, 977 n.490 (citing the findings of a survey by National Opinion Research Center, University of Chicago, that "one out of every seven whites openly stated that they would not vote for an African-American"). The Supreme Court does not offer any convincing rationale for treating majority-white and majority-minority districts differently. Justice Stevens states in his dissent in *Bush v. Vera*, 517 U.S. 952 (1996) that:

> 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, . . . 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 [in the case], in which they were manipulated in the political process as easily as white voters.

Id. at 1036.

[361] The distinction between racial awareness and intent helps to shelter the majority-white districts from equal protection challenges. *See* Briffault, *supra* note 333, at 51 ("The real difficulty in applying [*Miller v. Johnson*'s] racial-motivation test will be determining what counts as a *racial* motive."). Racial motivations could be concealed easily in political and incumbency protection gerrymanders which are perfectly constitutional. *See* Davis v. Bandemer, 478 U.S. 109 (1986) (holding that manipulation of district lines to assure that a political party has a majority in a selected district is not unconstitutional). The Court was even willing to permit intentional drawing of district lines to safeguard the relative strength of political parties in the entire State of Connecticut. *See* Gaffney v. Cummings, 412 U.S. 735, 754 (1973) (stating it is constitutional to draw district lines "not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State."). State legislatures are also free to create districts for the overt purpose of protecting incumbents or their designees. *See Race-based Districting*, 109 HARV. L. REV. 160, 168 (1995) ("But the courts will read *Miller* to say that districts that are 'set aside' for black representatives are unconstitutionally segregated by race, while districts that are drawn to protect white incumbents are simply following traditional districting principles.").

[362] The Court in *Miller* specifically emphasized its strong disapproval of the Justice Department's policy of requiring states to "maximize" the number of majority-minority districts as a condition for compliance with the Voting Rights Act. *See Miller*, 515 U.S. at 924. The Court stated that "[i]nstead of grounding its objections [to state districting plan] on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts." Further, "[t]here is no indication Congress

remediability of these harms; these are general and undifferentiated harms to the electoral process, more appropriately preventable by federal public law enforcement than piecemeal private litigation.[363] Individuals are not deprived of their personal rights to equal treatment because the "mere placement of an individual in one district instead of another denies no one a right or benefit provided to others."[364] A white voter questioning the constitutionality of a majority-minority district is not likely to be more aggrieved or adversely affected than a black voter in a reverse-racial-gerrymandering challenge to an existing majority-white district.

The grievance of the white voters against the creation of majority-minority districts cannot be understood in terms of any cognizable harm or tangible disadvantage. One may surmise that the essence of the protest is their feeling of discomfort from being placed in a district in which they are the minority and from the thought of being represented by an official of a different race.[365] The source of such discomfort can be simple stereotypical notions about minorities or sheer racial prejudice—the kind of sentiments the Court's gerrymandering law seeks to eradicate. These prejudices and stereotypes may make lasting gains and inflict serious harms to society if they are allowed to masquerade as equal protection claims. In the redistricting cases, the Court creates a "constitutional shield" for an equal protection claim "that is itself the product of a habitual way of thinking about strangers."[366] In

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intended such a far-reaching application of § 5 [of the Voting Rights Act], so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises." *Id.* at 927.

[363] It is highly significant here to note that the Constitution specifically invests Congress with the power to enforce the Fifteenth Amendment, thus enabling the federal government to prevent state redistricting irregularities.

[364] *Shaw*, 509 U.S. at 681-82 (Souter, J., dissenting). Whatever dignitary harms may be attributable to the stereotypical notion that, for instance, black people "think alike," are suffered by the minority voters, but none of them challenged the creation of majority-minority districts. The so-called representational harm is simply a fiction. Representatives elected from a majority-minority district are not likely to think that they represent only the minorities. The Court had not provided any proof to support such a possibility. The dynamics of the electoral politics would force elected representatives to pay more attention to the interests and support of minority constituents, such as whites in a majority-minority district, than to the majority race in the district unless the elected official belonging to the majority race was routinely elected without contest or opponents in the election. A contrary conclusion would reinforce the assumption that, in all the majority-white districts, elected representatives generally ignore the interests and well-being of their minority constituents.

[365] An individual's "constitutional rights are not violated merely because the candidate one supports loses the election or because a group (including a racial group) to which one belongs winds up with a representative from outside that group." *Shaw*, 509 U.S. at 682 (Souter, J., dissenting).

[366] Boy Scouts of Am. v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 2459 (2000) (Stevens, J., dissenting). Justice Stevens dissented from the Court's decision that permitted Boy Scouts of America to exclude homosexuals from holding official positions in the organization and

the process, the Court has consciously autotomized the core doctrine of invidious intent from its equal protection jurisprudence.

B. *Non-Application by Hermeneutics*

M.L.B. v. S.L.J.[367] involved the denial to an indigent natural parent, solely because of her inability to prepay over $2,350 in a record preparation fee, the opportunity to appeal the judicial termination of her parental rights to the custody of two minor children. The Court of Chancery, the trial court in Mississippi, found the aggrieved parent (*M.L.B.*), petitioner in the Supreme Court case, guilty of serious abuse and neglect and, therefore, unfit to have custody of her children.[368] Even though the relevant Mississippi statute required clear and convincing evidence of unfitness to support termination decisions, the Court of Chancery described no such evidence and detailed no reason to deprive permanently the petitioner of her custodial rights.[369]

The petitioner promptly sought to appeal the termination decision, but she was denied access to the appellate process solely due to failure to pay in advance the preparation fee as required by the state law.[370] The petitioner's efforts to proceed with the appeal without paying the fee were thwarted when the state's highest court ruled that "the right to proceed in forma pauperis in civil cases exists only at the trial level."[371] The petitioner sought review of the state court's ruling by the United States Supreme Court on the ground that the conditioning of the availability of state appeal

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argued that such prejudices cause serious and tangible harm to countless members of the homosexual community. Justice Stevens stated: "That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers." *Id.* at 2478.

[367] 519 U.S. 102 (1996).

[368] Petitioner M.L.B. was the biological mother of two children by the respondent. When the petitioner and respondent divorced in June 1992, respondent by mutual agreement, retained custody of the children. In September 1992, the respondent remarried. In November 1993, the respondent and his new wife filed suit in Chancery Court to terminate petitioner's custodial rights and to have the children adopted by their stepmother. After three hearings, the Chancellor approved the adoption and ordered that the children's birth certificates be changed to show the adopting parent as the mother. No description of the evidence supporting this conclusion was in the decree. The Chancellor instead recited segments of the Mississippi statute to declare that there has been "a substantial erosion of the relationship between the natural mother, [M.L.B.] and the minor children" caused by "serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children." *Id.* at 107-08 (citation omitted).

[369] *See id.* at 120.

[370] The State of Mississippi grants civil litigants a right to appeal, but only on condition that they prepay the costs for preparing and transmitting the record. MISS. CODE ANN. §§ 11-51-3, 11-51-29 (Supp. 1996); *see also M.L.B.*, 519 U.S. at 109.

[371] *Id.* at 109 (citation omitted).

on the ability to pay violated the "basic notions of fairness [and] of equal protection under the law."[372]

The Supreme Court, in an opinion delivered by Justice Ginsburg, held that the state had violated the petitioner's rights under the Equal Protection Clause by denying her equal access to appellate review. In order to support its holding, the Court had to resort to "anomalous" precedents, mostly involving denial of appeal rights to indigent criminal defendants.[373] Observing that petitioner M.L.B. endeavored to defend against the "State's devastatingly adverse action"[374]

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[372] The petitioner requested the Supreme Court to hold that:

> where the State's judicial processes are invoked to secure so severe an alteration of a litigant's fundamental rights—the termination of the parental relationship with one's natural child—basic notions of fairness [and] of equal protection under the law, . . . require that a person be afforded the right of appellate review though one is unable to pay the costs of such review in advance.

Id. (citations omitted).

[373] The Court's analysis of precedents concerning the "'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike,'" began with "the foundation case" of *Griffin* that mandated free access to appellate review for indigent defendants, including those sentenced to lesser punishment than death. *Id.* at 110 (quoting Griffin v. Illinois, 351 U.S. 12, 16 (1956)). Then the Court cited the "key case" of *Mayer v. Chicago*, 404 U.S. 189 (1971), which extended the *Griffin* rule to an indigent misdemeanant who was sentenced to pay a fine of $250. *M.L.B.*, 519 U.S. at 111. In *Mayer*, the Supreme Court emphasized the importance of access to the appellate process by defendants subjected to lesser punishments not involving incarceration by stating that petty offenses could entail serious collateral consequences to the defendant's career and reputation. *Id.* at 111-12. The Court also relied on two cases involving termination of parental status: *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), which was sympathetic to the appointment of counsel for indigent defendants seeking to defend against termination of parental status, and *Santosky v. Kramer*, 455 U.S. 745, 748 (1982), which mandated a "clear and convincing" proof standard in parental termination proceedings. *M.L.B*, 519 U.S. at 118. The Court did have to contend with cases that were not entirely supportive of its conclusion in the case at hand. For instance, in *United States v. Kras*, 409 U.S. 434 (1973), the Court held that there was no constitutional requirement to waive a court fee of $50 needed to secure a discharge in bankruptcy; and in *Ortwein v. Schwab*, 410 U.S. 656 (1973), the Court found nothing unconstitutional about an Oregon statute that required welfare recipients whose benefits were reduced, to pay a $25 fee as a condition to file an appeal. Synthesizing the precedents, the Court in *M.L.B.* stated:

> It would be anomalous to recognize a right to a transcript needed to appeal a misdemeanor conviction—though trial counsel may be flatly denied—but hold, at the same time, that a transcript need not be prepared for M.L.B.—though were her defense sufficiently complex, state-paid counsel, as Lassiter instructs, would be designated for her.

M.L.B., 519 U.S. at 123.

[374] *M.L.B*, 519 U.S. at 125. The Court decided to pair M.L.B.'s case with *Mayer*, rather than with *Ortwein* and *Kras* because *M.L.B.* was trying to safeguard a fundamental or "commanding" interest, and "endeavoring to defend against the State's destruction of her

terminating parental rights forever, the Court placed her case in the category of criminal and quasi-criminal cases "in which the State may not 'bolt the door to equal justice.'"[375]

The Court's equal protection analysis was both unconventional and enlightening. First, the Court appropriately ranked the parental interest at stake in termination decrees as "sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment,"[376] and decided to subject the state's attempt to deprive the interest to "the close consideration"[377] of the Court within the "equal protection framework."[378] The Court then proceeded to examine the constitutionality of the state's denial of equal access to the appeal process by assessing and balancing the weights of the two interests involved: "the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other."[379] The Court found that termination decrees "wor[k] a unique kind of deprivation"[380] that is "'irretrievabl[y] destructi[ve]' of the most fundamental family relationship."[381] In contrast, the state's justification for the appellate cost prepayment requirement was no more than its financial "interest in offsetting the costs of its court system."[382] The Court, therefore, concluded that the individual interest easily outweighed the fiscal interest of the state.

By straightforward interest balancing, the Court was able to accord M.L.B.'s interest the dignity and significance it intrinsically commanded and to arrive at a decision that was just and reasonable. Clearly, any alternative approach to constitutional adjudication, not adequately sensitive to, or sensible enough to accommodate M.L.B.'s interest would have produced an incorrect and untenable outcome. If the Court allowed itself to be sidetracked by the purposeful discrimination theory of *Washington v. Davis*,[383] as desired by the three dissenting Justices,[384] it would have ended up delivering a result favorable to Mississippi. The majority wisely and courageously averted such a disastrous result by invoking the *Griffin* line of cases[385] upholding the principle that there can be no justice where the

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family bonds, and to resist the brand associated with a parental unfitness adjudication." *Id.* at 118, 125.

[375] *Id.* at 124 (quoting *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring)).

[376] *Id.* at 119 (quoting Santosky v. Kramer, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting)).

[377] *Id.* at 116-17.

[378] *Id.* at 120.

[379] *Id.* at 120-21.

[380] *Id.* at 127 (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)).

[381] *Id.* at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

[382] *Id.* at 122.

[383] 426 U.S. 229 (1996).

[384] 519 U.S. at 136-37 (Thomas, J., dissenting).

[385] *See* 351 U.S. 12 (1956). *Griffin* was meticulously followed in *Mayer v. Chicago*, 404

kind of trial or adequacy of appellate review a criminal defendant gets depends on the amount of money she has.[386]

Justice Thomas, writing for the dissenting Justices, took issue with the Court's reliance on *Griffin* and its progeny primarily on the ground that the equal protection theory underlying those cases had been subsequently abandoned by the Court in the *Davis* line of cases.[387] The Justice maintained that the *Griffin* line of cases adopted the "disparate impact" theory of equal protection by requiring the State to provide free transcripts or court-appointed counsel to indigent criminal defendants.[388] In *Griffin*, for instance, the generally applicable state law requirement that the cost of the trial transcript be paid for by the appealing party was invalidated by the Court by "divin[ing] 'an invidious classification between the 'rich' and the 'poor.'"[389] Justice Thomas agreed with Justice Harlan, who dissented in *Griffin* and related cases on the ground that "the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.'"[390] In the opinion of Justice Thomas, the views of Justice Harlan were eventually accepted and the "disparate-impact theory of the Equal Protection Clause [was rejected altogether]"[391] by the *Davis* Court when it held that, absent a showing of purposeful discrimination, "a law, neutral on its face and serving ends otherwise within the power of government to pursue [will not be] invalid . . . simply because it may affect a greater proportion of one race than of another."[392]

U.S. 189 (1971) (requiring the state to provide free transcripts for an indigent appellant convicted on nonfelony charges when the state statute provided free transcripts only in felony cases) and *Williams v. Illinois*, 399 U.S. 235 (1970) (invalidating state law under which an indigent offender could be confined beyond the maximum prison term specified by the statute if his indigency prevented him from paying the monetary portion of the sentence).

[386] *See Griffin*, 351 U.S. at 18-19 (plurality opinion) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

[387] *See M.L.B.*, 519 U.S. at 135 (Thomas, J., dissenting) ("The lesson of *Davis* is that the Equal Protection Clause shields only against purposeful discrimination: A disparate impact, even upon members of a racial minority, the classification of which we have been most suspect, does not violate equal protection.").

[388] *See Griffin*, 351 U.S. at 18-19 (plurality opinion).

[389] *M.L.B.*, 519 U.S. at 134. (Thomas, J., dissenting) (quoting from Justice Harlan's dissent in *Griffin*, 351 U.S. at 35).

[390] *Id.* at 134-35 (Thomas, J., dissenting) (quoting from dissenting opinion of Justice Harlan in *Douglas v. California*, 372 U.S. 353, 362 (1963)); *see also Griffin*, 351 U.S. at 35 (Harlan, J., dissenting).

[391] *M.L.B.*, 519 U.S. at 136 (Thomas, J., dissenting) (citing his own analysis of *Washington v. Davis*, 426 U.S. 229 (1976), in *Lewis v. Casey*, 518 U.S. 343, 373 (1996) (Thomas, J., concurring)).

[392] *Davis*, 426 U.S. at 242.

Justice Thomas's assertion that the majority in *M.L.B.* was attempting to avoid "the irresistible force of the *Davis* line of cases"[393] was no exaggeration. Indeed, the doctrinal basis for *Griffin* and its progeny has been substantially undermined by the *Davis* line of cases. It was the theory of equal protection articulated by Justice Harlan in his dissenting opinions in *Griffin*[394] and *Douglas*,[395] that the Court adopted in the *Davis* line of cases. Justice Harlan argued that "a law of general applicability that may affect the poor more harshly than it does the rich" or "a financial exaction which the State imposes on a uniform basis [that may be] more easily satisfied by the well-to-do than by the indigent"[396] would not be unconstitutional because "the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.'"[397] A contrary theory of equal protection would, in his opinion, undercut "the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses."[398]

In *Davis*, the Supreme Court replicated and endorsed Justice Harlan's parade of horribles. Echoing the argument of Justice Harlan in *Douglas*, the *Davis* Court maintained that a disparate impact standard of equal protection "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[399] The Court in later cases carried the theme of *Davis* to such extremes that it even refused to attribute significance either to the possibility that "a law nondiscriminatory on its face may be grossly discriminatory in its operation"[400] or

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[393] *M.L.B.*, 519 U.S. at 136.

[394] *See* 351 U.S. at 29-39. The Court in *M.L.B.* called *Griffin* a "foundation case." *M.L.B.*, 519 U.S. at 110. In *Griffin*, the Court invalidated a facially neutral state law which required criminal defendants convicted of non-capital offenses who seek appellate review to pay for the stenographic minutes necessary to prepare the appeal. The Court found the statute violative of the Equal Protection Clause because it denied meaningful opportunity for appellate review to indigent defendants. *Griffin*, 351 U.S. at 24, 27.

[395] *See* 372 U.S. 353, 360-67 (1963). In *Douglas*, the Court held that a state violated the Equal Protection Clause when it failed to provide counsel to indigent criminal defendants who wished to appeal their convictions. *Id.* at 357 ("But where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.").

[396] *Id.* at 361 (Harlan, J., dissenting).

[397] *Id.* at 362 (Harlan, J., dissenting) (quoting Justice Harlan's own dissent in *Griffin*, 351 U.S. at 34).

[398] *Id.* at 361-62.

[399] Washington v. Davis, 426 U.S. 229, 248 (1976).

[400] *Griffin*, 351 U.S. at 17 n.11; *see also* Williams v. Illinois, 399 U.S. 235, 244 (1970).

to the severity of the disparate impact of a facially neutral statute on a particular class of individuals.[401] Therefore, it is not unreasonable to infer that the *Davis* rule of purposeful discrimination, by unconditionally repudiating the disparate impact theory of equal protection, has substantially undermined the jurisprudential foundation of *Griffin* and its progeny.

But the Court in *M.L.B.* downplayed the corrosive effects of *Davis* in order to breathe life into the *Griffin* line of cases. First, the Court claimed that *Davis* did not have such "sweeping effect" as to overrule the *Griffin* line of cases.[402] Then, it distinguished the issue of disproportionate impact raised in *M.L.B.* from that involved in *Davis*. "To comprehend the difference between the case at hand and cases controlled by *Washington v. Davis*," the Court said, "one need look no further than this Court's opinion in *Williams v. Illinois*."[403] In *Williams*,[404] the Court, in 1970, invalidated a state law that permitted the confinement of a prisoner beyond the statutorily prescribed maximum term in the event he fails to satisfy the monetary portion of his sentence. It held that the disparate impact of the law on indigents violated the Equal Protection Clause, even though the "statutory scheme [did] not distinguish between defendants on the basis of ability to pay fines."[405] The Court found that the fee requirements of *M.L.B.*, like the sanctions of the *Williams* genre, "'visi[t] different consequences on two categories of persons,'; they apply to all indigents and do not reach anyone outside that class."[406]

The main difficulty with the Court's analysis is its unfounded assumption that the *Williams* decision, and its lineal ancestor *Griffin*, have miraculously survived the *Davis* decision unscathed. First, no saving language in *Davis* even remotely suggests that its rule of purposeful discrimination will exempt disproportionate impact of the *Griffin-Williams* variety. As the Court stated in *Feeney*, "purposeful discrimination," not the severity of the impact of a neutral law on women or racial minorities, is "the condition that offends the Constitution"[407] under the regime of *Davis*. Moreover, the Court has undermined the force and effectiveness of *Williams* by several decisions

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[401] The Court in *Feeney*, for instance, refused to invalidate a law that gave employment preference to veterans even after finding that "[t]he impact of the veterans' preference law upon the public employment opportunities of women has thus been severe." Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271 (1979).

[402] M.L.B. v. S.L.J., 519 U.S. 102, 126 (1996). The Court specifically cited two cases: *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Bearden v. Georgia*, 461 U.S. 660 (1983), to support its contention that the *Griffin* line of cases are alive and well after *Davis*. *M.L.B.* at 519 U.S. at 127.

[403] *Id.* at 126 (citations omitted).

[404] 399 U.S. 235 (1970).

[405] *Id.* at 242.

[406] *M.L.B.*, 519 U.S. at 127 (citations omitted) (quoting *Williams*, 399 U.S. at 242).

[407] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

that directly address the rights of indigent criminal defendants. *United States v. MacCollom*,[408] decided just three days after *Washington v. Davis*, provides a convincing illustration. In *MacCollom*, the Court rejected an equal protection challenge to a federal statute that provided that an indigent could not qualify for a free trial transcript for the purpose of collateral review unless a court certified that the challenge to the conviction was not frivolous and that the transcript was necessary to prepare the review petition. Justices Brennan and Marshall dissented, maintaining that requiring a criminal defendant to show anything more than indigency to get a free transcript was a "plain departure from *Griffin* and its progeny."[409] The Justices quoted *Williams* to assert that the *MacCollom* "decision emptie[d] [] all promise the Court's assurance only six years ago that decisions applying *Griffin* 'have pointedly demonstrated that the passage of time has heightened rather than weakened the attempts [by this Court] to mitigate the disparate treatment of indigents in the criminal process.'"[410]

The Court in *M.L.B.* cited two of its prior decisions to demonstrate the continuing vitality of the *Griffin* line of cases after *Davis*. The Court claimed that in *Ross v. Moffitt*[411] six of the seven Justices from the majority in *Davis*, just two terms before *Davis*, relied on the "decisions in *Griffin* and related cases to hold that 'the State cannot adopt procedures which [deny] an indigent [a] 'meaningful appeal.'"[412] The Court also cited *Bearden v. Georgia*[413] as a decision "adhering in 1983 to '*Griffin*'s principle of 'equal justice.'"[414] But, the problem with these cases is that they demonstrate just the opposite of what the Court claimed that they did.

In *Ross*, an indigent defendant claimed that he had a constitutional right to appointed counsel to seek discretionary review of his criminal conviction in the highest court of North Carolina. He argued that his claim was supported by the *Griffin* line of cases, including *Burns v. Ohio*,[415] that held that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty."[416] However, the Supreme Court recited an unbroken chain of precedents in which it invalidated

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[408] 426 U.S. 317 (1976).

[409] *Id.* at 332.

[410] *Id.* at 334 (quoting *Williams*, 399 U.S. at 241).

[411] 417 U.S. 600 (1974).

[412] 519 U.S. at 127 n.16 (quoting *Ross*, 417 U.S. at 612).

[413] 461 U.S. 660 (1993).

[414] M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996) (quoting *Bearden*, 461 U.S. at 664-65) ("In sum, under respondent's reading of *Washington v. Davis*, our overruling of the *Griffin* line of cases would be two decades overdue. It suffices to point out that this Court has not so conceived the meaning and effect of our 1976 'disproportionate impact' precedent.").

[415] 360 U.S. 252 (1959).

[416] *Id.* at 257.

financial barriers to appellate process,[417] but then rejected the defendant's claim maintaining that the question of indigents' right to procedural equality was "not one of absolutes, but one of degrees"[418] and that the Equal Protection Clause did not require states to "equalize economic conditions."[419] The Court's opinion, written by then-Justice Rehnquist, concluded that by the state's failure to provide appointed counsel for discretionary review in the case, the defendant was only "somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding."[420] Thus, *Ross* did not subscribe to the *Griffin* principle of equality. Chief Justice Rehnquist's agreement with Justice Thomas's argument in *M.L.B.* that after *Davis*, "the equal protection theory underlying the *Griffin* line of cases [is not] viable"[421] makes such a conclusion easily unassailable.

Similarly, the central holding of *Bearden v. Georgia*[422] hardly would support the assertion that it faithfully adhered to the *Griffin* principle of equal justice. In *Bearden*, a criminal defendant, who was ordered to pay a $500 fine and $250 in restitution, challenged as violative of the Equal Protection Clause, the decision of the trial court to revoke his probation and impose a prison term for failure to pay a portion of the fine and restitution. His argument relied on the holdings of *Williams v. Illinois*[423] and *Tate v. Short*[424] that a state cannot impose "a fine as a sentence and then automatically convert[ ] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."[425] The Court, in an opinion by Justice O'Connor, held that the revocation decision of the trial court in the case was

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[417] *See Ross*, 417 U.S. at 599. In addition to *Griffin*, the Court cited *Draper v. Washington*, 372 U.S. 487 (1963) (striking down a law which made an indigent defendant's right to a free trial transcript contingent upon the certification by the trial court that the contentions in the appeal would not be frivolous); *Lane v. Brown*, 372 U.S. 477 (1963) (invalidating a law that provided a free transcript only to a public defender, because the indigent defendant would have no recourse if the public defender chooses not to request a transcript); *Douglas v. California*, 372 U.S. 353 (1963) (holding that a state must provide to an indigent an appointed counsel for pursuing his first appeal as of right); *Smith v. Bennett*, 365 U.S. 708 (1961) (invalidating a filing fee required to process a state habeas corpus application by a convicted defendant); *Burns v. Ohio*, 360 U.S. 252 (1959); and *McKane v. Durston*, 153 U.S. 684 (1894). The Court distinguished the right to counsel to pursue a first appeal in *Douglas* from the right to counsel claimed in *Ross* to pursue a discretionary appeal. *See Ross*, 417 U.S. at 599.

[418] *Ross*, 417 U.S. at 612.

[419] *Id.*

[420] *Id.* at 616.

[421] M.L.B. v. S.L.J., 519 U.S. 102, 133 (1996).

[422] 461 U.S. 660 (1983).

[423] 399 U.S. 235 (1970).

[424] 401 U.S. 395 (1971).

[425] *Id.* at 398 (quoting Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).

"fundamentally unfair" because the Court failed to explore alternatives to imprisonment and to consider the extent of the efforts made by the defendant to satisfy the fine.[426] The Court then established a brand new rule that "[o]nly if . . . alternatives to imprisonment are not adequate in a particular situation to meet the State's interests in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay."[427]

Despite the Court's effort to sketch it in a moral canvas with *Griffin-Williams* imprints, the new *Bearden* rule plainly permits a trial court to impose on an indigent a prison term in lieu of unpaid fines. The requirement that the sentencing court find non-prison alternatives adequate to achieve the penological interests of the State is not likely to operate as a restraint on a state court already inclined to impose a prison term. Moreover, as observed by four concurring Justices, no support exists in the Supreme Court cases or in the Constitution for this "novel requirement."[428] Of course, had the Court followed the *Griffin-Williams* principles, there would have been no need for such a requirement because the conversion of a fine, unpaid by an indigent, would be automatically unconstitutional.

In *M.L.B.*, the Supreme Court made an admirable effort to restore the theory of disproportionate impact to its rightful place in equal protection jurisprudence. The Court endeavored to accomplish its goal, quite appropriately, by rehabilitating *Griffin*, a seminal decision etched in solid moral and ethical foundation. The Court's half-hearted attempt to demonstrate that *Griffin* was alive and well all along under the *Ross-Bearden* line of cases was unnecessary and simply unconvincing. The undeniable truth is, as Justice Thomas has asserted repeatedly, "[t]hat the doctrinal basis for *Griffin* and its progeny ha[d] largely been undermined"[429] by *Davis* when it unconditionally rejected the equal protection theory of disproportionate impact in a racial discrimination setting. Thus, in the ultimate analysis, rehabilitation of *Griffin* would be impossible without simultaneously repudiating the holding of *Davis*, at least to the extent that it pertains to disproportionate impact of facially neutral laws on indigents. Therefore, it would be entirely reasonable to construe the Court's holding in *M.L.B.* as a rejection of *Davis* by implication and as an endorsement of the disproportionate impact theory.[430]

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[426] *Bearden*, 461 U.S. at 666.

[427] *Id.* at 672.

[428] *Id.* at 676 (White, J., concurring).

[429] Lewis v. Casey, 518 U.S. 343, 374 (1996) (Thomas, J., concurring); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 133 (1996) (Thomas, J., dissenting) ("I do not think that the equal protection theory underlying the Griffin line of cases remains viable.").

[430] The Court made a cursory statement, suggesting that the *Griffin-Williams-M.L.B.* statutes entailed "not merely *disproportionate* in impact," but they "visi[ted] different consequences on two categories of persons" based on their ability to pay; that "they appl[ied] to all indigents and [did] not reach anyone outside that class." *M.L.B.*, 519 U.S. at 127 (quoting Williams v. Illinois, 399 U.S. 235, 242 (1970)). The Court cannot be taken

CONCLUSION

As the foregoing analysis of the cases reveals, the Supreme Court's application of the invidious intent doctrine has been erratic and inconsistent. As a result, the meaning and status of the doctrine in equal protection jurisprudence have become increasingly uncertain. The apparent decline of the intent doctrine may be the natural consequence of the ascendance of the doctrine of neutrality. It is no accident that the Court rarely repeats the assertion that "purposeful discrimination is 'the condition that offends the Constitution'"[431] or the *Davis* aphorism that the "*central purpose* of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct [invidiously] discriminating on the basis of race."[432] Instead, the Court now prefers to emphasize that the "*central mandate* [of the Equal Protection Clause] is *racial neutrality* in governmental decisionmaking."[433] The Court seemed to confirm this doctrinal shift when it recently announced that Justice Harlan's memorable statement in *Plessy v. Ferguson*,[434] that the Constitution "neither knows nor tolerates classes among citizens"[435] is now "understood to state a

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seriously when it makes such flimsy distinctions. The statute in *M.L.B.* did apply to any and all persons who desired to take a discretionary appeal from the trial court decisions. It hardly impacted adversely on affluent persons who need not worry about the cost involved; it adversely impacted individuals of the middle class who may have to undergo considerable economic hardship to meet the cost requirement; and, it severely impacted the indigent who cannot afford the cost at all. Thus, the statute visits different consequences on at least three categories of individuals. But the *Davis* rule, as discussed earlier, does not recognize distinctions based on the intensity or severity of the impact. *See supra* notes 24-25 and accompanying text. Therefore, the only way the Court could reconcile its *M.L.B.* decision with *Washington v. Davis* was to repudiate the latter decision. The Court's attempt to distance *M.L.B.* from *Davis* is nevertheless understandable as a pragmatic measure to gain approval of the Court's majority without opening up the difficult jurisprudential debate concerning the soundness of *Davis*. But what is significant in *M.L.B.* is that the Court recognized the devastating disproportionate impact of a facially neutral statute on the poor without having to prove invidious intent, and in doing so it rebuked the basic rationale of *Davis* that recognition of disproportionate impact would invite a deluge of litigation seeking invalidation of revenue, custom, and regulatory laws in a way that imperils the rule of law. The Court rejected such an argument in *M.L.B.* after noting that "[r]espondents and the dissenters urge that we will open floodgates if we do not rigidly restrict Griffin to cases typed 'criminal.'" *M.L.B.*, 519 U.S. at 127. That was a pointed and significant rejection.

[431] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

[432] Washington v. Davis, 426 U.S. 229, 239 (1976) (emphasis added); *see also* Washington v. Seattle Sch. Dist. No. I, 458 U.S. 457, 484 (1982).

[433] Miller v. Johnson, 515 U.S. 900, 904 (1995) (emphasis added).

[434] 163 U.S. 537 (1896).

[435] *Id.* at 559 (Harlan, J., dissenting).

commitment to the law's neutrality."[436]

The doctrine of invidious intent seems to be ripe to be metamorphosed into the doctrine of neutrality. At times, the Supreme Court seemed to be inching toward formalization of such a transformation by adopting the same framework for neutrality inquiry as the Court has been using all along for intent inquiry. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[437] for instance, the Court utilized "an equal protection mode of analysis"[438] to determine whether the object of the city ordinances at issue was neutral for the purpose of the Free Exercise Clause of the First Amendment. The analysis entailed an assessment of "both direct and circumstantial evidence"[439] and all of the "objective factors [that] bear on the question of discriminatory object."[440] The inquiry led the Court to conclude that the impugned ordinances were not neutral as they were "enacted 'because of,' not merely 'in spite of,' their suppression of [the adversely affected] religious practice."[441] Obviously, the Court saw no discernible difference between discriminatory object, which violates neutrality under the Free Exercise Clause, and invidious discriminatory intent, which violates the Equal Protection Clause. One possible inference that could be drawn from this equation is that a violation of the Equal Protection Clause could be predicated on proof of discriminatory object, instead of invidious discriminatory intent.

Alternately, if we rule out the theoretical possibility of assimilation of the doctrine of intent into the doctrine of neutrality, then we must demarcate the respective spheres of operation of the two doctrines. The central importance of neutrality in current equal protection jurisprudence a fortiori denies co-equal status to the doctrine of intent. Moreover, neutrality is a much broader and more inclusive concept than the concept of invidious intent. The essence of neutrality is absolute impartiality in governmental decisionmaking. A law can be non-neutral without being discriminatory. If it disproportionately and unreasonably burdens or disadvantages an identifiable group, the law is not neutral to the affected group. Discrimination, intentional or not, is a sufficient, but not a necessary, condition of

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[436] Romer v. Evans, 517 U.S. 620, 623 (1996).

[437] 508 U.S. 520 (1993).

[438] *Id.* at 540 (quoting concurrence in Walz v. Tax Comm'n of N.Y. City, 397 U.S. 664, 696 (1970)).

[439] *Id.* (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1997)). The Court further adopted the same evidentiary components that it identified in *Arlington Heights*. *See id.* at 540 ("Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.").

[440] *Lukumi*, 508 U.S. at 540.

[441] *Id.* (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

non-neutrality.[442] Intentional discrimination is the prototype of non-neutrality, but not all instances of non-neutrality are the product of intentional discrimination.

Therefore, the Supreme Court logically could adopt neutrality exclusively as the guiding principle of the Equal Protection Clause and dispense with the intent doctrine without sacrificing its value and substance. But the Court has not yet taken that decisive step toward retiring the intent doctrine. On the contrary, as we have seen in the context of criminal law enforcement, the Court is determined to keep the intent doctrine alive, despite its apparent incongruity with the emerging neutrality doctrine.

It is entirely conceivable that the intent doctrine can coexist as a subset of the neutrality doctrine for the foreseeable future for carefully defined purposes. For instance, invidious intent can be a significant factor in determining the propriety and severity of sanctions for breaches of equal protection neutrality. The Supreme Court decision in *Guardians Ass'n v. Civil Service Commission of the City of New York*[443] could be an appropriate model. In that case, the Court held that a private Title VI[444] plaintiff was not entitled to compensatory relief in the absence of discriminatory animus and that "unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations."[445] By making the same principle of liability as the generally applicable remedial rule of Equal Protection Clause the Court could simultaneously accomplish the original purpose of the intent doctrine and further the goal of neutrality.

To make the intent doctrine compatible with the neutrality doctrine, the Court needs to rise above the usual interpretive gymnastics. It is incumbent upon the Court to revamp the intent doctrine precisely and delineate its sphere of operation within the framework of neutrality. The area of employment discrimination illustrates the point. For over three decades, the Supreme Court has permitted a Title VII[446] plaintiff to seek remedies for employment discrimination either by proving the invidious discriminatory intent of the employer[447] or the disparate impact of the challenged employment practice.[448] However, the Court steadfastly maintains that

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[442] *See* K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONST. L.Q. 89 (1999).

[443] 463 U.S. 582 (1983).

[444] Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7. Section 601 of the Act provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." § 2000d.

[445] *Guardians Ass'n*, 463 U.S. at 584 (White, J., plurality opinion).

[446] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17.

[447] *See, e.g.*, St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) (discussing presumptions and burden of proof required to show intentional discrimination).

[448] The Court first recognized a cause of action based on disparate impact in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For the difference between the two theories of

a public employer could be liable under the Equal Protection Clause only for intentional employment discrimination. The Court has never satisfactorily explained the reason for not making the Title VII standard which is being applied to tens of thousands of private sector employers, equally applicable to employers sued under the Equal Protection Clause. In the field of employment discrimination, the intent doctrine can be made compatible with the neutrality doctrine only if the current equal protection standard is raised to the level of the well-established Title VII standard.

The doctrine of invidious intent is in uneasy tension with the doctrine of neutrality in the Equal Protection Clause. The obvious way to ease the tension is to discard the intent doctrine and embrace the neutrality doctrine as the sole unifying principle of the Equal Protection Clause, but the Court has not taken that bold step. Because the intent doctrine has entrenched itself in several areas of the current equal protection jurisprudence, the only feasible alternative available to the Court, at least for the time being, is to craft explicit and durable alterations to the intent doctrine to make it compatible with the neutrality doctrine. The Court should move forward in that direction, realizing that the invidious intent doctrine is not only difficult to apply, but also fundamentally unsuitable to serve the majestic purposes of the Equal Protection Clause.

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liability, see *Connecticut v. Teal*, 457 U.S. 440, 446 (1982) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).