The Myth of Intent in Equal Protection  
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In 1976, the last major piece of traditional equal protection doctrine fell into place.1 That year the Supreme Court held in Washington v. Davis2 that in the absence of a racially discriminatory purpose a facially neutral governmental action having an adverse racial impact would not be subject to strict scrutiny. Some commentators have supported the intent requirement;3 some have quarreled with it;4 and many have argued with how the Court has applied it.5 All agree, however, that current doctrine makes intent the key to equal protection, and nearly all agree why.6

The ascendancy of process theory in constitutional law7 has led the

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1. See text accompanying notes 54-62 infra (describing development of different stages of modern equal protection law). The only area of equal protection to develop in large part after 1976 was affirmative action. The Court first discussed this issue in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), and has struggled with it ever since. See, e.g., United States v. Paradise, 480 U.S. 149 (1987); Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980). See generally George Rutherglen & Daniel R. Ortiz, Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence, 35 UCLA L. Rev. 467 (1988). Affirmative action cases, however, fall somewhat outside the mainstream of equal protection. They usually involve classifications that discriminate on their face, which most ordinary equal protection cases no longer do, and they concern equitable claims between blacks and “innocent” whites, see Paradise, 480 U.S. at 182-83; Wygant, 476 U.S. at 281-84; Richard H. Fallon, Jr. & Paul C. Weiler, Firefighters v. Stotts: Conflicting Models of Racial Justice, 1984 Sup. Ct. Rev. 1, 54-67; Rutherglen & Ortiz, supra, at 468-69, 488-90, 500-01, 503-04, which ordinary equal protection claims do not. My argument concerns only the traditional equal protection claim.


5. E.g., Lawrence, supra note 4 (arguing for broadened intent standard); Pamela S. Karlan, Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent, 93 Yale L.J. 111 (1983) (student author) (same).


7. In short, process theory holds that the Court is justified in striking down legislative actions whenever (and only whenever) it has reason to believe that the democratic process did
Court to avoid review of the substance of government decisionmaking. Instead, the Court tries to limit review to the processes of decisionmaking and invalidate only those laws resulting from process failure. Applied to equal protection, this approach implies that the Court should work only to keep the government's decisionmaking process pure.\(^8\) The Court should seek not to judge the substantive fairness of the outcomes of decisionmaking processes but only to screen out all impurifying motivations. In particular, it should strike down only those laws reflecting a discriminatory animus.

If we accept its assumptions, many of which are controversial,\(^9\) process theory offers a coherent explanation for an intent requirement, but not the one we actually have. Despite the doctrine's name, "intent" often has little to do with purpose or motivation. It largely fails, in fact, to regulate the inputs to the government decisionmaking process; in many cases, it actually evaluates the outcomes instead. Our general fascination with process theory, I believe, has led us to accept uncritically a description of the intent requirement that the cases do not support.

My goal is to offer a positive theory of intent in equal protection. In Part I, I discuss the law before \textit{Washington v. Davis} and leading theories of intent emerging at the time when the Court was considering whether to require it. Originally, the Court took the position that motivation was largely irrelevant to equal protection. Later, faced both with what it viewed as some unacceptable but necessary implications of that position and with some prominent academic criticism, the Court reversed course. This change I describe in Part II. In three cases decided over three years, the Court laid down a seemingly strict intent requirement. Even in these cases, however, intent failed to play the role the Court described.

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\(^{8}\) To proponents of process theory, one of the major attractions of taking such a stance is that it minimizes the intrusiveness of judicial review and reaffirms the primacy of the legislature. Paul Brest, \textit{Reflections on Motive Review}, 15 \textit{San Diego L. Rev.} 1141, 1143-44 (1978).

\(^{9}\) See Ackerman, \textit{supra} note 7, and Tribe, \textit{supra} note 7, for the two most powerful critiques of process theory. Both argue in very different ways that process theory cannot avoid substantive commitments on controversial matters. Ackerman, \textit{supra} note 7, at 739-40; Tribe, \textit{supra} note 7.
In Part III, I discuss the intent requirement in other equal protection contexts where it diverges even further from the Court's description. In the jury selection, voting, and education cases, intent has less to do with motivation than in the cases described in Part II. In Part IV, I attempt to redescribe the doctrine of intent. I believe the doctrine does cohere, but quite differently from the way its existing descriptions and theoretical justifications imply. Instead of regulating the inputs to decisionmaking, intent serves, I believe, as a way of judging substantive outcomes. In particular, it works, as do many Title VII doctrines,\(^\text{10}\) by allocating burdens of proof between the individual and the state. Of particular interest is the way the doctrine allocates these burdens differently in different contexts. In some, the allocation reflects a partial—but only partial—concern with discriminatory motivation. In others, motivation is largely irrelevant. The nature of the case makes all the difference.

In my view, intent allocates these burdens differently in different contexts in order to "balance" individual and societal interests consistently with the ideology of traditional liberalism.\(^\text{11}\) Where (as in housing and employment) this ideology either relegates decisionmaking to markets or allows the state much leeway in allocating goods, intent makes judicial supervision of decisionmaking difficult. On the other hand, where liberal ideology insists on particular types of nonmarket allocation (as in voting, jury selection, and sometimes education), intent makes judicial intervention more likely. By redescribing the intent requirement this way, I hope not only to challenge existing descriptions of what has become the central inquiry in equal protection analysis and to question accepted belief that process theory underlies it, but also and more importantly to show how the intent doctrine serves to reinforce and protect many of our reigning political and economic values. The doctrine's significance lies in the way it simultaneously achieves and hides this purpose.


\(^{11}\) I realize that "liberalism" is a loaded term. I use it quite broadly to refer to the core of classical liberal thought, which underlies the organization of most contemporary western societies. My aim is to characterize the least common denominator of such contemporary thinkers as Bruce Ackerman, Ronald Dworkin, and John Rawls. \textit{See generally} Bruce Ackerman, \textit{Social Justice in the Liberal State} (1980); Ronald Dworkin, \textit{Liberalism}, in \textit{Public and Private Morality} 113 (S. Hampshire ed. 1978); John Rawls, \textit{A Theory of Justice} (1971). This core is large, perhaps large enough to accommodate much contemporary libertarianism, including much of the system described in Robert Nozick, \textit{Anarchy, State, and Utopia} (1974). See text accompanying notes 186-189 \textit{infra} for a fuller description of liberalism.
I conclude by considering the most controversial equal protection case in recent years, *McCleskey v. Kemp*, which upheld the death penalty against a challenge based on its statistically discriminatory application. Although this case might at first appear to disrupt my model, its intent analysis may employ interest balancing more fully than do the other cases I describe. Our discomfort with its result, in fact, may stem from our disturbing awareness that the Court is balancing life against other values.

I. THE COURT'S ORIGINAL APPROACH AND THE CRITICS

In 1971, in the case of *Palmer v. Thompson*, the Court first directly considered the role of motivation in equal protection. Until 1962, Jackson, Mississippi segregated most of its public facilities, including all five of its swimming pools. It reserved four of them for whites and one for blacks. After the district court held the city's segregation policies unconstitutional, the city desegregated most of its facilities but refused to desegregate the pools. Instead, it closed them down. A group of black residents brought suit to open up the pools, but the district court and the court of appeals upheld the city's action.

The Supreme Court easily rejected the plaintiffs' central argument: that the city's alleged purpose in avoiding integration made the closings unconstitutional. "[N]o case in this Court," the Court stated, "has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." The Court's holding turned primarily on the difficulty and futility it perceived in an inquiry into purpose. Not only might it be impossible for a court to determine the motivation behind the choices of a group of legislators, but, even if a court could do so, the legislature could presumably lawfully reenact the challenged policy by passing it for different reasons. Although technically couched as a narrow holding—that discriminatory motivation alone would not invalidate a government action—the Court's hostility toward motivation inquiry led many lower courts and commentators to a broader conclusion: that discriminatory motivation was almost entirely irrelevant to equal protection.

Many commentators were unhappy with this position. In the year

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14. Id. at 224. As John Hart Ely has noted, "surely the historical claim was wrong." J. Ely, supra note 3, at 136. In fact, in Washington v. Davis, 426 U.S. 229, 239-44 (1976), the Court made the equally extreme yet opposite argument that the earlier cases had, in fact, turned on motivation.
16. See, e.g., Munoz Vargas v. Romero Barcelo, 532 F.2d 765, 766 (1st Cir. 1976); Tyler v. Vickery, 517 F.2d 1089, 1093 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976); Hawkins v. Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam); Brest, supra note 3, at 134 (criticizing "a blanket refusal to inquire into legislative and administrative motivation").
before Palmer, John Hart Ely had published the first major inquiry into the role of motivation analysis in constitutional law. Motivation, he had decided, should in many cases be central to constitutional analysis, particularly to equal protection. Shortly after Palmer, Paul Brest published a criticism of the case which argued that Ely had not gone far enough. A government decisionmaker’s motivation, Brest believed, was always relevant in equal protection; in fact, almost nothing else was as important. It was Brest’s purer application of process theory that the Court later cited with approval and followed.

Brest developed his argument about the proper role of motivation from four somewhat controversial assumptions. First, the Constitution prohibits government not from reaching unequal results but from pursuing suspect objectives. Second, giving weight to an impermissible objective may influence a decisionmaker’s ultimate choice. Third, an individual has a right to complain of an adverse decision that would not have been made but for the decisionmaker’s pursuit of an illicit goal. Finally, absent clear proof to the contrary, the Court should presume that an adverse decision would have come out differently if the individual shows that an impermissible factor entered into the decision-making calculus.

Brest’s key and most controversial assumption is his first. It is not clear why the Constitution might not prohibit government from reaching certain results regardless of the objectives pursued. Revealingly, Brest offers no theory—constitutional or otherwise—to justify this assumption; he merely makes it. This initial assumption is crucial to his

18. Brest, supra note 3.
21. Brest couches his rejection of the idea that the Constitution prohibits unequal results as an argumentative assumption “that a person has no legitimate complaint against a particular decision because it affects him adversely,” id. at 116, but the rest of his argument reveals that he is not dismissing this idea merely arguendo. See id. at 110 (racially disproportionate impact is irrelevant where law neither classifies on its face nor impinges on a fundamental interest). “It would be both impracticable and undesirable to require decisionmakers to assure that all decisions have an equal effect on rich and poor alike and on all races.” Id.
22. Brest does offer the following defense in a footnote to his argument: These particular objectives are proscribed because their pursuit is detrimental to society at large, or because it is unjust to disadvantage persons for possessing certain attributes, or for both reasons. A decision made for the purpose of disadvantaging a particular racial, ethnic, or religious minority, moreover, inflicts a stigmatic injury distinct from the operative consequences of the law: the act of adoption is itself an official insult to the minority.
Brest, supra note 3, at 116 n.109. At most, this argument shows why equal protection analysis should scrutinize actions taken with a discriminatory purpose, not why it should scrutinize only those actions. Although Brest does not explicitly reach this conclusion, he denigrates the most obvious alternative approach—focusing on unequal results. See note 21 supra.

Ely, on the other hand, offers an argument that the Constitution should prohibit goals rather than results. If it did not, he argues, the Constitution would require the government to
project, however, because it focuses the equal protection inquiry wholly on the inputs to the decisionmaking process. This focus is attractive because it allows the Court to maintain that it is avoiding substantive review. The first assumption defines equal protection not as a right to some form of substantive equality, but as a right to government decisions made through a process unaffected by improper concerns. Brest's second and third assumptions make this process description of the right clear. Both focus exclusively on the government's decisionmaking calculus. Brest's fourth assumption serves to round out the process approach by foreclosing judicial intervention in those situations where the process failure clearly made no difference. It establishes a kind of harmless error rule in equal protection. Not all errors in process should lead to invalidation of results; those errors that the state can show did not disrupt the overall process should not concern the judiciary. More importantly, the fourth assumption helps to determine whether a particular purpose is an actual ("but for") cause of discrimination—what the third assumption defines as the appropriate level of causation for which to test.

II. CHANGING COURSE

A. The Individual's Burden

In Washington v. Davis, several black officers charged that the hiring and promotion policies used by the District of Columbia's police department discriminated against them in violation of the equal protection component of the fifth amendment. In particular, they argued that a written test developed by the Civil Service Commission for gen-

take race affirmatively into account; only then could it be certain of avoiding impermissible results. Ely, supra note 17, at 1255-61. Although Ely takes care to say only that courts are unwilling to take this other step, his argument must rest on the normative assumption that they never should do so or, more strongly still, that government decisionmakers should not be allowed to take race into account even for benign reasons. See id. at 1258-59 (attributing these arguments to the Supreme Court). Ely thus grounds his process view of intent in a normatively controversial assumption about the equal protection clause's scope. In its stronger form, moreover, his justification conflicts with larger parts of his project. Process theory generally, and Ely's brand in particular, has few problems with affirmative action, where the state purposefully pursues racial goals. See J. Ely, supra note 3, at 170-72.

23. Brest, supra note 3, at 118 n.114.


26. In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court implicitly held that the due process clause of the fifth amendment contains an equal protection component that applies against the federal government. Since then, the Court has interpreted the scope of the fifth and fourteenth amendments' equal protection guarantees identically. Wayte v. United States, 470 U.S. 598, 608 n.9 (1985); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("[O]ur approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment.").
eral federal use and employed by the District to test verbal ability and reading and comprehension skills had a highly adverse impact on blacks. Proportionately four times as many blacks failed the exam as did whites. The district court, however, approved the exam because it was "reasonably and directly related to the requirements of the police recruit training program and [was] neither . . . designed nor operates to discriminate against otherwise qualified blacks."  

The court of appeals reversed. Following Palmer v. Thompson, it considered motivation irrelevant. Instead, like many lower courts at the time, it applied the legal standard of Griggs v. Duke Power Co., a Title VII case in which the Supreme Court held that disproportionate racial impact without discriminatory intent could establish a statutory violation. In particular, the Court in Griggs held that if a plaintiff shows disproportionate impact, the burden of proof shifts to the defendant to show that the disputed test "bear[s] a demonstrable relationship to successful performance of the jobs for which it [is] used." The court of appeals in Davis reversed the district court because the District's police department had failed to carry this particular burden.

The Supreme Court rejected the court of appeals' whole approach to the issue. Applying Title VII standards, the Court held, was error so "plain" as to be cognizable on review although not presented in the petition for certiorari. The Court distinguished the constitutional rule from the Griggs standard. Under the Constitution, the plaintiffs had to show not only disparate impact but also discriminatory purpose. This they had failed to do. By itself, the evidence of adverse impact could not establish such a purpose, and the remaining evidence in the case—including special efforts by the police department to recruit blacks and the test's admittedly legitimate aim of improving the verbal skills of public employees—served to rebut any suggestion of discriminatory motivation.

One year later, the Court fleshed out the intent requirement in Village of Arlington Heights v. Metropolitan Housing Development Corp. In that case, several individuals and organizations challenged the village's re-
fusal to rezone a parcel of land for low- and moderate-income housing. The court of appeals found an equal protection violation because the "ultimate effect" of the denial was racially discriminatory.\textsuperscript{38} Neither the district court nor the court of appeals, however, had found that the Village had acted with a discriminatory purpose.

After reaffirming the general requirement of discriminatory intent, the Supreme Court elucidated it in two ways. First, citing Brest's theoretical work,\textsuperscript{39} the Court held that a plaintiff alleging unconstitutional discrimination need not prove that the government's action rested "solely," or even "primar[ily]" or "dominant[ly],"\textsuperscript{40} on racially discriminatory purposes. It would be sufficient for the plaintiff to show that race had been "a motivating factor in the decision."\textsuperscript{41}

Second, the Court discussed how a plaintiff could show this amount of intent. Disproportionate impact, while not dispositive, could provide an important starting point which various other objective factors could supplement. These factors include the general historical background of the decision, the specific series of events leading up to the challenged action, departures from the normal procedural sequence and usual substantive policies followed by the government decisionmaker, and the legislative and administrative history of the action.\textsuperscript{42} Additionally, the Court suggested, in a few extraordinary cases government officials might be called to testify at trial about their motives.\textsuperscript{43}

In \textit{Personnel Administrator v. Feeney},\textsuperscript{44} the Court made clear how much weight these objective factors must carry. In that case, a woman challenged Massachusetts's employment preference for veterans. The state gave veterans competing for civil service jobs an absolute lifelong preference over non-veterans. Since veterans were predominantly male, Feeney claimed that the preference inevitably worked to disadvantage women in violation of the fourteenth amendment.

The Supreme Court agreed that the Massachusetts legislature had acted intentionally to advantage veterans and that such an aim would necessarily harm women. It refused, however, to import into equal protection the familiar doctrine that a person intends the natural and foreseeable consequences of her voluntary actions.\textsuperscript{45}

"Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the deci-

\textsuperscript{39.} \textit{Arlington Heights}, 429 U.S. at 266 n.12 (citing Brest, \textit{supra} note 3, at 116-18).
\textsuperscript{40.} \textit{Arlington Heights}, 429 U.S. at 265.
\textsuperscript{41.} \textit{Id.} at 265-66.
\textsuperscript{42.} \textit{Id.} at 266-68.
\textsuperscript{43.} \textit{Id.} at 268.
\textsuperscript{44.} 442 U.S. 256 (1979).
\textsuperscript{45.} \textit{See}, \textit{e.g.}, \textit{GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART} § 18 (2d ed. 1961); \textit{RESTATEMENT (SECOND) OF TORTS} § 8A & comment b (1965).
sionmaker, in this case a state legislature, selected or reaffirmed a par-
ticular course of action at least in part "because of," not merely "in
spite of," its adverse effects upon an identifiable group.46

Given this standard of specific intent, evidence of disparate effect
proves of little help to plaintiffs. Disproportionate impact on one
group can often spring from a valid governmental policy designed to
aid another. Because disproportionate impact can often result from
permissible or even laudable motivations, giving it much weight poses a
problem for a theory which tests for impermissible inputs.

As described so far, the trio of Washington v. Davis, Arlington Heights
v. Metropolitan Housing Development Corp., and Personnel Administrator v.
Feeney follows Brest's process approach to equal protection fairly
closely. All three cases require real evidence of motivation to disadvan-
tage a protected group, and all three prevent the government from pursu-
ing discriminatory goals but not from reaching disparate results. If
the Court does invalidate an outcome under these cases, it is only be-
cause the outcome results from a bad purpose, not because the out-
come itself is somehow objectionable. So far the intent doctrine fits
both its name and theory.

B. The Government's Burden

The problem is that Davis, Arlington Heights, and Feeney follow pro-
cess theory so completely that they ultimately fall prey to its self-contra-
dictions. Although process theory justifies an intent requirement, it
also makes any straightforward inquiry into motivation impossible be-
cause, at bottom, process theory requires the courts to do in practice
exactly what it forbids them to do in theory. By allowing the state to
negate discriminatory intent by showing that the decisionmaker would
have made the same choice without the impermissible motivation, pro-
cess theory requires the courts to imagine what the decisionmaker
would have done.

To judge whether discriminatory intent made a difference, process
theory requires the court to remake the government's decision without
the impermissible motive and then to see whether the decision remains
the same. In doing so, the court is supposed to place itself in the shoes
of the decisionmaker, but how meaningfully can the court bring the
decisionmaker's values, attitudes, and beliefs to the decision rather
than its own? The court cannot enter the mind of the decisionmaker; at
most it can recognize one or two important policies. The major part of
the court's judgment, then, must hinge on its own views of the substan-
tive worth of the original decision. In other words, to judge whether an
impermissible input made a difference, the court must determine for
itself what an acceptable outcome would be. Such a role places courts
uncomfortably close to legislatures. Like legislatures, they must weigh

46. Feeney, 442 U.S. at 279 (citation omitted).
conflicting values and policies without a “neutral” or “objective” criterion to guide them. In short, process theory often forces courts to play a role that the theory itself denies them. Ultimately, the Court has slipped out of this trap by backing away from this formulation, simultaneously losing the intent requirement’s theoretical grounding in process theory and circumventing full analysis of facially neutral classifications.

The cases reflect this underlying tension in the way they define the defendant’s burden of proof. In Davis, the Supreme Court found no discriminatory intent for two reasons. First, “the [employment] test [was] neutral on its face and rationally [could] be said to serve a purpose the Government is constitutionally empowered to pursue.”47 Second, special efforts by the police department to recruit black officers and the increasingly balanced racial composition of the younger part of the police force helped negate any inference that the department had purposefully discriminated on the basis of race.48 These two “rebuttals” represent very different approaches to intent. The second looks to the institution’s overall behavior to see whether it has acted in a way inconsistent with discriminatory purpose in a particular decision. Although not all parts of an institution may pursue the same goals—a particular decisionmaker may, for example, purposefully discriminate even though the larger institution of which it is a part is working to eradicate discrimination—in some cases an institution’s other actions may offer some evidence of its motivations in a particular decision.

The first rebuttal is more interesting, for it reveals how the Court has partially resolved the inconsistency to which process theory leads. The Court suggested that a purpose “the government is constitutionally empowered to pursue” which is “rationally” related to the contested decision would rebut the individual’s showing that discriminatory intent had been a motivating factor behind it. In the next case, Arlington Heights, Justice White’s dissenting opinion suggests the same type of rebuttal. Although the majority found that the plaintiffs had failed to show discriminatory motivation, Justice White argued instead that the village should win because the district court had found that it had been motivated “by a legitimate desire to protect property values and the integrity of the Village’s zoning plan.”49 To Justice White, the village’s “legitimate” desire negated any intent. Finally, in Feeney, the Court again found that a “legitimate” legislative policy could serve to negate intent. There, the Court stated that “[w]hen, as here, the [law’s disproportionate] impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, . . . the inference [of discriminatory motivation] simply fails

47. 426 U.S. at 246.
48. Id.
49. 429 U.S. at 273 (White, J., dissenting) (quoting 373 F. Supp. 208, 211 (N.D. Ill. 1974)).
to ripen into proof.”

The key terms in all these analyses—"rationally may be said to serve a purpose the government is constitutionally empowered to pursue," "legitimate desire," and "essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate"—resonate with the language of reduced scrutiny. That equal protection standard, which applies to all nonsuspect classifications, requires only that a law bear a rational relationship to a legitimate governmental interest to pass constitutional muster. In effect, then, as the Court's approach in each of these cases and its general appropriation of reduced scrutiny language suggest, the Court is asking a somewhat different question than it purports to ask. Instead of asking whether the decisionmaker would have made the same decision without the discriminatory motivation, the Court asks something a bit closer to whether it could have done so. The Court is not, of course, actually defining the defendant's burden as just meeting reduced scrutiny, but it is moving the burden somewhat in this direction.

Moving from a "would" question part way toward a "could" question helps solve the problem process theory poses. To the extent this change occurs, a court no longer has to evaluate the actual policy-worthiness of a decision to come to its own conclusion as to whether the decisionmaker would have reached the same result without the discriminatory purpose. Rather, the court can to some extent test the result by seeing if some valid purpose supports the decision. Moving toward "could" thus lessens the need for substantive review even if it does not avoid this bogeyman entirely. Even if only partial, however, this move causes several serious problems.

First, of course, the inquiry no longer focuses completely on actual motivation. Asking even partly whether a decisionmaker "could" have made the same decision, rather than whether it actually "would" have, fails to test well for whether discrimination was a "but for" cause. Racial discrimination could be the primary purpose behind a particular decision that some constitutionally permissible goals might also sup-
port. In such a situation, the Court's test might indicate that there was no discriminatory intent. The problem is that the presence of permissible goals—even very substantial ones—supporting a decision simply does not reveal how important the impermissible goals were. This is not to say that any permissible goal, no matter how insubstantial, would cure a showing of discriminatory motivation, no matter how clear. One suspects, in fact, that no conceivable purpose would cure an actual admission of discriminatory motivation. In such a case, the motivation itself creates great stigma which would likely prompt the Court to treat it as it now treats governmental actions that discriminate on their face. In these situations, the Court does not allow the state to argue that it would have reached the same decision without the discriminatory motivation but instead requires it to meet its ultimate burden of proof: showing that the challenged action bears a necessary relationship to a compelling state interest. But this is a very different inquiry; in cases where circumstantial evidence but no “smoking gun” points to discriminatory motivation, the Court appears more willing to let the state rebut the inference this way.

Second, moving from "would" toward "could" rips the intent doctrine from its mooring in process theory. No longer can the state's ability to negate intent be justified under a kind of harmless error rule. Under the Court's approach, impermissible motivation might have changed the ultimate result of the decisionmaking process and yet still be excused. Thus, as applied by the Court, the intent doctrine does not protect decisionmaking in the way process theory indicates it should. Intent simply fails to screen out all impermissible inputs. Instead, in some cases, all it ensures is that any impermissible motivations are accompanied by permissible ones.

Finally, and most importantly, moving from "would" toward "could" effectively short-circuits much of the heightened equal protection inquiry appropriate in cases of discrimination by proxy. Since the 1940s, equal protection doctrine has evolved into a well defined multi-stage analysis. First, the Court developed the doctrine of tiers of scrutiny. In a series of cases from the 1940s through the early 1960s, the Court made clear that some classifications (of which race was the paradigm) were to be accorded strict scrutiny, whereas others were to be accorded only reduced scrutiny.

This structure had become so clear and rigid by the early 1970s that Gerald Gunther could confidently de-
scribe the former as "‘strict’ in theory and fatal in fact,” and the latter as “minimal . . . in theory and virtually none in fact.” In the mid-1970s, the Court introduced a new, middle tier of scrutiny, so-called intermediate scrutiny, to apply to sex and legitimacy classifications.

After the results of this stage of the analysis became predictable, the important question became which classifications were entitled to more than reduced scrutiny. From the mid-1960s on, the Court has tried to answer this question both by deciding on a case-by-case basis which groups should and should not receive heightened scrutiny, and by developing general criteria to identify a suspect or quasi-suspect class. Although a few minor questions may remain about how to interpret the suspect class criteria, the Court has settled most issues and made clear which level of scrutiny different groups should receive. Very few questions remain here.

One can see intent—and, I will argue, the Court itself partly saw it—as a response to the rigidification of the suspect classification and tiers of scrutiny stages of equal protection analysis. Once it became clear which groups should receive heightened scrutiny and what ultimate results that choice would entail, the central question became how to identify for equal protection purposes the particular group affected by a government decision. Until the mid-1960s, such a question did not often arise because laws usually discriminated on their face against unpopular groups, pinpointing the proper classification for later stages.

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61. These criteria include: (i) the presence of current or historical discrimination against the group; (ii) the immutability of the characteristic that defines the group; (iii) the political powerlessness of the group; and (iv) invidious stereotyping of group members. See Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (plurality opinion); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442-44 (1985).


63. Examples include the school segregation laws struck down in Brown v. Board of

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of equal protection analysis. After the Court made clear that racial and 
some other sensitive classifications would receive heightened scrutiny, 
however, governments tried to circumvent equal protection by discrim-
inating by proxy. Instead of facially discriminating against a racial 
group, for example, the state would facially discriminate on the basis of 
a different characteristic that happened to correlate with race. The 
Oklahoma "grandfather clause" is perhaps the most notorious exam-
ple. Shortly after its admission to the Union, Oklahoma amended its 
constitution to regulate suffrage through a very stringent literacy test 
from which white voters were effectively relieved through the operation 
of a grandfather clause.64 The clause's facial classification concerned 
only whether one or one's ancestors were entitled to vote on or before 
January 1, 1866—a date prior to the adoption of the fifteenth amend-
ment. Yet, the Court had no trouble striking down the law,65 recognizing 
that the facial classification was only a proxy for race.

Intent serves to identify proxies for impermissible classifications. If 
a law is facially neutral but was passed in order to disadvantage a sus-
pect group, motivation analysis can help identify the suspect classifica-
tion, not the proxy, as the proper subject for equal protection analysis. 
In this way, intent aims to uncover covert classifications. In analyzing a 
facially neutral government action, intent largely determines how the 
suspect classification and tiers of scrutiny stages of equal protection 
analysis will proceed.

Splitting the intent stage of the inquiry into two parts—asking first 
whether the individual can show by a preponderance of the evidence 
that race was a motivating factor and then asking whether the state can 
show that it would have reached the same result anyway—follows this 
design. This allocation of the burden of proof merely structures the 
parties’ argument over what the classification really is. But by asking 
something closer to whether the same result "could" have, rather than 
"would" have, been reached, the Court seriously subverts the overall 
process. Instead of screening out from subsequent stages of analysis 
only those classifications which made no difference to the government’s 
ultimate decision, the state’s burden on intent essentially tests the deci-

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64. The amendment to the constitution stated:

No person shall be registered . . . or be allowed to vote . . . unless he be able to 
read and write any section of the Constitution of the State of Oklahoma; but no 
person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote 
under any form of government, or who at that time resided in some foreign nation, 
and no lineal descendant of such person, shall be denied the right to register and 
vote because of his inability to so read and write sections of such Constitution.


65. Guinn v. United States, 238 U.S. 347 (1915). The Court held that since blacks could 
not vote in most states before 1866, Oklahoma's action effectively restricted the franchise to 
whites in violation of the fifteenth amendment.
sion up front to see whether it meets a standard somewhere between "would have been reached anyway" and reduced scrutiny. If sufficient goals—in the Court's words, a "legitimate purpose" or "goal the legislature is constitutionally permitted to pursue"—support a government action, further analysis becomes unnecessary. In other words, the court can never reach heightened scrutiny if the state meets the second stage of the modified intent inquiry, which contains a standard somewhat below heightened scrutiny. The Court's move from "would" toward "could" in the intent test, then, threatens to make something less than heightened scrutiny the effective constitutional standard in many cases involving facially neutral governmental actions even when the decisionmaker intended primarily to discriminate against a protected group. The intent test fails to see a proxy for what it is.

III. INTENT IN OTHER CONTEXTS

In contexts other than employment and housing, the intent doctrine also fails to test for impermissible motivation. In jury selection, voting, and education cases, the Court may not allow the state to rebut an inference of discriminatory motivation with something partially irrelevant to purpose, as it did in the prior cases. It does, however, allow individuals to establish such inferences with something less than motivation—in some cases, in fact, with something close to a showing of mere disparate impact. In these contexts, the Court has untied the individual’s burden of proof, if not the state’s, from motivation.

A. Selection of Jurors

Juror selection has posed some of the country's earliest and most enduring equal protection problems. As early as 1879, in fact, the Court in *Strauder v. West Virginia* struck down a law excluding blacks from juries. The Court found in *Davis* that the jury cases supported the intent requirement. In retrospect, the Court thought, all the seemingly different legal standards announced in those cases focused on intent.

Since *Strauder*, the Court has considered two major types of jury discrimination cases. First, the Court has decided cases involving discrimination in constituting the venires from which individual jury panels are chosen. These cases mostly concern challenges to the "key-man" jury selection system or the permissibility of certain broad exemp-
tions to jury service. Second, the Court has heard cases involving discrimination in choosing individual panels of jurors from the venire. These cases usually concern the permissibility of various exercises of the prosecutor's peremptory challenge. In neither type of case do the standards focus precisely on the motivation of the jury selector. While actual discriminatory motivation violates both the venire selection and panel selection tests, so does much else. It is simply wrong to say, as the Court did in Davis, that these standards hinge on intent.

Until rather recently, many state and all federal courts selected jury venires through the key-man system. Some states, in fact, still do. Under this system, citizens of good standing (the "key" persons after whom the system is named) recommend to the court people in the community who will make responsible jurors. Notwithstanding that the highly subjective nature of the key persons' decisions make this system inherently susceptible to discrimination, the Supreme Court has held that key-man systems are not unconstitutional per se. Key-man systems violate equal protection if they meet certain conditions, including impermissible motivation.

In Castaneda v. Partida, the Court most fully elaborated these conditions. That case concerned a hispanic defendant who was convicted after indictment by a grand jury in which hispanics were underrepresented. In overturning the conviction, the Supreme Court applied a two-step test. First, it said, the criminal defendant must make out a prima facie case of impermissible discrimination. To do this, the defendant must show (i) that the group to which he belongs "is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied"; (ii) that the group has been underrepresented in the grand jury process over a significant period of time; and (iii) that the "selection procedure . . . is susceptible of abuse or is not racially neutral." Second, if the defendant carries this burden, the state may then rebut the prima facie case. Testimony from the selection officials that they acted without a discriminatory motive, how-

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78. Id.
79. Id. at 494 (citing Hernandez v. Texas, 347 U.S. 475, 478-79 (1954)).
80. Id.
ever, will not suffice. Nor can the state rely on a presumption that the officials faithfully discharged their sworn official duties. Instead, the state must put “evidence in the record about the way in which the commissioners operated and their reasons for doing so.” It must demonstrate not the mere absence of discriminatory motivation but rather that “permissible racially neutral selection criteria and procedures have produced the monochromatic result.” Under this test, perhaps not surprisingly, no state in recent years has successfully defended a key-man system having a nontrivial disparate impact before the Supreme Court.

The equal protection test for discrimination in selecting jury panels from the venire works similarly. In *Batson v. Kentucky*, the Supreme Court reconsidered whether prosecutors could constitutionally use peremptory challenges to exclude minorities from serving on particular juries. In an earlier case, *Swain v. Alabama*, the Court had made the prosecutor’s use of peremptory challenges in particular cases almost impervious to equal protection challenges. Under *Swain*, a defendant could challenge only a prosecutor’s removal of blacks “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim.” In other words, a defendant could not challenge a prosecutor’s use of race in a particular case but only his systematic and longstanding exclusion of blacks from many juries. In practice, the criminal defendant was simply unable to complain about the prosecutor’s decision to exclude black jurors whenever that decision was based on the belief that a black juror would be biased in favor of a black defendant. A black defendant could attack the prosecutor’s decision only when it was based on the belief that blacks were generally unfit to serve on juries. Justice White, who wrote for the majority in *Swain*, noted in his concurrence in *Batson* that *Swain’s* evidentiary burden was so high that “the practice of peremptorily eliminating blacks... in cases with black defendants remain[ed] widespread...” The burden of proof on defendants was, as the majority remarked, “crippling.”

*Batson* effectively overruled *Swain*. After *Batson*, criminal defendants could challenge not only the systematic exclusion of blacks but also their exclusion from particular cases. In particular, a prosecutor could no longer exercise peremptories to exclude black veniremen on

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81. Id. at 498 n.19 (citing Alexander v. Louisiana, 405 U.S. 625, 632 (1972); Hernandez v. Texas, 347 U.S. 475, 481 (1954); Norris v. Alabama, 294 U.S. 587, 598 (1935)).
83. Castaneda, 430 U.S. at 500.
84. Alexander v. Louisiana, 405 U.S. 625, 632 (citations omitted).
86. 380 U.S. 202 (1965).
87. Id. at 223.
89. Id. at 92.
90. Id. at 92-93, 100 n.25.
the assumption that they would be biased in a black defendant's favor. To make out a claim of discrimination in this context, the criminal defendant has to carry a burden much like that in Castaneda. He must show first that he belongs to a cognizable racial group whose members the prosecutor has removed from the venire through peremptory challenges. Because peremptory challenges are inherently discretionary, however, the defendant need not offer any evidence as to the second Castaneda factor—that the challenges are susceptible to manipulation. He is entitled to rely on the fact that peremptory challenges permit "'those to discriminate who are of a mind to discriminate.' " Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor excluded the veniremen because of their race. Such other circumstances could include evidence of a pattern of strikes against black jurors and the prosecutor's statements during voir dire.

If the defendant makes such a showing, the burden then shifts to the state, as in Castaneda, to rebut the inference of discrimination. The prosecutor must put forward a "'neutral explanation related to the particular case to be tried'" for challenging the black veniremen. Although the prosecutor's reason need not be as compelling as one justifying a challenge for cause, he cannot simply state that he believed a black juror would be biased in a black defendant's favor nor merely deny that he had a discriminatory motive. Quoting a Title VII employment case by way of analogy, the Court said that the prosecutor "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges.'" In all respects except the call for some additional evidence, the intent test in panel-selection cases parallels that in venire-constitution cases. Since the latter are more numerous and well developed, the remainder of my discussion focuses on them.

The intent test in the jury selection cases differs from the intent test in housing and employment cases in two important respects: it places both a lighter burden on the individual and a heavier burden on the state. Whereas an individual in an employment or housing discrimination suit must bring forth evidence of actual discriminatory motivation, a criminal defendant challenging the selection of a jury need only show that the selection procedures have had a racially disparate impact on his minority group and that the selection procedures were susceptible to

91. Id. at 97.
92. Id. at 96.
93. Id. (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
94. Id.
95. Id. at 97.
96. Id. at 98 (footnote omitted).
97. Id. at 97-98.
98. Id. at 98 n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).
abuse. Similarly, a state can often rebut an individual's prima facie case in the employment or housing context without quite showing that it "would" have made the same decision anyway:99 a prima facie case of jury discrimination, on the other hand, can be rebutted only by showing that "permissible racially neutral selection criteria and procedures"100 led to the underrepresentation. Furthermore, although Batson describes the prosecutor's burden as having to come forward with "legitimate reasons"101 for exercising the peremptories in the way he did, the context makes clear that these "legitimate" reasons must be somewhat weightier than the "legitimate" reasons that can carry the state's burden in an employment or housing case. In requiring a "clear and reasonably specific explanation" of such reasons, for example, the Court alluded to the more substantial burden alleged discriminators must carry under Title VII.102

That the intent test in jury selection cases differs from that in housing and employment cases may, by itself, be no cause for concern. Since the test in the housing and employment cases imperfectly screens for discriminatory motivation, a different test might fit the process model better. Unfortunately, the intent test in the jury selection cases fits the process model even less well. The intent test in employment and housing cases required individuals to show actual discriminatory motivation, but the test in jury cases does not. It requires only a showing of disparate impact plus a procedure's susceptibility to manipulation against racial groups. This burden tears the doctrine more completely away from any mooring in process theory. The test in housing and employment at least requires a showing of discriminatory motivation somewhere; the test in jury selection never does. These differences in doctrine between the two contexts create a peculiar result. In housing and employment cases, the intent doctrine can allow the state to escape liability even when discriminatory motivation represents a but-for cause, while in the jury selection cases the intent doctrine can lead to liability even when discriminatory motivation played no part in the decisionmaking. In terms of process theory, then, the intent requirement is not only incoherent but errs in all different directions.

The Supreme Court has defended relaxing the intent requirement in jury selection cases because of the special nature of jury discrimination. As the Court describes it:

The idea behind the [intent test in jury discrimination cases]... is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evi-

99. See text accompanying notes 49-52 supra.
101. 476 U.S. at 98 n.20.
102. Id.
dence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.\textsuperscript{103}

On the one hand, this justification proves too much. One could just as easily apply it to housing and employment and arrive at a similar standard for those cases. This is, in fact, exactly the justification for how the Court has interpreted Title VII, the statute prohibiting discrimination in employment.\textsuperscript{104} On the other hand, this justification fails to achieve its immediate aim: to reconcile the Court's standards with process theory. In the Court's own words, the test invalidates juries not only when "racial" factors figure in their selection but when "other class-related factors" do as well. In other words, factors other than race can invalidate a jury; disparate racial impact ultimately explainable by "other class-related factors," particularly wealth differences, can violate the law. Furthermore, as the key-man system itself shows, we may socially value—or at least not mind—many of these other factors.

The key-man system, although much abused, has a noble ambition. Recognizing the special responsibilities of the jury in the American legal system, it aims to ensure that juries are filled with intelligent and responsible people.\textsuperscript{105} It seeks to obtain a certain degree of civic virtue in those who decide what rights exist between different private parties, whose freedom the state can deny, and, most troublingly, who shall die.\textsuperscript{106} In theory, jury commissioners are supposed to choose the best

\textsuperscript{103} Castaneda v. Partida, 430 U.S. 482, 494 n.13 (1977).

\textsuperscript{104} Rutherglen, supra note 10, at 1309-11.

\textsuperscript{105} The Judicial Conference Committee on the Operation of the Jury System described the goals of the key-man system used in federal courts until 1968 as follows: The jury holds in its collective hands the life, the liberty and the welfare of individual defendants in criminal cases and the interests of litigants in civil cases. The importance of improving the calibre of these judges of the facts is therefore self evident. Therefore the jury list should represent as high a degree of morality, integrity, intelligence and common sense as the jury commission can find in each social and economic group by the use of impartial methods of selection.

\textsuperscript{106} Significantly, random selection, the major jury selection system in use today, also aims to select civically responsible people. Although the term "random selection" might suggest that the system aims to select a representative cross-section of the community without regard to character and judgment, random selection does so only within certain constraints. In the federal venire selection procedure, for example, names are chosen randomly not from telephone directories, the tax rolls, welfare lists or city address directories, but from voting registration or actual voter lists, 28 U.S.C. § 1863(b)(2) (1982), which "contain an important built-in screening element in that they eliminate those individuals who are . . . insufficiently.
and brightest in the community for jury service while paying sufficient attention to the fair cross-section requirement of the sixth amendment. Unfortunately, the commissioners have no objective “best and brightest” criterion to guide their selection. They must rely largely on their own subjective judgment or on the subjective judgment of the key people they consult in deciding whom to choose. This unavoidable reliance on individual judgment is what opens the system to abuse.

In practice, key-man systems exclude both blacks and many others. One study analyzing the occupations of jurors in a federal district court between 1958 and 1961 found that the white-collar upper class was highly overrepresented. The study showed that while managers, officials, and proprietors constituted 9.5 percent of the labor force eligible for jury service, they constituted 33.5 percent of the persons on the jury list. On the other hand, while deliverymen and semi-skilled factory workers constituted 20.2 percent of jury-eligibles, they represented only 7.1 percent of the jury list. Service workers, such as waiters, policemen, and domestic workers, made up 13.2 percent of jury-eligibles but only 4.3 percent of the jury list. Similarly, while laborers made up 8 percent of jury-eligibles, they constituted only 2 percent of the jury list. The most revealing discrepancy occurred between farm owners and managers, on the one hand, and farm workers, on the other. While farm owners and managers appeared on jury lists over three times as often as their numbers in the population would indicate, farm workers were underrepresented by a factor of five.\footnote{107}

It is not hard to see how such a situation could arise innocently. A former Chief Justice of the Pennsylvania Supreme Court (and author of one of the leading treatises on juries) has described how he, as a jury commissioner, picked people for jury service in Philadelphia:

In actually selecting the names, I was guided by the occupations or businesses of the electors, taking by preference those who were designated as householders and who lived on the chief streets; for, in a big city like Philadelphia, where thousands of names must be marked every year, it is impossible, for those fixed with the responsibility, to select jurors known to them personally.\footnote{108}


108. ROBERT VON MOSCHZISKER, TRIAL BY JURY § 94 (2d ed. rev. enlarged 1930).}
Although he admits no racial animus, his procedure would have had a large racially disparate impact. By using neighborhood, prestige of profession, and homeowner status as proxies for civic responsibility, his method screens out whole classes of people—not only blacks, but also the poor. Indeed, as one opponent of the move to random jury selection in the federal courts argued, the real reason for abolishing the key-man system was not race, but "the inevitable tendency of the courts in all parts of the country to exclude the poor." Any system aiming to ensure civic virtue which relies on convenient economic and employment "proxies" will necessarily have this effect, as would any system relying on voting lists, although probably to a lesser extent.

Even relying fully on personal knowledge of people rather than on proxies can lead to this same disproportionate result. A white, middle-class key person may strongly disapprove of discrimination against blacks and the poor and yet have little knowledge of those communities and few acquaintances within them. To the extent that middle-class whites are overrepresented among jury commissioners, they are likely to be overrepresented on jury venires, even if the commissioners completely lack discriminatory animus. As these examples suggest, the intent requirement in the jury cases largely tests the output of the jury selection process, not its inputs, as true process theory would demand. Even more than the standards developed in the housing and employment cases, it employs a concept of intent largely independent of motivation.

B. The Electoral Process

The intent doctrine in voting cases bears even less relationship to motivation. Although the Court has employed the intent doctrine in cases involving gerrymandering and voting qualifications, it has developed the doctrine most thoroughly in cases challenging at-large voting systems that submerge minority interests. Like key-man jury systems, at-large voting systems are not unconstitutional per se but only under certain circumstances. In City of Mobile v. Bolden, a majority of justices found that discriminatory intent was the central factor in proving a violation, but no majority agreed on how intent could be shown, or even whether it was present in that case. Rogers v.

110. See note 106 supra.
116. Id. at 66-68 (plurality opinion); id. at 94-95 (White, J., dissenting).
117. Compare id. at 65-74 (plurality opinion) with id. at 95-103 (White, J., dissenting).
later clarified how a plaintiff could establish intent. In that case, black plaintiffs challenged the constitutionality of the at-large election system used in Burke County, Georgia. No black had ever been elected there although blacks accounted for 53.6 percent of the population and 38 percent of those registered to vote. Probably because blacks were effectively excluded by other means when Burke County decided to adopt at-large voting in 1911, the plaintiffs made the claim that at-large voting was maintained, but not necessarily established, for invidious purposes.

The Court reaffirmed that intent was the central inquiry, but it then proceeded to find intent in an aggregate of factors having at best an indirect bearing on motivation. In particular, the Court found discriminatory intent substantiated by the following factors: (i) that blacks constituted a majority of the county's overall population but a distinct minority of its registered voters; (ii) the presence of bloc racial voting; (iii) the fact that no black candidates had ever won election; (iv) past discrimination against blacks in voting, including the use of literacy tests, poll taxes, and white primaries, which had a continuing effect on black registration rates; (v) past discrimination against blacks in education; (vi) past discrimination in political party affairs and primaries; (vii) property ownership requirements that made it difficult for blacks to serve as chief registrar of the county; (viii) past discrimination in grand jury selection, county hiring, and appointment to county boards and committees; (ix) unresponsiveness and insensitivity of elected officials to the needs of the black community; (x) the depressed socioeconomic conditions of blacks; (xi) the large geographic size of the county, which made it difficult for blacks to reach polling places; (xii) a requirement of repeated runoff elections until one candidate received a majority of the votes cast; (xiii) a requirement that candidates run for specific seats, which prevented a cohesive political group from focusing their support on a single candidate; and (xiv) the absence of a residency requirement, which allowed all the commissioners to come from a single, perhaps “lily white,” part of the county.

The sufficiency of this type of evidence reveals the first difference between the voting cases and the housing, employment, and jury selection cases. Whereas the housing and employment discrimination cases require that the plaintiff produce some objective evidence of discriminatory motivation in order to establish a prima facie case, and the jury cases require a showing of disparate impact plus a showing that the jury selection procedure was susceptible to abuse, the voting cases appear to require only a showing of disparate impact plus a showing that the jurisdiction has engaged in other types of discrimination in the past. In

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118. 458 U.S. 613 (1982).
119. Id. at 614-15.
120. Id. at 623-27.
voting cases, the intent requirement does not demand any showing of actual discriminatory motivation in the decision to adopt or retain the at-large system. At most, the requirement tests for discriminatory motivation on the part of the legislature in other decisions at other times, or perhaps the bloc voting factor may be seen as a way of testing for discriminatory motivation on the part of individual voters in past elections.

Allowing either of these kinds of motivation to satisfy the intent requirement poses problems for process theory. Given the tragic history of race-based oppression in our country, it is usually easy to find the first type of motivation in areas where the use of at-large districts makes a difference. Doing so effectively allows the plaintiff to transfer motivation from one area of governmental activity to another. Applied generally, this technique would eviscerate the intent requirement. Few governmental entities are so innocent of discrimination that a plaintiff could not find some motivation to discriminate in some area at some time. The historical pervasiveness of discrimination makes this approach unhelpful in evaluating the current inputs into the decisionmaking process.

The second type of motivation, individual motivation, poses different but no less serious problems. Although it tests for actual discriminatory motivation and thus avoids the difficulties of the first approach, it tests for such motivation in individual voting decisions, not in the government's decision to establish or maintain the at-large system. This deflection of the intent inquiry threatens to make the government liable for discrimination whenever a voting procedure gives voice to private values which reflect racial prejudice. If adopted generally, this view could invalidate many government programs which rely on, incorporate, or consult private values in making decisions. The Court has accepted this view in a few limited situations, but accepting it generally would undermine much of the state action requirement, which limits the reach of equal protection to governmental actions. Under this more expansive view, the fourteenth amendment would still not reach purely private conduct, but it would reach government conduct which reflects certain kinds of private choices. This would go a long way towards erasing the distinction the law has created between public and private action. Although the Constitution regulates the former, it leaves the latter largely untouched.

122. E.g., Anderson v. Martin, 375 U.S. 399 (1964) (striking down scheme under which ballot listed race of candidates).
Court is following those critics who have attacked the coherence of this troubling distinction.124

Whatever the Court’s rationale, the overall result of these two approaches to motivation is to make intent largely coextensive with adverse impact in voting cases. By allowing adverse impact plus evidence of past governmental discrimination in decisions unrelated to the adoption or maintenance of the at-large system to demonstrate intent, the Court moves just as far away as it did in the jury selection cases from any traditional conception of intent as motivation. Nor are the voting cases concerning at-large systems unique in this regard. Other voting cases, particularly those involving claims of gerrymandering, similarly downplay the importance of motivation. Although the plurality opinion in the Court’s one brush with political gerrymandering claims, *Davis v. Bandemer*,125 stated that intent to discriminate against a particular political group is necessary to make out an equal protection claim, the plurality found that even very weak evidence would support it. Despite Feeney’s holding that an individual must show that the government decisionmaker took a particular course of action at least in part “because of,” not merely “in spite of,” its adverse discriminatory consequences, the plurality in *Bandemer* would eagerly infer intent from foreseeable consequences in gerrymandering cases:

> [W]e think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win. . . . As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.126

In this view, intent requires little more than a showing of a gerrymander’s likely political consequences—in other words, its likely disparate effect.

The state’s burden in negating intent in the voting cases also violates process theory. Just as in the housing, employment, and jury selection cases, the plaintiff’s showing of intent here merely shifts the burden to the state to negate the inference. In the housing and employment cases, the state had to support its decision with some amount of “legitimate” purpose. In the jury selection cases, it had to bear a heavier burden. In *Rogers*, the burden sits heavier still. It is clear that some very good reasons support the use of at-large voting systems. As

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126. *Id.* at 128-29 (plurality opinion) (footnote omitted).
compared to the most likely alternative—single-member districting—at-large systems make every representative accountable to the jurisdiction as a whole and thereby ensure that each representative has the interests of different areas at heart. Reformers in the Progressive Era, in fact, championed at-large voting as a way of avoiding capture of representatives by narrow local interests. Such aims are at least “legitimate,” in the Court’s terms, but surprisingly are seldom mentioned. By its silence in case after case where these arguments are made, the Court suggests that these aims are not substantial enough to carry the state’s burden. To win its case, the state must carry nothing less than its ultimate burden by showing a “compelling” purpose.

In Hunter v. Underwood, the one voting case where the Court has explicitly considered a state’s argument that a nondiscriminatory purpose could rebut an inference of discriminatory motivation, the Court made clear that the state would have a higher burden to meet than in the employment, housing, and jury selection cases. In Hunter, the Court found that Alabama had originally adopted for discriminatory reasons a state constitutional provision disenfranchising persons convicted of crimes of moral turpitude. Nonetheless, the state argued that the provision did not offend equal protection. It believed that the original framers’ additional intent to disenfranchise poor whites in order to prevent a resurgence of populism, and the general validity of denying the franchise to those convicted of crimes of moral turpitude, cured any problem. The Court rejected the state’s first argument because “an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks.” It rejected the second argument partly because disenfranchising those guilty of crimes of moral turpitude “simply was not a motivating factor” and also because the provision “was motivated by a desire to discriminate against blacks on account of race and . . . [a]s such . . .

127. EDWARD C. BANFIELD & JAMES Q. WILSON, CITY POLITICS 52 (1963) (“When a city undertakes to reconstitute its political system by dropping ward in favor of at-large elections . . . elected officials find that they must represent the city, not the ward . . . .”); Alternative Voting Systems as Remedies for Unlawful At-Large Systems, 92 YALE L.J. 144, 155 (1982) (Daniel R. Ortiz student author) (“Representatives in multimember districts are less susceptible to capture by narrow local interests. Since each candidate must run in the district as a whole, there is little political advantage to becoming identified with the interests of a particular locality.”).

128. Samuel P. Hays, The Politics of Reform in Municipal Government in the Progressive Era, in 2 NEW PERSPECTIVES ON THE AMERICAN PAST 148, 157 (S. Katz & S. Kutler eds. 1969); see City of Mobile v. Bolden, 446 U.S. 55, 70 n.15 (1980) (“It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government.”) (citations omitted).

129. But see Bolden, 446 U.S. at 70 n.15.
131. Id. at 229-30.
132. Id. at 232.
133. Id.
violates equal protection under *Arlington Heights*." Even though the state argued that the fourteenth amendment itself expressly contemplated such exclusions, the inference of intent proved unrebuttable.

C. Education

Modern school desegregation cases employ one of the most interesting forms of the intent requirement. The typical desegregation suit follows several steps. First comes the initial finding of liability, when the court declares that the school system violates the equal protection clause. In making this determination, the court distinguishes between de jure and de facto segregation. The former reflects purposeful discrimination, whether by statute, local ordinance, or informal action, whereas the latter reflects segregation based on other factors, such as residential housing patterns. The difference is crucial because only de jure segregation offends the Constitution. Once purposeful discrimination is shown, the suit enters a second stage where the school district falls under an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination [is] eliminated root and branch." In this stage, the trial court usually retains jurisdiction until all vestiges of discrimination disappear, at which point the court declares the district "unitary." This finding usually frees the district from the affirmative duty imposed by the original finding of liability, wipes the slate clean of past violations, and releases the schools from the trial court's continuing jurisdiction.

At first glance, the school desegregation suit appears to follow the process model closely. The liability stage, for example, appears to hinge completely on the de jure/de facto distinction, a distinction which attempts to separate process from substance review. Under the de jure standard, the motivation behind decisions, not the substance of the outcomes themselves, triggers intervention. The Court, however, has applied the de jure/de facto distinction with enough flexibility almost to erase it. In *Keyes v. School District No. 1*, for example, the Court held that a district's affirmative duty could attach systemwide if the district purposefully segregated only a part of the school system. In effect, the ruling allowed plaintiffs to transfer discriminatory intent

134. *Id.* at 233.
135. *Id.* Section 2 of the fourteenth amendment reduces a state's representation in the House of Representatives by the proportion of male citizens over 21 years old who are disenfranchised "except for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2 (emphasis added).
136. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973) ("We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation ... is purpose or intent to segregate.") (emphasis in original).
141. 413 U.S. 189 (1973).
from a part of the district to the whole. The Court based its decision on the grounds that discriminatory intent in a part of a district is strong evidence as to intent in the whole, and that intentional segregation in a part would have segregational effects on the whole. Both grounds are surely right, but how right and how relevant are they? Discriminatory intent in a part of a district surely does serve as some evidence of intent in the whole, but as dispositive evidence which the district cannot even rebut? Similarly, intentionally segregating a part of a district may affect the racial balance of the whole, but how much? By allowing plaintiffs to transfer intent from part to whole, the Court relaxed the connection between the intent requirement and actual motivation without destroying it entirely.

In Columbus Board of Education v. Penick and Dayton Board of Education v. Brinkman, the Court further divorced intent from motivation. Both cases held that plaintiffs could satisfy the intent requirement by showing that the district had acted purposefully to segregate the schools as far back as the time of Brown v. Board of Education (Brown I), where the Court first held purposeful segregation under the "separate but equal doctrine" invalid. In other words, plaintiffs could temporally transfer discriminatory motivation from any time between 1954 and the present in order to prove current de jure segregation. Thus, de facto segregation in any area where the state had purposefully discriminated at or after the time of Brown I became unconstitutional. In large parts of the country, then, despite the de jure/de facto distinc-

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142. The Court's actual reasoning was quite complex. It first held that proof of intentional segregation of a "meaningful portion of a school system" establishes a prima facie case of intentional segregation of the whole. It then shifts to the district to disprove intent as to the whole. Id. at 210. A district cannot carry this burden, however, by "rely[ing] upon some allegedly logical, racially neutral explanation for [its] actions." Id. It must actually show that "segregative intent was not among the factors that motivated [its] actions." Id. This amounts to a burden to rebut each of the plaintiff's showings of intent to segregate a portion of the district. Furthermore, in attempting to carry this burden or to show that the same degree of de facto segregation would have resulted without intent, the district cannot rely on the existence of segregated housing patterns, which might have led to segregated schools under a "neighborhood school policy." Id. at 211-13. The overall result is to make it extremely difficult for the district to argue successfully against transferring intent from a part of the school system to the whole.

143. Id. at 207.
144. Id. at 201-03.
146. 443 U.S. 526 (1979) (Dayton II).
149. One passage in Keyes suggests, in fact, that intent before the time of Brown I may also serve to establish current liability. The Court stated:

The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in Brown. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

413 U.S. at 210-11.
tion, current disparate effects, not motivation, became the operative liability standard.

The second stage of the school desegregation suit more clearly violates the process model of intent. After liability attaches, the school district falls under an affirmative duty to move to a so-called unitary school system. A unitary system is one where, in theory, all remaining vestiges of segregation have disappeared.150 During the time between the finding of liability and the point at which unitariness is attained, the court exercises continuing jurisdiction over the district to ensure that it is moving to dismantle the existing dual system.151 Notwithstanding the intent requirement, the court effectively holds the district to an effects standard during this time. Any practice having a discriminatory effect, even if it would not have been objectionable under the original liability standard, violates the district’s continuing duty to eradicate all vestiges of discrimination. It is under this theory that courts sometimes require busing to overcome the effects of segregated housing patterns even though they could not have predicated a district’s original liability on such de facto segregation.152 Once the court finds liability, in other words, de facto segregation becomes the operative constitutional standard until the district achieves unitariness. For this period of time, adverse impact, not motivation, controls.

After a court declares a district “unitary,” the standard of intent changes completely. Since a finding of unitariness means that the district has fulfilled its affirmative duty, the finding wipes away the original violations and releases the district from the court’s jurisdiction.153 To reassert jurisdiction over the school district after this point, the court must find a completely new violation, one arising after the declaration of unitariness has issued.154 The plaintiff can no longer transfer discriminatory motivation from the past to the present because unitariness extinguishes all past illicit motivations. A declaration of unitariness, then, raises the level of the intent requirement. Since a plaintiff can no longer make arguments from the past and the district no longer has any affirmative duty, future court intervention must rest on a showing of actual and recent discriminatory motivation. In practical terms, it becomes much more difficult to establish a constitutional violation. Perhaps more important to school plaintiffs, gains in integration made as a result of the original suit may be lost as districts move back toward neighborhood school programs and racial housing patterns reassert ra-

153. Raney, 391 U.S. at 449.
cial imbalances between different school attendance zones.\textsuperscript{155}

The intent doctrine in the school cases varies dramatically from stage to stage of the desegregation suit. To establish liability, a plaintiff must show discriminatory motivation, but only in a part of the district and at any time on or after the day *Brown I* was decided. From the finding of liability to the declaration of unitariness, school districts’ actions are judged under an effects standard. Actions having an adverse impact violate the affirmative duty that liability imposes on the district. After the declaration of unitariness, the intent requirement demands a showing of contemporary discriminatory animus. Only the latter formulation of the intent requirement fits process theory, and even it does so only partially. Although the intent requirement at that stage requires the plaintiff to offer evidence of motivation, the Court does not allow the state to rebut it by showing that the decisionmaker would have made the same choice for other reasons.\textsuperscript{156} Short of carrying its ultimate burden by offering a compelling state interest, something the Court has never found in the context of segregated schools, the state would lose the desegregation suit.

The overall effect of this varying intent test is clear. In jurisdictions where the state or local school district purposefully segregated the schools at the time of *Brown I* or thereafter, plaintiffs have one fairly easy shot at “correcting” the situation, at least temporarily, but after that they must prove real discriminatory animus. Perhaps this uncomfortable compromise between motivation and effects standards reflects both our special sensitivity toward discrimination in education and the symbolic importance of *Brown I*, on the one hand, and our attraction to neighborhood schools and our reluctance to disturb underlying patterns of housing, on the other. Whatever the reason, the intent requirement as applied in this area cannot fit a process theory description.

**IV. The Overall Design**

The Supreme Court has developed the intent requirement so unevenly that it now fails to fit either its name, the Court’s description of it, or the theory its champions and opponents alike claim gave it birth. What are we to make of intent, then? Perhaps we can begin reconstructing the concept by noting certain similarities of function in the different areas in which the Court has applied it. Although the intent doctrine appears to operate quite differently in these different contexts, structurally it functions the same in each.

In each area discussed, the intent requirement serves to allocate

\textsuperscript{155} See id. (communities “in a growing, mobile society” unlikely to remain “demographically stable” after declaration of unitariness).

\textsuperscript{156} See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211-13 (1973) (foreclosing defense that neighborhood school policy would have led to similar degree of segregation).
burdens of proof between the individual and the state. In the housing
and employment discrimination cases, for example, it allocates to indi-
viduals the burden of producing evidence of discriminatory motivation;
if this is shown, it then shifts the burden of proof to the state to show
legitimate reasons for the disparate treatment. Similarly, in the jury
selection cases, the doctrine places on individuals the burden of show-
ing adverse impact on an identifiable group and the susceptibility of the
selection procedure to manipulation; if this is met, it then shifts the
burden to the state to show that valid reasons underlie the selection of
particular jurors.

In the voting cases, intent requires that the individual show adverse
impact in voting plus discrimination in other areas of life, and then
shifts the burden to the state to offer a compelling reason for the elec-
toral discrimination. In the school desegregation cases, the rule is
more complicated. At the initial liability stage, the individual must
come forth with evidence of discriminatory motivation at some time
from *Brown I* on and then, to rebut, the state must come forward with a
compelling reason for segregation—which no state has ever done.
Once liability is found, the district falls under an affirmative obligation
to remedy segregation, a duty which effectively judges its actions under
an effects test. After the declaration of unitariness, however, the test
becomes much more strict. Since the district has cured the original vio-
lations, plaintiffs can no longer point to any discriminatory motivation
from the time before the unitariness finding. Thus, after the school
district has achieved unitariness, the intent doctrine requires the same
showing on the plaintiff’s side that it requires in the housing and em-
ployment cases: actual discriminatory motivation. The only difference
lies in the state’s burden. In the school cases, the state has never ne-
gated intent by arguing “legitimate” interests.

The irony of intent is that over time it has come to embrace an ap-
proach it was originally adopted to avoid. In *Washington v. Davis*, the
Court required intent largely to escape the implications of the analysis
the lower courts were applying to facially neutral governmental actions
having disparate effects. The lower courts at that time were for the
most part treating this type of equal protection claim the same way they
treated disparate impact claims under Title VII. If the plaintiff
showed disparate impact in an employment case, for example, then the
burden shifted to the state to show what, in *Griggs v. Duke Power Co.*, the
Court variously described as “business necessity,” “relat[ionship] to
job performance,” and “manifest relationship to the employment in

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157. *See*, e.g., *Douglas v. Hampton*, 512 F.2d 976, 981 (D.C. Cir. 1975) (“No court has
distinguished the standard mandated by the Fifth and Fourteenth Amendments from that
specified by Title VII of the Civil Rights Act of 1964.”); *Bridgeport Guardians, Inc. v.*
Bridgeport Civil Serv. Comm’n, 482 F.2d 1333, 1337 & n.6 (2d Cir. 1973); *Castro v. Beecher,
459 F.2d 725, 732-33 (1st Cir. 1972).
question.” Through this sometimes complex shifting of burdens of proof, Title VII doctrine aimed to evaluate “the consequences of employment practices, not simply the motivation.” In other words, it tested the outcomes of decisionmaking, not the inputs. Griggs’s particular allocation of the burden of proof, moreover, served to balance the interests of minorities and employers. Title VII did not proscribe all employment practices having harmful disparate effects, but only those practices not justified by bona fide business interests. In the words of Griggs, the allocation roughly pit the cost of “‘built-in headwinds’ for minority groups” against businesses’ legitimate need to “measur[e] job capability.” In origin at least, Title VII focused unabashedly on the substance of decisionmaking, not its motivation.

The intent doctrine has come to resemble Title VII in both focus and structure. In many contexts, it too centers on outcome, rather than input, and it too weighs the claims of both sides through its allocation of the burden of proof between the parties. More important, intent doctrine allocates the various burdens of proof in a systematic way. As the individual's interest becomes greater, the doctrine places a correspondingly lesser burden on the individual and a greater burden on the state. This observation contradicts one of the central doctrinal claims of process theorists, who believe that under the traditional suspect classification strand of equal protection the importance of the individual interest does not matter. As Ely puts it in arguing against the view that the Court considers the “amount of harm”: “[Such an] account would make sense if the Court followed the practice of reviewing more strenuously those distinctions that hurt more, which it doesn’t. A taxation distinction worth $1,000,000 receives about the same review as one worth $100—that is, virtually none.”

Ely’s point is well taken, but only so far. The Court does not vary review according to the size of individual penalties, but it does distinguish between various categories of interests. In particular, it appears to follow the familiar hierarchy the Court employs in the fundamental rights strand of equal protection in deciding what level of scrutiny to accord various kinds of interests. In that area, voting and certain

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158. 401 U.S. 424, 431-32 (1971). The courts have applied these different formulations in different situations. For a helpful discussion of the confusion surrounding the burden a defendant must bear under Griggs, see Rutherglen, supra note 10, at 1297-99, 1312-29.

159. Griggs, 401 U.S. at 432 (emphasis in original).

160. Id.

161. But see Rutherglen, supra note 10 (arguing that Griggs and the theory of disparate impact under Title VII aim to uncover discriminatory motivation). My own discussion of Title VII is limited to disparate impact claims. Claims based on disparate treatment, the other major prong of Title VII doctrine, clearly focus on motivation. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

162. J. Ely, supra note 3, at 150-51 (emphasis in original).

criminal process rights,¹⁶⁴ along with the right to travel,¹⁶⁵ receive heightened scrutiny; education receives somewhat elevated scrutiny, in practice, if not in theory;¹⁶⁶ and traditional economic interests receive reduced scrutiny.¹⁶⁷ Contrary to the claims of the Court and commentators,¹⁶⁸ then, the fundamental rights and suspect classification strands of equal protection are not totally separate. Intent takes into account not only the invidiousness of the government’s classification but also the importance of the individual interest at stake. At the heart of this most confusing stage of the equal protection inquiry, the seemingly disparate strands of larger equal protection doctrine meet.

This description of the intent requirement poses two major questions which are, in fact, related. First, why this particular hierarchy of value? Why should the law treat these particular kinds of cases more seriously than others? Second, why the great gap between the housing and employment cases and all the others? In the housing and employment cases, the plaintiff must show current, actual discriminatory motivation; in the others, current disparate effects plus some other showing—at most of motivation in the past or in decisions unrelated to the one under consideration—suffice. Not only is it much more difficult to prove intent in the housing and employment cases, but, more interestingly, they involve a completely different kind of inquiry. Why such a great difference in approach and result between these two groups of cases? Why require motivation in the one and pay only lip service to it in the other?

In Washington v. Davis, the Supreme Court gave three reasons for requiring discriminatory motivation: precedent, institutional role, and the slippery slope. Ironically, the precedents on which it relied consisted of jury selection, voting, and school desegregation cases¹⁶⁹—contexts where today, at least, the Court does not require a meaningful showing of discriminatory motivation on the part of the government decisionmaker. The Court’s argument based on institutional role was more straightforward. Absent invidious motivation, it thought, review as searching as that under Title VII was simply too disruptive of government decisionmaking.¹⁷⁰ Congress could permit such intrusive ju-

¹⁶⁸. See, e.g., Plyler, 457 U.S. at 216-17 (distinguishing between suspect class and fundamental right strands); Rodriguez, 411 U.S. at 16-17 (same); Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1077-84 (1979) (same).
¹⁷⁰. Id. at 245-48.
dicial intervention, to be sure, but the courts could not undertake it themselves without statutory authorization.

The Court's final reason, the often throwaway slippery slope, reveals the most about its fears in this area. At the point of choosing between an effects and an intent test, the Court looked ahead to see where an effects test might lead:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.171

And in a footnote, the Court paraded even more horribles:

[One commentator] suggests that disproportionate-impact analysis might invalidate "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferrred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule.172

This parade of horribles, as the Court's comparison of "the poor and . . . the average black" with "the more affluent white" shows, arises out of the overlap of race with other classifications in our society, particularly wealth.173 As the Court's identification of "poor" with "average black" and of "more affluent" with "white" makes clear, any rule classifying on the basis of wealth has disproportionate racial effects because race and wealth are cohort classifications in our society. In other words, it is the case both that blacks are disproportionately poor and that the poor are disproportionately black. The two classifications correlate to some degree. According to the Bureau of the Census, for example, the median household net worth of blacks in 1984 was $3397, while that of whites was $39,135—a difference of over 1100 percent.174 One difficulty with allowing racial effects alone to cast suspicion on governmental action, then, is that such a rule would cast doubt on the validity of many laws reflecting differences in wealth. In a society like ours, however, wealth classifications can hardly be suspect.175 In an

171. Id. at 248.
173. Formal education is another major related classification. There are, of course, still many others, like high infant mortality, but to a large extent these others may derive from differences in wealth.
175. Rejecting an inference of intent based on an employer's use of arguably sex-biased
advanced market economy, wealth is in many ways a foundational classification, one on whose legitimacy large parts of the economic and social structure stand. If the Court were to hold that wealth was a suspect classification, the government could not simply accept the market as a background assumption for most of its programs. In many areas, it would have an affirmative obligation to work to revise market allocations.\textsuperscript{176} A simple effects test, then, might well have threatened many of our most traditional and commonly accepted social and economic structures,\textsuperscript{177} and made more difficult any particular legislative efforts to reform them.

As originally developed in \textit{Washington v. Davis}, the intent doctrine served a very critical and difficult function. It attempted to separate race from other classifications—particularly wealth—to which it was very closely related. If these other classifications served as mere pretexts for race, intent condemned them. If they did not, intent preserved them from searching scrutiny. Intent aimed, in other words, to separate racial proxies from mere racial cohorts. This task was critical because race had become as culturally odious as some of its cohorts had become foundational. Seen this way, the intent requirement serves as much a protective as a condemnatory function. It works not just to identify troubling classifications but also to insulate others—which

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\textsuperscript{176} This has already occurred in the area of certain criminal process rights. In \textit{Griffin v. Illinois}, 351 U.S. 12 (1956), for example, the Court held that the state could not rely on the market to provide trial transcripts necessary for appeal, and in \textit{Douglas v. California}, 372 U.S. 353 (1963), it held that the state could not relegate an indigent criminal defendant to the market for appellate legal services. In both these cases Justice Harlan saw the threat this brand of equal protection posed to traditional market allocation:

\begin{quote}
[The Equal Protection Clause does not impose on the States “an affirmative duty to lift the handicaps flowing from differences in economic circumstances.” To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. \textit{Douglas}, 372 U.S. at 362 (Harlan, J., dissenting) (quoting \textit{Griffin}, 351 U.S. at 34 (Harlan, J., dissenting)).
\end{quote}

\begin{quote}
Whether revision of these institutions would be beneficial is a normative question lying far beyond the scope of this article. I want only to point out the fundamental inconsistency between existing market structures and an effects standard. Frank Michelman made this point well in the late 1960s:

\begin{quote}
[The risk of exposure to markets and their “decisions” is not normally deemed objectionable, to say the least, in our society. Not only do we not inveigh generally against unequal distribution of income or full-cost pricing for most goods. We normally regard it as both the fairest and most efficient arrangement to require each consumer to pay the full market price of what he consumes, limiting his consumption to what his income permits.
\end{quote}

Frank I. Michelman, \textit{The Supreme Court 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment}, 83 HARV. L. REV. 7, 27-28 (1969). More recently, Margaret Radin has noted the relationship between liberalism and markets. In her view, the tenets of liberalism “lead[] to the traditional liberal pluralist picture of a laissez-faire market domain walled off from a few exceptions that are completely removed from the market.” Margaret Jane Radin, \textit{Market-Inalienability}, 100 HARV. L. REV. 1849, 1891 (1987).
largely constitute our society—from serious review. The market, if not exactly a constitutional value, is protected from constitutional concern.178

Seeing intent in this way helps explain both the gap between the housing and employment cases and the others, and the rest of the hierarchy of value that the intent doctrine reflects. In those areas traditionally relegated primarily to market control, like housing and employment,179 the intent doctrine requires actual motivation. This not only makes judicial supervision of government participation in and regulation of these markets difficult, but it also places beyond constitutional question differences, like those in education or wealth, upon which market rewards at least in part depend. Intent thus protects not only the government's decision to participate, intervene, or not intervene in traditional markets, but also the criteria, like wealth endowments, through which we structure society in these areas.

In other contexts, such as voting, jury selection, and school desegregation, the Court does not protect these cohort classifications. In fact, in these areas, the Court has independently condemned discrimination on the basis of those classifications, like wealth, on which the market operates. In Douglas v. California180 and Griffin v. Illinois,181 for example, the Court held that the states had to extend certain rights to indigent criminal defendants that were available to those defendants who could pay. The state could not simply rely on the market to allocate these goods. Similarly, many of the voting rights cases under the fundamental rights strand of equal protection, particularly the poll tax cases,182 effectively outlaw use of wealth classifications in the electoral pro-

178. In his recent work, Cass Sunstein has argued an even stronger form of this hypothesis: that much contemporary constitutional law prohibits the government from acting in ways that disrupt the market. Cass R. Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873 (1987). Describing this strand of constitutional law in terms of the Court's approach in Lochner v. New York, 198 U.S. 45 (1905), Sunstein states:

For the Lochner Court, neutrality, understood in a particular way, was a constitutional requirement. The key concepts here are threefold: government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law. Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Whether there was a departure from the requirement of neutrality, in short, depended on whether the government had altered the common law distribution of entitlements. Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.

Sunstein, supra, at 874.

179. I do not mean to deny that both these markets are heavily regulated. See Radin, supra note 177, at 1918-19. Labor laws, zoning restrictions, and antidiscrimination requirements influence much private behavior in these areas. In our society, however, the market remains the dominant allocational force in both areas.


cess.\textsuperscript{183} And finally, although the Court has held that education is not a fundamental right,\textsuperscript{184} it has also suggested certain limits to how much the state can discriminate in this area on the basis of wealth. In particular, it appears that the state may comparatively, but not absolutely, deprive the poor of education.\textsuperscript{185} As these fundamental rights strand cases show, in those contexts where the Court has significantly eased the intent requirement in the suspect classification strand it generally finds discrimination on the basis of wealth to be an independent problem. In these cases there is simply no need for a court to sort out race from wealth. Where we do not traditionally relegate an area of social activity largely to market control, equal protection can condemn both proxies and cohorts.

As this discussion suggests, the intent doctrine distinguishes between two types of goods. The first kind, which it fairly aggressively protects, consists primarily of political, criminal, and educational rights. The second kind, over which it allows the state much control, consists of "ordinary" social and economic goods, like jobs and housing. In making this distinction, intent doctrine reflects our prevailing political ideology—liberalism—which is a system of values rooted in the belief that the state should allow every individual to pursue his own conception of the good.\textsuperscript{186} Since such an aim requires the state to remain neutral between competing conceptions of the good, the state can legitimately act only to allow individuals more fully to pursue their own private conceptions. Thus, in its most extreme form, libertarianism, this ideology permits the state only to create basic property law, to criminalize private behavior hindering others' ability to choose their own ends, to educate society's youngest citizens so that they too may learn to choose their own ends, and to enforce private bargains. In this extreme system, nearly all remaining social interaction is governed by free markets since that mechanism is thought best to allow persons to achieve their individually chosen objectives in free trade.\textsuperscript{187} Like libertarianism, liberalism also aggressively protects those basic rights, like voting, education, and freedom from unwarranted physical restraint, which are

\textsuperscript{183} E.g., Bullock v. Carter, 405 U.S. 134 (1972).


\textsuperscript{185} Plyler v. Doe, 457 U.S. 202 (1982). In fact, some of these limits may have been implicit in the qualifications of Rodriguez itself. See Rodriguez, 411 U.S. at 22-28, 36-37.

\textsuperscript{186} E.g., B. Ackerman, supra note 11, at 10-12, 43-45 (discussing requirement of neutrality); Dworkin, supra note 11, at 127-30. Michael Sandel best states the "core thesis" of liberalism as follows:

[S]ociety, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not themselves presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather that they conform to the concept of right, a moral category given prior to the good and independent of it.


\textsuperscript{187} See generally R. Nozick, supra note 11 (discussing minimal state).
necessary for a person to be able to choose her own ends. And, like libertarianism, liberalism also relegates most remaining social behavior to the market.\textsuperscript{188} Liberalism does, however, differ from libertarianism in permitting the state to interfere somewhat in the market—certainly to overcome market failure and also to ensure a certain minimum level of dignity and welfare to all individuals.

In this description, liberalism has two central features. First, it grants the first type of goods priority over the second.\textsuperscript{189} In nearly all forms of liberalism, the state cannot seriously infringe these first-order goods and the individual cannot even voluntarily trade them away for others. Since they are foundational in the sense that they enable the individual to choose and pursue her own private conception of the good, they are necessarily primary. Second, while liberalism relies primarily on the market to allocate ordinary social and economic goods, it does allow the state to intervene to some degree in market allocation. Only strict libertarianism commands the state to leave the market inviolate. In prescribing the burdens borne by the parties, the intent doctrine thus reflects both of the core features of liberalism: the aggressive protection of those rights and liberties that enable the individual to pursue her own vision of the good and the permissive supervision of government intervention in traditional economic and social markets.

\section*{V. A Final Challenge: Capital Punishment}

The most controversial and, to some, notorious of the Court's recent equal protection cases might appear to cast doubt on this redescription of the intent doctrine. In \textit{McCleskey v. Kemp},\textsuperscript{190} the Court held that statistical evidence that capital punishment strongly correlated with the race of the criminal defendant and his victim did not make the death penalty unconstitutional. The criminal defendant's expert, Professor Baldus, had submitted a study which argued a strong disparate impact in the incidence of the death penalty.\textsuperscript{191} According to the Court, the Baldus study showed

\begin{quote}
that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a
\end{quote}

\textsuperscript{188} See B. Ackerman, \textit{supra} note 11, at 177, 180, 263; J. Rawls, \textit{supra} note 11, at 270-74; Dworkin, \textit{supra} note 11, at 130-32.
\textsuperscript{189} E.g., J. Rawls, \textit{supra} note 11, at 62-63, 302-03 (discussing priority rules and lexical ordering); see M. Sandel, \textit{supra} note 186, at 1-14 (discussing priority of the right over the good).
\textsuperscript{190} 481 U.S. 279 (1987).
\textsuperscript{191} As the Court described it:
The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11\% of the cases, but defendants charged with killing blacks received the death penalty in only 1\% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4\% of the black defendants received the death penalty, as opposed to 7\% of the white defendants.

\textit{Id.} at 286.
death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty. 192

Although the district court had rejected McCleskey's claim because of alleged flaws in the study, 193 the Supreme Court "assume[d] the study [was] valid statistically without reviewing the factual findings of the District Court." 194 As considered by the Court, then, the racially disparate impact of the death sentencing procedures was uncontested.

The Court decided the equal protection claim on the basis of intent. 195 It first noted that McCleskey had to show that "the decisionmakers in his case acted with discriminatory purpose," 196 and that he had offered no specific evidence to show that racial concerns played a part in his individual sentencing. Thus, he had only the statistical evidence contained in the Baldus study to rely on. The Court rejected the study as evidence of intent for four different reasons. First, it rejected the analogy to Title VII and to the jury selection cases, where statistics by themselves can "prove" motivation, because "the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases." 197 The fundamental difference appeared to be that in those other cases "the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions." 198 By fewer entities, the Court must have meant to distinguish jury commissioners, on the one hand, from the legislature that drafts a capital punishment statute, the prosecutor who decides to press for a death sentence, the jury that recommends it, and the judge who adopts this recommendation, on the other. There is no doubt that capital sentencing involves more entities, but does the number make a difference?

In venire selection, many actors are involved too. In Castaneda, for example, the state legislature had passed the statute setting up the keyman system, and state judges appointed the commissioners, who in turn relied on key people to exercise their individual judgment in recommending people for jury service. 199 Discretion pervaded every part of the system. One may also wonder whether there is any real differ-

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192. Id. at 287.
195. The Court also rejected McCleskey's eighth amendment claim, id. at 314-18, which is irrelevant to the present discussion.
196. Id. at 292 (emphasis in original).
197. Id. at 294.
198. Id. at 295 (citations omitted).
ence in the number of variables involved in each of the two kinds of decisions. The Court in McCleskey elaborated this distinction as follows:

In venire-selection cases, the factors that may be considered are limited, usually by state statute. . . . In contrast, a capital sentencing jury may consider any factor relevant to the defendant's background, character, and the offense. There is no common standard by which to evaluate all defendants who have or have not received the death penalty.200

This is true, but misleading. State law usually does not meaningfully limit the factors that key persons may consider in selecting the venire, although state law usually sets fairly specific and objective minimal eligibility requirements for jury service,201 just as it sets more specific criteria for eligibility for death sentencing.202 In fact, a discretionless standard would prove incompatible with the key-man system's aim of choosing civically responsible adults for jury service, for "good citizenship" cannot be measured objectively. In the end, no matter how the state expresses it, the standard of civic responsibility guiding the selection of jurors is no less subjective and discretionary than the standards which guide the jury's determinations in death sentencing.203

The second reason for rejecting the Title VII and the jury selection precedents lay in the fact that in those cases "the decisionmaker has an opportunity to explain the statistical disparity," whereas in capital punishment cases he does not.204 The Court argued that public policy considerations prevent questioning jurors and prosecutors about their death-penalty decisions, especially when the challenges come many years after sentencing. These difficulties are, of course, real ones, but are they any different from the difficulties the state faces in venire-selection cases? The Court may be somewhat less reluctant to question key persons about their venire-selection decisions, but because of the highly subjective nature of the key person's decision, the state cannot


201. In Castaneda, for example, Texas law did not guide, let alone limit, key persons' discretion in selecting for the venire. 430 U.S. at 484; Tex. Crim. Proc. Code Ann. art. 19.06 (Vernon 1977) (amended in 1979 to encourage selection of a "broad cross section"). It did, however, set out somewhat detailed minimal qualifications: a grand juror had to be a citizen of Texas and a resident and qualified voter of the county where the jury sat, "be 'of sound mind and good moral character,' be literate, have no prior felony conviction, and be under no pending indictment 'or other legal accusation for theft or of any felony.'" Castaneda, 430 U.S. at 485 (quoting Tex. Crim. Proc. Code Ann. art. 19.08 (Vernon 1977)).


204. McCleskey, 481 U.S. at 296.
realistically expect to use their testimony to rebut a statistical prima
facie case. No matter how convincingly a key person testifies that he
was not motivated by prejudice and sought only exemplary citizens, he
cannot, the Court has held, rebut a prima facie case.\textsuperscript{205} To do that, he
must offer persuasive objective evidence to support each of his deci-
sions. Consequently, although a court may be more willing to explore
the mind of a key person than the mind of a juror or prosecutor, it will
not likely find anything there to explain away a statistical disparity.

The Court's third reason states that since McCleskey committed an
act for which the Constitution and Georgia law permit capital punish-
ment, "a legitimate and unchallenged explanation for the decision" ex-
isted which made rebuttal of the statistical case unnecessary.\textsuperscript{206} The
presence of "a legitimate and unchallenged explanation," in other
words, negated McCleskey's showing. Surprisingly, the state's burden
of rebuttal here somewhat resembles that in the housing and employ-
dment discrimination cases, where "legitimate" reasons served to help
rebut an individual's showing of discriminatory motivation. As in the
earlier cases, the intent doctrine in \textit{McCleskey} serves to allocate burdens
of proof between the individual and the state.

The Court's final reason for rejecting the jury selection and Title
VII precedents best reveals why it thought it had to allocate these bur-
dens differently than before:

Finally, McCleskey's statistical proffer must be viewed in the context
of his challenge. McCleskey challenges decisions at the heart of the
State's criminal justice system. . . . Implementation of [the criminal]
laws necessarily requires discretionary judgments. Because discretion
is essential to the criminal justice process, we would demand excep-
tionally clear proof before we would infer that the discretion has been
abused.\textsuperscript{207}

Discretion in this context, far from being a reason to distrust decision-
making, is a reason to insulate it from attack. This is the fundamental
difference between the jury selection and the death sentencing con-
texts, but the Court fails to explain it. Why should the exercise of dis-
cretion be a cause of suspicion in one context and a reason for
protection in another?

The answer may lie in the difference between procedural and sub-
stantive discretion. The Court willingly eradicates discretion along the
procedural margins of the criminal process but insists on protecting it
within the substantive core.\textsuperscript{208} The fear is that the racially dispropor-

\textsuperscript{205} Alexander v. Louisiana, 405 U.S. 625, 632 (1972); cf. Batson v. Kentucky, 476 U.S.
79, 98 (1986) (same high standard for prosecutor's use of peremptory challenges).
\textsuperscript{206} \textit{McCleskey}, 481 U.S. at 297.
\textsuperscript{207} Id.
\textsuperscript{208} Controlling procedural discretion is less intrusive than controlling substantive dis-
cretion (particularly sentencing, enforcement, and prosecutorial discretion) and places a
lesser burden on the criminal process overall. \textit{Cf. Developments in the Law—Race and the Criminal
tionate impact in the death cases might extend to all criminal sentencing and convictions. If it did, finding for McCleskey would have created huge problems for the criminal justice system as a whole. All convictions and sentences might have become suspect. Because such an attack would go to "the heart of the State's criminal justice system" and entail costs which the system might not bear, the Court drew back. As the Court stated near the end of its opinion, "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."

Still, one could object, the Court might have avoided this problem by restricting McCleskey to its context: death-sentencing. If the Court had simply held, as it has in some other cases, that death is "different," it could have avoided sliding down the slippery slope of reviewing sentencing discretion generally. The Court, however, has recently shied away from saying that death is different. In the last few years, the Court has often refused to treat death cases with special care. In fact, some argue that the Court has revised doctrine to treat them with special expedition. If the Court views the death penalty as special nowadays, it does so equally because of the litigation it creates (and the demand it places on judicial resources) and because of the fact that any mistake cannot be corrected.

Had it decided in McCleskey's favor, the Court would have faced two clear remedial options that may also have influenced it against treating death specially. McCleskey made two distinct discrimination

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*Process, supra note 106, at 1491-93 (arguing that the goal of maintaining the criminal "system's institutional integrity" largely determines how the courts apply intent doctrine).*


210. *Id.* at 314-15. The Court best explained this fear within the context of McCleskey's eighth amendment challenge:

The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system . . . . As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.

*Id.* at 315-18 (citations and footnotes omitted). These same concerns also apply to equal protection. If anything, the Court may have worried more about the implications of a successful equal protection claim. Unlike the eighth amendment, the equal protection clause reaches far beyond sentencing—back to guilt-determination and even earlier stages of the criminal process.


claims: that capital punishment strongly correlated with the race of the defendant and that it strongly correlated with the race of the victim. In other words, he argued, it was the case both that black defendants were sentenced to death disproportionately more often than white defendants for the same types of crimes and that murderers of whites were sentenced to death disproportionately more often than murderers of blacks. The second claim was statistically stronger than the first. If the Court had limited McCleskey to death sentencing and had held, pursuant to McCleskey’s stronger claim, that a statistically significant correlation between capital punishment and the race of the victim could establish an equal protection violation, the Court would have confronted a stark choice. It could either have effectively abolished capital punishment in many, if not all, jurisdictions or required that more murderers of blacks be executed.

Both alternatives posed difficulties. The first would in some ways have represented the admission of a mistake, which some on the Court might have been unwilling to acknowledge. Abolishing capital punishment would have wiped away at least a decade of death jurisprudence in which the Court had both insisted that capital punishment is not unconstitutional per se, and struggled to delineate constitutionally acceptable death sentencing guidelines and procedures. The Court might simply have balked at the prospect of repudiating so much of its recent work so quickly. The second alternative would have deeply troubled many for a different reason. Since most murders of blacks in Georgia are committed by blacks, requiring the state to execute more murderers of blacks—if the state could manage constitutionally to do so—would increase both the overall number of blacks executed and the statistical correlation between capital punishment and the race of the defendant (the basis of McCleskey’s other equal protection claim). Remedying discrimination against black victims, then, might well have led to more executions of blacks, which would not only have troubled many by itself, but would have worsened the other type of discrimination of which McCleskey complained. Faced with these troubling and

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214. See Kennedy, supra note 212, at 1390 & n.13.
215. Randall Kennedy refers to these two options as the level-down and level-up remedies, respectively. Id. at 1436, 1439. Of all the commentators, he is the most adept at discussing the remedial issues in McCleskey and their troubling implications. See id. at 1429-40.
218. According to the Baldus study, of the 1502 convictions for the murder of blacks in Georgia between 1974 and 1979, all but 64 were committed by blacks. McCleskey v. Kemp, 753 F.2d 877, 920 (11th Cir. 1985) (Clark, J., dissenting).
219. Perhaps the most effective way to accomplish this result would be to require courts to impose the death penalty in certain categories of cases. The eighth amendment, however, proscribes death sentencing that does not give the jury any discretion. Woodson v. North Carolina, 428 U.S. 280, 301 (1976); Roberts v. Louisiana, 428 U.S. 325, 331-36 (1976).
potentially embarrassing choices, it may have been exactly in order to confront the slippery slope that the Court refused to say that death is different. Paradoxically, the frightening prospect of reviewing all sentencing decisions may have presented the Court with a more comfortable ground on which to decide the case.

As in prior cases, the intent doctrine in *McCleskey* serves to allocate burdens of proof between the individual and the state. The individual must show actual discriminatory motivation in his particular case, which the state can rebut by carrying its ultimate burden of proof—showing a compelling purpose—or perhaps something less. 220 *McCleskey*’s formulation of intent, however, appears to diverge from formulations in the prior cases in one important respect. In those other cases, the burden on the individual decreased and that on the state increased as the individual right involved became more important. As we move from the employment to the voting cases, for example, the state’s burden of defense becomes dramatically more difficult. In *McCleskey*, however, the individual right concerns life—one would think the most important individual interest—yet intent doctrine makes the criminal defendant's case very hard indeed. He must show actual motivation; statistical evidence, even if uncontroverted, cannot suffice. Does *McCleskey* stand as a dramatic exception to my redescription of the doctrine or can we reconcile it? Does not treating the individual's burden in a death case much as the individual's burden in an employment or housing case indicate that the doctrine applies across different kinds of cases in a more stable manner than I describe?

Not really. *McCleskey*’s handling of intent suggests rather that the importance of the individual interest is only one of the concerns to which the intent doctrine responds. As the individual's interest becomes more important, the governmental action becomes more difficult for the state to justify. By the same token, however, *McCleskey* suggests that when the state’s interest increases, the action becomes correspondingly easier for the state overall. In this view, intent ultimately serves as a balancing mechanism. It allocates burdens of proof between the state and individual in a way that reflects a balance of interests—as seen by traditional liberal ideology—involving in general kinds of cases. In a case touching the heart of the criminal process, then, it is not surprising that the individual has to bear a greater burden than in the voting and jury selection cases—even though the individual interest is greater in *McCleskey*. As Robert Nozick notes, protecting citizens against violence, theft, and fraud represents the irreducible core of the

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220. Since McCleskey failed to carry his burden of proof, the Court had no occasion to consider the state’s burden. Certain of the Court’s remarks, however, suggest that the state might be permitted to carry something less than its ultimate burden. See text accompanying note 206 supra.
state in classical liberal theory. Individuals will simply be unable to pursue their own conceptions of the good without the "night watchman" of the criminal process to protect them.

A more general explanation along these same lines could support the Court's particular allocation of the burden of proof in the housing and employment cases. The argument would not be that the state has an unusually large interest in the specific activities it has undertaken in these particular areas. Rather, the foundational character of many racial cohort classifications—primarily wealth and education—at work in these areas, and the corresponding public interest in maintaining the liberal order, weigh heavily in the state's favor. Of course, one could argue with the Court's assessment of the importance of either the state's or the individual's interests in McCleskey or in any of these other cases. For my purposes, that is unimportant. My aim is not to criticize or defend the Court's reasoning and results in particular cases, but only to describe what the Court is doing and offer an explanation for its overall approach.

VI. Conclusion

Given the rigidification of the rest of equal protection law, and the increasing predictability of its results, it seems inevitable that the Court would invent a doctrine to balance competing interests. The puzzle is why the Court did so through intent, a concept seemingly unrelated to interest-balancing. In many areas of constitutional law, the Court freely employs balancing tests. Dormant commerce clause jurisprudence, for example, in many cases straightforwardly weighs the benefits to a state against the burdens to interstate commerce in determining the constitutionality of a state regulation. Equal protection, however, has always carefully avoided the appearance of balancing. The rigid tiers of scrutiny framework, together with the well-settled suspect classification analysis, appears to leave no room for the weighing of various interests. In fact, whenever a justice suggests departing from the tiers of scrutiny framework, if only in the name of judicial honesty, other members of the Court either ignore his noises or pounce for apostasy. The other justices are concerned at bottom that interest-

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221. R. Nozick, supra note 11, at 26, 53. Nozick also places enforcement of private contract in this core.
222. The metaphor is Nozick's. Id. at 26.
224. As T. Alexander Aleinikoff has noted, the tiers of scrutiny framework actually does permit some degree of interest-balancing, as must any doctrinal mechanism which requires the court to pick among differing levels of review. T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 968-71 (1987).
225. These reactions can best be seen in the different responses to Justice Marshall's proposal that the Court abandon the rigid tiers of scrutiny framework in favor of a more flexible sliding-scale approach to judicial review, San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting) (no Court response) (strongly criticized by
balancing may move the Court beyond law into politics. Justices would appear to be legislating rather than judging as they make the many value choices balancing requires.\textsuperscript{226}

The intent doctrine, as developed by the Court, offers a way out of this difficulty. By allocating burdens of proof according to the balance of individual and public interests, intent overcomes the problem of doctrinal rigidity and offers a degree of flexibility in an otherwise inflexible area. It does so, however, without appearing overtly to weigh and compare interests. When the Court strikes down a governmental action, it can still avoid the charge of judicial legislation. Although it is actually weighing interests, it can claim to be just looking at motivation—a seemingly objective inquiry unrelated to the balance of interests at stake—to determine which particular tier of scrutiny to apply. In the end, the intent doctrine submerges judicial discretion to the level where it becomes invisible to those outside the system.

Anxious not to appear to weigh interests any more than absolutely necessary, the Court has retained its rigid overall doctrinal structure. It has at the same time, however, reconceptualized the key to the whole inquiry—intent—so that it can flexibly consider both the individual and public interests without appearing to do so. Not surprisingly, the balances it reaches in particular kinds of cases reflect our reigning cultural, political, and economic values. We should be surprised if it were otherwise. Intent insulates government participation in or regulation of traditional markets from judicial supervision while aggressively protecting the individual in certain other areas (notably voting, criminal procedure, and education) which we have traditionally excepted from market control.

In a sense, the intent doctrine fulfills two central purposes in equal protection. Through its allocation of burdens of proof in particular kinds of cases, the intent doctrine makes many of the ultimate value choices implicit in equal protection. Furthermore, through its name and widely-held descriptions based in process theory, it obscures these choices. Thus, it helps both to reinforce a particular vision and understanding of society, and to hide the fact that it is doing so. In short, the intent doctrine both perpetuates and mystifies, and, one could argue, perhaps it better perpetuates because it mystifies. By "covering its own tracks," so to speak, intent helps insulate its choices and the judicial process in general from certain kinds of criticism.

In this respect, the intent doctrine runs against the movement of much post-modern political theory, which advocates institutional ar-

rangements that announce their commitments and proclaim their own contingency. Only in this way can our social and political structures open themselves up to our revision and thus continually reflect our changing desires, values, and aspirations. By obstructing proper understanding, the intent doctrine frustrates change because those who would revise the law's values must first be able to see what they are. Perhaps, then, intent is interesting more for what it says about us than for what it says about equal protection. In the end, it confronts us with a series of large and somewhat troubling questions: Why do we make central a doctrine that masks its own objectives and thereby resists revision? And if law is indeed one of our most important cultural activities, what does this need to mystify tell us about ourselves and our political institutions?
