Ideological Drift and the Forgotten History of Intent

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It would no doubt surprise many readers of contemporary Equal Protection scholarship to hear intent doctrine described as one of the major racial justice victories of the Brown v. Board of Education *era. Instead, under the account familiar to most contemporary readers, the institutionalization of intent was a conservative development, marking a turn away from racial justice concerns in the mid- to late 1970s.*

Drawing on archival and other historical source materials, this Article contends that the former account in fact represents the true genesis of intent doctrine in Equal Protection jurisprudence. During the Plessy v. Ferguson *era, restrictive doctrines barred racial justice advocates from challenging laws based on their invidious intent. Intent doctrine arose in the aftermath of* Brown *as a response by progressive actors to the ways that these* Plessy*-era doctrines allowed rampant Southern evasion of* Brown*'s desegregation mandate.*

Understanding this progressive history of intent doctrine has important implications. There are strong reasons to believe that these early progressive struggles to establish intent-based invalidation helped facilitate the 1970s-era conservative turn in intent doctrine that progressive scholars today decry. Thus, although the normative valence of intent doctrine shifted from progressive to conservative in the early to mid-1970s, progressive and moderate Justices on the Court were slow to realign their own doctrinal preferences. As a result, the Court's progressive wing rarely resisted—and at times aided—the conservative doctrinal developments of the mid- to late 1970s.

The long history of intent therefore may help us to better understand the genesis of a phenomenon that scholars have long observed: the realignment of Equal Protection doctrine away from racial justice aims. And the long history of intent suggests that it is not only politics, but also doctrine, that plays a key role. Thus, while changes in popular sentiment serve as the backdrop to shifts in the Court's normative orientation, it is the cooptation of progressive doctrine that renders such shifts familiar and unobjectionable to the Court.

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Introduction

For close to half a century, progressive scholars of the Equal Protection Clause have argued that intent doctrine[1] is antithetical to racial justice aims.[2] Suggesting that the Court made a wrong turn in embracing an intent-based regime, many such scholars have argued that an effects-based approach was both a superior and a doctrinally plausible alternative.[3] In this traditional account, intent doctrine is treated as a creation of the mid- to late 1970s, arising from a trio of precedents: *Washington v. Davis*,[4] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[5] and *Personnel Administrator of Massachusetts v. Feeney*.[6]

This Article suggests that this perspective is historically—and, as a result, normatively—incomplete.[7] Although it is common today to trace the origin of disputes over intent doctrine to the mid-1970s, such disputes in fact trace back much further in Equal Protection history. And, for much of this long history, intent doctrine was not the project of opponents of racial justice. Rather, intent doctrine originated as a progressive project, promoted

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[1] Although the scope of this project is broader, when scholars discuss intent doctrine, they typically are referring to the set of cases in the mid to late 1970s that held that intent is a required component of an Equal Protection violation. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976).

[2] *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935 (1989); Alan David Freeman, *Legitimating Racial Discrimination Through Antidiscrimination Law*, 62 Minn. L. Rev. 1049 (1978); *see also* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 703–04 (2006) (describing the liberal scholarly perspective on *Davis*). *But cf.* Selmi, *supra* (critiquing disparate impact and effects-based arguments from a liberal perspective); *infra* note 7 (describing recent efforts, including by some of the same scholars who have previously written contra intent, to offer a more positive account of intent doctrine).

[3] *See* sources cited *supra* note 2.

[4] 426 U.S. 229 (1976).

[5] 429 U.S. 252 (1977).

[6] 442 U.S. 256 (1979); *see, e.g.*, Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 Va. L. Rev. 1537, 1556 (2004); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 Cornell L. Rev. 1151, 1157–59 (1991); Siegel, *supra* note 2, at 1133–36; *see also* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1785 n.17 (2012) (collecting casebooks that treat *Davis* and *Feeney* as the key cases); *cf. id. passim* (placing primary emphasis on *Feeney* as the key turning point).

[7] Several other scholars have also complicated this account recently by unearthing more capacious approaches to proving up intent that seemed plausible (at least in the lower courts) in the 1970s. *See, e.g.*, Reva Siegel, *Foreword: Equality Divided*, 127 Harv. L. Rev. 1, 15–23 (2013); Haney-López, *supra* note 6. Siegel and Haney-López's accounts are consonant with my own, insofar as both suggest a more complicated normative account of intent doctrine. Our historical accounts, however, focus on substantially different factors and time frames in explaining the Court's turn to intent-mandatory Equal Protection doctrine in the mid-1970s.

internally by race liberals on the Court and externally by racial justice advocates. Thus, for most of intent doctrine's history, it was a progressive project, believed to serve racial justice aims.

Why might progressive advocates and justices have pushed for an intent-focused regime? Today, scholars' discussion of intent in Equal Protection doctrine focuses largely on its conservative role: as a mandatory element of an Equal Protection claim ("intent-mandatory Equal Protection"), precluding arguably more efficacious racial justice approaches based on effects.[8] Intent doctrine's more progressive manifestation—as a permissive basis for invalidating invidiously intended but facially race-neutral government action ("intent-based invalidation")—is generally taken for granted.[9] But even as late as the 1960s, it was hardly a foregone conclusion that such intent-based invalidation would be allowed. Indeed, doctrines barring intent-based invalidation had existed for most of the Fourteenth Amendment's history, and *Brown v. Board of Education*[10] did not disturb them. It thus took a decade following *Brown*—during which the Southern states extensively relied on the unavailability of intent-based invalidation to evade *Brown*—before the Court made its first explicit moves to institutionalize an intent-based regime.

During this post-*Brown* time frame, the Court's race liberals were, unsurprisingly, the advocates of intent doctrine on the Court. Early on, many of the Court's race liberals recognized that without a robust intent doctrine, Southern school districts could indefinitely avoid integration. As such, the Court's race liberals would argue, ultimately successfully, for the abandonment of the Court's traditional rule banning the consideration of intent. Moreover, during the same time frame, the Court's race liberals would also (accurately) characterize the Court's existing effects-focused alternatives, such as administration-based challenges, as patently ineffective.[11] Indeed,

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[8] *See* sources cited *supra* note 2. *But cf.* Siegel, *supra* note 7, at 15–23 (arguing that intent doctrine had a more progressive cast prior to the late 1970s); Haney-López, *supra* note 6 (same).

[9] *See* sources cited *supra* note 2. There are a few exceptions to this general rule, including important works by Michael Klarman, Caleb Nelson, and Mark Tushnet. *See generally infra* Parts I–II.

[10] 347 U.S. 483 (1954).

[11] This set of doctrines was not referred to using the terminology that we today associate with effects-based doctrines ("disparate impact," "*de facto* discrimination," or "effects doctrines"). Indeed, the Court often technically characterized these doctrines as a sort of intent- or purpose-based inquiry. *See, e.g.*, Myers v. Anderson, 238 U.S. 368, 379–80 (1915). Thus, one may characterize these doctrines as offering a possibility for intent-based invalidation, but only upon a very particular effects-based evidentiary showing. *Cf.* Haney-López, *supra* note 6, at 1793–98 (characterizing some of the doctrines discussed herein in this way).

For several reasons, I instead characterize these doctrines as "effects-focused" or "effects-based" herein. First, an extreme showing of discriminatory effects—rather than any broader inquiry into what we would today think of as "intent" evidence—defined the metric that the Court overwhelmingly used to assess the existence of a constitutional violation under these doctrines. *See generally infra* Part I.B. Second, *Palmer v. Thompson*, 403 U.S. 217 (1971), the case most often characterized by contemporary scholars as illustrating the plausibility of an effects-based approach, characterized the operative inquiry arising out of this line of cases as

such effects-focused alternatives were widely perceived—on and off the Court—as playing into the hands of Southern school districts, as they allowed virtually indefinite obstruction upon a showing of token desegregation. Thus, in the immediate aftermath of *Brown*, the normative alignment of intent- and effects-based arguments was not what it is today, but instead was inverted from its modern configuration.[12]

Understanding this largely forgotten history of intent has important implications for contemporary understandings of Equal Protection doctrine. First, and perhaps most importantly, the history of intent reminds us that the ability to invalidate a law based on intent, often taken for granted today, was not a foregone conclusion in the aftermath of *Brown*. *Brown* did not overrule *Plessy*-era doctrines that had long eviscerated the effective implementation of the limited political rights afforded to blacks during the *Plessy* era, and such doctrines posed an existential threat to *Brown*'s basic mandate in its aftermath. Had the Court never embraced an intent-based invalidation standard, our contemporary constitutional regime would offer a far different, and much bleaker, outlook for racial justice concerns. It is thus important to recall that without intent, we would lack a key bulwark against open evasion of the most basic promises of *Brown*.[13]

Prescriptively, this normative complicating of intent doctrine has important implications as well. There were obvious and important reasons why racial justice advocates pursued an intent-based regime in *Brown*'s immediate aftermath. But, as elaborated *infra*, there are significant reasons to believe that these initial struggles over whether to allow intent-based invalidation also played a key role in the move to intent-mandatory Equal

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an effects-based one. *See id.* at 225; *see also* Siegel, *supra* note 2, at 1132 (discussing *Palmer* as the major example of the possibility of a turn by the Court toward effects). Finally, at least with respect to facial statutory invalidation, it appears that most legal observers during the *Brown* era perceived the bar on intent-based invalidation as complete, rather than a high evidentiary threshold. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 & n.117 (1959); *see also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 340 (2004) (noting that as of 1960, "the weight of authority still rejected inquiries into legislative motives").

I acknowledge, however, that the stature of these doctrines, especially the branch relating to administration-based challenges, was ambiguous. Indeed, even for the Court itself, the proper understanding of administration-based challenges was internally uncertain and varying. *Compare* Smith v. Texas, 311 U.S. 128, 131–32 (1940) (suggesting effects, not intent, was dispositive), *with* Akins v. Texas, 325 U.S. 398, 403–07 (1945) (characterizing the standard as a "purpose to discriminate" but in fact demanding an effects showing). This uncertainty no doubt contributed to the doctrinal confusion that continued to exist over the proper understanding of the Court's intent doctrine into the 1970s. *See generally infra* Part III.

[12] *Cf.* Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004) (offering a complicated account of how antisubordination and anticlassification values informed conflicts after *Brown*).

[13] The consequences of this lack of historical memory are perhaps most apparent in liberal scholars' celebration of *Palmer v. Thompson*, a case which in fact marked a serious retrenchment in intent-permissive invalidation and whose results were opposed by the Court's race liberals. *See infra* Part III.C.

Protection that racial justice advocates today decry. The Court's race liberals continued, into the early 1970s, to pursue the institutionalization of an intent-based regime, even when doing so came at the cost of opportunities to institutionalize alternative effects-based approaches. Even as the normative alignment of intent and effects shifted (and ultimately inverted), the Court's race liberals largely continued to embrace the intent project, allowing intent-mandatory Equal Protection to be institutionalized virtually without internal opposition. Ultimately, although the Court's race liberals *could* have differentiated between their long-standing project seeking to allow intent-based invalidation and doctrines requiring a showing of intent (intent-mandatory invalidation), they generally did not.

What explains this? It is impossible to know conclusively, but it seems likely that a number of factors arising from the long history of intent played a role. The progress that the Court's race liberals had made in institutionalizing a standard *allowing* invalidation based on intent was called into question in the early 1970s, just as the first cases involving effects started to come up to the Court. Moreover, during that same era, parties and courts often cast effects and intent as being in opposition—as competing, inconsistent accounts of the proper focus of an Equal Protection claim.[14] But perhaps most importantly, while most pre-1970s iterations of white resistance to *Brown* had been presented in terms easily identified as backlash arguments, arguments for requiring intent were packaged in a familiar, reassuringly progressive form.[15] Thus, doctrinal form—as well as prior normative associations—appears to have played a key role in facilitating the success of opponents' efforts to limit *Brown*'s reach via intent doctrine; whereas prior efforts cast in more obviously anti-racial justice forms had failed.[16]

This dynamic was no doubt facilitated by the gradualist, understated way in which intent-mandatory equal protection standards were institutionalized. Contra the standard account of intent—which situates *Washington v. Davis* as the singular point at which intent became required—intent-mandatory standards were instead institutionalized over an extended period of time in the early 1970s, during which there was much continuing ambigu-

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[14] This was especially true at the Supreme Court level. *See, e.g.*, *infra* Parts IV.A, V.D. *But cf.* Siegel, *supra* note 7 (documenting ways that some courts, to the contrary, treated effects and intent as intertwined, complimentary inquiries during this era). It appears that *Palmer v. Thompson*, which simultaneously revived the ban on intent-based invalidation and offered support for effects-based arguments, may help explain this phenomenon.

[15] The *Briggs* doctrine, interposition, and "right to discriminate" arguments all provide examples of other backlash arguments that the Court's race liberals easily rejected during the post-*Brown* era due to their long association with opposition to racial integration in the South. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 175–76 (1976) ("right to discriminate"); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 200 n.11 (1973) (*Briggs* doctrine); Cooper v. Aaron, 358 U.S. 1, 17–20 (1958) (interposition). *See generally Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) ("The Constitution . . . does not require integration. It merely forbids discrimination.").

[16] *See generally* Siegel, *supra* note 2 (arguing that legal doctrines limiting the reach of justice reforms often appear more neutral and unobjectionable in their own era).

ity in the doctrine. Thus, there are significant reasons to believe that the Court's race liberals perceived their actions less as a momentous turning point (as in *Brown*), and more as a series of small inconclusive decision points, sited within particular contextual circumstances.[17] So understood, it is unsurprising that they might prioritize a familiar, progressive doctrine—one consistent with widely shared intuitions about discrimination's foundational harms—even as the doctrine increasingly drifted away from their normative aims.[18]

This history poses a dilemma for modern social justice movements. Scholars have long observed that constitutional doctrines may be subject to "ideological drift," wherein a doctrine may become unmoored from its original normative underpinnings and may even come to serve opposing aims.[19] This is arguably an apt description of intent doctrine, which initially was deployed by racial justice advocates as a means to invalidate intentionally racially discriminatory actions, but was soon re-appropriated by racial justice opponents as a means of circumscribing efforts to allow for constitutional invalidation on non-intent-based grounds. But while many scholars of ideological drift have assumed that as doctrine drifts, so too will its proponents realign, the history of intent suggests that such realignments are, at least on the Court, not so predictable.[20] Especially where there is little temporal divide between the progressive and conservative deployment of a doctrine, existing doctrinal commitments may be slow to shift, even as external forces realign.

The long history of intent thus suggests a deep role for doctrine, divorced from its normative content, in the trajectory of the law. In so doing, intent's history suggests that what scholars have long observed as a descriptive feature of the Equal Protection regime—its normatively hollowed-out contemporary form—may in fact be a byproduct of retrenchment's etiology. That is, the cooptation of new doctrinal forms, though predictable in a common law constitutional system, may well facilitate the re-institutionalization of prior status regimes (what Reva Siegel has referred to as "preservation through transformation").[21] If backlash politics provide the backdrop

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[17] It does appear that—whether or not the liberal justices recognized it at the time—*Keyes* represented just such a key turning point in whether effects-based arguments would be allowed. *See infra* Part IV. *See generally* Keyes v. Sch. Dist. No. 1, 427 U.S. 160 (1973).

[18] *Cf.* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (discussing evidence suggesting that most people perceive discrimination as an explicit, intentional phenomenon).

[19] *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 130–32 (1999); Jack M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993); *cf.* David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249 (2013).

[20] *See infra* Parts II–V; *cf.* Balkin, *supra* note 19.

[21] *See* Siegel, *supra* note 2, at 1113.

against which retrenchment is set, doctrinal cooptation provides the mechanism by which it comes to be seen as unexceptionable.[22]

This Article takes up these issues in six Parts. Part I, by way of background, describes the Equal Protection regime that existed during the *Plessy* era (1876–1954) and the doctrines that largely barred intent-based invalidation during that time frame. Part II (1954–1964) turns to the aftermath of *Brown* and traces the important role that these *Plessy*-era bars on intent-based invalidation played in Southern efforts to resist *Brown*, and describes the Court's ultimate turn away from such bars in response to Southern intransigence. Part III (1964–1971) takes up the emergence on the Court of second-generation disputes over whether intent was required to find a constitutional violation (intent-mandatory invalidation), simultaneous with the revival of renewed disputes over whether intent-based invalidation should be allowed, a confluence that generated immense uncertainty in the Court's Equal Protection doctrine. Part IV (1971–1973) turns to how this uncertainty played out in the context of the critical 1973 case of *Keyes v. School District Number 1* and the liberal Justices' decision there to forgo effects-based arguments in favor of an intent-based approach. Part V (1974–1979), at last, turns to the cases thought of today as the key cases in the intent canon: *Davis*, *Arlington Heights*, and *Feeney*. In contrast to most contemporary accounts of these cases as pivotal, this Part explains the reasons why, by the time each of those decisions was rendered, the institutionalization of an intent-mandatory standard seemed largely inevitable to the Justices. Finally, Part VI pulls together the insights of the foregoing sections to describe the ways in which a longer history of intent affords a different perspective on intent doctrine's origins—and may help illustrate generally how doctrinal drift can lead to the normative disassociation of doctrine from its origins.

I. The Plessy Era (1876–1954): Origins of the Ban on Intent-Based Invalidation

It is often forgotten that even before *Brown*, some forms of race discrimination were not subject to *Plessy v. Ferguson*'s "separate but equal" regime.[23] In particular, in the arena of political rights (such as voting and jury service), the Court's formal rule proscribed race-based exclusion or differentiation even during the post-Reconstruction era.[24] Thus, although *Brown* is often configured as the starting point of the Court's efforts to develop a doctrinal structure predicated on a foundation of formal equality, in fact such efforts long predated *Brown* itself.

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[22] *See infra* Parts I–V; *cf.* Siegel, *supra* note 7, at 15–20 (situating developments in the Court's 1970s intent doctrine in political backlash and Nixon-era appointments); Haney-López, *supra* note 6, at 1804 (same); Balkin, *supra* note 6, at 1554–56, 1565–66 (same).

[23] *See generally* 163 U.S. 537 (1896).

[24] *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879).

The results of the Court's *Plessy*-era efforts to enforce formal equality were hardly inspiring. Indeed, despite the Court's nominal endorsement of blacks' equal rights to voting and jury service, disenfranchisement and exclusion from jury service were rampant in the pre-*Brown* South.[25] Many of the mechanisms of blacks' exclusion from these political rights were extrajudicial (such as extensive violence and economic intimidation).[26] However, judicial doctrines also played an important role in eviscerating the effectiveness of the nominal guarantees of equality that the Court continued to endorse in the political rights realm.

A. The Plessy*-Era Ban on Intent-Based Invalidation*

Key among the doctrines that served during the *Plessy* era to divest black political rights of effective enforcement was a bar on looking behind the face of a neutral statute to invalidate it based on invidious intent. As the Court put it in the 1885 case of *Soon Hing v. Crowly*,[27] "the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them . . . ."[28] Under this rule, state constitutional and statutory provisions that were facially neutral as to race, but enacted with the open intent of divesting blacks of political rights, proliferated in the post-Reconstruction South.[29]

During this time frame, bars on interrogating legislative intent were not unique to the Equal Protection context.[30] Rather, as scholars such as Caleb Nelson have shown, they represented the general rule with regard to consti-

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[25] *See, e.g.*, KLARMAN, *supra* note 11, at 28–43, 52–59, 62–64, 85–86, 96–97, 125–26, 141, 154, 225–27, 244–46, 250, 253, 267–69, 283, 447–48, 456–57; Sanjay K. Chhablani, *Re-Framing the 'Fair Cross-Section' Requirement*, 13 U. PA. J. CONST. L. 931, 937–38 (2011).

[26] *See* sources cited *infra* note 40. For an important account of the way that extrajudicial actors succeeded in using violence and terror to suppress black political rights during the late reconstruction era, see James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 391 (2014). Pope identifies *Cruikshank* as playing a key role in the success of this violent campaign, because the decision substantially impeded already difficult federal civil rights enforcement efforts. *See id.* Interestingly, Pope notes that the Court in *Cruikshank* demanded a showing of intent as an element of statutory civil rights enforcement by the Department of Justice, an approach in some tension, if not in outright conflict, with the effects-focused alternatives that the Court demanded elsewhere in its doctrine. *See id.* at 423; *see also United States v. Cruikshank*, 92 U.S. 542, 556 (1875). Much later, race liberals on the Court would seek to rely on the intent requirements of many Reconstruction-era federal civil rights statutes to make the case that intent-based invalidation must be permitted generally under the Fourteenth Amendment. *See Palmer*, 403 U.S. at 241–43 (White, J., dissenting).

[27] 113 U.S. 703.

[28] *Id.* at 710; *see also* Williams v. Mississippi, 170 U.S. 213 (1898); KLARMAN, *supra* note 11, at 9, 28–43, 52–59, 62–64, 72, 85–86, 96–97, 125, 141, 250, 253, 267–69, 283, 447–48, 456–57.

[29] *See, e.g.*, KLARMAN, *supra* note 11, at 30–36, 54–55; NAT'L HISTORIC LANDMARKS PROGRAM, NAT'L PARK SERV., CIVIL RIGHTS VOTING IN AMERICA, RACIAL VOTING RIGHTS 10–16 (2009).

[30] *See generally* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

tutional adjudication.[31] Nevertheless, they dramatically undermined the effectiveness of the political rights ostensibly guaranteed to blacks, as even openly evasive efforts to divest blacks of political rights were largely constitutionally unassailable.[32]

B. Effects-Focused Alternatives During the Plessy *Era*

Even during the *Plessy* era, there were limited alternatives that could allow an Equal Protection challenge to a facially race-neutral law. Most common were challenges to laws "in administration," wherein a litigant could charge that the actual administration of the statute showed that, whatever the legislators' intent, it was being enforced with respect to race.[33] In addition, as the Court grew impatient with the South's most flagrant evasion of the 15th Amendment's voting rights guarantee—the so-called "Grandfather Clause"[34]—it developed a line of cases that allowed invalidation of a statute that, on its face, amounted to a racial classification.[35]

Both of these approaches typically looked to numbers or effects as the primary metric of a constitutional violation (although, especially in the jury context, the Court would sometimes also look to other evidence, such as jury commissioner testimony).[36] But both for challenges in administration and

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[31] *Id.* Caleb Nelson has further argued that these bans did not necessarily represent a view that intentionally discriminatory laws were constitutional. Rather, Nelson suggests, they represented the view that, while such laws might be unconstitutional, institutional concerns precluded the courts from interrogating legislator intent. *See id.* at 1793–94. In the Equal Protection context, there is certainly some language that would support this understanding. *See, e.g.*, *Soon Hing*, 113 U.S. at 710. However, there is also language that would support the argument that invidiously intended laws that did not explicitly rely on racial criteria were not considered substantively unconstitutional. *See, e.g.*, *Williams*, 170 U.S. at 222 (suggesting that facially neutral provision intended to disenfranchise black people was "within the field of permissible action under the limits imposed by the federal constitution," where "the means of it were the alleged characteristics of the negro race"). In the immediate post-*Brown* era, many commentators (accurately or inaccurately) treated the latter account as the correct one. *See infra* notes 45–46.

[32] *See supra* notes 28–29.

[33] *See, e.g.*, Norris v. Alabama, 294 U.S. 587, 588, 596 (1935); Yick Wo v. Hopkins, 118 U.S. 356 (1886); *see also* KLARMAN, *supra* note 11, at 36, 62, 69–71, 85–86, 96–97, 125–26, 154, 225–27, 243, 244–46, 267–69, 283, 447–48, 456–57.

[34] The Grandfather Clause was an especially notorious disenfranchisement device used in the *Plessy*-era South. Typically, it operated by exempting those who were qualified to vote (or whose ancestors were qualified to vote) just prior to the ratification of the Fifteenth Amendment from onerous voter registration requirements like literacy tests. In that way, whites could avoid being swept up in the facially neutral laws intended to disenfranchise African Americans. *See* sources cited *infra* note 35.

[35] Myers v. Anderson, 238 U.S. 368 (1915); Guinn v. United States, 238 U.S. 347 (1915); *see also* Lane v. Wilson, 307 U.S. 268 (1939); KLARMAN, *supra* note 11, at 62, 69–71, 85–86, 197.

[36] *See, e.g.*, *Norris*, 294 U.S. at 589 (suggesting that constitutional violation would be found to exist where "all persons of the African race are excluded," and finding constitutional violation on that basis); *Yick Wo*, 118 U.S. at 356 (allowing administration-based challenge where onerous law applied exclusively to Chinese laundry operators); *see also* Akins v. Texas, 325 U.S. 398 (1945) (nominally suggesting that "purposeful discrimination" was the standard

for the Grandfather Clause line of cases, the challenger was required to show a virtually complete exclusion of minorities, tantamount to a total racial classification.[37] Thus, across the host of Supreme Court cases in the seventy-year timeframe from the end of Reconstruction to *Brown*, the Court found a constitutional violation only in those very rare circumstances where minorities had been excluded persistently and with virtual completeness.[38]

Unsurprisingly, these effects-focused alternatives did little to deter a rampant regime of state discrimination in the voting and jury service realms. Because such challenges could be defeated by allowing token black political participation, government actors with minimal sophistication could continue to effectuate widespread racial exclusion with little risk of a successful constitutional challenge.[39] As a result, at the time that *Brown* was decided, access to political rights remained overwhelmingly low, despite the nominally greater protections afforded to such rights under Equal Protection doctrine.[40]

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Importantly, this set of sub-constitutional doctrines—which served to so effectively eviscerate black political rights during the *Plessy* era—had not been disestablished at the time that *Brown* was decided. Thus, although the Court had grown increasingly impatient with Southern evasions of black political rights, it had not decisively abandoned the set of *Plessy*-era doctrines that allowed such evasions to proliferate.[41] Accordingly, *Brown*'s invalida-

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but in fact apparently applying an effects standard); *cf* Smith v. Texas, 311 U.S. 128, 131–32 (1940) (where requisite effects showing had been made, refusing to allow rebuttal through testimony about motives). *But cf.* Cassell v. Texas, 339 U.S. 282, 290 (1950) (plurality opinion) (apparently relying on testimony as to the fact of discrimination rather than requiring usual showing of "systematic exclusion continuing over a long period"). *See generally* KLARMAN, *supra* note 11, at 36, 62, 69–71, 85–86, 96–97, 125–26, 154, 225–27, 243, 244–46, 267–69, 283, 447–48, 456–57.

[37] *See supra* notes 33–36; *infra* note 38. It is important to note that this, of course, differs dramatically from the type of showing required in effects-based litigation today, where a simple showing of statistically significant disparity can suffice. *See generally* DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW 227–28 (8th ed. 2010).

[38] *See, e.g.*, *Smith*, 311 U.S. at 128; *Norris*, 294 U.S. at 588, 596; Carter v. Texas, 177 U.S. 442 (1900); *Yick Wo*, 118 U.S. at 373; *see also* KLARMAN, supra note 11, at 36, 62, 69–71, 85–86, 96–97, 125–26, 154, 225–27, 243, 244–46, 267–69, 283, 447–48, 456–57 (discussing substantial limits of these alternative ways of proving a constitutional violation during the *Plessy* era). *But cf. Cassell*, 339 U.S. at 290 (plurality opinion) (not requiring an effects showing and instead finding a constitutional violation based on jury commissioner testimony).

[39] *See supra* notes 33–38; *see also infra* note 40.

[40] *See, e.g.*, KLARMAN, *supra* note 11, at 28–43, 52–59, 62–64, 85–86, 96–97, 125–26, 141, 154, 225–27, 244–46, 250, 253, 267–69, 283, 447–48, 456–57; Chhablani, *supra* note 25, at 937–38. These low levels of access to political rights no doubt also reflected extra-legal impediments to the exercise of black political rights, such as economic reprisals and outright violence. *See, e.g.*, CIVIL RIGHTS VOTING IN AMERICA, *supra* note 29 at 27–28. *See generally* Pope, *supra* note 26, at 426 (discussing the use of "terrorism and election fraud" by white Democrats to break black voting strength in the Reconstruction Era South).

[41] *See* sources cited *infra* note 46; *see also* KLARMAN, *supra* note 11, at 70–71, 196–97, 203–05, 225–26 (describing the Justices' increasing impatience with the Southern states' efforts to deprive black people of political rights during the *Plessy* era). One case decided summarily

tion of *Plessy*'s separate-but-equal regime was carried out against the backdrop of a set of existing doctrines that arguably posed deep challenges to the enforcement of racial justice objectives.

II. Responding to Massive Resistance (1954–1964): The Struggle to Allow Intent-Based Invalidation

In May 1954, the Supreme Court famously declared that "in the field of public education, the doctrine of 'separate but equal' has no place," thus bringing to an end the eighty-year era of legally endorsed constitutional segregation.[42] But in sweeping away the separate-but-equal doctrine, the Court did not wipe the slate of Equal Protection doctrine clean. Rather, the Court's *Plessy*-era doctrines governing black political rights, including the ban on intent-based invalidation, remained in effect, casting an immediate shadow over efforts to enforce *Brown*.[43] Thus, in the decade following *Brown*, the Court's *Plessy*-era ban on intent-based invalidation would play a major role in shielding obstructionist responses to *Brown* from constitutional censure.

A. *Pupil Placement Laws and Other Evasive Devices Emerge in the Aftermath of* Brown *(1954–1958)*

The extent to which the Court's other *Plessy*-era doctrines posed a threat to *Brown*'s implementation became rapidly apparent in *Brown*'s aftermath. As Southern resistance to *Brown* gained momentum, facially race-neutral obstructionist laws were quickly enacted throughout the South.[44] Characterized by Southern lawyers and legislators as a "legal way to preserve school segregation," such measures were defended as a constitutional alternative to laws that facially mandated segregation.[45]

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by the Court in 1949, *Schnell v. Davis*, 336 U.S. 933 (1949), could be (and sometimes was) read as eroding the rule barring interrogation of intent. But its import was highly unclear, due to the Court's invocation of *Yick Wo*, an administration-based case, as its primary authority, and apparently favorable citation of *Williams* (which had barred direct consideration of intent).

[42] *Brown*, 347 U.S. at 495. As Michael Klarman has observed, it actually took several years before *Brown* became widely understood as invalidating segregation generally, as opposed to only in the field of education. *See, e.g.*, Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 247–48 (1991).

[43] *See infra* Parts II.A–C.

[44] Many states adopted both facially neutral and facially discriminatory measures in resistance to *Brown*, often within a single package of legislation. *See, e.g.*, Liva Baker, The Second Battle of New Orleans: The Hundred-Year Struggle to Integrate the Schools (1996) (detailing the array of legal approaches that the state of Louisiana took to resist *Brown*); Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–61, chs. 16–18 (1994) (same, throughout the South); cases cited *infra* notes 51, 57, 79 (describing segregationist legislation that included both facially neutral and facially race-based elements).

[45] *Placement Law Test Looms in Alabama*, Wash. Post & Times Herald, Sep. 13, 1957, at A1; *see also* Baker, *supra* note 44, *passim* (discussing the legal perspective and arguments of desegregation opponents in the New Orleans desegregation struggles, including arguments that facially neutral devices were a lawful way to preserve segregation). Some Southern segre-

Problematically, even when such facially neutral laws were enacted with openly segregationist aims, they were not obviously unconstitutional.[46] Indeed, under the Court's existing doctrines that barred inquiry into the legislature's intent, the courts arguably could do little, even when a legislature had acted with openly segregationist aims.[47] Only a challenge "in administration"—which could be indefinitely delayed through exhaustion doctrines and defeated upon a showing of token desegregation—provided a permissible means of challenge.[48]

By 1958, four years after *Brown*, the magnitude of the problems posed by this doctrinal regime had become apparent. Facially neutral "pupil placement laws," often enacted with the express intent of evading *Brown*'s strictures, had proliferated throughout the Deep South.[49] Such laws imposed onerous transfer requirements on those seeking to leave their existing (segregated) school assignments—and vested virtually entire discretion in segregationist administrators. Unsurprisingly, such a regime effectively impeded all but token desegregation in most Southern states.[50]

Nor were such laws routinely deemed unconstitutional in the lower federal courts. While two such laws were constitutionally invalidated on the grounds that they were expressly linked to facially race-based requirements, others that were more carefully crafted were deemed facially valid.[51] More-

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gationists were familiar with the use of facially neutral devices as a lawful way to eviscerate black political rights, and explicitly adverted to that example in urging the enactment of similar laws to evade desegregation in the aftermath of *Brown*. *See, e.g.*, ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS, ch. 1 (2009).

[46] *See, e.g.*, KLARMAN, *supra* note 11, at 340 (noting that as late as 1960, "the weight of authority still rejected judicial inquiries into legislative motive"); Wechsler, *supra* note 11, at 33 (assuming that inquiry into motive was "generally foreclosed to the courts"); Arthur Krock, *The Choices That Remain for Virginia*, N.Y. TIMES, Jan. 20, 1959, at 34 (reading *Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101 (1958), discussed *infra*, as "show[ing] the Southern states how racial integration could legally be held to a very small percentage for a long time").

[47] *See generally supra* Part I.

[48] *See id.*; *see also* TUSHNET, *supra* note 44, at 243–44, 249–50, 253, 266–67, 271 (describing the use of exhaustion doctrines in conjunction with facially neutral laws to obstruct desegregation). Though extraordinarily rare, facially neutral laws that *de facto* created a virtually entire racial classification were also challengeable. *See supra* note 35.

[49] *See, e.g.*, KLARMAN, *supra* note 11, at 330, 358–59; TUSHNET, *supra* note 44, at 241–46, 248, 253–56, 269; *High Court Rules 22 Times on School Issue: Dixie Still Fights Decision of 1954*, CHI. DEFENDER, Jul. 13, 1957, at 20. For a fascinating account of the role that "legal" strategies like the pupil placement laws played in Southern moderates' efforts to obstruct *Brown*, see generally WALKER, *supra* note 45.

[50] *See* sources cited *supra* note 49; sources cited *infra* note 70.

[51] *See, e.g.*, Sch. Bd. v. Atkins, 246 F.2d 325 (4th Cir. 1957), *cert. denied*, 355 U.S. 855 (1957) (affirming trial court order enjoining application of pupil placement law insofar as it directly required consideration of race, but holding that Plaintiffs would still be subject to the other vague criteria in the law and required to exhaust administrative remedies before seeking relief under the injunction); Orleans Par. Sch. Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957), *cert denied*, 354 U.S. 921 (1957) (declining to address intent, but finding that Louisiana pupil placement law unconstitutionally offered only facially race-based standards for pupil placement); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert denied*, 353 U.S. 910 (1957) (declining to facially invalidate North Carolina pupil placement law).

over, even those courts that struck down facially race-linked pupil placement laws suggested that more carefully crafted laws would be permissible, sometimes going so far as to find that the law's remaining, non-race-linked transfer requirements would require exhaustion before seeking further relief.[52] Thus, despite their openly segregationist purpose, pupil placement laws proved to be remarkably resistant to constitutional challenge.[53]

B. The Court Adheres to the Ban on Intent-Based Invalidation: Shuttlesworth v. Birmingham Board of Education *(1958)*

In 1958, the case of *Shuttlesworth v. Birmingham Board of Education*[54] placed the pupil placement issue within the Court's mandatory jurisdiction for the first time. Arriving on the Court's docket just after *Cooper v. Aaron*,[55] *Shuttlesworth* was arguably an ideal case for the Court to revisit its *Plessy*-era precedents prohibiting the consideration of intent. As Justice Douglas emphasized in an extensive memorandum to his colleagues, the Alabama legislature had quite openly expressed its segregationist intent.[56] And the trial court below had based its ruling on restrictive *Plessy*-era intent precedents, holding that "[i]f the State has the power to do an act, its intention . . . cannot be inquired into."[57] Thus, *Shuttlesworth* cleanly presented the issue of whether a law intended to obstruct desegregation could be facially struck down, or whether instead it could be invalidated only in an administration-based challenge.

As several Justices recognized, requiring the plaintiffs to take the administration-based course virtually ensured that the law would continue to operate as an impediment to integration for many years.[58] Given the high standards that the Court had adopted for administration-based challenges, such challenges were rarely successful—typically only where there was a record of total black exclusion over a period of many years.[59] Because such a showing could "be avoided by having token integration," several Justices acknowledged that "the case we could knock out [in an administration-

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[52] *See, e.g.*, *Atkins*, 246 F.2d at 328 (taking this approach).

[53] *See* TUSHNET, *supra* note 44, at 240–46, 253–56, 271; *see also supra* notes 51–52.

[54] 358 U.S. 101 (1958).

[55] 358 U.S. 1 (1958).

[56] *See generally* Memorandum from Mr. Justice Douglas, Ruby Fredericka, Shuttlesworth v. Birmingham Bd. of Educ. (Nov. 13, 1958) (on file with Library of Congress, William J. Brennan Papers, Box I: 25, folder 9) [hereinafter Brennan Papers].

[57] Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372, 381 (N.D. Ala. 1958). The district court also suggested that the legislature's open announcement of segregationist intent was simply an "escape valve through which the legislators blew off steam," *id.*, a questionable interpretation, as Michael Klarman has observed, *see* KLARMAN, *supra* note 11, at 330.

[58] *See infra* note 60 and accompanying text.

[59] *See supra* notes 36–40 and accompanying text.

based challenge] would be a long time coming" (or, in the words of Chief Justice Warren, "not until we are long dead").[60]

Although the obstructionist potential of the pupil placement laws was thus clear, and known to the Court at the time *Shuttlesworth* was decided, these practical concerns ultimately would not cause the Court to abandon its longstanding ban on intent-based invalidation. Concluding that the "law could not be said to be unlawful on its face," all but two of the Justices would vote to affirm the district court's finding of constitutionality.[61] Ultimately, all of the Justices would join the Court's unanimous per curiam decision, affirming "upon the limited grounds on which the District Court rested its decision."[62] Thus, *Shuttlesworth* would mark the first substantial indication that, despite the advent of *Brown*, other *Plessy*-era race precedents undermining black equality rights might endure.[63]

C. Increasing Pressures to Permit Intent-Based Invalidation in the Face of Continuing Southern Resistance (1958–1964)

The response by Southern politicians to *Shuttlesworth* was swift and overwhelmingly positive. As described by Michael Klarman, "Alabama of-

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[60] *See* Handwritten Conference Notes, Justice William O. Douglas, Shuttlesworth v. Birmingham Bd. of Educ., No. 341 (undated) (on file with Library of Congress, William O. Douglas Papers, Box II: 1211) [hereinafter Douglas Papers]; *see also* KLARMAN, *supra* note 11, at 331; Memorandum from RJH, Law Clerk to Earl Warren, No. 341, Shuttlesworth v. Birmingham Bd. of Educ. at 1 (undated) (on file with Library of Congress, Earl Warren Papers, Box 190) [hereinafter Warren Papers] (handwritten notation indicating that "[t]o affirm this would make progress impossible"); *id.* at 11 (noting that student could, if required to use law's administrative mechanism, "forever be denied relief").

[61] *See* Douglas *Shuttlesworth* Conference Notes, *supra* note 60; *see also* KLARMAN, *supra* note 11, at 331. *See generally* Memorandum from CM to William O. Douglas, Re: Shuttlesworth v. Birmingham Bd. of Educ. (Nov. 5, 1958) (Douglas Papers, Box II: 1211) (clerk, making similar argument in initial memo).

[62] *Shuttlesworth*, 358 U.S. at 101. This unanimity did not mark a change in the beliefs of Justice Douglas and Chief Justice Warren, who had initially voted to invalidate the law. Rather, as Justice Douglas recorded, "The CJ and I decided not to note our dissent to an affirmance, for we felt that unanimity of the Court in the segregation cases was more important than anything else and that our dissent would underline the defeat or setback which school integration had suffered as a result of this decision." *See* Douglas *Shuttlesworth* Conference Notes, *supra* note 60.

[63] Behind the scenes, several of the Court's race liberals were pushing already for the abandonment of this rule. Within a few months of *Shuttlesworth*, Chief Justice Warren and Justices Brennan and Douglas publicly aired their disagreement with the rigid bar on intent-based invalidation, dissenting in *Harrison v. NAACP*, 360 U.S. 167 (1959). *See id.* at 179–84 (Douglas, J., dissenting). And in a voting rights challenge decided the same day as *Harrison*, Justice Douglas inserted in a majority opinion dicta suggesting—apparently contrary to the beliefs of a majority of his colleagues—the possible permissibility of a facial intent-based attack. *See Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53 (1959) (suggesting that where literacy requirement appeared from evidence to be "merely a device to make racial discrimination easy," it might be "unconstitutional on its face"); *see also* Memorandum by CM to William O. Douglas, Lassiter v. Northampton Cty. Bd. of Elections (May 30, 1959) (Douglas Papers, Box II: 1212) (encouraging Douglas to "explain[ ]" that *Schnell v. Davis* should be understood as a case allowing intent-based invalidation in order to shore up the expected voting rights enforcement efforts of the political branches).

ficials were 'jubilant' over *Shuttlesworth*, which Governor John Patterson saw 'as an indication that the Supreme Court is going to let us handle our own affairs.'"[64] Other Southern politicians expressed similar views, interpreting the decision as "show[ing] a willingness of the [C]ourt to settle for token integration."[65] News organizations, too, read *Shuttlesworth* as a major victory for anti-integrationist elements, observing that under *Shuttlesworth*, integration "could legally be held to a very small percentage for a long time."[66]

And indeed, in the years following *Shuttlesworth*, integration experienced very little progress, especially in the Deep South.[67] As Anne Emanuel has noted, by 1960, still "no integration . . . had occurred in the public elementary and secondary schools of Alabama, Georgia, Louisiana, Mississippi, and South Carolina."[68] Token integration, involving a tiny fraction of black students, "had occurred in Arkansas, Florida, North Carolina, Tennessee, Texas, and Virginia."[69] Pupil placement laws and other facially neutral devices continued to play a key role in allowing this persistent segregation, insulating states from charges that they continued to operate under a Jim Crow regime.[70]

But although many district and circuit judges continued, pursuant to *Shuttlesworth*, to treat pupil placement laws and other evasive regimes as constitutionally permissible, by 1960 some lower court judges had become impatient with such openly evasive laws.[71] Faced with the reality of the laws' segregationist aims—and their apparently indefinite effectiveness in forestalling integration—a small number of judges began to look behind the text of facially neutral laws to invalidate them based on intent.[72]

Most notable among such apparent departures from *Shuttlesworth*'s holding were a series of decisions issued by District Judge J. Skelly Wright in the escalating litigation battles over desegregation of the New Orleans public schools.[73] Tired of the glacial pace of desegregation, and "convinced

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[64] *See* KLARMAN, *supra* note 11, at 331.

[65] *Id.* (internal quotation marks omitted).

[66] Krock, *supra* note 46, at 34.

[67] *See, e.g.*, Claude Sitton, *Integration: Pace Slows in the South*, N.Y. TIMES, May 22, 1960, at E7.

[68] *See, e.g.*, Anne S. Emanuel, *Turning the Tide in the Civil Rights Revolution: Elbert Tuttle and the Desegregation of the University of Georgia*, 5 MICH. J. RACE & L. 1, 13–14 (1999).

[69] Emanuel, *supra* note 68, at 13–14.

[70] *Id.*; *see also* KLARMAN, *supra* note 11, at 358–60; Sitton, *supra* note 67, at E7.

[71] For cases treating pupil placement laws and other evasive regimes as constitutional during this time, see, e.g., Calhoun v. Members of the Bd. of Educ., 188 F. Supp. 401 (N.D. Ga. 1959); Beckett v. Sch. Bd., 181 F. Supp. 870 (E.D. Va. 1959).

[72] *See infra* notes 73–79 and accompanying text.

[73] *See infra* note 79 and accompanying text. *See generally* BAKER, *supra* note 44 (detailing history of battles over desegregation in New Orleans); Davison M. Douglas, Bush v. Orleans Parish School Board *and the Desegregation of New Orleans Schools*, FED. JUD. CTR., (2005) (same).

[he] was right,"[74] Judge Wright became the first judge in a Deep South city to order desegregation in 1960, in the case of *Bush v. Orleans Parish School Board*.[75] In response to the cavalcade of obstructionist laws that followed (many of which were neutral on their face), Judge Wright and his three-judge district court colleagues[76] abandoned the historic bar on intent-based invalidation.[77] Observing that "[h]owever ingeniously worded . . . the sole object of every measure . . . [was] to preserve a system of segregated public schools,"[78] Judge Wright and his colleagues—across a series of decisions—enjoined immediately the state's obstructionist (but facially neutral) laws.[79] The defendants, in turn, would appeal each of these decisions, such that ultimately eight separate appeals would be docketed in the *Bush* case during the 1960 and 1961 Terms.[80]

The *Bush* appeals arguably posed a dilemma for the Supreme Court. Just prior to the resolution of the first *Bush* appeal, the Court had, in the case of *Gomillion v. Lightfoot*,[81] carefully avoided revisiting the question of whether its *Plessy*-era intent cases remained good law.[82] Involving a facially neutral law that excluded virtually all of Tuskegee's black voters (but not a single white voter), there could be little doubt in *Gomillion* as to the law's invidious purpose.[83] Yet the lower courts had dismissed the complaint before discovery, based in part on *Shuttlesworth* and the courts' inability to

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[74] BAKER, *supra* note 44, at 331.

[75] 188 F. Supp. 916, 919 n.1 (E.D. La. 1960); *see* BAKER, *supra* note 44, at 331; *see also id.* at 258; Douglas, *supra* note 73, at 3; Sitton, *supra* note 67, at E7.

[76] Then-current law mandated a three-judge district court in any case where the plaintiffs were arguing to enjoin state law on the grounds that it violated the United States Constitution. *See* James E. Wright III, Bush v. Orleans Parish School Board: *The Second Battle of New Orleans, Chronicles of the Case and the Judge*, 61 LOY. L. REV. 135, 141 n.34 (2015).

[77] *See* decisions cited *infra* note 79; *see also* BAKER, *supra* note 44, *passim*; TUSHNET, *supra* note 44, at 267; Douglas, *supra* note 73, *passim*.

[78] *Bush*, 188 F. Supp. at 927.

[79] Bush v. Orleans Parish Sch. Bd., 194 F. Supp. 182 (E.D. La. 1961); Bush v. Orleans Parish Sch. Bd., 191 F. Supp. 871 (E.D. La. 1961); Bush v. Orleans Parish Sch. Bd., 190 F. Supp. 861 (E.D. La. 1960); *Bush*, 188 F. Supp. at 916; *see also* Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649 (E.D. La. 1961) (involving neighboring school parish and addressing same set of segregationist legislation). *See generally* BAKER, *supra* note 44; TUSHNET, *supra* note 44, at 267; Douglas, *supra* note 73.

[80] *See* Docket Sheet, Orleans Parish Sch. Bd. v. Bush (No. 589) (on file with Yale Manuscripts & Archives, Potter Stewart Papers, Box 381) [hereinafter Stewart Papers]; Docket Sheet, Orleans Parish Sch. Bd. v. Bush (No. 613) (Stewart Papers, Box 381); Docket Sheet, Legislature of La. v. Bush (No. 706) (Stewart Papers, Box 381); Docket Sheet, City of New Orleans v. Bush (No. 812) (Stewart Papers, Box 381); Docket Sheet, Denny v. Bush (No. 868) (Stewart Papers, Box 382); Docket Sheet, Legislature of La. v. United States (No. 967) (Stewart Papers, Box 382); Docket Sheet, Tugwell v. Bush (No. 1037) (Stewart Papers, Box 382); Docket Sheet, Gremillion v. United States (No. 200) (Stewart Papers, Box 383); *see also* Docket Sheet, St. Helena Parish Sch. Bd. v. Hall (No. 586) (Stewart Papers, Box 383) (related appeal from litigation in neighboring parish). All of these appeals fell within the Court's mandatory jurisdiction, as appeals from the decisions of a three-judge district court.

[81] 364 U.S. 339 (1960).

[82] *See id.*

[83] *See id.* at 341; *see also* KLARMAN, *supra* note 11, at 340 (noting "[t]he legislature had not hidden its racial purpose").

consider legislative intent.[84] On appeal, the defendant continued to maintain that the law was impervious to intent-based attack, with the plaintiffs (as well as the United States as *amicus curiae*) arguing that intent-based invalidation should be allowed.[85]

In conference, several Justices appeared ready to embrace the plaintiffs' intent-based reasoning. Situating the fundamental constitutional defect in the law in its plain purpose to exclude black voters, Justices Black, Frankfurter, and Douglas all articulated the necessity of reversal in purpose- or intent-based terms.[86] But, ultimately, the Court would eschew direct confrontation with its long-standing intent precedents, opting instead to situate *Gomillion* within the Court's narrow *Plessy*-era alternatives.[87] Removing explicit language regarding intent-based invalidation from the opinion (contained in the original *Gomillion* drafts),[88] Justice Frankfurter, in his final opinion for the Court, would ground the holding instead within the "Grandfather Clause" line of cases (allowing invalidation where a statute facially would result in the exclusion of virtually all blacks).[89] Thus, while repre-

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[84] *See* Gomillion v. Lightfoot, 270 F.2d 594, 595, 597–99 (5th Cir. 1959); Gomillion v. Lightfoot, 167 F. Supp. 405, 409–10 (M.D. Ala. 1958).

[85] *See* Brief for Respondents at 14–16, *Gomillion*, 364 U.S. 339 (No. 32); Brief for Petitioners at 6–13, *Gomillion*, 364 U.S. 339 (No. 32); Brief for the United States as Amicus Curiae at 3–5, 8–18, *Gomillion*, 364 U.S. 339 (No. 32). The Petitioners and the United States also relied in part on the administration and Grandfather Clause lines of cases in arguing that the Tuskegee redistricting was unconstitutional. *See* Brief for Petitioners, *supra*, at 6–13; Brief for United States as Amicus Curiae, *supra*, at 3–5, 8–18.

[86] *See* THE SUPREME COURT IN CONFERENCE (1940–1985) 842–44 (Del Dickson ed., 2001); William O. Douglas Conference Notes, No. 32, Gomillion v. Lightfoot (Oct. 21, 1960) (Douglas Papers, Box 1234); Docket Sheet, Gomillion v. Lightfoot, No. 32 (undated) (Brennan Papers, Box I: 43); Docket Sheet, Gomillion v. Lightfoot, No. 32 (undated) (Stewart Papers, Box 381); *see also* Memo from SD to William O. Douglas, Re: Gomillion v. Lightfoot, No. 32 (March 14, 1960) (Douglas Papers) (noting that "[t]o reverse this case will require departure from the generally accepted principle that motive in legislation, unless it appears in the statute itself, is not material").

[87] *See infra* note 88.

[88] *Compare Gomillion*, 364 U.S. 339 (not explicitly addressing the intent argument at all, and relying for authority on the "Grandfather Clause" line of cases), *with* Memorandum of Mr. Justice Frankfurter, Gomillion v. Lightfoot, No. 32 at 2 (undated) (*microformed on* American Legal Manuscripts from the Harvard Law School Library, The Felix Frankfurter Papers. Part II: Supreme Court of the United States Case Files of Opinions and Memoranda October Terms, 1953–1961) (including explicit language stating that the Court need not address the intent issue, although it was much discussed by the parties). *But see Gomillion*, 364 U.S. at 347–48 (including a passage that arguably pointed to an intent-based approach).

[89] *Gomillion*, 364 U.S at 339; *see also* Bench Memorandum from MHB to Earl Warren, No. 32, Gomillion v. Lightfoot (undated) (Warren Papers, Box 207) (arguing that *Gomillion* could be distinguished from *Lassiter* and *Shuttlesworth* and instead should be viewed as falling within the "Grandfather Clause" or administration line of cases, as it resulted on its face in a racial classification); Certiorari Memorandum from MHB to Earl Warren, No. 32, Gomillion v. Lightfoot, at 1 (undated) (Warren Papers, Box 207) (handwritten notation of Earl Warren endorsing a similar theory); *supra* notes 35–38 and accompanying text (explaining the reasoning of the "Grandfather Clause" line of cases, which required that the statute on its face effectuate a virtually entire racial exclusion).

senting an incremental incursion on the Court's line of cases barring consideration of intent, *Gomillion* did not mark a full frontal attack.[90]

Unlike *Gomillion*, the *Bush* cases presented no such obvious basis for sidestepping the conflict with the Court's historical intent precedents. The Louisiana laws invalidated by Judge Wright and his colleagues did not necessarily result in a racial classification and thus could not be said to fall within the Grandfather Clause line of reasoning.[91] Nor were there grounds for an administration-based challenge, as the entire package of laws had been immediately enjoined, and thus there was no evidence of their actual effects.[92] Accordingly, the *Bush* decisions arguably presented a clear conflict with the Court's historical cases barring the consideration of legislative purpose or intent—a conflict that could not be resolved or sidestepped by resort to existing effects-focused alternatives.[93]

But the stakes of reversing the district court were also plain. By the time the first of the *Bush* appeals came up to the Court, a firestorm of resistance and mob violence had erupted in New Orleans over the entry of four little black girls into formerly all-white schools.[94] And the Louisiana legislature and other public defendants had made no secret, even while the cases

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[90] *See supra* note 89; *see also* KLARMAN, *supra* note 11, at 340 (noting that at the time *Gomillion* was decided, "the weight of authority still rejected judicial inquiries into legislative motive"). Interestingly, many legal scholars now (apparently inaccurately) identify *Gomillion* as an intent case. *See, e.g.*, Barbara Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CALIF. L. REV. 935, 958 & n.115 (1994).

[91] *See* cases cited *supra* note 79 (describing legislation).

[92] *Id.*

[93] This highlights an important reason why intent doctrine was perceived as necessary in the aftermath of *Brown*, and why the simple expansion of effects-focused alternatives, like the administration and Grandfather Clause cases, would probably not have sufficed. Even if the Court had loosened the standards for proving effects (requiring something short of a showing of total racial exclusion), many of the obstructionist laws enacted in the South would have been difficult to immediately enjoin, as it was difficult to argue that they, on their face, had *any* racially disparate effects.

For example, pupil placement laws—the most widespread device of this kind—on their face simply vested discretion to determine pupil placements based on certain facially neutral criteria. *See generally supra* note 51. Thus, in order to argue for an immediate injunction, plaintiffs would have to contend that black students disproportionally did not, in fact, meet the criteria, an argument that would have put advocates (and the courts) in the position of suggesting that black children were less morally and educationally fit. There are clear reasons why neither race advocates nor the Court's race liberals had any interest in entertaining this approach. *Cf.* WALKER, *supra* note 45, ch. 1 (describing how pupil placement laws were intended by segregationists to dovetail with factual arguments emphasizing African Americans' allegedly undesirable moral characteristics—as evidenced by considerations such as the higher rates of documented non-marital births in the African American community).

Nor would an expanded administration-based challenge doctrine have necessarily solved the problem of obstructionist post-*Brown* laws. In the fast-moving context of Southern resistance to *Brown*—where the legislatures often took multiple steps to obstruct desegregation—the slow pace of litigation, coupled with exhaustion requirements, virtually ensured that administration-based challenges would be ineffective. *See generally* BAKER, *supra* note 44 (describing the extensive and rapid-fire steps taken by the Louisiana legislature to attempt to avoid desegregation in New Orleans).

[94] *See* BAKER, *supra* note 44, ch. 19–20; Douglas, *supra* note 73, at 8–9, 45–49.

were pending on appeal, of their segregationist aims.[95] There could be little doubt what the outcome of a reversal would be: succor for Louisiana and other Southern states in their continued resistance to *Brown*, and a tacit signal to the lower courts to hew closely to the Court's legalistic and patently ineffective race law approach.[96]

Faced with such implications, the Justices unanimously affirmed.[97] But the Court did so, as was often in the case in the immediate aftermath of *Brown*, through the quietest means available: a summary affirmance.[98] As such, in *Bush*, the Court issued six separate orders (and another in the related *St. Helena Parish* case), affirming the district court without a word of explanation.[99] Thus, the Court quietly struck down Louisiana's specially enacted laws, "practically the last steps the state c[ould] take to circumvent [*Brown*]," [100] allowing integration at last to proceed.

D. The Court Embraces Intent-Based Invalidation: Griffin v. Board of Supervisors *(1964)*

Perhaps unsurprisingly, the summary orders in *Bush* did not put an end to arguments in the lower courts that facially neutral laws were impermeable to intent-based attack. Instead, coupled with *Gomillion*, the Court's summary affirmances led to widespread confusion among litigants and the lower courts over the continued validity of the Court's *Plessy*-era doctrines banning the consideration of intent.[101] Thus, the early 1960s saw a wide array of approaches to intent-based invalidation, with some courts increasingly willing to strike down indisputably segregationist (but facially neutral) laws based on their intent, while others continued to treat such laws as constitutionally unassailable.[102]

By 1964, the Justices were ready to reenter these disputes. Following a term in which the Court had increasingly expressed open dissatisfaction with

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[95] *See, e.g.*, BAKER, *supra* note 44, *passim*.

[96] *Cf.* KLARMAN, *supra* note 11, at 358 (noting that the lower courts had "powerful incentives not to push harder than the Court was mandating").

[97] *See* Gremillion v. United States, 368 U.S. 11 (1961); Denny v. Bush, 367 U.S. 908 (1961); Legislature of La. v. United States, 367 U.S. 908 (1961); Tugwell v. Bush, 367 U.S. 907 (1961); City of New Orleans v. Bush, 366 U.S. 212 (1961); Orleans Parish Sch. Bd. v. Bush, 365 U.S. 569 (1961); *see also* St. Helena Parish Sch. Bd. v. Hall, 368 U.S. 515 (1962).

[98] *See supra* note 97; *see also* Klarman, *supra* note 42, at 247–48 (noting that the Court dramatically expanded the import of *Brown* through per curiam opinions).

[99] *See supra* note 97. An initial stay request based on interposition-based arguments had been denied in terms that strongly (albeit briefly) reiterated *Cooper v. Aaron*'s vitality. *See* United States v. Louisiana, 364 U.S. 500 (1960) (per curiam); *supra* note 15. But in its merits decisions, the Court would not afford even brief treatment to the issues.

[100] *Blow to Racists: School Segregation Suit is Lost By Louisiana*, N.Y. TIMES, Feb. 25, 1962, at E6.

[101] *See infra* note 102.

[102] *See, e.g.*, Griffin v. Bd. of Supervisors, 322 F.2d 332 (4th Cir. 1963); Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962); United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963); Deerfield Park District v. Progress Dev. Corp., 174 N.E.2d 850, 854–55 (Ill. 1961).

the pace of desegregation, in January 1964 the Court granted certiorari in the case of *Griffin v. County School Board of Prince Edward County*.[103] Providing the Court with its first major opportunity to address intent doctrine since *Bush*, *Griffin* involved a challenge to a set of facially neutral laws that had authorized the wholesale closure of the public schools in Prince Edward County, Virginia—and their replacement with a system of state tuition grants.[104] Under this system, the black students of Prince Edward County had still, a decade post-*Brown*, been entirely precluded from enrolling in desegregated public schools.[105]

Arguing for the petitioners, NAACP general counsel Robert Carter contended that such neutral laws, enacted and deployed for the purpose of obstructing desegregation, were facially unconstitutional.[106] Drawing extensively on the *Bush* and *St. Helena Parish* affirmances, as well as dicta from *Cooper v. Aaron*, Carter made the case that "[c]overt schemes to subvert and avoid implementation of federally guaranteed rights are as objectionable as affirmative and overt acts."[107] Noting that the disputed actions here "w[ere] clearly designed to accomplish . . . an unconstitutional purpose[,]" Carter argued that their invalidity should be "beyond question."[108]

In response, the County Board of Supervisors argued vigorously that intent-based invalidation was impermissible.[109] Noting that the proscription on inquiring into intent had long roots, the Board contended that "[t]he constitutionality of legislation is to be determined by what the legislation provides and not by any motive or purpose which may have been in the minds of the legislative representatives."[110] Observing that recent cases such as *Shuttlesworth* had reaffirmed the notion that "[i]n testing constitutionality [the courts] cannot undertake a search for motive," the Board argued that no modern precedent of the Court undermined the continuing validity of its *Plessy*-era precedents banning consideration of intent.[111]

But this perspective was no longer persuasive by 1964.[112] Although there were other grounds on which the Court could have invalidated the

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[103] 375 U.S. 391. The political backdrop with respect to civil rights enforcement also changed considerably around this time. *See generally* KLARMAN, *supra* note 11, at 340–42, 361–63.

[104] *See* Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 222–24 (1964).

[105] *See* Brief for Petitioners at 4, *Griffin*, 377 U.S. 218 (No. 592) (observing that "an entire generation of Negro children of public school age have forever lost their constitutional rights to a public school education unimpaired by the burden of racial discrimination" as a result of the long delays in implementing *Brown*).

[106] *See infra* notes 107–108.

[107] Brief for Petitioners at 27, *Griffin*, 377 U.S. 218 (No. 592); *see also id.* at 27–30.

[108] *Id.* at 29.

[109] *See* Brief for the Board of Supervisors of Prince Edward County at 37–47, *Griffin*, 377 U.S. 218 (No. 592).

[110] *Id.* at 39.

[111] *Id.* at 39–48.

[112] *See generally* KLARMAN, *supra* note 11, at 342 (noting that although "[t]raditional constitutional doctrine disfavored judicial inquiries into legislative motives[,] . . . years of massive resistance had changed the justices' minds" by the time that *Griffin* was decided).

disputed actions, the Court instead elected to situate its decision firmly within the rubric of intent.[113] The Court observed:

> [T]he record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. *Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.*[114]

Thus, the Court at last in *Griffin* explicitly held that intent-based invalidation was permissible.[115]

III. Effects Arguments Arrive at the Court, as Disputes Over Whether Intent-Based Invalidation is Allowed (Reprise) (1964–1971)

Thus, in *Griffin*, the Court at last abandoned its *Plessy*-era doctrines and permitted the invalidation of facially neutral statutes based on intent. But this turn to intent-based invalidation would nevertheless leave many ques-

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[113] *See Griffin*, 377 U.S. at 231; *see also infra* notes 122–130 and accompanying text (describing the "state action" and remedial arguments that the Court increasingly turned to in the late 1960s). *Griffin* was a particularly compelling case for resolution within the Court's state action line of cases because the state in *Griffin* essentially funded and supported a set of segregationist private schools. *See, e.g.*, Brief for the United States as Amicus Curiae at 31–35, *Griffin*, 377 U.S. 218 (No. 592) (making the state action argument).

[114] *Griffin*, 377 U.S. at 231 (emphasis added). This language is ambiguous, insofar as it could be understood in a narrower sense to mean that intent-based invalidation is permitted only where no purpose *other* than a racial one could possibly be inferred from the legislature's actions. *See id.*; *cf.* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1295 (1970) (treating *Griffin* as triggering only a requirement of producing a "rational and non-racial defense"). However, there are significant reasons to believe that this more restricted meaning was not how the Justices understood *Griffin* at the time. First, in a pair of voting rights cases the following year, the Court took actions consistent only with a broad overruling of its ban on the consideration of legislative intent. *See* Louisiana v. United States, 380 U.S. 145, 148–53 (1965); United States v. Mississippi, 380 U.S. 128, 143–44 (1965). Second, even when disputes over intent-based invalidation again erupted on the Court in the early 1970s in *Palmer*, no Justice—including those on the Court when *Griffin* was decided—suggested that *Griffin* should be read in the narrower way. Rather, the majority in *Palmer* would claim that *Griffin* did not allow intent-based invalidation at all, a claim that, as Paul Brest has noted, was an entirely implausible reading of *Griffin*. *See Palmer*, 403 U.S. at 225 (claiming that motive or purpose was not the basis for *Griffin* and that the "focus . . . was on the actual effect of the enactments, not upon the motivation"); *see also* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976) (noting that the majority opinion in *Palmer* "rewrote history" in its characterization of *Griffin*).

[115] *Griffin*, 377 U.S. at 231–32; *see also* Wright v. Rockefeller, 376 U.S. 52, at 72 (1964) (apparently employing an intent-based approach).

tions unanswered. Most notably, as the decade turned, the question of whether a lack of intentional discrimination might be raised as a defense (or whether effects-based arguments should also be allowed) would increasingly arise.[116] Simultaneously, racial justice defendants would succeed, once again, in defeating intent in its traditional manifestation (as a *claim*); persuading the Court in the case of *Palmer v. Thompson*[117] to temporarily revive its ban on intent-based invalidation.[118] Thus, after a period of relative quiet immediately following *Griffin*, the cross-cutting arguments of racial justice defendants would push the Court in conflicting directions, ultimately generating intense uncertainty in the Court's intent doctrine.

A. The Court Turns to State Action and Remedial Arguments (1964–1970)

Although debates over intent would be revived by the end of the decade, during the years immediately following *Griffin* such debates largely faded into the background. *Griffin* and *Gomillion* were generally read as resolving the issue of whether intent-based invalidation was allowed.[119] And this doctrinal development, together with the collapse of massive resistance, led Southern school districts to generally turn away from the openly discriminatory responses that dominated the immediate aftermath of *Brown*.[120] Against this backdrop, openly evasive devices (such as the pupil placement laws) increasingly faded from the focal point of legal disputes over desegregation, although less forthright attempts to obstruct desegregation remained common.[121]

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[116] *See infra* Part III.B.

[117] 403 U.S. 217 (1971).

[118] *See infra* Part III.C.

[119] *See, e.g.*, Louisiana v. United States, 380 U.S. 145, 148–53 (1965); United States v. Mississippi, 380 U.S. 128, 143–44 (1965) (both relying on intent as the basis for constitutional invalidation); United States v. Sch. Dist. 151 of Cook Cty., Ill., 404 F.2d 1125, 1134 (7th Cir. 1968) (relying on *Griffin* for the proposition that an inquiry into motives was a proper basis for constitutional invalidation); *cf.* Palmer v. Thompson, 419 F.2d 1222, 1228 (5th Cir. 1969) (noting that "[m]otive behind a municipal or a legislative action may be examined where the action potentially interferes with or embodies a denial of constitutionally protected rights" but concluding that race-related government action was constitutional when taken not for "invidious" reasons, but rather for safety and economic reasons). *But cf.* Brief for Appellees at 13–14, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (Nos. 48, 655) (immediately post-*Griffin*, still making the argument that inquiry into motives was impermissible).

[120] *See, e.g.*, cases cited *infra* note 121. *See generally* KLARMAN, *supra* note 11, at 407–08; Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from* Brown *to* Grutter, 7 U. PA. J. CONST. L. 809, 818 (2005). Enforcement of Title VI no doubt also played a major role in this turn because states would lose their federal funding if they openly adhered to discriminatory policies. *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 234–36 (1998); Richard I. Slippen, *The Title VI Enforcement Process*, 21 WAYNE L. REV. 931, 950 (1975).

[121] In the vast majority of Supreme Court school desegregation cases during the late 1960s and early 1970s, no current expression of intentional discrimination was at issue, although there were sometimes allegations of contemporary covert discrimination, and of course a historical dual system. *See, e.g.*, Wright v. Council of the City of Emporia, 407 U.S. 451 (1972);

As such measures receded to the background, other issues increasingly came to the fore. School districts, both Northern and Southern, continued to operate under largely segregated conditions, as a result of both covert and historically discriminatory state and private action.[122] In addition, complex issues of state action increasingly arose, as responsibility for maintaining the institutions of segregation increasingly devolved to semi-private actors.[123] Thus, across an array of contexts, the Court began in the late 1960s to grapple with the complicated second-generation issues arising from *Brown*.

Initially, most anti-discrimination plaintiffs showed little enthusiasm for pushing beyond the boundaries of intent doctrine in the context of these second-generation disputes. There were respectable doctrinal arguments that intentional discrimination—now subject to invalidation after *Griffin*—might not mark the outer boundaries of what the Constitution prohibited.[124] Still, in *Griffin*'s immediate aftermath, plaintiffs generally did not pursue *de facto* discrimination (or, in today's parlance, "disparate impact" or "effects") arguments before the Court.[125] Defendants, in kind, generally focused on those arguments explicitly made by plaintiffs (although they often assumed as a baseline that intentional discrimination marked the standard).[126]

Just as Plaintiffs generally eschewed "disparate impact" or other effects-based arguments during this initial time frame, so too the Court after *Griffin* showed little taste for pushing beyond its new intent regime to consider the possibility of finding a constitutional violation based on effects.[127] Rather, the Court increasingly deployed doctrines such as the state action

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Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); United States v. Montgomery Cty. Bd. of Educ., 395 U.S. 225, 236 (1969); Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 433–35 (1968); *cf.* Monroe v. Bd. of Comm'rs of City of Jackson, 391 U.S. 450, 459 (1968) (rejecting as constitutionally impermissible defendants' argument that free transfer plan was needed to prevent white flight). Although the pupil placement laws enacted during the immediate post-*Brown* era remained in effect in many states in the early 1960s, by shortly after *Griffin* they were largely abandoned after having been deemed insufficient by HEW under the Civil Rights Act of 1964. *See* Slippen, *supra* note 120, at 944.

[122] *See, e.g.*, Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, The Civil Rights Project, E Pluribus . . . Separation: Deepening Double Separation for More Students 19 (2012); *see also* cases cited *supra* note 121.

[123] *See, e.g.*, Evans v. Abney, 396 U.S. 435 (1970); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966).

[124] *See, e.g.*, Memorandum for United States as Amicus Curiae at 6–7, 13–15, *Green*, 391 U.S. 430 (No. 695) (drawing on *Brown*'s language regarding the stigmatizing effects of segregation on black children to make an effects-based argument). *See generally infra* notes 182–196 and accompanying text (describing types of *de facto* discrimination arguments available in early 1970s). The tradition of challenges in administration and the Grandfather Clause cases also provided effects-focused alternatives, although, as discussed, *supra*, such approaches had traditionally imposed standards that were virtually impossible to meet.

[125] *See, e.g.*, Brief for Respondents, *Reitman*, 387 U.S. 369 (No. 483); Brief for the Petitioners, *Green*, 391 U.S. 430 (No. 695); Brief for Petitioners, *Swann*, 402 U.S. 1 (No. 281); *cf.* Memorandum for United States as Amicus Curiae, *supra* note 124 (making pure effects-based argument, in addition to remedial arguments).

[126] *See, e.g.*, Brief for Petitioners, *Reitman*, 387 U.S. 369 (No. 483); Brief for Respondents, *Green*, 391 U.S. 430 (No. 695); Brief for Respondents, *Swann*, 402 U.S. 1 (No. 281).

[127] *See infra* note 128.

doctrine, or remedial arguments, that allowed it to side-step disputes over whether *de facto* discrimination was actionable.[128] And, even within the framework of the intent regime itself, the Justices generally avoided elaborating on the standards to be applied (i.e., when courts should deem challenged conduct to be intentionally discriminatory).[129] Therefore, even in cases where plaintiffs presented intentional discrimination arguments, the Court generally eschewed further developing the details of its new intent doctrine.[130]

However, by the late 1960s, it had become clear that the Court could not avoid such issues indefinitely. Most notably, even as the Justices turned to remedial arguments to justify sweeping desegregation orders in Southern school districts, many were aware that the constitutionality of *de facto* segregation[131] (the prominent, albeit not exclusive, form of segregation in the North) was likely to come before the Court in the near future.[132] Moreover, questions about what sort of evidence sufficed to show intentional discrimination similarly abounded.[133] Consequently—although the precedents of the

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[128] *See* cases cited *supra* note 121. Another related, but not entirely overlapping, dispute that this turn to remedial arguments helped the Court to sidestep was the long-standing dispute over whether the Constitution, as a matter of substantive standards, demanded integration or simply prohibited segregation. Before the Court turned to remedial approaches, an influential post-*Brown* lower court decision held that the Constitution only commanded the latter, and other courts regularly deployed its language to reject strong integrationist measures. *See Briggs*, 132 F. Supp. at 777; Henry Stratford May, Jr., *Busing,* Swann v. Charlotte-Mecklenburg*, and the Future of Desegregation in the Fifth Circuit*, 49 TEX. L. REV. 884, 886 (1971) (noting, as of 1971, that the *Briggs* formulation was "followed by courts of appeals until quite recently").

[129] *See* cases cited *supra* note 121.

[130] *Id.*; *see also* Brief for Respondents, *supra* note 125 (making an intent-based argument); Brief for Petitioners, Raney v. Bd. of Educ., 391 U.S. 443 (1968) (No. 805) (same).

[131] *De facto* segregation was the term used in the 1970s to describe segregation that was not caused by intentional segregationist state action (intentionally or facially segregationist state action was referred to as "*de jure*" segregation). *See, e.g.*, Case Comment, Keyes v. School District No. 1, *Unlocking the Northern Schoolhouse Doors*, 9 HARV. C.R.-C.L. L. REV. 124, 124 & n.5 (1974). Although there was some ambiguity regarding the scope of what fell within the *de facto* category, broadly speaking, *de facto* segregation arguments were thought of as consistent with an "effects" approach, whereas *de jure* segregation arguments were generally thought of as reflecting an "intentional" or facial discrimination approach. *Id. See generally* Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

[132] *See, e.g.*, Brennan Case History Summaries, October Term 1967, at XXV–XXXI (Brennan Papers, Box II: 6) (illustrating that although *Green*, *Raney*, and *Monroe* ultimately were decided on remedial grounds, the Justices were aware that they had potential implications for "the *de facto* segregation bramble bush" and that that issue was likely to come before the Court); Brennan Case History Summaries, October Term 1970, at XXV–XLII (Brennan Papers, Box II: 6) (same, *Swann*).

[133] The Justices were far from decided on these questions. For example, internal documents from *Wright v. Council of City of Emporia*, 407 U.S. 251 (1972) and *United States v. Scotland Neck*, 407 U.S. 484 (1972), make clear that the Justices disagreed as to whether the disputed actions in the cases were intentionally discriminatory, what type of evidence was relevant, and whether courts should consider intent in the remedial context. *See, e.g.*, Memorandum from Chief Justice Burger to the Conference, Wright v. Council of City of Emporia (Mar. 16, 1972) (Stewart Papers, Box 80); Memorandum from F. to Justice Powell, Re: Chief's Circulation in Emporia Case (Mar. 17, 1972) (Powell Papers); Blackmun Handwritten Notes

late 1960s generally avoided further addressing the reach and role of intent in the Court's developing Equal Protection doctrine—it was clear that numerous issues likely to require resolution by the Court remained unresolved.

B. Effects Arguments Come to the Fore in the 1970 Term: Swann*, the* Keyes *Stay, and* Griggs *(1970–1971)*

This simmering tension over intent doctrine's trajectory would at last come to the fore during the 1970 Term.[134] And when it did, it would make apparent just how uncertain the future of intent doctrine remained on the Court.[135] Two issues dominated the Court's internal deliberations regarding intent during the 1970 Term: (1) whether *Griffin* had truly settled the issue of whether intent-based invalidation was allowed (or whether the *Plessy*-era ban on considering intent still stood); and, conversely, (2) whether intent was a *mandatory* requirement for a showing of an Equal Protection violation (or whether racially disparate effects or, in the schools context, *de facto* segregation sufficed). Confusingly, the Court would treat the individual cases in which these issues were raised as virtual silos, despite the obvious connectedness of the two questions. As a result, the Court's intent doctrine would be left in a state of disarray by the Term's close.

The initial case that would bring disputes over intent doctrine to the surface was the Term's major school desegregation case: *Swann v. Charlotte-Mecklenburg Board of Education.*[136] Consistent with the Court's turn to remedial arguments in the late 1960s, the parties in *Swann* largely framed their arguments in remedial terms. Thus, the parties' disputes in *Swann* were principally focused on whether the district court's remedial order—mandating

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on *Emporia* (undated) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 141) [hereinafter Blackmun Papers]; Bench Memo from GTF to Justice Blackmun, Wright v. Council of City of Emporia, US v. Scotland Neck, Cotton v. Scotland Neck (Feb. 19, 1972) (Blackmun, Box 154). The Court ultimately resolved both *Emporia* and *Scotland Neck* on remedial grounds. *See Emporia*, *supra*; *Scotland Neck*, *supra*.

[134] *See infra* Part III.B; *cf.* Carter v. Jury Comm'n of Greene Cty., 396 U.S. 320, 332 & n.41, 338–39 (1970) (implying strongly that intent was required and that a showing of effects alone was not enough); Burns v. Richardson, 384 U.S. 73, 88 (1966) (suggesting in dicta that effects *or* purpose would be sufficient to prove a violation in the context of districting). *Burns* and several other voting rights/districting cases were for a time the major exception to the Court's turn to an intent-mandatory standard. *See* White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); *cf.* City of Mobile v. Bolden, 446 U.S. 55 (1980) (turning away from effects-based approach in the districting context, but with strong dissents by the Court's race liberals).

[135] For the perspective of two leading scholars on the uncertain status of intent doctrine as of this time frame, see Ely, *supra* note 114; Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971).

[136] 402 U.S. 1 (1971). *Swann* was decided together with several companion cases. *See* Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971); Davis v. Bd. of Sch. Comm'rs of Mobile Cty., 402 U.S. 33 (1971); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43 (1971). For a leading historical account of *Swann* and its companion cases, see BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986).

widespread busing and using particular racial percentages as the benchmark for remedial success—was appropriate.[137] And the Court's Justices, both conservative and liberal, largely also suggested at their initial conference that it was unnecessary to address what could form the basis for a constitutional violation, as it was undisputed in *Swann* that a dual system had been maintained.[138]

But Chief Justice Burger—new to the Court and eager to make his mark on the Court's desegregation jurisprudence—seized control of the majority opinion in *Swann*, drafting an initial opinion for the Court that explicitly rejected the notion that *de facto* segregation was unconstitutional (thus implicitly holding that only intentional discrimination was actionable).[139] Arguing that it was necessary to "restate the essential holding of *Brown I*" to provide a "predicate for any guidelines that can be formulated," the Chief Justice suggested that *Brown I* prohibited only "segregation" and did not demand "integration."[140] Moreover, he asserted that "[n]o holding of this Court has ever required the assignment of pupils to establish racial balance or quotas" and that school authorities were not required "to construct a system of racial balance to offset . . . the imbalances resulting from the residential patterns of the area."[141] Thus, Chief Justice Burger's initial opinion explicitly rejected the notion that mere racial imbalances (that is, *de facto* as opposed to intentional discrimination) could form the predicate for a constitutional violation—an issue that the Court had largely avoided until that point.[142]

Chief Justice Burger's opinion generated widespread dissatisfaction among his brethren, for reasons both related and unrelated to his characteri-

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[137] *See* Brief for Petitioners, *Swann*, 402 U.S. 1 (No. 281); Brief for Respondents, *Swann*, 402 U.S. 1 (No. 281). The defendants in *Swann* did argue that "racial balance" was not constitutionally required, but they primarily focused on demonstrating that the plan they had put forth amply met the requirements for a desegregation plan that would bring the district into unitary status. *See* Brief for Respondents, *supra*.

[138] *See* DICKSON, *supra* note 86, at 674–78; Blackmun Memo, Re: School Cases — Conference of October 17, 1970 (undated, labeled "to be destroyed") (Blackmun Papers, Box 127–28).

[139] *See infra* notes 140–142, regarding the content of Chief Justice Burger's initial draft. For an account of Chief Justice Burger's perspective on *Swann*'s importance to his institutional legacy, and his self-assignment of authorship of the opinion despite arguably being in the minority, see SCHWARTZ, *supra* note 136, at 111–13; BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 95–100 (1979).

[140] *See* Draft Opinion, Swann v. Charlotte-Mecklenburg Bd. of Educ., No. 281, at 14 (Dec. 8, 1970) (Douglas Papers, Box 1514).

[141] Draft Opinion, *supra* note 140, at 14–15, 21.

[142] *See supra* notes 140–142; *cf. Montgomery Cty. Bd. of Educ.*, 395 U.S. at 236 (noting that the United States argued the case only in remedial terms and was not suggesting that racial balance was constitutionally required); Brennan Case History Summaries, October Term 1967, at XXV–XXXI (Brennan Papers, Box II: 6) (making clear that *Monroe* could have been viewed as implicating the "racial balance" issue, but that the Justices deliberately framed it just in remedial terms).

zation of the *de facto* discrimination issue.[143] Nevertheless, it was not entirely clear whether the Justices' resistance to Chief Justice Burger's treatment of the *de facto* segregation issue in fact marked a fundamental disagreement, or whether it instead marked lesser disputes over scope and tone.[144] Indeed, even Justice Douglas, who would later prove to be the Court's most stalwart defender of *de facto* or disparate impact theories, displayed at best a tepid attachment to pure *de facto* arguments during the *Swann* deliberations.[145]

Nevertheless, the Chief Justice ultimately would be persuaded to make sweeping changes to the *Swann* opinion, including the omission of its most strident language rejecting the *de facto* discrimination theory.[146] Pieced together from revisions suggested by multiple justices, the final opinion included only equivocal (albeit still negative) references to the *de facto* segregation issue. Thus, while suggesting that the Constitution does not re-

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[143] Among other things, his initial proposed result—remanding for reconsideration by the district court of its remedial order—was contrary to the vote of the majority of Justices at conference to affirm the district court. *See* SCHWARTZ, *supra* note 136 at 117–84 (providing an account of the deliberations); WOODWARD & ARMSTRONG, *supra* note 139, at 103–12 (same); Brennan Case History Summaries, October Term 1970, at XXV–XLII (Brennan Papers, Box II: 6) (same); *see also* sources cited *infra* note 144 (addressing the *de facto* discrimination issue).

[144] Several Justices, for example, were concerned that Chief Justice Burger's language embracing the so-called *Briggs* doctrine (i.e., stating that *Brown* did not command integration, it simply prohibited segregation) would be seen as a signal to retreat from the more aggressive approach to desegregation that the Court had adopted after *Green*. *See, e.g.*, Memorandum from Justice Brennan to Chief Justice Burger, RE: Nos. 281 & 349, Swann v. Charlotte-Mecklenburg (Mar. 8, 1971) (Douglas Papers, Box 1514). In addition, Burger's draft seemed to resolve adversely to plaintiffs the issue of whether other forms of intentional discrimination (such as *de jure* housing discrimination) that had led to segregated schools would suffice to show *de jure* segregation, an issue several Justices felt should be left unresolved or resolved differently. *See, e.g.*, Memorandum from Justice Douglas to Chief Justice Burger, In re: Swann (Dec. 10 1970) (Douglas Papers, Box 1514); Memorandum from Justice Brennan to Chief Justice Burger, Re: No. 281 — Swann v. Charlotte-Mecklenburg Board (Dec. 30 1970) (Douglas Papers, Box 1514); Memorandum from Justice Marshall to the Conference, Re: No. 281, Swann v. Charlotte-Mecklenburg Bd. of Educ. (Jan. 12, 1971) (Douglas Papers, Box 1514).

[145] Justice Douglas would go so far at one point in the deliberations as to signal his willingness to hold explicitly that only intentional discrimination was prohibited. *See* Memorandum from Justice Douglas to Justice Stewart (Feb. 16, 1971) (Douglas Papers, Box 1514) (signaling his willingness to join Stewart's draft opinion); Memorandum of Mr. Justice Stewart at 4–5, Swann v. Charlotte Mecklenburg Bd. of Educ. (December 1970) [Stewart Draft Opinion] (Douglas Papers, Box 1514) (stating clearly that only intentional discrimination was impermissible, not simply racial imbalance); *see also* Draft Memorandum from Justice Douglas to Justice Brennan (Feb. 10, 1971) (Douglas Papers, Box 1514) (not sent) (making clear that Justice Douglas knew his vote would make Stewart's "views [o]n racial balance . . . the law"). The internal papers do not clearly explain why Douglas would have been willing to make this move in *Swann* (ultimately mooted by Burger modifying his own opinion sufficiently to attract a unanimous Court), but it appears likely driven by some combination of the exigencies of the particular case, as well as a lack of a strong commitment to effects-based arguments at this juncture.

[146] *See* sources cited *supra* notes 143–145 (documenting the extensive internal negotiations in *Swann*). *Compare* sources cited *supra* notes 139–142, *with* sources cited *infra* note 147.

quire "any particular degree of racial balance or mixing," the final opinion for the Court did not clearly hold that *de facto* discrimination arguments were impermissible.[147]

Thus, *Swann*, in both its internal deliberations and final opinion, seemed to signal a potentially negative, but hardly conclusive, outlook on the Court for effects-based Equal Protection arguments.[148] The language contained in the final opinion, while negative in tenor, was ambiguous.[149] Moreover, it was clear internally that several Justices did not deeply endorse the nuances of the *Swann* opinion, but rather had been driven to join the compromise opinion by a desire to maintain the Court's tradition of unanimity in school desegregation cases.[150]

Stay proceedings in the unrelated desegregation case of *Keyes v. School District Number 1* would confirm that the Justices did not understand *Swann* as firmly institutionalizing a requirement of demonstrating intentional discrimination (and rejecting effects-based arguments).[151] Decided virtually simultaneously to *Swann*, the *Keyes* stay proceedings marked the second of three occasions on which *Keyes* would be before the Court. (As discussed in Part IV, *infra*, the third *Keyes* trip to the Court would itself mark a pivotal turning point in the Court's turn toward an intent-mandatory standard.)[152] And yet, in the *Keyes* stay deliberations, few of the Justices treated *Swann* as dispositive of whether effects-based arguments might be actionable.[153] Thus, four of the nine Justices (with others uncommitted) signed on to a draft order

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[147] *Swann*, 402 U.S. at 1; *see also* WOODWARD & ARMSTRONG, *supra* note 139, at 109–10 (describing the vast shift in the tenor and content of the *Swann* opinion).

[148] *See* sources cited *infra* note 150; *see also* James v. Valtierra, 402 U.S. 137 (1971) (strongly implying that an intent-mandatory standard applied in another context that term).

[149] *See generally Swann,* 402 U.S. at 1.

[150] *See generally* SCHWARTZ, *supra* note 136, at 117–84; WOODWARD & ARMSTRONG, *supra* note 139, at 103–12; Brennan Case History Summaries, October Term 1970, at XXV–XLII (Brennan Papers, Box II: 6).

[151] *See generally* Keyes v. School Dist. No. 1, 402 U.S. 182 (1971) (vacating stay by Court of Appeals).

[152] *See infra* Part IV (describing the merits proceedings in *Keyes* two years later).

[153] The specific *de facto* discrimination theory at issue in the stay proceedings in *Keyes* was based on *Plessy v. Ferguson*'s prohibition on separate and unequal facilities. The theory reasoned that, although *Brown* had overruled *Plessy* insofar as it allowed legalized segregation, *Plessy* continued to require equalization of facilities, even where they were *de facto* segregated. *See* sources cited *infra* notes 154, 196. This theory was not identical to the "racial balance" issue addressed in *Swann* but did similarly deal with the issue of whether *de facto* discrimination might be deemed unconstitutional.

This *Plessy*-based theory is no doubt jarring to the modern ear, at a time when *Plessy* has been firmly situated in the anticanon. *Cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011). But *Plessy* was not explicitly overruled in *Brown*, and, as Michael Klarman has shown, *Brown*'s reasoning was frequently understood as failing to entirely overturn *Plessy* in *Brown*'s immediate aftermath. *See, e.g.*, Klarman, *supra* note 42, at 238–48. As late as the early 1970s, a number of Justices were willing to take seriously the notion that *Plessy* had been overruled only insofar as it suggested that *de jure* segregation was lawful, and that its holding that qualitative or financial inequality among minority and white institutions was unconstitutional remained effective. *See infra* notes 154–155 and accompanying text.

in *Keyes* embracing a *de facto* discrimination rationale.[154] Although ultimately this version of the order would not be issued—with the Justices instead embracing a less controversial basis for the stay decision—the internal receptiveness of a number of the Justices to such effects-based arguments suggests that their stature remained far from settled.[155]

The Court's seminal holding in *Griggs v. Duke Power Co.*,[156] decided just before *Swann*, also raised questions regarding the scope of the Court's potential receptiveness to non-intent-based arguments.[157] Endorsing an effects-based understanding of discrimination under Title VII of the Civil Rights Act of 1964, *Griggs* seemed to go far in endorsing a theory of discrimination decoupled from intent.[158] But questions remained as to whether the Justices would ultimately construe *Griggs* simply as a decision grounded in statutory or administrative interpretation, or whether they would instead construe it more broadly to reach constitutional understandings of discrimination.[159] Further complicating any simplistic extension of *Griggs* to the constitutional context, the Court—in contrast to the lower court and the parties—eschewed reliance on constitutional precedents in endorsing an effects-based approach.[160]

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[154] *See* Keyes v. Sch. Dist. No. 1, 313 F. Supp. 61, 77–83 (D. Colo. 1970) (embracing the Plaintiffs' *Plessy*-based theory of liability); Douglas Draft Opinion at 6, Keyes v. Sch. Dist. No. 1 (Apr. 6, 1971) (Stewart Papers, Box 247) (affirming desegregation as remedy for *de facto* segregation based on *Plessy*); Memorandum from Justice Marshall to Justice Douglas, Re: Keyes v. Sch. Dist. No. 1 (Apr. 6, 1971) (Douglas Papers, Box II: 1500) (joining Douglas's opinion); Memorandum from Justice Brennan to Justice Douglas, RE: Wilfred Keyes et al. v. Sch. Dist. No. 1, (Apr. 7, 1971) (Stewart Papers, Box 247) (same); Memorandum from Potter Stewart to Justice Douglas, Keyes v. Denver Sch. Dist. No. 1 (Apr. 7, 1971) (Stewart Papers, Box 247) (same); *see also* EARL MALTZ, TURNING POINT: THE 1972 TERM OF THE SUPREME COURT AND THE TRANSFORMATION OF CONSTITUTIONAL LAW, at 21–22 (forthcoming) (draft chapter, on file with the author) (providing account of the *Keyes* stay proceedings).

[155] *See Keyes*, 402 U.S. 182.

[156] 401 U.S. 424 (1971).

[157] *Id.*

[158] *Id.* at 432. As Michael Selmi has observed, the meaning of *Griggs*—and the extent to which it was truly decoupled from intent—remained somewhat ambiguous in its aftermath, even in the statutory context. *See* Selmi, *supra* note 2, at 720–24, 727–28; *cf.* Civil Rights Act of 1991, Pub. L. 102-166 § 105 (1991) (codifying truly impact-based standard for disparate impact).

[159] For evidence suggesting that *Griggs* was largely understood by the Court as a statutory interpretation or administrative deference case, see, e.g., DICKSON, *supra* note 86, at 731–33; Blackmun Notes, No. 124 — Griggs v. Duke Power Co. (Blackmun Papers, Box 125). During the several years following *Griggs*, a majority of the Court's citations to it were also for the proposition that an agency enforcing its own statute is entitled to deference. *See, e.g.*, NLRB v. Boeing Co., 412 U.S. 67, 75 (1973); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 409 (1973); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972). *See generally* ACKERMAN, *supra* note 120, at 185 (suggesting that administrative deference played an important role in *Griggs*); Samuel Estreicher, *The Story of* Griggs v. Duke Power Co., *in* EMPLOYMENT DISCRIMINATION STORIES 163–66 (Friedman, ed. 2006) (same).

[160] *Compare Griggs*, *supra* note 157 (not relying on constitutional cases in support of disparate impact theory), *with* Brief for United States as Amicus Curiae at 12–14, *Griggs*, 401 U.S. 424 (No. 124) (relying on constitutional cases) *and* Griggs v. Duke Power Co., 420 F.2d 1225, 1238, 1247 (4th Cir. 1970) (Sobeloff, J., dissenting) (same). *See generally* DICKSON,

Thus, the cases of the 1970 Term brought to the forefront an issue long simmering below the surface of the Court's late 1960s school desegregation opinions: whether *de facto* discrimination or other effects-based arguments (outside of the Court's very limited historical alternatives) might be actionable. But, as the Court's muddled internal deliberations demonstrated, it was far from clear that the Justices had settled on an answer to this question. The 1970 Term thus raised as many questions as it answered regarding whether, and to what extent, effects-based arguments would be actionable.

C. A Return to Plessy*-Era Doctrines?* Palmer v. Thompson *and the Reprisal of the Ban on Intent-Based Invalidation*

If the internal deliberations in *Swann*, *Keyes*, and *Griggs* suggested a Court unsettled as to the boundaries of the Court's recent intent doctrine, the Term's final desegregation case—*Palmer v. Thompson*[161]—would suggest even more radical instability in the Court's intent doctrine. Despite the assumption of many legal observers that *Griffin* had permitted intent-based invalidation,[162] the defendant contended in *Palmer*—and a majority of the Court would ultimately hold—that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[163] Characterizing cases such as *Griffin* and *Gomillion* as focused on the "actual effect[s]" of the government's action, "not upon the motivation which led the States to behave as they did," the *Palmer* majority thus refused to allow intent-based invalidation despite undisputed evidence of segregationist intent.[164] *Palmer* thus seemed to return the Court to its pre-*Griffin* doctrine, in which facially neutral laws could be challenged only under limited effects-focused doctrines, and intent-based invalidation was not allowed.[165]

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supra note 86, at 732 (showing that Justice Harlan explicitly noted at Conference that the reversal was "not on the Constitution, but on the act").

[161] 403 U.S. 217 (1971).

[162] *See supra* notes 114–119 and accompanying text (noting the wide assumption after *Griffin* that intent-based invalidation was permissible).

[163] *Palmer*, 403 U.S. at 224.

[164] *Id.* at 225–26; *see also id.* at 249–54 (White, J., dissenting) (detailing the evidence, not seriously disputed, that the pools were closed in order to avoid operating them on a desegregated basis). The defendants did argue that cost and public safety considerations associated with operating desegregated pools, not bald racism, motivated them, but even the majority rejected the argument that this distinction was significant. *See id.* at 226. *See generally* Brest, *supra* note 114 (arguing that the majority opinion in *Palmer* "rewrote history" in its characterization of *Griffin* and *Gomillion*).

[165] As discussed *supra* note 114, there *was* a plausible reading of *Griffin* that could have read it as a relatively narrow extension of intent-based invalidation, to only those circumstances where the intent was clear and the Defendant could articulate no non-racial purpose. However, the majority in *Palmer* took issue much more fundamentally with whether intent-based invalidation was allowed at all, suggesting that it was not. *See Palmer*, 403 U.S. at 224–26. Moreover, the majority in *Palmer* rejected the defendant's argument that practical concerns regarding desegregation—the defendant's only alleged "non-racial" purposes—were

Internally, however, it was not clear that *Palmer* should be understood so broadly.[166] At issue was the closure of the Jackson, Mississippi swimming pools in response to a desegregation decree, a factual context that some Justices deemed highly significant.[167] Indeed, the key swing Justice in *Palmer*, Justice Blackmun, appears to have been persuaded that the dissenters had the better doctrinal argument regarding intent, but was so troubled by the possibility that the city might be compelled to indefinitely operate unprofitable pools that he provided a fifth vote for the majority.[168] Therefore, although *Palmer*'s holding seemed to sweep broadly—returning the Court to *Plessy*-era restrictions on interrogating intent—it was far from clear that the Justices forming the *Palmer* majority would remain committed to such an approach in other contexts.

Nevertheless, *Palmer*'s apparent holding was troubling. Many Northern desegregation cases depended on the ability to pierce facially neutral government actions and look to intent.[169] And the limited effects-focused alter-

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in fact "non-racial" in nature. *See id.* at 226. As such, the pools closure in *Palmer* should have failed even on this narrower reading of *Griffin*.

[166] *See infra* notes 167–168 and accompanying text. In addition, the primary contemporary case on which *Palmer* relied to resurrect the *Plessy*-era ban on consideration of intent was a muddled First Amendment decision, *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Justices' internal deliberations focused virtually exclusively on issues unrelated to the intent issue. *See* Brennan Case History Summaries, October Term 1967, at XLIII–XLV (Brennan Papers, Box II: 6) (documenting the internal deliberations in *O'Brien*).

[167] Although Justice Black's majority opinion ultimately based its reasoning on the ban on interrogating intent, virtually all of the concerns raised at conference by the Justices who ultimately joined the majority related to whether a municipality could be compelled to continue a non-essential service such as pools. *See, e.g.*, Brennan Conference Notes, Palmer v. Thompson, No. 107 (Brennan Papers, Box I: 228); Douglas Conference Notes, Palmer v. Thompson, No. 107 (Douglas Papers, Box II: 1511); Blackmun Conference Notes #1, Palmer v. Thompson, No. 107 (Blackmun Papers, Box 124); Blackmun Conference Notes #2, Palmer v. Thompson, No. 107 (Blackmun Papers, Box 124); *see also* sources cited *infra* note 168.

[168] *See, e.g.*, Blackmun Draft Opinion, No. 107 — Palmer v. Thompson (undated) (Blackmun Papers, Box 124) (showing that Blackmun drafted an opinion indicating that the case was controlled by *Bush* and *Reitman*, and that because the pool was closed for racial reasons, the opinion of the court of appeals denying the plaintiffs relief must be reversed); Blackmun Notes, No. 107 — Palmer v. Thompson (Dec. 12, 1970) (showing that Blackmun initially believed that the court of appeals had to be reversed given that the pool was closed for racial reasons); Memorandum from Justice Blackmun to Justice Black, Re: No. 107 — Palmer v. Thompson (Feb. 12, 1971) (Blackmun Papers, Box 124) (inquiring whether perhaps the *Bush* affirmance should lead to a different result); *see also* Memorandum form Justice Black to Justice Blackmun, Re: No. 107 — Palmer v. Thompson (Feb. 16, 1971) (responding to Blackmun's concerns, and articulating defense not in terms of global bar on interrogating intent, but rather on grounds that public entity should be able to decide "for any reason, good or bad[,]" that it no longer wants to provide service). *See generally Palmer*, 402 U.S. at 228–29 (Blackmun, J., concurring) (noting that this was a "hard case[ ]" and expressing concern regarding the city being "locked in" to providing an unprofitable service).

[169] *See, e.g.*, *Keyes*, 413 U.S. 189 (relying on school district's intentionally, but not facially, discriminatory actions to justify a finding of *de jure* segregation). There is a possibility that such challenges could have been brought as administration-based challenges, although it is not clear that the courts would have so characterized the type of school board actions typically at issue. *See, e.g.*, Keyes v. School Dist. No. 1, 303 F. Supp. 289, 295 (D. Colo. 1969) (identifying school board's segregationist actions as legislative in nature). *See generally* Sailors v. Bd. of Educ., 387 U.S. 105, 110 & n.7 (1967) (making clear that the Court under-

natives that had always existed (such as administration-based challenges) had historically demanded a showing of virtually total exclusion of minorities, a showing that had long proved easy for racial justice defendants to defeat.[170] Thus, rather than embracing the *Palmer* majority's apparent turn to effects-based arguments, the Court's race liberals strongly dissented in *Palmer*, arguing that "[s]tate action predicated solely on opposition to a lawful court order to desegregate is a denial of equal protection of the laws."[171]

The majority opinion in *Palmer* thus raised major questions about the trajectory of the Court's intent doctrine. No longer was it clear that *Plessy*-era doctrines barring consideration of intent were, as many had believed following *Griffin*, firmly interred. Moreover, the majority's focus on effects seemed to signal a return to the limited *Plessy*-era effects doctrines on which plaintiffs had traditionally been forced to rely. But neither was it clear that *Palmer*, with its unusual factual posture, decisively signaled a return to the pre-*Griffin* intent-blind state of affairs.[172] As one contemporary commentator put it, intent doctrine in Equal Protection was, at the close of the 1970 Term, "one of the most muddled areas of our constitutional jurisprudence."[173] And *Palmer* was "typical of the current state of the art."[174]

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stood some school board functions as legislative and some as administrative). The standards for an administration-based challenge also remained quite high, although they had moved away from the overwhelmingly rigid requirements of the *Plessy* era. *See infra* note 170.

[170] *See supra* Part I.B (describing the two prominent historical approaches to effects-focused Equal Protection arguments, administration-based challenges, and the Grandfather Clause line of cases). As of 1971, the standards for these types of effects-focused challenges remained extremely high. Thus, the most prominent modern case arising out of the Grandfather Clause line of cases, *Gomillion*, involved a virtually entire exclusion of black voters. *See supra* Part II.C. And, while the standards had apparently begun to loosen somewhat for administration-based challenges (interestingly, as the Court began to treat those challenges as a more straightforward intent-based inquiry), they remained very high, higher even than what would suffice today to establish intentional discrimination through statistics. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 205–06 (1965) (finding 16% gap between available black jury pool and proportion of black people selected to be on jury panels to be insufficient to create a prima facie case); *see also* Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 357 (1966) (demonstrating through statistical analysis that it is virtually impossible that the relevant disparities in *Swain* could have occurred by chance). Moreover, the relief that could be obtained from such challenges was limited. *See, e.g.*, *Carter*, 396 U.S. at 329–37 (refusing, in an administration challenge, to invalidate a law that had regularly been used to discriminate, and affirming the district court's decision to simply enjoin the relevant administrative actors from discriminating).

[171] *See Palmer*, 403 U.S. at 261–66 (White, J., dissenting). The Court's race liberals also pointed out that even if cases such as *Griffin* and *Bush* were, as the majority suggested, decisions predicated on effects, so too here, there were adverse effects on the minority community (thus justifying a finding in favor of the plaintiffs, even under an effects standard). *See id.* at 266–70. Note that although Justice Black, the author of the majority opinion in *Palmer*, was once a liberal, he had drifted considerably to the right by the 1970 Term. *See, e.g.*, Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1513–14 (2007).

[172] Indeed, just one term prior to *Palmer*, Justice Black, *Palmer*'s author, had been willing to "assum[e] arguendo" that a racial motivation would render impermissible actions remarkably similar to those at issue in *Palmer*. *See Abney*, 396 U.S. at 445.

[173] *See* Brest, *supra* note 135, at 99.

IV. The Drift Toward Intent-Mandatory Equal Protection (1971–1973)

The 1970 Term left the Court's intent doctrine in a state of disarray. For the first time since *Griffin*, *Palmer* seemingly revived disputes over whether intent-based invalidation would be permitted. And, in characterizing cases such as *Gomillion* and *Griffin* as effects-based decisions—not decisions based on intent—*Palmer* appeared to set up effects and intent as opposing, mutually exclusive ways of understanding the Court's contemporary doctrine. Thus, while plaintiffs during this era increasingly argued for *both* effects and intent as complementary approaches to constitutional invalidation, *Palmer* seemed to offer them as alternative ways of understanding the Court's contemporary approach to facially race-neutral laws.[175]

It also remained far from clear what an effects-focused alternative would look like, if embraced. As the post-*Brown* period amply illustrated, cases decided under the Court's traditional effects-focused doctrines (such as *Gomillion*) provided a weak tool for attacking sophisticated discriminatory action.[176] And yet it was not at all apparent that the Court was prepared to embrace more capacious modern alternatives, such as the Title VII *Griggs* standard, in the constitutional context. Nor was it obvious what role other modern effects-based theories, distinct from the traditional administration-based challenges and Grandfather Clause cases, might play in shaping the resolution of this issue.

A. Early Rejection of Effects Arguments in the 1971 Term (1971–1972)

The Court would take a few steps toward resolving these disputes during the 1971 Term. In particular, the Court's actions in two cases—*Jefferson v. Hackney*[177] and *Spencer v. Kugler*[178]—would strongly suggest that the Court, if inclined to embrace constitutional effects-based arguments at all, was unlikely to adopt the type of modern effects theory embraced in *Griggs*. Thus, in both *Jefferson* and *Spencer*, the Court would reject *Griggs*-style effects arguments with little dissension even from the Court's race liberals.[179] Indeed, in *Jefferson*, the Court would go further, seeming to retrench altogether from *Palmer*'s rhetorical embrace of effects arguments in the prior Term.[180] Accordingly, the 1971 Term would suggest that the Court's state-

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[174] *Id.*

[175] *See supra* Part III.C; *cf. infra* Part V.C (documenting the arguments made by the plaintiffs in *Arlington Heights*, including both intent- and effects-based arguments).

[176] *See supra* Part II.

[177] 406 U.S. 535 (1972).

[178] 404 U.S. 1027 (1972).

[179] *Jefferson*, *supra* note 177; Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd* 404 U.S. 1027 (1972).

[180] *See Jefferson*, 406 U.S. at 547–48.

ments in *Palmer* might not signify any broad willingness to turn toward effects arguments.[181]

Jefferson, in particular, seemed to bode poorly for the institutionalization of modern effects-based arguments in the constitutional context. Challenging a Texas state law that funded Aid to Families with Dependent Children (a form of federal benefits primarily received by minority families) at a much lower level than other Social Security-authorized benefits programs (predominantly received by whites), the *Jefferson* plaintiffs raised in the constitutional context precisely the type of "disparate impact" arguments that *Griggs* had endorsed.[182] They argued that since the "obvious *effect* [of the statute] was to disproportionately burden Black and Mexican-American welfare recipients[,] . . . [t]he discrimination should have been subjected to special scrutiny."[183] Contending that legislative motive was irrelevant under *Palmer*, the plaintiffs suggested instead that discriminatory effects provided the standard, and here should prove dispositive.[184] Thus, *Jefferson* squarely presented the question of whether *Palmer* in fact endorsed an effects-based approach to the evaluation of facially neutral government action and, if so, which standards any such effects-based approach should employ.

As to both questions, *Jefferson* seemed to counsel against reading too much into the developments of the 1970 Term. Despite the statements of a majority of the Court in *Palmer*—suggesting that effects, not intent, controlled—in *Jefferson* a majority of the Court easily dismissed the plaintiffs' statistical theory.[185] And even the Court's dissenting race liberals did not apparently disagree with this approach, focusing their constitutional arguments on documenting evidence of intentional discrimination, rather than

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[181] The Court, however, did further embrace a turn to a pure effects-based approach in the remedial context in *Emporia* and *Scotland Neck*, creating a significant divide between the Court's remedial and liability approaches.

[182] *See* Brief for Appellants and Appendix at 14, 29, 47–53, *Jefferson*, 406 U.S. 535 (No. 70-5064).

[183] *Id.* at 14, 29.

[184] *See id.* at 14. It is somewhat surprising how quickly racial justice plaintiffs appear to have grasped the potential of *Palmer*, given that the Court's race liberals themselves appear to have viewed it as a problematic, rather than helpful, decision. *See supra* notes 169–171 and accompanying text; *cf.* Siegel, *supra* note 2, at 1132–34 (relying on *Palmer* to argue that the Court need not have turned to a narrow intent-based standard and could instead have turned to a more robust effects-based approach). For other contemporary progressive deployments of *Palmer*, see, e.g., Robinson v. Shelby Cty. Bd. of Educ., 467 F.2d 1187, 1194 (6th Cir. 1972) (McCree, C.J., dissenting in part and concurring in part); Brief Amicus Curiae for the National Education Association and the Colorado Education Association at 47–48, *Keyes*, 413 U.S. 189 (No. 71-507); United States v. Texas Educ. Agency, 467 F.2d 848, 864 n.25 (5th Cir. 1972); Brief for Petitioners, *Emporia*, 407 U.S. 451 (No. 70-188). A series of cases that had embraced capacious effects-based approaches in the lower courts even pre-*Palmer* may have contributed to both plaintiffs' and the lower courts' receptivity to embracing *Palmer*'s turn to effects-based reasoning. *See, e.g.*, Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 930–32 (2d Cir. 1968).

[185] *See, e.g.*, 406 U.S. at 547–48.

arguing in favor of the plaintiffs' preferred effects-based approach.[186] Even in the Court's internal deliberations, no Justice would push for the adoption of the *Griggs* argument—or any other pure effects-based approach—in the constitutional domain.[187]

Spencer, decided earlier the same Term, reinforced the impression that *Palmer* did not signal a robust turn by the Court to the type of pure effects arguments that *Griggs* arguably endorsed.[188] Involving a challenge to New Jersey's system of municipality-based school districts (resulting in racially imbalanced schools), the *Spencer* plaintiffs made a simple racial imbalance argument that was easily rejected by the district court.[189] On appeal, only Justice Douglas dissented from the Court's summary affirmance, with the remainder of the Court summarily rejecting the plaintiffs' "racial imbalance" claims.[190]

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[186] *See, e.g.*, *id.* at 574–76 (Marshall, J., dissenting). Justice Marshall did suggest that it might be appropriate to shift the burden of proof on whether a racially discriminatory motive existed, where, as in *Jefferson*, there was considerable evidence of racial impact. This approach is consistent with the type of plaintiff-favorable burden-shifting approaches to proving intent that both he and Justice Brennan attempted to institutionalize at other times during the 1970s. *See id.*; *see also infra* notes 215–218, 379–383, and accompanying text (describing similar efforts to institutionalize plaintiff-favorable burden-shifting approaches by the Court's race liberals in *Keyes* and *Feeney*). As noted *supra* note 7, several scholars have suggested recently that the Court's race liberals' hope or expectation that intent doctrine would be applied more capaciously may help explain their failure to pursue pure effects arguments.

[187] *See, e.g.*, Docket Sheet, No. 70-5064, Jefferson v. Hackney (Brennan Papers, Box I: 254); Docket Sheet, Jefferson v. Hackney, No. 70-5064 (Powell Papers); Douglas Conference Notes, No. 70-5064 — Jefferson v. Hackney (Feb. 25, 1972) (Douglas Papers, Box II: 1559); Blackmun Conference Notes, No. 71-5064 (Blackmun Papers, Box 144); Memorandum from Justice Douglas to the Conference, Jefferson v. Hackney (Mar. 30, 1972) (Blackmun Papers, Box 144); Memorandum from Justice Brennan to Justice Marshall, RE: No. 70-5064 — Jefferson v. Hackney (Apr. 20, 1972) (Douglas Papers, Box II: 1559); Memorandum from Justice Brennan to Justice Douglas, RE: No. 70-5064 — Jefferson v. Hackney (Apr. 28, 1972) (Douglas Papers, Box II: 1559); Handwritten Notes, No. 70-5064 (undated) (Blackmun Papers, Box 144).

Justice Douglas did, ultimately unsuccessfully, attempt to persuade his colleagues that *Griggs* rendered the plaintiffs' statutory Title VI claim meritorious. *See* Douglas Draft Dissent (8th Draft), Jefferson v. Hackney, No. 70-5064 (May 12, 1972); *see also, e.g.*, Memorandum from KRR, Law Clerk to Justice Douglas, Jefferson v. Hackney, No. 70-5064 (May 19, 1972) (Douglas Papers, Box II: 1560) (making clear that Douglas's chambers made efforts to persuade others on the Title VI argument); *cf. Jefferson*, 406 U.S. at 551–58 (Douglas, J., dissenting) (not including the Title VI argument). *See generally* Memorandum from KRR, Law Clerk to Justice Douglas, Jefferson v. Hackney, No. 70-5064 (Apr. 8, 1972) (Douglas Papers, Box II: 1560) (inquiring whether Justice Douglas wanted work done on the constitutional question, which Justice Douglas apparently never requested).

[188] As Michael Selmi has observed, it wasn't immediately clear that, even as a statutory matter, *Griggs* should be understood as embracing a pure effects approach. *See supra* note 158.

[189] *See Spencer*, 326 F. Supp. at 1241–43.

[190] *See generally Spencer*, *supra* note 178. Because *Spencer* was decided as a summary affirmance, there is very little documentation of the Justices' perspectives on the case. However, even if the Court's race liberals wished to pursue pure effects/*de facto* segregation arguments, *Spencer* was not an ideal case in which to do so. The theory presented by the *Spencer* plaintiffs represented the most pure and wide-reaching version of the *de facto* segregation argument: that the entirety of the New Jersey system of locality-based school districts was unconstitutional, given its correspondence to *de facto* segregated municipalities. *See* Jurisdic-

Both *Jefferson* and *Spencer* arguably augured poorly for pure racial impact-based arguments. But the pure effects argument raised by the plaintiffs in *Jefferson* and in *Spencer* was only one variation of the effects-focused arguments circulating in the lower courts in the early 1970s.[191] Most notably, racial justice litigators often raised a distinct "interspherical"[192] argument: where intentional discrimination in one sphere (such as state-sponsored residential segregation) caused racial impacts in another domain (e.g., causing residentially-based schools to be segregated), such racial consequences could be addressed even when those second-order impacts could not be shown to be intentionally discriminatory.[193] This blended effects- and intent-based argument had often fared well, leading to successful claims that the deployment of such criteria served to impermissibly "transfer," "lock in," or "freeze" prior intentional discrimination.[194]

Litigants also argued, and some judges agreed, that *Brown* and *Plessy* (to the extent it was not overruled) provided a foundation for effects-based invalidation. Thus, *Brown*, which included language founding the relevant harm of segregation in its effects on black children, could be (and sometimes was) understood as suggesting that where government action led to stigmatizing effects for minorities, it was constitutionally invalid, regardless of its intent.[195] And *Plessy*—although understood by the 1970s to have been par-

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tional Statement at 36–41, *Spencer*, 404 U.S. 1027 (No. 71-519). Such an unbounded, far-reaching version of the effects argument was almost certainly politically unpalatable in the context of increasing resistance to busing away from neighborhood schools (or perhaps under any circumstances). *See generally infra* note 200 and accompanying text. Thus, it may again be the case that the Justices simply viewed *Spencer* as a contextually grounded case in which it was better to quietly punt on the specific *de facto* segregation arguments raised, without understanding it to fully foreclose future effects arguments. *See generally supra* note 17 and accompanying text.

[191] For the specific nature of the effects-based arguments made in *Spencer* and *Jefferson*, see Brief for Appellants and Appendix at 14, *Jefferson*, 406 U.S. 535 (No. 70-5064); Jurisdictional Statement at 36–41, *Spencer*, 404 U.S. 1027 (No. 71-519). Although *Jefferson* and *Spencer* included hints of some of the other arguments for *de facto* liability discussed *infra*, the cases' primary focus was purely on the existence of disparities and racial imbalance. *See id*; *cf. Spencer*, 404 U.S. at 1028–32 (Douglas, J., dissenting) (making broader arguments for *de facto* liability, including some of those discussed *infra*).

[192] I borrow this useful term from Bruce Ackerman. *See, e.g.*, ACKERMAN, *supra* note 120, at 326.

[193] *See, e.g.*, Henry v. Clarksdale School Dist., 409 F.2d 682, 688 (5th Cir. 1969); Selmont Improvement Ass'n v. Dallas Cty. Comm'n, 339 F. Supp. 477, 481 (S.D. Ala. 1972); *cf. Griggs*, 401 U.S. at 429–30 (relying in part on similar argument). *See generally* Cary Franklin, *Separate Spheres*, 123 YALE L.J. 2878 (2014) (describing an array of contexts in which courts and legislators were attentive during the post-*Brown* era to the potential effects of "spill over" discrimination).

[194] *See* sources cited *supra* note 193. Arguably, this approach had roots in the Grandfather Clause line of cases—which, at least where the incorporated intentional discrimination would operate as a direct proxy for race, would find such discrimination unconstitutional. *See supra* note 35 (describing the reasoning of the Grandfather Clause line of cases); *see also* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS, 1023–24 (5th ed. 2006) (describing this form of discrimination as "transferred de jure discrimination").

[195] For an early iteration of this argument, see Memorandum for United States as Amicus Curiae at 13–15, *Green*, 391 U.S. 430 (No. 695). Although language invoking this argument

tially overruled by *Brown*—was given new and paradoxically progressive life through certain judges' application of its holdings to invalidate *de facto* segregation when it divided black and white students into materially unequal educational settings.[196]

As the major case of the following Term, *Keyes v. Denver School District No. 1*,[197] would demonstrate, the Justices did not perceive these alternative effects-based theories to be definitively foreclosed by their decisions in *Jefferson* and *Spencer*.[198] Rather, the Justices viewed the vitality of these more nuanced effects-based arguments, and in particular their application to continuing school desegregation debates, as one of the major open issues in Equal Protection doctrine into the 1972 Term. Thus, it would not be until *Keyes* itself—and the Court's race liberals' decision in that case to pursue an intent-based rather than effects-based theory—that the Court would firmly chart its trajectory toward an intent-mandatory Equal Protection doctrine.[199]

B. The Court's Race Liberals Choose Intent: Keyes v. Denver School District No. 1 *(1973)*

Set against the backdrop of escalating political disputes over busing, and marking the Court's first major Northern desegregation case, the arrival at the Court of *Keyes v. Denver School District No. 1* was much antici-

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in a more modest form originally appeared in the *Green* draft opinion prepared by Justice Brennan, it was later removed as a result of disagreement by Justices White and Harlan. *See* Brennan Case History Summaries, October Term 1967, at XXIX (Brennan Papers, Box II: 6); *see also* Draft Opinion, Green v. Cty. Sch. Bd. of New Kent Cty., at 7–8 (May 16, 1968) (Warren Papers, Box 551) (including the *Brown* language); ACKERMAN, *supra* note 120, at 237–41 (discussing Brennan's modification of his opinion and arguing that his removal of this language was a betrayal of *Brown*'s fundamental "anti-humiliation principle"). This argument appears to have been a favorite of Justice Brennan's, and he often deployed it as an adjunct to other arguments (albeit apparently never as a stand-alone argument for liability). *See, e.g.*, Evans v. Abney, 396 U.S. 435, 53–54 (1970) (Brennan, J., dissenting); Brennan Case History Summaries, October Term 1970, at XXV–XLII (Brennan Papers, Box II: 6); Memorandum from Justice Brennan to Justice Douglas, Re: Swann (Mar. 27, 1970) (Douglas Papers, Box 1514, Part 1). For a fuller discussion of the *Brown* effects-based argument and the ways it was deployed during this time frame, see generally ACKERMAN, *supra* note 120; Siegel, *supra* note 12.

[196] *See, e.g.*, *supra* notes 151–155 and accompanying text; *see also Spencer*, 404 U.S. at 1028 (Douglas, J., dissenting) (relying in part on this theory). As discussed *supra,* while by the 1970s there was broad consensus that *Plessy* had been overruled insofar as it allowed government-mandated segregation, there was not similar consensus that *Plessy*'s equalization mandate had been abandoned.

[197] 413 U.S. 189 (1973).

[198] *See infra* Part IV.B.

[199] *Id.* Even in *Keyes* itself, the Court did not formally foreclose the possibility that effects-based approaches might be permissible. *See generally Keyes*, 413 U.S. 189. But, as described *infra* Parts V–VI, *Keyes* appears to have been a key turning point, insofar as the Justices, after *Keyes*, largely regarded themselves as committed to an intent-based paradigm, and the doctrinal consequences that flowed therefrom. Note that I am not the only recent scholar to situate *Keyes* as a more central decision in the Court's Equal Protection jurisprudence, although scholars have differed as to its implications and genesis. *See, e.g.*, MALTZ, *supra* note 154, at 20–31; Siegel, *supra* note 7, at 15; Haney-López, *supra* note 6, at 1801–06.

pated.[200] The case had already twice been up to the Court on stay proceedings and, on the most recent occasion, had produced the Court's most significant flirtation with effects-based Equal Protection arguments outside the remedial realm.[201] Moreover, the district court had relied squarely on the *Plessy* effects argument—that even a *de facto* separate and unequal system was unconstitutional—in justifying its broad order.[202] (Conversely, both the district and circuit courts had found that the district's intentionally discriminatory actions—characterized by those courts as targeting only a certain neighborhood—could not support district-wide busing relief.)[203] Thus, although the plaintiffs themselves encouraged the Court that it was possible to find in their favor without resorting to effects-based analysis, it was clear that *Keyes* was likely to mark a major fulcrum for the ongoing debates about whether, and to what extent, effects-based arguments should be allowed.[204]

Nor did it appear that the dilemmas presented by *Keyes* were unique. Rather, the facts in *Keyes* appeared to exemplify the messy factual scenarios that, outside of the South,[205] dominated mid-1970s race litigation.[206] While there was some evidence of intentional segregation in Denver School District No. 1, the evidence was hardly unequivocal.[207] More significantly, ac-

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[200] *See, e.g.*, Richard A. Shaffer, *Showdown in Denver: School-Integration Case Could Decide How Far North's Cities Must Go, High Court May Tell Future of Busing and Finally Rule on De Facto Segregation*, WALL ST. J., June 15, 1972, at 1; *see also* MALTZ, *supra* note 154, at 16–20 (discussing the controversial political backdrop against which *Keyes* was decided and noting that progressives and conservatives did not line up neatly on the *de facto/de jure* issue); ACKERMAN, *supra* note 120, at 257–71 (discussing the escalating conflicts in the political branches over busing in the months and years leading up to *Keyes*).

[201] *See* Keyes v. Sch. Dist. No. 1, 396 U.S. 1215 (1969) (Brennan, J.) (overruling stay); Keyes v. Sch. Dist. No. 1, 402 U.S. 182 (same, with full court participating); *see also supra* notes 151–155 (describing the second *Keyes* stay proceedings). The Court's expanding state action doctrine had also allowed some findings of liability where a plaintiff had not shown that the government directly acted with discriminatory intent. *See* cases cited *supra* note 123. *But cf.* Sophia Z. Lee, *A Revolution at War with Itself? Preserving Employment Preferences From* Weber *to* Ricci, 123 YALE L.J. 2964, 2996 (2014) (noting that even at the height of the Warren Court's embrace of state action doctrine, state action merely permitting discriminatory private action was not considered to fall within the scope of the doctrine).

[202] *See Keyes*, 313 F. Supp. at 77–83.

[203] *See id.* at 72–76; *see also* Keyes v. Sch. Dist. No. 1, 445 F.2d 990, 1006–07 (10th Cir. 1971).

[204] *See* Brief for Petitioners at 101–02, *Keyes*, 413 U.S. 189 (No. 71-507) (arguing that the intentionally discriminatory acts of the defendants alone warranted a finding for Plaintiffs). *See generally* Shaffer, *supra* note 200, at 1 (quoting Alexander Bickel as suggesting that "the mere fact that the court has accepted [*Keyes*] probably means it is finally ready to rule on the de facto question").

[205] By the 1970s, the Court had increasingly turned to an approach to the South that presumed the existence of a constitutional violation on the basis of pre-*Brown* maintenance of a dual school system. This largely allowed the Court to side-step disputes over liability standards in cases involving Southern school districts, and instead to focus its attention on the proper scope of the remedy. *See, e.g.*, *Emporia*, 407 U.S. at 459–62.

[206] *See infra* notes 207–08 and accompanying text.

[207] Both parties disputed the lower courts' findings regarding both the existence and causal effects of the school district's intentionally discriminatory acts. *See, e.g.*, Brief for Petitioners at 93–104, *Keyes*, 413 U.S. 189 (No. 71-507); Brief for Respondents at 72–98, *Keyes*, 413 U.S. 189 (No. 71-507).

cording to the lower courts, the evidence of intent that did exist related to only one of the challenged areas (Park Hill), not to the second major area (the core city schools) as to which the plaintiffs sought relief.[208] Thus, *Keyes* foregrounded the challenges that both the Justices and many contemporary race equality lawyers recognized were likely to characterize the next generation of race-based Equal Protection litigation.[209]

Perhaps because of its obvious significance, *Keyes* deeply divided the Justices from the start. At conference, Justice Douglas alone—now firmly ensconced as the Court's most stalwart defender of effects-based arguments—spoke in favor of the district court's *Plessy* argument for desegregating the core city schools.[210] Justice Powell, although rejecting the *Plessy* rationale, also intimated his potential willingness to abrogate the *de facto/de jure* distinction[211] (and thus to accept effects-based arguments in the school segregation context).[212] But the Court's two remaining participating[213] race liberals, Justices Brennan and Marshall, argued principally that the district court's decision was justifiable on intentional discrimination (that is, *de jure*)

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[208] *See* sources cited *supra* note 203.

[209] Although such issues had largely been relegated to the background of the Court's opinions in the late 1960s and 1970s, the Justices appear to have been well aware that they would ultimately require resolution by the Court. *See, e.g.*, *supra* notes 132–33.

[210] Douglas also endorsed an "interspherical" argument, predicated on discriminatory state action in the residential realm. Interestingly, Douglas characterized these as *de jure* discrimination arguments, making clear how fuzzy the line between *de facto* and *de jure* discrimination could sometimes be. *See* DICKSON, *supra* note 86, at 678–81; Docket Sheet, Keyes v. School Dist. No. 1, No. 71-507 (Powell Papers); Blackmun Conference Notes, No. 71-507 (Oct. 17, 1972) (Blackmun Papers, Box 154); Douglas Conference Notes, Keyes v. School Dist. No. 1 (Oct. 17, 1972) (Douglas Papers, Box II: 1593); Docket Sheet, Keyes v. School Dist. No. 1, No. 71-507 (Stewart Papers, Box 412); Docket Sheet, Keyes v. School District No. 1, No. 71-507 (Brennan Papers, Box I: 280); *see also* Brennan Case History Summaries, October Term 1972, at XXXIX (Brennan Papers, Box II: 6) [hereinafter Brennan *Keyes* Summary] (noting that "Justice Douglas and Justice Powell wanted to use the case to abolish the *de facto/de jure* distinction, but for obviously different reasons"); WOODWARD & ARMSTRONG, *supra* note 139, at 265 (describing the move to a *de facto* standard as a change "long sought" by Justice Douglas).

[211] As discussed *supra* note 131, *de facto* segregation was the term commonly used in the 1970s to describe segregation (or discrimination) that did not arise from intentionally or facially discriminatory government action, while *de jure* segregation was commonly used to refer to intentionally or facially discriminatory government action. Although the question of what was encompassed within each of these categories was blurry at the margins, roughly speaking, *de facto* discrimination arguments looked to effects in finding a constitutional violation, whereas *de jure* discrimination arguments typically looked to intent or racially classifying government action.

[212] *See* sources cited *supra* note 210. Powell did not specify at conference on what reasoning he would embrace *de facto* discrimination arguments, other than to allude to his belief that the forces producing segregation in the South (where the Court's opinions required remediation) and North (where it was not clear such remediation would be required) were the same. *Id.*

[213] Justice White had recused himself from the case because of the participation of his former law firm as counsel for the Denver School Board. *See* Brennan *Keyes* Summary, *supra* note 210, at XXXIX.

grounds, although they appeared willing to "go along" with the embrace of effects-based arguments.[214]

And indeed, when Justice Brennan circulated the first draft of the majority opinion, his draft opinion justified its plaintiff-favorable outcome squarely in terms of an intent-based regime.[215] Thus, the opinion—relying on an intent-based regime—concluded that the lower courts erred when they failed to ascribe district-wide significance to the finding of intentional discrimination as to the Park Hill schools.[216] Observing that the Park Hill schools comprised a significant proportion of the minority students in the city, and that the "[p]etitioners proved that for almost a decade . . . respondent School Board had engaged in an unconstitutional policy of deliberate racial segregation [there]," the Brennan-authored opinion suggested that the school board should be required to bear the burden of proving that intentional discrimination did not cause the racial disparities elsewhere.[217]

In shifting the burden to defendants, Justice Brennan's opinion reached an undoubtedly progressive outcome. But it did so firmly within the rubric of an intent-based regime.[218] Nowhere, outside of the case history, did the opinion reference the district court's *Plessy* theory of liability; nor did it endorse any of the other contemporary effects-based arguments.[219] Rather, Brennan's proposed opinion seemed to further entrench intent as the governing paradigm, "emphasiz[ing] that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate" and treating the plaintiffs (inaccurately) as having "concede[d] for the purposes of this case that . . . plaintiffs must prove . . . that [the challenged segregated schooling] was brought about or maintained by intentional state action."[220] Thus, as Justice Powell observed, the opinion's "em-

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[214] *See* sources cited *supra* note 210 (conference notes). It appears that this initial choice to focus on intentional discrimination arose in part because of fears that, with Justice White out of the case, a decision founded on abrogating the *de facto/de jure* distinction might result in a 4-4 split. *See* Brennan *Keyes* Summary, *supra* note 210, at XXXIX. As set out *infra*, however, even when it became apparent that Justice Blackmun was willing to provide a fifth vote for abrogating *de facto/de jure*, Justice Brennan (author of the *Keyes* opinion) did not seek to pursue that alternative.

[215] *See* Brennan Draft, Keyes v. Sch. Dist. No. 1 (Nov. 30, 1972) (Powell Papers, Keyes — Opin. Printed 1 of 2 Folder).

[216] *Id.* at 8–23.

[217] *Id.* at 8–9; *see also id.* at 16–19.

[218] *See infra* notes 219–221 and accompanying text. This aspect of *Keyes* supports the argument of other scholars that Brennan and others among the race liberals might have hoped that intent doctrine would ultimately be institutionalized with more plaintiff-favorable sub-constitutional rules. *See generally* Siegel, *supra* note 7; Haney-López, *supra* note 6.

[219] Brennan Draft, *supra* note 215, at 4.

[220] *Id.* at 8, 17. While the plaintiffs argued that intentional state action underlay the segregation and resulting school inferiority, they specifically distinguished between a need to show segregationist or discriminatory intent and a need to show more generally that intentional state action (regardless of racial purpose) was responsible for the ultimate status quo. Plaintiffs suggested that only the latter was required, whereas Justice Brennan's asserted concession, read in context, suggested the former. *Compare id.* at 8, *with* Brief for Petitioners at 114–16,

phasis" was clearly "on *intent*": "adhere[ing] to—indeed emphasiz[ing] and perhaps embroider[ing]—the de jure/de facto distinction."[221]

Nevertheless, Justice Brennan's opinion, which was circulated on November 30, 1972, quickly gained the assent of the two other participating race liberals (Justices Douglas and Marshall) and Justice Stewart, a race moderate.[222] Although Justice Douglas continued to adhere to his Conference views embracing effects-based arguments (and ultimately authored a concurrence favoring an effects-based approach), he nonetheless joined the Brennan opinion, bringing it within one vote of a majority.[223] Thus, as of mid-December, both *Keyes*' outcome and Brennan's intent-focused opinion seemed to hang on the votes of Justice Blackmun (who at conference was potentially willing to go along with a remand) and perhaps Justice Powell (who had indicated a potential willingness to find a constitutional violation in the core city schools, but only if the *de jure/de facto* distinction was abrogated).[224]

Unknown to Justice Brennan, Justice Powell, whose public response to the draft indicated only that he would "defer decision for some further study,"[225] was strongly opposed to the approach taken in the opinion.[226] Viewing Justice Brennan's opinion as further institutionalizing an intent regime—a regime Justice Powell viewed as creating a hypocritical and unworkable divide between North and South[227]—Powell wrote to his law clerk that "I am certain that I cannot join the opinion circulated by Mr. Justice Brennan."[228] Thus, Justice Powell began to work with his clerk on a sweeping concurring opinion, doing away with the *de facto/de jure* divide but also reinterpreting prior remedial decisions such as *Green v. County School*

Keyes, 413 U.S. 189 (No. 71-507). The Plaintiffs at oral argument also reaffirmed their commitment to pursuing both the effects- and intent-based arguments on which the district court had founded liability, albeit in terms that were at times quite muddled. *See* Oral Argument Recording at 2:00–2:22, 24:47–27:10, 93:00–97:38, *Keyes*, 413 U.S. 189 (1973) (No. 71-507), http://www.oyez.org/cases/1970-1979/1972/1972_71_507, *archived at* http://perma.cc/8U53-GL52.

[221] Memorandum from Lewis F. Powell, Jr. to JHW, Re: No. 71-507 Keyes (Jan. 6, 1973) (Powell Papers, Keyes — Denver Basic Folder); Memorandum from Lewis F. Powell, Jr. to JW, Re: Keyes (Dec. 20, 1972) (Powell Papers, Keyes — Denver Basic Folder).

[222] *See* Joint Record, No. 71-507 Keyes v. Sch. Dist. No. 1 (undated) (Powell Papers).

[223] *Id.*; *see also Keyes*, 413 U.S. at 214–17 (Douglas, J., concurring).

[224] *See* sources cited *supra* note 210.

[225] Memorandum from Justice Powell to Justice Brennan, Re: No. 71-507 Keyes v. School District No. 1 (Dec. 1, 1972) (Douglas Papers, Box II: 1593).

[226] *See* Memorandum from Lewis F. Powell, Jr. to JHW, Re: No. 71-507 Keyes (Jan. 6, 1973) (Powell Papers, Keyes — Denver Basic Folder) [hereinafter JHW Memo].

[227] Justice Powell, a Southerner, felt it was hypocritical and unfair to impose sweeping desegregation decrees on the South, but not the North, when he saw the contemporary causes of segregation in both South and North as principally deriving from *de facto* segregation. *See* sources cited *infra* note 228.

[228] *See* JHW Memo, *supra* note 226; *see also* MALTZ, *supra* note 154, at 24–29 (providing account of Justice Powell's perspective and actions in *Keyes*); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 292–308 (1994) (same).

Board[229] and *Swann v. Charlotte Mecklenburg Board of Education*[230] as demanding a much more limited scope of relief.[231]

On January 9, 1973, in response to Justice Brennan's prodding, Justice Blackmun at last articulated his own views.[232] And, for the first time, he too voiced discomfort with the *de facto*/*de jure* divide (and the concomitant notion that intentional segregation alone might be actionable). Stating that "[s]egregation may well be segregation whatever the form," he noted that "I am not at all certain that the de facto-de jure distinction in school segregation will hold up."[233] Thus, while "in large part in accord" with Justice Brennan's November 1972 draft, Justice Blackmun indicated that he would "withhold [his] vote pending other circulations."[234]

As Justice Brennan was aware, both Justices Douglas, who had joined his opinion, and Justice Powell, who had not, also endorsed the abrogation of the *de facto*/*de jure* divide.[235] Indeed, virtually simultaneously with Justice Blackmun's memorandum, Justice Douglas sent Justice Brennan his own concurrence, which continued to endorse abrogating the *de facto*/*de jure* divide.[236] Thus, Justice Blackmun's memorandum made plain that, if Justices Brennan and Marshall would also agree to hold *de facto* discrimination unconstitutional, there was a majority on the Court for endorsing a *de facto* discrimination approach.[237]

And indeed, after Justice Blackmun's January circulation, revising the majority opinion to adopt a *de facto* discrimination approach was arguably the more obviously secure path to a majority. Justice Powell had made clear at conference that he would not join in ordering a remand unless the Court endorsed a *de facto* discrimination theory.[238] And Justice Blackmun, the

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[229] 391 U.S. 430 (1968).

[230] 402 U.S. 1 (1971).

[231] *See* sources cited *supra* note 228; *see also* Keyes, 413 U.S. at 217–53 (Powell, J., concurring in part and dissenting in part).

[232] Memorandum from Justice Blackmun to Justice Brennan, Re: No. 71-507 — Keyes v. Sch. Dist. No. 1 (Jan. 9, 1973) (Douglas Papers, Box II: 1593); *see also* Brennan *Keyes* Summary, *supra* note 210.

[233] *See* sources cited *supra* note 232; *see also* Handwritten Memorandum from Justice Brennan to Justice Douglas, Re: 71-507 (Jan. 16, 1973) (Douglas Papers, Box II: 1593) (noting that he understood Justice Blackmun's memo to convey that Justice Powell's "idea there is no difference between de jure & de facto appeals to him [i.e., Justice Blackmun].").

[234] *See* sources cited *supra* note 232. Justice Blackmun also alluded to the need to consider other matters, apparently a reference to the soon-to-be-pending *Milliken v. Bradley*, 418 U.S. 717 (1974).

[235] *See* sources cited *supra* notes 210–214 (discussing the deliberations at conference).

[236] *See* Handwritten Note from Justice Douglas to Justice Brennan and Attached Douglas Draft Opinion (Jan. 11, 1973) (Brennan Papers, Box I: 289).

[237] Even if Justice Stewart (who did not wish to abrogate the *de facto*/*de jure* divide) declined to go along, there were, with Justice Blackmun's vote, five justices whose politics or legal position inclined them towards embracing a constitutional standard that would hold *de facto* segregation unconstitutional. *See* sources cited *supra* notes 235–36; *see also* Brennan *Keyes* Summary, *supra* note 210, at XLIV, XL (showing that Justice Stewart did not want to reach the *de facto*/*de jure* issue in *Keyes*).

[238] *See* sources cited *supra* note 210.

other key swing vote, had revealed that he too was uncomfortable with Court's failure to address the *de facto/de jure* divide.[239] Consequently, there were reasons to be concerned that a fifth vote might not be forthcoming for Justice Brennan's intent-focused approach, whereas a *de facto* discrimination majority seemed close to assured.[240]

Despite this fact, Justice Brennan took no steps in the months following Justice Blackmun's memorandum to rework his opinion to adopt a less intent-focused frame.[241] Nor, despite his reputation as a back-door dealer,[242] did he apparently even sound out the possibilities for institutionalizing an effects-based (*de facto*) approach.[243] Instead, over the next several months, Justice Brennan would simply wait for further word from his fellow Justices.[244] Thus, it was not until April of 1972—when Justice Powell circulated his lengthy concurring and dissenting opinion—that the issue of *Keyes*'s trajectory again became the Court's central focus.[245]

Although Justice Powell had previously signaled that he would write in concurrence of remand in *Keyes*, his circulated draft was the first extended

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[239] *See* sources cited *supra* note 232. *See generally* Brennan Handwritten Response to Douglas Note, Re: 71-507 (Jan. 15, 1973) (noting that Powell's idea of abrogating *de facto/de jure* divide appealed to Blackmun, and suggesting that they might lose Blackmun if Powell or Rehnquist wrote persuasively in dissent).

[240] *But cf.* MALTZ, *supra* note 154, at 30 (suggesting that Justices Brennan and Powell were divided by an unbridgeable gap in *Keyes*). It is clear that Justices Brennan and Powell were divided by an unbridgeable gap on the issue of remedies. But it is not apparent what would have prevented them from reaching agreement on the issue of substantive liability. *Cf.* JEFFRIES, *supra* note 228, at 304 (making a similar observation and describing as "surprising" Justice Powell's failure to attempt to explore common ground with Justice Brennan).

[241] *See generally* Brennan *Keyes* Summary, *supra* note 210 (describing no activity on *Keyes* during this time, except for Justice Rehnquist's circulation of his dissent and Justice Brennan's limited response to areas that Rehnquist had mischaracterized).

[242] Justice Brennan has often been characterized as remarkable for his ability to build majorities around results that he sought. *See, e.g.*, Hunter R. Clark, *The Pulse of Life in Justice Brennan's Jurisprudence*, 46 DRAKE L. REV. 1, viii–x (1997).

[243] *See* Brennan *Keyes* Summary, *supra* note 210. The tenor and content of Justice Brennan's *Keyes* account strongly suggests that he was interested in effects-based arguments only to the extent that failing to embrace them might cause him to lose Justice Blackmun's vote (and thus a majority). *Id.* Rather, it seems that that Justice Brennan was far more interested in pushing the doctrinal framework he had already sketched out in his initial draft: one that firmly institutionalized an intent-based standard, with plaintiff-favorable burden-shifting rules. *Id.*

While the records in *Keyes* do not clearly address why Justice Brennan felt this way, they are certainly consistent with the notion that he—especially post-*Palmer*—felt strongly about prioritizing the institutionalization of an intent-based regime, and did not perceive it as a dangerous or damaging framework for racial justice plaintiffs. *See generally infra* notes 408–411 and accompanying text. *Keyes* is also consistent with the account of other scholars that the Court's race liberals probably hoped that intent doctrine would be implemented with a more plaintiff-favorable set of sub-constitutional guidelines than has ultimately come to be the case. *See supra* note 218. Finally, it also appears that, even at this late date, the Court's race liberals continued to view their actions as incremental and contextually grounded, rather than decisively foreclosing opportunities for effects-based arguments. *See, e.g.*, *supra* note 199. *Cf. infra* note 309 (discussing the reasons why *Keyes* may have been the last realistic juncture for the institutionalization of an effects-based regime).

[244] *See* Brennan *Keyes* Summary, *supra* note 210.

[245] *Id.*

exposition of his arguments in favor of abrogating the *de facto*/*de jure* divide.[246] And indeed, the opinion quite explicitly called for the abandonment of the *de facto*/*de jure* distinction, referring to it as a historical artifact of the case law's evolution that "no longer can be justified on a principled basis."[247] Largely devoid of an affirmative theory *for* embracing *de facto* discrimination arguments, Justice Powell claimed descriptively that the Court had already moved in *Green* and *Swann* to a doctrine requiring districts to remediate *de facto* segregation, albeit only in the South.[248] Noting that in 1972 the principal causes and harms of segregation were the same in the North and South, Justice Powell argued that a single, nationwide liability standard should apply.[249]

Powell's opinion also, however, called for significantly limiting the remedies that would attach to the finding of a constitutional violation.[250] In particular, busing, which Justice Powell abhorred, was to be minimized; used exceedingly rarely for "elementary age" children and only sparingly for those in the higher grades.[251] Moreover, a "rule of reason" should be applied to any remedial decree, balancing competing equitable considerations instead of focusing exclusively on concrete measures of integration.[252] Thus, while Justice Powell's draft considerably expanded the circumstances in which a constitutional violation might be found, it also meaningfully limited the remedial consequences.[253]

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[246] *See* Powell Draft Opinion, Keyes v. Sch. Dist. No. 1, No. 71-507 (Apr. 2, 1973) (Powell Papers, Keyes — Opin. Printed 2 of 2 File) [hereinafter April 2 Powell Draft].

[247] *Id.* at 9.

[248] *Id.* at 5–8. This is perhaps unsurprising, given that Powell apparently did not have a legally principled argument for *de facto* discrimination, but rather wanted to adopt the rule because of his perception that this was in fact the approach that was already being applied in the South, from his perspective unfairly penalizing the South for its history of *de jure* segregation. *See* MALTZ, *supra* note 154, at 24–29; JEFFRIES, *supra* note 228, at 292–307; *see also id.* at 306–08 (noting that Justice Powell's solicitude for effects-based arguments in *Keyes* did not carry over to, and in fact was inconsistent with his approach in, other contexts).

[249] April 2 Powell Draft, *supra* note 246, at 5–9. Justice Powell viewed himself as abrogating the *de facto*/*de jure* divide and represented his opinion in this way. However, he did not endorse a pure effects model, finding that some predominantly black and white schools could continue to exist within an integrated system. *Id.* at 11. Moreover, Justice Powell explicitly delineated the types of state actions that would suffice to render a school system integrated, and his list did not require districts to remediate the prime cause of *de facto* segregation: the imposition of a neighborhood school system on residentially segregated cities. *See id.* at 10–11; *cf. id.* at 24–25 (arguing that school districts should be required to take desegregationist steps available within framework of "neighborhood education" system).

[250] *See infra* notes 251–53 and accompanying text.

[251] April 2 Powell Draft, *supra* note 246, at 26–36.

[252] *Id.* at 21–24. One of the major disputes that had arisen regarding remedies in Southern school desegregation cases was whether equitable considerations such as the educational impact of desegregation or white flight could be considered in formulating a remedial decree. *See generally* Brief for Respondents at 32–41, *Swann*, 402 U.S. 1 (No. 70-281) (advocating on behalf of school district defendant for the adoption of a "rule of reason" as the standard for remedial decrees in the schools desegregation context).

[253] This aspect of Justice Powell's proposed opinion was consistent with the focus of the increasing debates in the political branches over the Court's desegregation decisions, debates that were primarily targeted at limiting busing. *See supra* note 200 and accompanying text.

For obvious reasons, Justice Brennan—although now secure in a fifth vote for remand—was less than enthralled with the remedial portion of Justice Powell's proposed opinion.[254] Viewing the opinion as signaling a "substantial retreat from our commitment . . . to eliminate all vestiges of state-imposed segregation in the public schools," and worried that it might prove enticing to Justice Blackmun, Justice Brennan "sensed the need to pre-empt the tactical advantage that Justice Powell might have gained."[255] Thus, he circulated a memo signaling for the first time his own willingness to retire the *de facto*/*de jure* divide and to allow constitutional invalidation based on effects alone.[256] Noting that he "too was deeply troubled by the [*de facto*/*de jure*] distinction," he stated that "[w]hile I am still convinced that my proposed opinion for the Court is . . . a proper resolution of the case, I would be happy indeed to . . . jettison the distinction if a majority of the Court is prepared to do so."[257] As Justice Brennan learned through the clerk grapevine, "the memo . . . indeed achieved its intended purpose—if Justice Blackmun really did want to reach the *de facto-de jure* distinction he would have to consider my proposal as well as Justice Powell's opinion."[258]

But cf. President Richard Nixon, *Statement About Desegregation of Elementary and Secondary Schools* (Mar. 24, 1970), *http://www.presidency.ucsb.edu/ws/?pid=2923*, *archived at* http://perma.cc/BD2U-DMY7 (addressing busing concern, but also specifically stating that *de facto* discrimination did not violate the Constitution). In contrast, Justice Brennan's majority opinion did not limit busing relief and indeed apparently ultimately provoked more, not less, political backlash, because it led to invasive busing orders in an increasing number of Northern cities. *See*, *e.g.*, ACKERMAN, *supra* note 120, at 276–77. Because Justice Brennan's approach in *Keyes* was not responsive to the core extant political concern regarding busing relief (and indeed arguably exacerbated it), it is difficult to credit a simple political backlash account of his actions. However, it is certainly plausible (and indeed likely) that the increasing backdrop of political resistance influenced his actions in more complex ways.

[254] *See* Brennan *Keyes* Summary, *supra* note 210, at XLII–XLIII. Some scholars have identified this as the key reason why Justice Brennan did not pursue common cause with Justice Powell in *Keyes*. *See, e.g.*, MALTZ, *supra* note 154, at 30. But there are some difficulties with this explanation for why Justice Brennan did not pursue effects arguments, including the fact that Justice Powell's view on the remedial issue became fully known only when he circulated his opinion fairly late in the deliberations (whereas he made his views on the *de facto* discrimination issue apparent much earlier, at conference). In addition, given that the remedial principles flowing from a constitutional violation were well established by 1973, it is not entirely clear why Justice Brennan could not have focused on the liability component, leaving Powell to dissent on remedies against a backdrop of established law. *But cf. supra* note 200 (explaining that most of the broader political upheaval during this era focused on the remedial issue).

[255] *See* Brennan *Keyes* Summary, *supra* note 210, at XLII–XLIII.

[256] *Id.* at XLIII. Although Justice Brennan's April memorandum describes himself as having indicated his willingness to abrogate the *de facto*/*de jure* divide at conference, the Justices' conference notes do not state this. *See* sources cited *supra* note 210. It is possible that Justice Brennan's assent to this concept was simply not recorded, but it is also possible that Justice Brennan's characterization of his conference comments was revisionist in nature. *Cf.* Memorandum of Justice Blackmun to Justice Brennan, Re: No. 71-507 — Keyes v. Sch. Dist. No. 1 (May 30, 1973) (Douglas Papers, Box II: 1593) (identifying Justices Powell and Douglas as having endorsed a *de facto* discrimination approach, and not mentioning Justice Brennan).

[257] Brennan *Keyes* Summary, *supra* note 210, at XLIII.

[258] *Id.* at XLIV.

Following Justice Brennan's April 3 memorandum, several weeks again would pass with little activity regarding *Keyes*.[259] At last, on May 30, Chief Justice Burger suggested that perhaps the case should go over to the following term, so that it might be heard together with the Detroit desegregation case, *Milliken v. Bradley*.[260] But this move, which was widely perceived as an attempt to stall the resolution of *Keyes*, backfired.[261] Thus, following a series of sharp exchanges between Justice Brennan and Chief Justice Burger, Justice Blackmun joined Justice Brennan's existing opinion (which, despite Justice Brennan's memorandum, had never been revised to redirect its focus away from intent).[262] Although persuaded, "as Lewis and Bill Douglas appear to be, that the *de jure-de facto* distinction eventually must give way," Justice Blackmun stated himself willing to join Justice Brennan's intent-focused opinion, given that "we need not meet the *de jure-de facto* distinction for purposes of the Denver case."[263]

Thus, with Justice Blackmun's final vote, the high point of the Court's consideration of effects-based arguments for Equal Protection liability came to an end. In the final *Keyes* opinions, only two Justices—Douglas and Powell—spoke in favor of abrogating the *de facto/de jure* divide and allowing effects to stand alone as a basis for finding a constitutional violation.[264] The rest (except Justice Rehnquist, who dissented entirely) silently joined Justice Brennan's opinion, emphasizing intent as the basis for unconstitutionality.[265] And thus, three years prior to *Washington v. Davis*, *Keyes* would set the Court's course: away from effects-based theories and toward an intent-mandatory regime.

V. The Consolidation of Intent-Mandatory Equal Protection: *Davis*, *Arlington Heights*, and *Feeney* (1974–1979)

The 1971 and 1972 Terms strongly suggested that *both* aspects of *Palmer*'s holding—its endorsement of effects-based arguments and its resurrection of the *Plessy*-era ban on intent-based invalidation—might prove transitory.[266] Rather than embracing the *Palmer* majority's approach, cases such

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[259] *Id.* During this time, Justice Powell made an attempt (apparently unsuccessful) to woo Justice Blackmun, and Justice Douglas circulated his concurrence to the full Court. *See id.*; *see also* Handwritten Note from Justice Powell to Justice Blackmun (May 4, 1972) (Blackmun Papers, Box 154).

[260] *See* Memorandum from Chief Justice Burger to Justice Brennan, Re: No. 71-507 — Keyes v. Sch. Dist. No. 1 (May 30, 1973) (Powell Papers, Keyes — Denver Basic File).

[261] *See* Jeffries, *supra* note 228, at 305.

[262] *See* Brennan *Keyes* Summary, *supra* note 210, at XLV–VI.

[263] Memorandum of Justice Blackmun to Justice Brennan, Re: No. 71-507 — Keyes v. Sch. Dist. No. 1 (May 30, 1973) (Douglas Papers, Box II: 1593).

[264] *Keyes*, 413 U.S. at 214–53.

[265] *Id.*

[266] In fact, the Court's deliberations and outcome the following Term in *Milliken v. Bradley* are intelligible only in the context of a presumption that intent was the standard and that effects were not controlling. *See Milliken*, *supra* note 234; *cf.* Ackerman, *supra* note 120, at 276–78 (characterizing *Milliken* as the major constitutional moment when the Court—respon-

as *Keyes*, *Jefferson*, and *Spencer* all declined to endorse effects arguments, while stating the operative standard in intent-based terms.[267] Accordingly, by 1973 it seemed increasingly apparent that neither aspect of the *Palmer* majority's approach was, despite the breadth of the opinion's rhetoric, likely to prove enduring.

Such a premature demise for *Palmer* boded well for the Court's race liberals' long project of institutionalizing *permissive* intent-based invalidation.[268] But the demise of *Palmer* boded poorly for the types of effects-based arguments that racial justice plaintiffs were increasingly making in the lower courts.[269] Thus, even as cases such as *Keyes* (and the prior Term's decisions) marked a consolidation of the Court's race liberals' longstanding project of *permitting* intent-based invalidation, they rendered the possibility that the Court might endorse effects arguments ever more remote.

A. The Lower Courts' Embrace of Effects-Based Arguments (1970–1976)

Although *Keyes*—and the prior Term's decisions in *Jefferson* and *Spencer*—augured poorly for effects-based arguments, they would do surprisingly little to dampen the enthusiasm of advocates and lower court judges for effects-based Equal Protection arguments.[270] Despite the growing indications that the Court was unlikely to accept an effects-based approach outside of the remedial context, both litigants and lower courts would continue to widely endorse effects-based Equal Protection theories through the mid-1970s.[271] Thus, many of the circuit courts would, during this time frame, find *Griggs*'s pure impact test to be directly applicable to the Equal Protec-

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sive to hostile political dynamics—retreated from efforts to achieve desegregation). *See generally* Milliken v. Bradley Case Files, Justice Lewis F. Powell, Jr., http://law.wlu.edu/powellarchives/page.asp?pageid=1345 (making clear that even among the Court's race liberals, the objections articulated to the result in *Milliken* generally assumed intentional discrimination as the baseline standard).

[267] *See supra* Part IV.A–B.

[268] *Keyes* carried this inference explicitly as it endorsed and allowed intent-based invalidation. *See supra* Part IV.B. *Jefferson* did so only implicitly, by assuming that intentional discrimination was the standard, and finding that the Plaintiffs had not met that standard. *See supra* Part IV.A.

[269] *See supra* note 184 (citing sources in which *Palmer*-based effects arguments were made by plaintiffs during this era). There were also many lower court opinions that embraced effects-based arguments in the constitutional realm on the authority of *Griggs*'s statutory holding during this time frame. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971).

[270] *See infra* notes 271–73 and accompanying text.

[271] *See, e.g.*, Siegel, *supra* note 7, at 11–15; *see also infra* notes 274–77 and accompanying text (describing the lower court proceedings in *Davis*, *Arlington Heights*, and *Feeney*). As Siegel has noted, evidence of impact was sometimes used, standing alone, to substantiate a constitutional violation. *See* Siegel, *supra* note 7, at 11–15. At other times, it was used to buttress findings of intentional discrimination or to shift the burden to the defendant to prove an absence of intent. *See id.* Finally, courts at times would invalidate racially impactful government actions on rational basis review, an interesting approach that I am exploring in a current project. *See, e.g.*, Chance v. Bd. of Examiners, 458 F.2d 1162, 1174–77 (2d Cir. 1972). *See generally* Katie Eyer, *Protected Class Rational Basis Review* (draft manuscript, on file with the author).

tion context.[272] Other more complex theories (often bridging the divide between intent and effects) would also gain purchase, as lower courts demonstrated a willingness to strike down local and state laws passed in the face of knowable (or known) discriminatory effects.[273]

Plaintiffs, perhaps unsurprisingly, responded to this hospitable lower court environment by continuing to raise such arguments into the 1970s.[274] Indeed, all three of the cases that are today thought of as the Court's trio of intent decisions—*Washington v. Davis*, *Arlington Heights v. MHDC*, and *Personnel Administrator v. Feeney*—were litigated predominantly in the lower courts as effects-based cases, with alternative arguments playing a subsidiary role.[275] And, in all three cases, the lower courts ultimately concluded that the defendants had not acted with discriminatory intent, despite finding a constitutional violation.[276] Thus, each case—as it came up to the Court—would present the question of whether intent was the required standard against the backdrop of explicit findings that intentional discrimination had not been proven.[277]

Ultimately, *Davis*, *Arlington Heights*, and *Feeney* would all come up to the Court for review in close proximity, during the 1975 Term and the summer that followed.[278] Although the Court had heard one case arguably implicating the permissibility of effects-based arguments during its 1973 Term—the pregnancy discrimination case of *Geduldig v. Aiello*[279]—the parties and

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[272] Siegel, *supra* note 7, at 14; *see also infra* notes 275–77 and accompanying text (describing the lower court approach in *Davis*).

[273] *See, e.g.*, *infra* notes 275–77 and accompanying text (describing the approaches taken in the lower courts in *Arlington Heights* and *Feeney*); *cf.* Siegel, *supra* note 7, at 14–15 (describing similar approaches taken in the lower courts).

[274] *See* sources cited *infra* note 275.

[275] *See, e.g.*, Joint Appendix at 24–29, 47–48, *Davis*, 426 U.S. 229 (1976) (No. 74-1492) (Amended Complaint in Intervention and Motion for Partial Summary Judgment); Joint Appendix at 4–19, 20–24, 64–106, *Arlington Heights*, 429 U.S. 252 (1977) (No. 75-616) (Complaint, Defendants' Motion to Strike and Dismiss Cause, and Final Pretrial Order); Joint Appendix at 46–60, 71–98, *Feeney*, 442 U.S. 256 (1979) (No. 78-233) (Feeney Complaint and Agreed Statement of Facts).

[276] *See, e.g.*, Davis v. Washington, 512 F.2d 956, 960–61 (D.C. Cir. 1975) (noting the police department's "commendabl[e]" efforts to recruit blacks, but holding that lack of discriminatory intent was "irrelevant" because the test had a "racially disproportionate impact"); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 412–15 (7th Cir. 1975) (affirming that the Village had not applied its zoning law in a discriminatory way and rejecting a pure disparate impact argument, but accepting the argument that where there was longstanding residential segregation of which the Village was aware, its actions had "racially discriminatory effects" that could be upheld only on a showing of a compelling public interest); Anthony v. Commonwealth of Massachusetts, 415 F. Supp. 485, 495–99 (D. Mass. 1976) (noting that "[t]he Massachusetts Veterans' Preference was not enacted for the purpose of disqualifying women from receiving civil service appointments" and that the law had a "worthy purpose," but nevertheless finding that "the result," i.e., a disparate impact on women, was impermissible); *see also id.* at 501 (Campbell, C.J., concurring) (same).

[277] *See* sources cited *supra* note 276.

[278] *See* Brief for Petitioners, *Davis*, 426 U.S. 229 (No. 74-1492); Petition for Certiorari, *Arlington Heights*, 429 U.S. 252 (No. 75-616); Jurisdictional Statement, Commonwealth of Massachusetts v. Feeney, 429 U.S. 66 (1976) (No. 76-265).

[279] 417 U.S. 484 (1974).

Justices there had largely focused on a *per se* sex discrimination argument orthogonal to the core intent/effects debate.[280] Consequently, the 1975 Term would be the Court's first major opportunity to revisit the intent/effects question since *Keyes*.[281] And it would be *Davis*, the first of the cases to be filed in the district court, that would be the first to be heard by the Court.[282]

B. Washington v. Davis *(1976)*

Filed in 1970, *Washington v. Davis* was litigated in the lower courts as an effects case.[283] Challenging the standardized civil service test used for entrance into the District of Columbia Police Academy, the plaintiffs alleged that blacks fared considerably worse on the test and that it was unrelated to job performance.[284] There were no meaningful allegations of discriminatory intent in *Davis*; on the contrary, there was significant evidence that the department had engaged in rigorous recruiting of black officers.[285] Therefore, the primary issues facing the Court were whether the test was sufficiently job-related, and whether the burden should have been shifted to the employer under the specific factual circumstances of the case.[286]

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[280] The main sex discrimination argument made in *Geduldig* was that discrimination on the basis of pregnancy was directly—and not simply as a matter of disparate impact—a form of sex discrimination. *See, e.g.*, Brief for Appellees, *Geduldig*, 417 U.S. 484 (No. 73-640); *see also Geduldig,* 417 U.S. at 497–502 (Brennan, J., dissenting) (arguing that pregnancy-based discrimination "inevitably constitutes sex discrimination," and not relying on disparate impact precedents). *But cf.* Brief for Appellant, *Geduldig*, 417 U.S. 484 (No. 73-640) (in arguing against liability, relying on *Jefferson* and framing the argument in impact-based terms); Memorandum to File by Justice Blackmun at 2–4, Geduldig v. Aiello, No. 73-640 (Mar. 25, 1974) (Blackmun Papers, Box 188) (making clear that Justice Blackmun was thinking about the case in disparate impact terms). How to characterize the issue in *Geduldig,* and its relevance for the race context, may have been complicated by the fact that, at the time, sex had not yet been designated a "quasi-suspect" class. *See generally* Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014) (discussing the timeframe during which sex came to be characterized as quasi-suspect class). Some Justices and their law clerks later identified *Geduldig* as salient to the more traditional impact arguments made in *Davis*. *See, e.g.*, Powell Memorandum to File, No. 74-1492 Washington v. Davis (Mar. 1, 1976) (Powell Papers).

[281] As discussed *supra* note 266, *Milliken* arguably implicated the intent/effects issue, insofar as its assessment of the lack of a constitutional violation across district boundaries depended on an assumption that *de facto* segregation was insufficient. But most of the Justices seem to have viewed the issue in *Milliken* as primarily remedial in nature. *See generally* Milliken v. Bradley Case Files, Justice Lewis F. Powell, Jr., http://law.wlu.edu/powellarchives/page.asp?pageid=1345 (including numerous memos from Justices who joined the majority in *Milliken* exhorting Chief Justice Burger, who viewed effects issue as key, to refocus his draft instead on the issue of inter-district remedies).

[282] *See generally* sources cited *supra* note 278.

[283] *See* sources cited *supra* notes 275–76.

[284] *See* sources cited *supra* note 275.

[285] *See* sources cited *supra* note 276. The plaintiffs did argue that these recruitment efforts had been less successful than the defendant claimed. *See, e.g.*, Brief for Respondents at 6–8, *Davis*, 426 U.S. 229 (No. 74-1492).

[286] *See* Brief for Petitioners at 2, *Davis*, 426 U.S. 229 (No. 74-1492); Brief for Respondents at 1, *Davis*, 426 U.S. 229 (No. 74-1492); Brief for Federal Respondents, *Davis*, 426 U.S. 229 (No. 74-1492).

It was not entirely clear whether these issues, which the defendants framed within the rubric of the *Griggs* burden-shifting test, needed to be resolved within the context of the plaintiffs' constitutional claims. The plaintiffs in *Davis* had raised both statutory and constitutional claims, and, perhaps for that reason, the parties had not bothered to closely parse the constitutional standards.[287] Moreover, Title VII had been amended to include public employers during the pendency of the case, and the defendant acknowledged at oral argument that "for all practical purposes . . . it now does apply" (a conclusion the circuit court had also reached).[288] Thus, although constitutional claims had been the central basis for the plaintiffs' summary judgment arguments (and for the lower courts' opinions), all parties suggested that the case might be most properly resolved on statutory grounds.[289]

Nevertheless, some of the Justices in *Davis* became concerned that failing to address the distinctive standards applied to Equal Protection claims could "constitutionalize *Griggs* and Title VII *sub silentio*."[290] Thus, at oral argument, the parties were pressed on the distinction between the standards applicable to statutory and constitutional claims, with several Justices explicitly noting that prior cases, such as *Jefferson*, had required discriminatory intent in the constitutional context.[291] And, despite the parties' joint and repeated efforts to suggest that they did not dispute the applicable constitutional standard,[292] several of the Justices continued to press the question of

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[287] *See* Joint Appendix at 27, *Davis*, 426 U.S. 229 (1976) (No. 74-1492) (Amended Complaint in Intervention) (raising claims under the Fifth Amendment, 42 U.S.C. § 1981, and the D.C. Code). *See generally* sources cited *supra* notes 275–76, 286.

[288] Oral Argument Transcript at 17, *Davis*, 426 U.S. 229 (1976) (No. 74-1492) [hereinafter *Davis* Oral Argument Transcript]; *see also* Davis v. Washington, 512 F.2d 956, 958 n.2 (D.C. Cir. 1975). Procedurally, as the plaintiff's counsel acknowledged, this was questionable. *See Davis* Oral Argument Transcript, *supra* at 50. But the defendant appears to have been uninterested in pushing this issue, perhaps to avoid the specter of a new lawsuit being filed after administrative exhaustion. *See infra* note 292.

[289] *See, e.g.*, *Davis* Oral Argument Transcript, *supra* note 288, at 17, 30–31, 54, 68, 75; *see also Davis*, 426 U.S. at 236 (noting that the plaintiffs' summary judgment motion was made on constitutional grounds).

[290] Memorandum from CW to Justice Powell at 6, No. 74-1492, Washington v. Davis (Feb. 23, 1976) (Powell Papers); *see also id.* (displaying Justice Powell's handwritten notation next to quote: "Yes"). In contrast, the original cert. pool memo focused exclusively on the technical operation of the *Griggs* disparate impact test. *See* Preliminary Memorandum, No. 74-1492, Washington v. Davis (Aug. 22, 1975) (Powell Papers).

[291] *See Davis* Oral Argument Transcript, *supra* note 288, at 16–17, 24–25, 28–31, 48–57, 68, 75.

[292] Note that it was not simply that the plaintiffs and the city defendant both believed Title VII standards would be applied *with respect to impact*, although it appears that they did. *See Davis* Oral Argument Transcript, *supra* note 288, at 16–17, 24–25, 52–53. More complexly, both apparently believed that *with respect to the defendants' burden of validating the test*, the standards under Title VII were the same as those required by the Equal Protection rational basis test. *Id.* at 3, 12–13, 49, 51, 53–57; *cf.* Eyer, *supra* note 280, at 572 (noting the use of robust rational basis arguments in disparate impact contexts during this timeframe); *see generally* Eyer, *supra* note 271 (extensively discussing this issue). In both of these domains, the parties in *Davis* were steadfast, and indeed curiously resistant to the cues of the Justices at oral argument to argue the contrary position in support of their cause. *See id.* at 16–17, 24–25

whether the presence of discriminatory effects sufficed to require the application of strict scrutiny.[293]

At conference, concerns regarding the proper constitutional standard were again raised, with Justices Stewart, White, Powell, and Rehnquist all arguing that the Title VII and Fourteenth Amendment standards were distinct and that the constitutional standard demanded a showing of intent.[294] Only Justices Brennan and Marshall would contend otherwise, but without articulating any meaningful arguments in support.[295] And, following conference, even Justices Brennan and Marshall would fail to pursue any argument regarding the plaintiffs' constitutional claims, circulating a dissent that addressed only the majority's treatment of the statutory basis for the plaintiffs' claims.[296] Indeed, Justice Brennan would go even further, writing to Justice White to suggest that—if Justice White would remove his discussion of the statutory issue—Justice Brennan would go along without dissent.[297] (Justice White did not, and Justice Brennan thus went forward with his dissent on statutory grounds.[298])

Ultimately, the Court would famously hold—with no dissent as to the Equal Protection issue—that "racially discriminatory purpose," not "racially disproportionate impact," was the showing demanded by the Equal

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(showing that the defendant refused to argue that the statutory and constitutional approaches to effects arguments should be differentiated); *id.* at 55–57 (showing that the plaintiffs refused to argue that strict scrutiny must be applied).

[293] *See* sources cited *supra* notes 291–92. By this time the strict scrutiny standard, rather than an absolute anti-classification standard, had crystalized as the operative standard for actionable race discrimination under the Fourteenth Amendment. *See, e.g.*, Rebecca Schoff, *Deciding on Doctrine*, 95 VA. L. REV. 627, 663–64 (2009) (discussing the adoption of the strict scrutiny standard in *Loving v. Virginia*, 388 U.S. 1 (1967), and the historical evidence suggesting the Court may have adopted that approach rather than a categorical one, because of concerns regarding colorblindness arguments being used to defeat desegregation decrees); *see also* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 164–71 (1992) (discussing reasons why a strict anti-classification approach was a plausible understanding of *Brown* and the cases decided in its aftermath, as well as the reasons why the Court might have thought it important by the time of *Loving* to adopt a less restrictive compelling state interest approach). Thus, the Justices' questions in *Davis* were framed in terms of whether heightened scrutiny would be triggered, not whether the government's practice would be categorically invalidated. *See supra* note 292 and accompanying text.

[294] Docket Sheet, Washington v. Davis, No. 74-1492 (Mar. 3, 1976) (Powell Papers); Docket Sheet, Washington v. Davis, No. 74-1492 (Mar. 5, 1976) (Blackmun Papers, Box 224); Docket Sheet, Washington v. Davis, No. 74-1492 (undated) (Brennan Papers, Box I: 368).

[295] *See*, *e.g.*, Docket Sheet, Washington v. Davis, No. 74-1492 (Mar. 3, 1976) (Powell Papers) (recording Brennan as stating: "No dif. Between E/P & Title VII standards, but in any event CADC was entitled to rely on TVII standards.").

[296] In addition to its famous holding that impact is not a sufficient basis to trigger strict scrutiny in the constitutional context, *Davis* also held that the defendants had met the standards required to rebut plaintiff's statutory disparate impact claims. *See Davis*, 426 U.S. at 248–52. Justice Brennan's dissent (both in draft and final form) addressed only that statutory issue, not the constitutional issue. *See id.* at 256–70 (Brennan, J., dissenting); *see also* Brennan Draft Dissent, Washington v. Davis, No. 74-1492 (May 26, 1976) (Marshall Papers, Box 169).

[297] Memorandum from Justice Brennan to Justice White, RE: No. 74-1492 Washington v. Davis (April 27, 1976) (White Papers, Box 348).

[298] *See generally Davis*, 426 U.S. at 256–70.

Protection clause.[299] Citing *Keyes*, *Jefferson*, and cases from the jury discrimination context, the Court's decision stated (arguably correctly) that "[w]e have never held" that Title VII's impact-based standards were applicable to an Equal Protection claim.[300] Stating that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced back to racially discriminatory purpose," the Court thus rejected the argument that effects alone could suffice to trigger strict scrutiny.[301]

The majority in *Davis* also took the opportunity to firmly inter any intimation in *Palmer* that a contrary rule—preferencing effects over intent—might apply. Addressing the language in *Palmer* that seemed to preclude consideration of intent and privilege the "effect of the law" as the proper grounds for decision, the majority noted that *Palmer* did not involve an effects-based invalidation.[302] Moreover, the Court's holdings before and after *Palmer* contradicted its reasoning, demonstrating that the decision did not "work[ ] a fundamental change in equal protection law."[303] Thus, writing for the majority in *Davis*, Justice White (author of the lead dissent in *Palmer*) characterized as erroneous dicta the *Palmer* majority's sweeping repudiation of an intent-based regime.[304]

Davis thus simultaneously put to rest both of the early-1970s developments *Palmer* helped spur in the lower courts: effects-based litigation strategies and the revival of resistance to intent-based invalidation.[305] And, once again, the Court's race liberals did not push for a contrary regime.[306] Indeed, it appears that all of the Justices (including the Court's race liberals) viewed *Davis* as a fairly unexceptional statement of the constitutional consensus al-

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[299] *Davis*, 426 U.S. at 239. There was no need for the Court to reach this issue. As noted *supra*, the plaintiff had conceded that rational basis review applied. *See* sources cited *supra* notes 292–93. In addition, the Court went on to find as to the statutory claims that the relevant validation standards had been satisfied. *See Davis*, 426 U.S. at 249–52.

[300] *Id.* at 239–48.

[301] *Id.* The Court did acknowledge that effects could be relevant to a showing of intent. *See id*. This remains black-letter doctrine today but differs from a doctrinal rule saying that effects analysis alone is sufficient. Rather, such a rule simply allows courts to take into account statistical disparities in outcomes as one indicium of intent. *But cf. id.* at 253–55 (Stevens, J., concurring) (noting that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume"); Siegel, *supra* note 7 (making a similar argument about the lack of a clear line between intent and effects in the 1970s); Haney-López, *supra* note 6 (same).

[302] *Id.* at 242–44 & n.11.

[303] *Id.*

[304] *See id.*

[305] *Arlington Heights*—where the lower courts refused to allow inquiry into legislative intent on the authority of *Palmer*, while also finding for the plaintiffs on the basis of a quasi-effects argument—is an excellent example of both of these phenomena. *See infra* Part V.C and accompanying text; *see also supra* note 184 (discussing the speed with which racial justice litigants embraced the effects aspect of *Palmer*'s ruling); *infra* notes 392–393, 400 (discussing cases in which *Palmer* was deployed to argue that intent-based invalidation was not allowed in the 1970s and 1980s).

[306] *See supra* notes 294–301 and accompanying text.

ready developed in cases like *Keyes* and *Jefferson.*[307] And, that consensus was one in which intent, not effects, provided the operative standard.[308] Thus, although the lower courts and litigants had continued to take effects-based arguments seriously into the mid-1970s, it appears that from the Justices' perspective, the moment of possibility for such arguments had passed.[309]

C. Village of Arlington Heights v. Metropolitan Housing Development Corp. *(1977)*

The Justices thus appeared to view *Davis* simply as an application (or perhaps a solidification) of their existing case law. But for those who had litigated cases in the context of widespread lower court endorsement of effects-based arguments, *Davis* marked a significant turn.[310] Thus, for the liti-

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[307] *See id.*; *cf.* Haney-López, *supra* note 6, at 1785 (reading *Davis* as simply "help[ing to] formalize the Court's long-established contextual approach to proving intent"). I agree with Haney-López that *Davis* largely simply marked a codification of the Justices' existing consensus on the intent issue; however, it did, in holding that intent was required, mark a significant departure from the approaches taken by many lower courts. *See supra* Part V.A.

[308] *See generally supra* Part IV.

[309] It may well be the Court's progressive Justices found themselves in *Davis* at a juncture where effects no longer looked like a plausible alternative without ever perceiving themselves as being at a key turning point. There are good reasons why the Justices viewed intent as a progressive doctrinal paradigm, and thus it may have seemed natural and not troubling to them for intent to provide the framework in individual cases during the early 1970s. *See generally supra* Parts I–IV. And, by the time the Justices considered *Davis*, it appears that they generally perceived the accumulated decisions as precluding an embrace of effects arguments; an assessment that was probably accurate in view of the accumulated cases, as well as other post-*Keyes* developments. *See supra* Parts III–IV; *see also infra* note 419 (noting that Justice Powell turned away from effects-based arguments after *Keyes* was decided, and Justice Douglas left the Court in 1975, before it revisited the effects issue again).

A desire to repudiate *Palmer* may also have played a role in the Court's race liberals' actions, even through *Davis*. *Palmer*'s language barring intent-based invalidation was not explicitly repudiated until *Davis* itself, *see supra* notes 303–04 and accompanying text, and thus the specter of *Plessy*-era bans on intent-based invalidation continued to overshadow the Court's race liberals' actions during this time frame. And although theoretically *both* effects and intent could be permissible bases for constitutional invalidation, *Palmer* had treated the two as competing accounts of the Court's contemporary approach. *See supra* note 14. Thus, although in theory the Court's race liberals could have pushed simultaneously for both intent and effects theories, *Palmer*'s prominence as an authority may have made it difficult to do so. *See generally supra* note 305.

Other factors may also have played a role. None of the liberal justices (except Justice Douglas, who had retired by the time *Davis* was decided) ever showed a principled attachment to effects-based arguments as a metric of constitutional violation. *See generally* Parts III–IV. In addition, the political environment had changed significantly by 1976, in ways that were considerably more hostile to racial justice concerns generally and to effects-targeted approaches specifically. *See generally* ACKERMAN, *supra* note 120, at 282–87 (identifying *Milliken*, in 1974, as marking the end of the "constitutional moment" of the Second Reconstruction). Finally, it may be that the Court's race liberals continued to hope that intent doctrine would be institutionalized with comparatively favorable sub-constitutional rules for implementation, a project they continued to push with some success into the late 1970s. *See, e.g.*, *infra* note 385.

[310] *See generally supra* notes 271–73. One area where *Davis*'s impact was less then clear was as to those cases that had been litigated in the lower courts on rational basis review

gants in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, then also pending at the Court, the impact of *Davis* was obvious (and for the plaintiffs, concerning).[311] For, while the plaintiffs had raised an intent-based argument—suggesting that they were denied a zoning variance because of community fears that the low-income housing they proposed would attract minority residents—it had been far from their dominant argument. Moreover, it had not been the basis on which they prevailed in the Seventh Circuit.[312]

Unsurprisingly, then, the defendants in *Arlington Heights* wasted little time in pointing out *Davis*' implications. In a supplemental brief filed shortly before oral argument, the defendants argued that *Davis* conclusively made clear that "racial purpose" and not "disproportionate racial impact" was the touchstone of an Equal Protection analysis.[313] Noting further that the Court in *Davis* had explicitly included the Seventh Circuit's *Arlington Heights* decision among the Court of Appeals decisions that improperly "have held . . . that substantially disproportionate racial impact . . . suffices to prove racial discrimination violating the Equal Protection Clause," Defendants argued that *Davis* effectively disposed of the plaintiffs' effects-based claims.[314]

In response, the plaintiffs acknowledged that *Davis* established a purpose-based standard for demonstrating an Equal Protection violation, but argued that such a standard had, in fact, been met in their case.[315] Observing that the Seventh Circuit had rejected a pure effects-based approach in favor of a "totality of the relevant facts" approach, the plaintiffs argued that the court properly considered all relevant facts to find a racially discriminatory purpose.[316] While acknowledging that the Seventh Circuit might not have entirely "anticipated the [*Davis*] opinion," the plaintiffs argued that its approach—which essentially found the municipality responsible for failing to take any steps to deal with a known problem of residential segregation—was consistent with what *Davis* demanded.[317] Thus, the plaintiffs treated *Davis* as demanding not a showing of discriminatory intent *per se*, but rather a

(ironically, the same argument relied on by the Plaintiffs, but ignored by the Justices, in *Davis* itself). *See generally* Eyer, *supra* note 271.

[311] *See supra* notes 275–77 and accompanying text.

[312] *See id.*

[313] *See* Petitioner's Supplemental Brief at 4, Vill. of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (No. 75-616).

[314] *Id.* at 4–5; *see also Davis*, 426 U.S. at 244 n.12; *cf. id.* at 257–58 & n.1 (Brennan, J., dissenting) (observing that it was inappropriate for the Court, having granted full review in *Arlington Heights*, to "effectively reverse[ ]" it by including it "in a laundry list of lower court decisions").

[315] *See* Respondents' Reply to Petitioners' Supplemental Brief at 2–10, *Arlington Heights*, 429 U.S. 252 (No. 75-616).

[316] *Id.* at 3–6.

[317] *Id.* at 3–6, 9–10.

more context-sensitive showing of "racially discriminatory purpose," which, they argued, could be met absent proof of discriminatory motive.[318]

The plaintiffs added that even if a showing of official motivation (as opposed to what they characterized as "discriminatory purpose") was required, they had made such a showing.[319] Noting that all of the merits-based factors favored the plaintiffs' application, and that substantial racially explicit community pressure existed to deny it, the plaintiffs contended that "[t]he contrast with . . . *Washington v. Davis* is striking."[320] Thus, they argued, even if racial motivation *per se* was demanded, it had been shown here.[321] Plaintiffs further observed that the defendants, who now contended that "no racial motive was proven," had successfully urged the district court, "on the strength of *Palmer v. Thompson* and *United States v. O'Brien*[,] to prohibit any inquiry into their state of mind or motivation."[322]

And indeed, the plaintiffs' argument that there was in fact discriminatory intent in *Arlington Heights* appears to have had substantial merit.[323] Challenging a denial of a zoning variance for a low-income housing development, the plaintiffs in *Arlington Heights* had contended not only that denial of the variance would have a racially disparate effect, but also that there was explicit evidence of intent.[324] As the plaintiffs observed, the Village was virtually all white, a circumstance that the cost of housing alone could not

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[318] *Id.* The distinction between "motive" or "intent" and "purpose" was sometimes made in the lower courts and among commentators in the 1970s, but the distinction appears to have had relatively little purchase among the Justices themselves. *See, e.g.*, Nelson, *supra* note 30, at 1787 n.5; *see also* Brief for Appellants at 40–41, *Feeney*, 442 U.S. 256 (No. 78-233). To the extent that the distinction has any grounding in the Court's doctrine, it appears to have been as a historical artifact of disputes over whether inquiry into legislative intent was *permitted*, rather than being a more robust or generous way of proving that racial discrimination in fact had occurred. *See generally* Nelson, *supra* note 30, *passim*. Thus, while inquiry into objective factors, like the absolute racial exclusion at issue in the Grandfather Clause line of cases, might be permitted as a way of showing "purpose," intent-based evidence, such as a legislator's statements, was not. *Id.* While it is difficult to identify how plaintiffs like those in *Arlington Heights* understood the difference between purpose and intent, it appears that they may have been attempting to make an argument that only objective effects-based indicators of impact (like in the Grandfather Clause cases) need be shown, but untrammeled by the highly restrictive standards that the Court had traditionally applied to such determinations. Alternatively, it may be that the plaintiffs meant to invoke the Circuit Court's understanding of purpose as an awareness of the racial consequences of their actions. Regardless, the Court apparently did not find persuasive either variant of this motive-versus-purpose distinction.

[319] *See* Respondents' Reply to Petitioners' Supplemental Brief at 7–8, *Arlington Heights*, 429 U.S. 252 (No. 75-616).

[320] *Id.*

[321] *See id.*

[322] *Id.* The district court had precluded discovery regarding intent on the authority of *Palmer*, *see id.* at 7 n.*, and suggested in its decision that effects, not intent, controlled, *see* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp. 208, 210 (N.D. Ill. 1974). Confusingly, however, the court went on to conduct an inquiry into whether the defendants were motivated by race, concluding that there was insufficient evidence to demonstrate that they were so motivated. *See id.* at 210–11.

[323] *See infra* notes 324–27 and accompanying text; *see also* Haney-López, *supra* note 6, at 1811–12 (making similar observation).

[324] *See* Brief for the Respondents at 24–26, *Arlington Heights*, 429 U.S. 252 (No. 75-616).

explain.[325] Moreover, it appeared that the buffer zone policy purportedly forming the basis for the denial had not been consistently applied (although the Seventh Circuit had affirmed the finding that the inconsistency did not necessarily imply "discriminatory" administration of the policy).[326] Perhaps most graphically, community opposition, which the Village President termed "a mandate to reject th[e] proposal," had included numerous explicitly racial comments.[327]

But despite this strong evidence of intent, *Arlington Heights* again produced few divisions among the Justices.[328] No Justice argued in favor of the Seventh Circuit's approach, which had essentially applied a recklessness standard to the Village, faulting it for disregarding known racially segregationist effects.[329] Nor did any Justice endorse the plaintiffs' suggested distinction between purpose and motive.[330] Finally, despite fairly robust evidence of discriminatory intent, no Justice suggested overruling the lower courts' findings that no such intent existed.[331] Thus, only minimal divisions existed among the Justices as to the merits in *Arlington Heights*, centering only on whether the Court should remand to the Seventh Circuit to allow it to address the intent issue in the first instance.[332]

Ultimately, only Justice White would decline to join the articulation of the standard in *Arlington Heights*.[333] Thus, all but one of the participating

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[325] *See* Respondents' Reply to Petitioners' Supplemental Brief at 5, n.*, *Arlington Heights*, 429 U.S. 252 (No. 75-616).

[326] *See* Brief for Respondents at 3, 11 & n.**, *Arlington Heights*, 429 U.S. 252 (No. 75-616). *But cf. Arlington Heights*, 517 F.2d at 412 (finding that the evidence did not compel the conclusion that the zoning law had been administered in a discriminatory manner).

[327] *See, e.g.*, Brief for Respondents at 16–19, *Arlington Heights*, 429 U.S. 252 (No. 75-616). For example, one letter from a resident appearing in the local newspaper said, "We do resist low-income housing because it is a ploy to export blacks from Chicago to integrate the suburbs." *Id.* Other comments were similarly explicit in linking opposition to the project to racial concerns. *See id.*

[328] *See* Docket Sheet, No. 75-616, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Stewart Papers, Box 429); Docket Sheet, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Powell Papers); Docket Sheet, No. 75-616, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Blackmun Papers, Box 240); Docket Sheet, No. 75-616, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Brennan Papers, Box I: 401); *see also Arlington Heights*, 429 U.S. 252 (1977).

[329] *See* sources cited *supra* note 328; *see also Arlington Heights*, 517 F.2d at 413–15.

[330] *See* sources cited *supra* note 328.

[331] *Id.* To the contrary, for many Justices these findings appear to have been a key factor, rendering the decision an obvious reversal in light of *Davis*. *See, e.g.*, Docket Sheet, No. 75-616, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Brennan Papers, Box I: 401) (showing that Justice Stewart thought it significant that "[t]wo courts found no racial discriminatory intent"); Powell Notes for Delivery from Bench, No. 75-616, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Jan. 10, 1977) (Powell Papers) (treating the lower courts' factual findings, coupled with *Davis*, as dispositive); *Arlington Heights*, 429 U.S. at 273 (White, J., dissenting) (suggesting that there was no reason for the Court to elaborate on the standards for ascertaining intent, given that the lower courts had found the defendant to be motivated by legitimate considerations).

[332] *See* sources cited *supra* note 328.

[333] *See Arlington Heights*, 429 U.S. 252, 252 (1977); *see also id.* at 272 (White, J., dissenting). Note that Justice White authored the Court's opinion in *Davis* and joined the majority

Justices (including race liberals such as Justices Brennan and Marshall) joined the Court's statements that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," and that *Davis* "reaffirmed a principle well established in a variety of contexts."[334] The Justices also overwhelmingly agreed as to the nuances of the standard—that only a showing that discriminatory intent was a "motivating" (not exclusive) factor was required; that such a showing could be rebutted by a defense demonstrating that the same action would have been taken anyway; and that factors such as racial impact, historical background of the decision, deviations from neutral rules, and legislative or administrative history might all be properly taken into account in proving intent.[335,336]

In the end, the only minor point of disagreement among the Justices in *Arlington Heights* was whether "[t]he Court of Appeals is better situated than this Court . . . to reassess the significance of the evidence . . . in light of the standards we have set forth."[337] Thus, Justices Marshall, Brennan, and White all contended that, in light of the differing legal backdrop against which the case was litigated, it should be remanded rather than reversed outright.[338] But none of the three disputed the basic standards articulated by the majority, nor did they contend that the Seventh Circuit's foreseeability approach should be affirmed.[339] As such, the Justices ultimately spoke with virtual unanimity as to the appropriate intent-focused approach to Equal Protection doctrine, rejecting the plaintiffs' invitations to endorse a more nuanced or generous approach.

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opinion in *Feeney*, *see Davis*, 426 U.S. at 231; Massachusetts v. Feeney, 442 U.S. 256 (1979), and thus it appears that whatever objection he had to Justice Powell's articulation of the standard did not relate to its embrace of an intent-based standard.

[334] *Id.* at 265 (majority opinion); *see also id.* at 271 (Justice Marshall, joined by Justice Brennan, concurring in part and dissenting in part) (specifically concurring in this section of the Court's opinion).

[335] *See* sources cited *supra* note 328. Even at this late date, there was some continued dispute among the Justices over to what extent direct evidence of legislative or administrative motivation could be inquired into. *See generally* Memorandum from Justice Rehnquist to Justice Powell (undated) (Powell Papers) (encouraging Justice Powell to include more aggressive language limiting the use of decisionmaker testimony); *cf. Arlington Heights*, 429 U.S. at 268 & n.18 (adopting some but not all of then-Justice Rehnquist's suggested language).

[336] As discussed *infra* note 350, the Court in *Arlington Heights* did not specifically address the plaintiff's argument that discriminatory "purpose" could be proven by acting in the face of known discriminatory effects, although the Court implicitly rejected the argument. As such, the issue would again be raised later in *Feeney*. *See infra* notes 351–57 and accompanying text.

[337] *See Arlington Heights*, 429 U.S. at 271–72 (Marshall, J., concurring in part and dissenting in part).

[338] *Id.*; *see also id.* at 272–73 (White, J., dissenting).

[339] *See id.*; *cf.* Handwritten Notation on Docket Sheet, No. 75-616, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Powell Papers) (noting at an early stage that Justice Marshall thought that the "case is wrong but not imp[ortant]").

D. Personnel Administrator of Massachusetts v. Feeney *(1979)*

Arlington Heights was decided in January 1977, only six months after *Davis*.[340] But *Personnel Administrator v. Feeney*, though appealed to the Court soon after *Davis* and *Arlington*, had not yet reached merits review by the end of the 1976 Term.[341] Mired in procedural disputes, the case had been certified to the Massachusetts Supreme Judicial Court to resolve whether the state Attorney General had the authority to prosecute an appeal contrary to the wishes of his clients.[342] Therefore, it was not until September 1977—when the Supreme Judicial Court sided with the Attorney General—that the Justices would first turn to *Feeney*'s merits, initially remanding the case to the district court in light of *Davis*.[343]

Even more so than in *Arlington Heights*, *Davis* posed significant problems for the *Feeney* plaintiffs. Challenging a state law that afforded veterans an absolute preference for virtually all desirable civil service jobs, the plaintiffs alleged unconstitutional sex discrimination.[344] The original decision of the three-judge district court had acknowledged that the law "was not enacted for the purpose of disqualifying women from receiving civil service appointments" but struck down the law on effects-based grounds.[345] And, unlike in *Arlington Heights*, in which there was fairly substantial evidence of discriminatory intent, there was relatively little such evidence in *Feeney*.[346] Thus, it was unclear how the district court on remand (or the Supreme Court) could find for the plaintiff under *Davis*' intent-based regime.[347]

But on remand, the district court would again find in the plaintiff's favor, laboring to fit the facts of *Feeney* within the rubric of *Davis*' and *Arlington Heights*' intent-based approach.[348] Arguing that the legislature must surely have been aware of the drastic and inevitable effects that the

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[340] *Arlington Heights*, 429 U.S. at 252; *Davis*, 426 U.S. at 329.

[341] *See infra* notes 342–43 and accompanying text.

[342] *See* Massachusetts v. Feeney, 429 U.S. 66, 66–67 (1976).

[343] *See generally* Massachusetts v. Feeney, 434 U.S. 884 (1977); Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977) (deciding as a matter of state law that the state Attorney General had authority to prosecute the appeal).

[344] *Feeney*, 442 U.S. at 259–60. Although *Feeney* was a sex case, it is clear that the Justices had race discrimination doctrine—specifically, their race discrimination precedents on intent—on their minds in rendering their decision. *See, e.g.*, SERENA MAYERI, REASONING FROM RACE 136–41, 229–30 (2011).

[345] Anthony v. Massachusetts, 415 F. Supp. 485, 495–99 (D. Mass. 1976); *see also id.* at 501 (Campell, J., concurring).

[346] *See generally Anthony*, 415 Supp. 485.

[347] Although the plaintiff in *Feeney* developed strong arguments at the Supreme Court for why she should nevertheless prevail, there was an undeniable tension in the case between the lower courts' factual findings and *Davis*' holding. For a discussion of the arguments that the plaintiff put forward in her briefing to the Court in an attempt to work around this problem, see *infra* notes 358–60, and see also MAYERI, *supra* note 344 (describing advocates' arguments for why requiring proof of discriminatory motive "would be particularly inappropriate in sex discrimination cases," given the often thoughtlessly stereotyped nature of sex discrimination).

[348] *See infra* notes 350–53 and accompanying text.

Veterans' Preference law would have on women's opportunities,[349] the lead opinion for the court stated that although the Commonwealth's "motive" was to benefit veterans, its "intent" was to achieve that purpose by subordinating employment opportunities for women.[350] Thus, the court would adopt a "foreseeability" approach, concluding that where the "course of action chosen by the Commonwealth had the inevitable consequence of discriminating against the women of this state . . . [its] salutary motive does not justify its intention to realize that end by disadvantaging its women."[351]

While the district court thus reframed its arguments on remand, it was clear that a majority of the judges' factual understandings remained unchanged. Thus, one of the two judges to vote in the plaintiff's favor would explicitly reaffirm that "no one thinks that [the Veterans' Preference law] was enacted as a pretext to harm women . . . [as opposed to with] the entirely justifiable desire to aid individuals who had served their country"—a proposition with which the dissenter also expressed agreement.[352] As such, it was evident that the district court majority's use of the word "intent" did not signify a significant shift in the court's understanding of the facts: that the legislature had acted with the purpose of benefitting veterans, and not to disadvantage women.[353]

Appealing again to the Supreme Court, both the defendants and the United States as *amicus curiae* would make much of these factual findings.[354] Observing that the district court had explicitly found that the Veterans' Preference law "was not enacted for the purpose of disqualifying women," both argued that this factual finding should be dispositive under *Davis*.[355] Moreover, as the defendants observed, the district court had not made any effort to justify its result in intent-based terms before *Davis*, and it had not gathered any further evidence on remand that might warrant a

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[349] At the time, women's enlistment had long been severely restricted by explicit limitations on women's military participation. *See* Anthony v. Massachusetts, 415 F. Supp. 485, 489–90 (D. Mass. 1970).

[350] Feeney v. Massachusetts, 451 F. Supp. 143, 149–50 (D. Mass. 1978); *see also id.* at 151 (Campbell, J., concurring) (making a similar argument). Note that this was very similar to an argument made in *Arlington Heights* that the Court tacitly rejected there. *See supra* notes 318, 330 and accompanying text. However, perhaps because the *Arlington Heights* decision did not directly address this argument, it was again revived in the *Feeney* litigation. As articulated by the District Court, this rationale found "intentional" sex-based action where the state acted with awareness of the consequences for women. *Feeney*, 451 F. Supp. at 149–50.

[351] *Feeney*, 451 F. Supp. at 150.

[352] *Id.* at 150 n.* (Campbell, J., concurring); *see also id.* at 153–55 (Murray, J., dissenting).

[353] *See id.*

[354] *See infra* notes 355–57 and accompanying text. As Serena Mayeri has observed, the decision of the Carter administration to file a brief in the case in support of the defendants caused an uproar among feminist advocates. *See* MAYERI, *supra* note 344, at 137–38. Ultimately, a second brief would be filed by agencies that supported the plaintiffs. *See id.*

[355] *See, e.g.*, Brief for Appellants at 13, 30–31, 38, *Feeney*, 442 U.S. 256 (No. 78-233) [hereinafter *Feeney* Appellants' Brief]; Brief for the United States as Amicus Curiae at 10, 13–14, 18–19, *Feeney*, 442 U.S. 256 (No. 78-233) [hereinafter *Feeney* SG Brief].

change in position.[356] Finally, both argued that the lower court's foreseeability standard was not the equivalent of a discriminatory intent standard, and indeed resulted in "an approach not materially different from the 'effect' theory of equal protection that this Court has rejected."[357]

The plaintiff, in response, would raise several powerful alternative arguments for the law's treatment as a form of sex discrimination.[358] Like the district court's concurring judge, the plaintiff first argued that the statute could not be deemed facially neutral, insofar as it adopted a qualification (military service) that was determined by explicitly discriminatory criteria (that is, laws and regulations explicitly excluding women from service).[359] Moreover, the plaintiff contended, it was quite clear that the legislature would not have adopted such a burdensome restriction on women's employment absent stereotypical assumptions about the likelihood that women could or would compete for higher-level civil service positions.[360] Thus, the plaintiff argued that regardless of the stature of effects-based arguments, the Veteran's Preference law's invalidation must be affirmed.

And indeed, much more so than in *Davis* or *Arlington Heights*, the law at issue in *Feeney* troubled many of the Justices.[361] The impact of the Veterans' Preference law on women's public employment opportunities was, as the majority would ultimately observe, "severe."[362] Moreover, this effect

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[356] *See Feeney* Appellants' Brief, *supra* note 355, at 30–32.

[357] *Feeney* SG Brief, *supra* note 355, at 28; *see also Feeney* Appellants' Brief, *supra* note 355, at 26–32.

[358] *See generally* Brief of the Appellee, *Feeney*, 442 U.S. 256 (No. 78-233) [hereinafter *Feeney* Appellee's Brief].

[359] *Id.* at 26–30; *see also Feeney*, 451 F. Supp. at 151 (Campbell, J., concurring); Appendix at 46–60, *Feeney*, 442 U.S. 256 (No. 78-233) (Complaint); Plaintiff's Supplementary Memorandum of Law at 13–16, *Feeney*, 451 F. Supp. 143 (D. Mass. 1978) (Civ. A. No. 75-1771-T) (on file with the Radcliffe Schlesinger Library, Records of NOW Legal Defense & Education Fund, Box 587.5).

[360] *See Feeney* Appellee's Brief, *supra* note 358, at 37–47. These stereotypes were evidenced in a variety of ways in the statutory scheme, including in a series of "women's requisitions" for low-level civil service positions that the legislature had historically allowed. *Id.* at 41–47.

[361] *See infra* notes 362–64 and accompanying text; *see also* MAYERI, *supra* note 344, at 140 (noting that "[t]he swing Justices disliked veterans' preferences"); Draft Concurrence, No. 78-233, Pers. Adm'r v. Feeney (May 8, 1979) (unpublished draft) (Powell Papers) (stating that although Powell could not find the law unconstitutional, "I do question the social utility. . ..of laws that have a seriously discriminatory effect on women as well as a similarly discriminatory effect—intended as such—against all non-veterans."); Preliminary Memorandum at 1, No. 78-233 ATX, Pers. Adm'r v. Feeney (Sept. 25, 1978) (Blackmun Papers, Box 293) (handwritten notation on cover: "I . . . *w[oul]d prefer* moderate alternatives." (emphasis in original)); Blackmun Handwritten Notes, 78-233, Pers. Adm'r v. Feeney (Blackmun Papers, Box 293) ("The pref here *is* extreme & annoying.").

[362] *Feeney*, 442 U.S. at 271. The Veteran's Preference law at issue in *Feeney* resulted in almost all desirable civil service positions being unavailable to non-veterans. *See id.* at 283. Given that only 2% of all veterans were women, this "rendered desirable state civil service employment an almost exclusively male prerogative." *Id.* In contrast, the impact of the test in *Davis* was far less severe, in part because the police force engaged in compensatory recruiting. *See Davis*, 426 U.S. at 235 (noting the fact that since 1969, 44% of new police force recruits in the District of Columbia had been black).

was inevitable—and the law arguably not facially neutral—insofar as women's military participation opportunities were formally restricted by law.[363] Accordingly, it was not only the Court's race liberals, but also some of its moderates, who initially felt the law might properly be found unconstitutional.[364]

But for the Court's moderates, this concern was also tempered by a belief that the case should not be used to "undercut or weaken the authority of *Davis* and *Arlington Heights*."[365] Noting that the district court had "found t[hat the] intent was to benefit Vets, n[ot] t[o] discrim[inate] vs women,"[366] several Justices worried that affirming the claim would "place equal protection on an 'effects' basis comparable to Title VII."[367] Believing that "the Equal Protection Clause simply must have some principled limits" (and that an effects-based test would not provide them), the Court's moderates viewed the lower court's factual finding of a lack of discriminatory purpose as deeply problematic for the plaintiff's principal claims.[368]

The plaintiff's alternative argument—that a preference for military status (a status *de jure* restricted primarily to men) was facially non-neutral—similarly troubled the moderates.[369] As Justices such as Stewart and Stevens observed, this argument was not easily limited to the context of veterans' preference employment statutes, but rather would encompass any law privileging veterans.[370] Moreover, the argument could also extend far beyond the veterans context to the numerous other contexts in which official

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[363] *See supra* note 362.

[364] For example, Justice Powell in his initial memorandum on the case noted, "[M]y 'gut reaction' is that [the law] cannot be sustained under modern gender-based discrimination analysis." Memorandum from Justice Powell to David at 2, No. 78-233, Pers. Adm'r v. Feeney (Feb. 20, 1979) (Powell Papers) [hereinafter *Feeney* Powell Memorandum]; *see also* Handwritten Notation on Preliminary Memorandum, Pers. Adm'r v. Feeney, at 1, No. 78-233 ATX (Sept. 25, 1978) (Powell Papers) (indicating that "[i]ssues are too imp. to affirm summarily" thus suggesting that he was initially inclined toward affirming district court).

[365] *Feeney* Powell Memorandum, *supra* note 364, at 2–3.

[366] Blackmun Handwritten Notes, 78-233, Pers. Adm'r v. Feeney (Blackmun Papers, Box 293); *see also* Powell Conference Notes, No. 78-233, Personnel Adm. v. Feeney (Feb. 28, 1979) (Powell Papers) (recording Justices Blackmun and Stewart as expressing the view that the district court's factual finding of no intent resolved the case); Docket Sheet, No. 78-233, Personnel Administrator of Mass. v. Feeney (Brennan Papers, Box I: 466) (recording Powell as saying that "[w]e'd wash Davis and Arlington Hts out of books if we acted on impact in face of conceded purpose to favor [vets]"); Bobtail Bench Memorandum from D. to Justice Powell at 4, Re: Personnel Administrator of Mass. v. Feeney, No. 78-233 (Feb. 26, 1979) (Powell Papers) [hereinafter *Feeney* Powell Bench Memo] (stating, in handwritten note by Powell next to description of fact findings below, that "*Intent* only to benefit Veterans").

[367] *Feeney* Powell Memorandum, *supra* note 364, at 3; *see also* sources cited *supra* note 366.

[368] *Feeney* Powell Memorandum, *supra* note 364, at 3; *see also* MAYERI, *supra* note 344, at 140; sources cited *supra* note 366.

[369] *Cf. supra* notes 192–94; *infra* note 371 (discussing the concept behind this type of "interspherical" theory of discrimination and some of the other areas in which the theory was raised in the 1960s and 1970s).

[370] *See, e.g.*, Powell Conference Notes, *supra* note 366; Brennan Docket Sheet, *supra* note 366; Powell Oral Argument Notes, 78-233 Personnel Adm. v. Feeney (Jan. 26, 1979) (Powell Papers).

race or sex discrimination had until recently been the norm.[371] As such, far from perceiving the plaintiff's "incorporation" argument as a modest, limited argument, the Court's moderates generally regarded it as a sweeping theory for Equal Protection invalidation.[372]

Ultimately, despite the moderates' concerns regarding the statute's scope and effects, only Justices Brennan and Marshall would vote to invalidate the law in *Feeney*.[373] Noting the district court's factual finding (and the Plaintiff's alleged concession) "that the distinction between veterans and nonveterans drawn by [the law] is not a pretext for gender discrimination," the majority instead found that the law was "as it seems to be": a law distinguishing between veterans and non-veterans, not a classification by sex.[374] Rejecting the plaintiff's argument that the law's gender-based results were "intentional" (and thus unconstitutional) because they must surely have been known to the legislature, the Court famously held that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[375] Therefore, while again acknowledging that a law's impact could create a "strong inference" of discriminatory intent, the Court held that where "all of the available evidence" demonstrated the opposite, "the inference simply fails to ripen into proof."[376]

Addressing the Plaintiff's "incorporation" argument, the Court similarly chose the path that would least upend its existing intent/effects doctrine. Indeed, the Court largely dodged the incorporation argument altogether, relying on the district court's finding (and the Plaintiff's failure to

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[371] For example, early arguments for disparate impact analysis of testing and education requirements often rested on such an "interspherical" theory, emphasizing that *de jure* segregation had until recently boxed African Americans out of educational opportunities. *See, e.g.*, *Griggs*, 401 U.S. at 430; Gaston County v. United States, 395 U.S. 285, 292–96 (1969); *see also Keyes*, 413 U.S. at 215–17 (Douglas, J., concurring) (partially relying on an interspherical argument in advocating for the abrogation of the *de facto*/*de jure* divide); Selmi, *supra* note 2, at 708–16 (describing the roots of statutory disparate impact doctrine, including the "incorporation" argument).

[372] *See, e.g.,* Typed First Draft at 28, Personnel Administrator of Massachusetts v. Feeney, No. 78-233 (undated) (Stewart Papers, Box I: 141) (including language, ultimately omitted from the majority opinion, that *Davis* and *Arlington Heights* might also have been characterized as implicating interspherical discrimination); *Feeney* Powell Bench Memo, *supra* note 366, at 6 (agreeing with clerk's description of the difficulty of cabining the "incorporation" argument); *see also* MAYERI, *supra* note 344, at 140 (making a similar observation).

[373] *See* DICKSON, *supra* note 86, at 767–69; Brennan Docket Sheet, *supra* note 366; Docket Sheet, No. 78-233, Personnel Administrator of Massachusetts v. Feeney (Feb. 28, 1979) (Blackmun Papers, Box 293); Docket Sheet, No. 78-233, Personnel Administrator of Mass. v. Feeney (Stewart Papers, Box 442); Powell Conference Notes, *supra* note 366. Even Justice Brennan characterized his vote to affirm as only "tentative[ ]." Stewart Docket Sheet, *supra*.

[374] *Feeney*, 442 U.S. at 274–75.

[375] *Id.* at 276–79 (internal citation omitted).

[376] *Id.* at 279 n.25.

dispute) that classifications based on veteran status were "legitimate" to conclude that "the history of discrimination against women in the military is not on trial in this case."[377] Thus, the Court largely rejected, with little analysis, the long-standing argument that second-order discrimination might trigger heightened scrutiny.[378]

Justices Marshall and Brennan dissented in *Feeney*.[379] But once again, they did not take issue with the majority's basic premise that an intent regime controlled.[380] Rather, they took as their starting point the majority's understanding of discriminatory intent—as a specifically intended consequence—and simply argued in favor of a more plaintiff-favorable burden-shifting regime.[381] But here, unlike in *Keyes*, this procedural approach would attract little support.[382] When cast against the district court's factual findings of a lack of discriminatory intent, formal arguments regarding the order of proof apparently had little purchase, persuading none of the other Justices to join in dissent.[383]

Thus, as the 1970s came to a close, intent doctrine would at last come to resemble its modern form. Intent, as *Davis* and prior cases made clear, would be required.[384] And *Feeney*, while not demanding that judges adopt a harsh, malice-like standard for finding intent, would also not adopt the more capacious conceptions of intent that plaintiffs had long endorsed.[385] Rather, judges would generally be left to see—or not see—intentional discrimina-

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[377] *Id.* at 276–78.

[378] *Id. Feeney* thus rejected—with virtually no meaningful analysis—what had been one of the analytically strongest arguments that certain types of effects could be actionable even within an intentional discrimination regime. Although *Feeney*'s language, which rested on case-specific concessions, arguably is not generalizable to other contexts, it is relatively rare to see such arguments made today, at least in the constitutional domain. *But cf.* Franklin, *supra* note 193 ("[A]lthough concern about the cumulative effects of inequalities across spheres may be an underdeveloped aspect of current law, it is not absent from the law.").

[379] *Feeney*, 442 U.S. at 281–88 (Marshall, J., dissenting).

[380] *See id.*

[381] *See id.* at 284.

[382] *Cf.* Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (securing a majority for the application of a robust burden-shifting approach to findings of intentional discrimination).

[383] *See generally Feeney*, 442 U.S. at 281–88 (Marshall, J., dissenting); *cf.* sources cited *supra* notes 365–68 (making clear that several of the race moderates viewed the district court's factual findings as correct and dispositive).

[384] *See supra* Parts IV–V.

[385] *Feeney* is sometimes characterized as mandating a very narrow, harsh vision of intent, approximating something like malice or animus. *See, e.g.*, Reva Siegel, *Race-Conscious But Race-Neutral*, 66 ALA. L. REV. 653, 669 (2015) (suggesting that *Feeney* demands a showing of "animus, malice, or intent to harm"); *cf.* Siegel, *supra* note 2, at 1139 (noting that *Feeney* "leaves judges with substantial discretion" in deciding Equal Protection challenges). Although courts have sometimes deployed *Feeney* as demanding something approaching animus, *see, e.g.*, Soto v. Flores, 103 F.3d 1056, 1067–72 (1st Cir. 1997), there is little to suggest that the Justices understood the decision as mandating such an inquiry. *See supra* Part V.D; *see also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (affirming, the same term as *Feeney*, a lower court opinion that relied significantly on effects evidence and plaintiff-favorable burden-shifting rules in finding intentional segregation). Nevertheless, it is clear that *Feeney* left much room for judges disinclined to "see" discrimination to find against plaintiffs. *See infra* note 386 and accompanying text.

tion, with few doctrinal restraints.[386] And, as the decades passed, few judges would do so, perhaps least of all the Court itself.[387] And so it would be that intent doctrine, once prized, would come to be seen as a mistake.[388]

VI. Ideological Drift and the Forgotten History of Intent

In 1985, writing of an Alabama constitutional provision disenfranchising those convicted of crimes of moral turpitude, then-Justice Rehnquist would observe:

> [T]he Alabama Constitutional Convention of 1901 [at which the provision was proposed] was part of a movement that swept the post-Reconstruction South to disenfranchise blacks . . . . The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[389]

Noting that it could not be meaningfully disputed that the moral turpitude provision was "motivated by a desire to discriminate against blacks," Rehnquist would go on to invalidate the provision as a violation of the Equal Protection Clause despite its facial neutrality.[390] Thus, close to a century after the Court upheld virtually identical disenfranchisement provisions in Mississippi's constitution, the Court would at last hold in *Hunter v. Underwood* that the South's post-Reconstruction efforts to disenfranchise blacks were in fact unconstitutional.[391]

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[386] *Compare* Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 561–67 (3d Cir. 2002) (finding that the intentional discrimination standard established in *Feeney* did not demand malice or ill will, just intentional use of race), *with* Jana Rock Constr. Co. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 211 (2d Cir. 2006) (stating that *Feeney* requires a demonstration of "intent to harm").

[387] *See* Siegel, *supra* note 7, at 6–7; Haney-López, *supra* note 6, at 1784. *See generally* Eyer, *supra* note 18 (discussing psychological research suggesting that most Americans are disinclined to "see" discrimination).

[388] *Cf.* Eisenberg & Johnson, *supra* note 6, at 1160 (noting that early academic commentary generally favored intent and that commentators did not "shift gears" until after *Davis*).

[389] Hunter v. Underwood, 471 U.S. 222, 229 (1985).

[390] *Id.* at 232–33.

[391] *Id.* at 228–32; *cf.* Williams v. Mississippi, 170 U.S. 213 (1898) (addressing Mississippi's disenfranchisement provisions, and holding that where "the means of it" were facially race-neutral, it was "within the field of permissible action under the limitations imposed by the federal constitution"). *See generally Hunter*, 471 U.S. at 229 (noting that historical testimony had shown that the "Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks"); Klarman, *supra* note 11, at 30–32 (describing the variety of law-based approaches that the southern states took to the disenfranchisement of black voters during the *Plessy* era); Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 Harv. L. Rev. 279 (1899) (discussing the openly racist origins of a facially neutral constitutional provision in Louisiana's state constitution).

This result may seem so obvious to us today as to be unremarkable. But even in 1985, the Court's historic ban on interrogating intent cast a long shadow. Citing *Palmer*, the district court in *Hunter* had found that, even if discriminatorily intended, the law could not be invalidated because "an impermissible motive standing alone will not invalidate legislation for which there is a permissible basis."[392] Nor did the state abandon this argument on appeal, maintaining that any legitimate purpose was sufficient to save a statute "neutral on its face."[393] Thus, more than a century after the ratification of the Fourteenth and Fifteenth Amendments, the Court's *Plessy*-era doctrines barring consideration of intent continued to be raised as an obstacle to racial equality; as an attempt to shield indisputably discriminatory provisions from invalidation.

But in *Hunter*, the Court would not—as it once did—credit such arguments. Relying on *Davis* and *Arlington Heights*, the Court instead held that where a "purpose to discriminate against all blacks . . . was a 'but-for' motivation" for the law, the Equal Protection clause required its invalidation.[394] Thus, the Court dismissed *Palmer*'s sweeping statements of intent's irrelevance, finding that the decision had been superseded by *Arlington Heights* and other decisions designating intent as the standard for invalidating a law.[395] As such, in *Hunter*, intent doctrine would stand as the champion of racial justice, rather than an obstacle to its effectuation: as the basis for, rather than a hindrance to, invalidating a racially subordinating law.

This casting of intent as the hero, rather than the anti-hero of racial justice, may sound strange to us in an era where intent doctrine has long been characterized as an obstacle to Equal Protection's racial equality goals.[396] And indeed, in a time when few government actors are as candid as Alabama's constitutional delegates, it is increasingly rare to see intent doctrine used in the service of progressive racial justice aims.[397] But, as a longer history of intent reminds us, a progressive casting of intent would not have been unfamiliar to the Justices who sat on the Court in the early 1970s.[398]

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[392] *See* Underwood v. Hunter, 730 F.2d 614, 617 n.7 (11th Cir. 1984). The way in which the district court framed the argument was somewhat different than in *Palmer*, but the upshot of the argument was the same: a facially neutral law—even one possessing a discriminatory purpose—would only be required to also have a legitimate purpose, i.e., would be required only to pass rational basis review. *Cf. supra* note 114 (discussing this narrow approach as a potential alternative reading of *Griffin*).

[393] *See* Brief for Appellants at 19–20, 31–32, *Hunter*, 471 U.S. 222 (No. 84-76).

[394] *Hunter*, 471 U.S. at 231–32.

[395] The *Hunter* decision, authored by then-Justice Rehnquist, did continue to suggest in dicta that proving motivation often will be difficult. *Id.* at 228. But it did dispel any notion that where motivation has in fact been proven as a but-for cause, the law can nevertheless be affirmed. *Id.* at 231–32.

[396] *But cf.* Siegel, *supra* note 7 (suggesting that versions of intent doctrine extant prior to the mid-1970s had promise as a progressive force for equality); Haney-López, *supra* note 6 (same).

[397] *See generally* sources cited *supra* notes 2, 387.

[398] *See supra* Parts I–IV. This is not to suggest that there was no confusion among the Justices regarding the intent issue, especially in the early 1970s. Indeed, Justice Douglas, in

Rather, the specter that a law with a discriminatory purpose might be considered constitutionally unassailable was a very real and troubling possibility for most of Equal Protection's long history.

There are significant reasons to believe that this progressive vision of intent was not only familiar, but important, to the Court's race liberals as they charted their approach to intent in the early 1970s. The historic ban on intent-based invalidation had posed one of the primary obstacles to implementing *Brown*, and in 1971, *Palmer* raised the possibility of its resurrection.[399] Thus, simultaneously with the arrival of the early effects cases on the Court (challenging intent doctrine's dominance, sometimes on the authority of *Palmer* itself), the Court's race liberals were faced with the possibility that the Court would retrench from its commitment to invalidating invidiously intended laws.[400]

This context helps explain what is otherwise a perplexing feature of the Court's early 1970s jurisprudence: the Court's race liberals' failure to pursue effects-based approaches to Equal Protection liability at a time when such approaches were gaining credence elsewhere.[401] Most strikingly, Justice Brennan in *Keyes*—joined by every one of the Court's participating race liberals—authored an opinion eschewing an effects-based approach, while embracing an explicitly intent-based one.[402] Even with a majority of the Court apparently prepared to abrogate the distinction between *de facto* and *de jure* discrimination (thus embracing effects-based arguments), Justice Brennan continued in *Keyes* to exclusively pursue an intent-based regime.[403] Similarly, in other early cases in which effects-based arguments were raised,

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particular, seemed to take widely diverging approaches to this issue over time. *Compare supra* notes 58–63 (demonstrating that Justice Douglas was an early advocate for the propriety of looking behind the face of a neutral statute to interrogate intent), *with Palmer*, 403 U.S. at 236 (Douglas, J., dissenting) (suggesting that "[t]he question for the federal judiciary is not what the motive was, but what the consequences are").

[399] *See supra* Parts I–III.

[400] *See id.* This possibility of retrenchment was not merely theoretical; *Palmer* was regularly cited in its aftermath for a variety of limitations on intent in constitutional adjudication. *See, e.g.*, Pride v. Cmty. Sch. Bd. of Brooklyn, 482 F.2d 257, 265–66 (2d Cir. 1973); Holt v. Richmond, 459 F.2d 1093, 1098–99 (4th Cir. 1972); Cousins v. City Council of Chicago, 466 F.2d 830, 856–57 (7th Cir. 1972) (Stevens, J., dissenting); Kosydar v. Wolman, 353 F. Supp. 744, 752 n.4 (S.D. Ohio 1972); Appendix at 62–63, *Arlington Heights*, 429 U.S. 252 (1977) (No. 75-616) (Decision on Plaintiffs' Discovery Motions).

[401] *See supra* Parts III–V.

[402] *See supra* Part IV. Although Justice Brennan's opinion nominally left open the issue of whether intent was required in *Keyes*, the case appears to have marked the last realistic juncture for the institutionalization of an effects-based standard. However, as noted *infra*, it is quite plausible, and indeed likely, that Justice Brennan and the other race liberals did not perceive *Keyes* at the time as the turning point that it appears to be from the perspective of hindsight.

[403] *See supra* Part IV. One reason may be Justice Brennan's mistrust of Justice Powell, whom he perceived (correctly) as seeking to significantly retrench on the remedies available in school segregation cases. *See* Brennan *Keyes* Summary, *supra* note 210, at XLII. But Justice Brennan's actions—in *Keyes* and in other cases—also do not suggest a Justice with a principled commitment to a regime in which effects alone would suffice to prove a constitutional violation. *See generally supra* Parts III–V.

the Courts' race liberals generally failed to take them up, instead framing their arguments in intent-based terms.[404]

From a contemporary perspective, this failure to pursue effects-based arguments may seem surprisingly inattentive to the limitations of an intent-based regime as a means of enforcing Fourteenth Amendment racial justice goals.[405] And indeed, there is some evidence that—even among the Court's race liberals—the Justices simply did not perceive effects-based arguments as stating a constitutional violation; that even for those instrumentally inclined to support racial justice ends, effects arguments had an opaque constitutional grounding.[406] Thus, it may be in part that the dominant conception of "discrimination"—as a narrow, explicit, and intended phenomenon—posed an obstacle to the embrace of effects-based understandings of discrimination, even among those undoubtedly sympathetic to racial justice goals.[407]

But there are also reasons to believe that the Court's race liberals' actions in the early 1970s were informed by a historical backdrop in which an inability to engage in intent-based invalidation constituted a serious problem, and in which effects-focused theories had not traditionally provided an adequate substitute.[408] Although lower courts (and to a much lesser extent, the Court itself) had begun to embrace more robust effects-based tools by the 1970s, historically, Equal Protection doctrine's "effects" branch had demanded a virtually impossible showing of almost complete minority exclusion.[409] And bars on intent-based invalidation had permitted—even through

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[404] *See supra* Part IV.

[405] Several prominent scholars have recently endeavored to explain this quandary in other ways, including the influence of broader political backlash, as well as the belief by the Court's race liberals that a more plaintiff-favorable approach to proving intent would be operative. *See, e.g.*, Siegel, *supra* note 7; Haney-López, *supra* note 6. Especially the latter claim has support in the historical account I provide herein. *See generally supra* Parts III–V. The former claim also seems likely (although support for it in the historical record is less explicit) especially insofar as increasing political backlash during the 1970s most likely made it increasingly implausible to instantiate an effects-based regime.

[406] *See generally supra* Parts III–V.

[407] *Id.*; *see generally* Eyer, *supra* note 18 (describing research suggesting that most people view discrimination as a very narrow, explicit phenomenon). Note that this account is consistent with an understanding under which the Justices' actions were informed by the progressive history of intent doctrine. Indeed, it seems likely that the two were intertwined in their influence: the progressive Justices, like most other Americans, may well have intuitively perceived what constitutes "discrimination" fairly narrowly but have been willing to depart from those intuitions where necessary to respond to doctrines they could clearly identify as backlash doctrines. *See supra* note 15 (discussing examples of the Justices' responses to identified backlash doctrines). In contrast, there are good reasons why intent doctrine, as a doctrine both consistent with the race liberals' intuitions and historically associated with progressive goals, may not have stood out as a backlash doctrine necessitating a departure from the Court's race liberals' general sense of what types of discrimination the Constitution proscribed.

[408] *See supra* Parts I–III.

[409] *See id.* As discussed *supra* note 93, even expanding the standards of these effects-focused alternatives, to allow for a less stringent showing, would likely have been ineffectual in addressing post-*Brown* resistance to school desegregation. Thus, it is unsurprising that the Court's race liberals (and advocates) turned to intent-based invalidation in the aftermath of *Brown*. *See supra* Part II. And, having done so, it appears that this approach acquired a path dependency that helped to ultimately lead to intent-mandatory standards. *See supra* Parts

the early 1970s—openly invidiously motivated government actions to escape constitutional censure.[410] Viewed against this history, the Court's race liberals' decision in *Keyes* to seek the institutionalization of an intent-based regime, with plaintiff-favorable rules for implementation, becomes far more understandable.[411]

It is also true that neither *Keyes*—nor the other early 1970s cases in which the Court's race liberals failed to meaningfully pursue an effects-based paradigm—mandated the specific intent regime that ultimately came to exist in the late 1970s; nor even, arguably, an intent-mandatory regime at all. Although cases like *Keyes*, *Jefferson*, and *Spencer* were hardly promising for an effects-based regime, the Court's race liberals appear to have perceived them as leaving space for a later embrace of effects-focused alternatives, as well as more capacious approaches to intent.[412] Thus, there is much to suggest that the Court's race liberals did not understand themselves as making a momentous choice to institutionalize intent-mandatory Equal Protection, but rather as simply making a series of small, case-by-case, context-specific choices to prioritize intent.[413]

This aspect of the development of intent doctrine emphasizes an important feature of the evolution of constitutional doctrine outside of the domain of landmark cases: it is often incremental and gradual in its drift. Certainly, this was the case with the institutionalization of intent-mandatory Equal Protection, to which the Court's race liberals gradually acceded over a series of cases that are largely forgotten today.[414] And although each of these small steps may have seemed contextually appropriate and perhaps even insignificant at the time, collectively they established the beginnings of a new constitutional consensus: one that repudiated an effects-focused standard and firmly embraced intent.[415]

By the mid-1970s, it seems that this new consensus had hardened, such that the trajectory of the Court's Equal Protection decisions—while not in

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III–V; *see also* Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and European Union*, 35 YALE J. INT'L L. 115, 135 (2010) (making a similar observation about how early doctrinal decisions can shape the trajectory of anti-discrimination law).

[410] *See supra* Part III.C; *see also* Nelson, *supra* note 30, at 1850–51 (noting that it was not until cases like *Davis* and *Arlington Heights* that it became truly clear that the Court would be willing to interrogate subjective indicia of discriminatory intent).

[411] *See generally* Slippen, *supra* note 120, at 950 (contemporaneous law review article, treating *Keyes* as having established the proposition that segregationist purpose—and not just facially discriminatory laws—could form the basis for a finding of a constitutional violation in a school desegregation case); *see also* Siegel, *supra* note 7 (making the argument that more robust doctrinal approaches to intent existed than those that ultimately developed on the Court); Haney-López, *supra* note 6 (same, and suggesting that this may have played a causal role in why the liberal Justices did not object in *Davis*).

[412] *See supra* Parts III–IV.

[413] *See id.*

[414] *See id.*

[415] *See id.*

fact inevitable—appeared so to many of the Justices.[416] Thus, in *Davis*, there seems to have been little dispute that the Court's prior case law had resolved the issue of whether intent was required—that the Court had addressed, and rejected, the notion that effects alone might control.[417] And in the eyes of the Court's race moderates (whose votes were needed for the institutionalization of any more capacious standards for understanding intent), the adoption of an intent regime seems to have further demanded rejection of the expansive notions of intent that plaintiffs in the late 1970s put forward.[418] Thus, while the trajectory of intent in the mid- to late 1970s can hardly be characterized as inexorable, it appears that key members of the Court perceived it as such at key junctures.[419]

A full understanding of intent's evolution thus serves as a reminder of the important and complex role that doctrine—and the stickiness of its metaphorical structures—can play in the law's development.[420] Doctrine, as the history of intent reminds us, does not have fixed normative content; it can be

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[416] *See id.*

[417] *See supra* Part V.

[418] *See id.* As discussed in Part V, many of the Court's race moderates perceived the more expansive arguments made by plaintiffs (such as for a foreseeability standard or for interspherical discrimination) as likely in fact to devolve into a general effects standard.

[419] The perception was evidently not created exclusively by the Court's prior doctrinal decisions. For example, by the mid-1970s, public opinion had generally turned against robust efforts to effectuate racial justice ends. *See generally* ACKERMAN, *supra* note 120, at 282–87 (identifying *Milliken*, in 1974, as marking the end of the "constitutional moment" marked by the Second Reconstruction). The dynamics on the Court had also shifted by the time that *Davis* was decided, with Justice Powell turning decisively away from effects-based arguments after *Keyes* and Justice Douglas leaving the Court. *See, e.g.*, JEFFRIES, *supra* note 228, at 306–08 (observing that in post-*Keyes* cases, Powell justified his arguments in terms of a requirement of intentional segregation); United States Supreme Court, *Frequently Asked Questions,* http://www.supremecourt.gov/faq_justices.aspx, *archived at* http://perma.cc/9VVM-MATH (noting that Justice Douglas's tenure on the Court ended in 1975). Nevertheless, there are reasons to think that the Court's existing doctrine—and in particular the doctrinal choices made by the Court's race liberals in struggling to disestablish the ban on intent-based invalidation—played a substantial role in creating perceptions of path dependency that ultimately led to intent-mandatory standards in *Davis* and other cases.

Of course, one could argue that this perception of inevitability also resided in part in a failure of imagination on the part of the Justices and an unwillingness or inability to understand the nuanced and sometimes complex ways that discrimination operates. *See, e.g.*, MAYERI, *supra* note 344, at 248 (describing the *Feeney* attorneys' arguments as to why proof of discriminatory motive should not be required in sex discrimination cases, given the fact that sex discrimination often operated simply as an "insensitivity or indifference" to women's interests); *cf.* Charles Lawrence III, *The Id, The Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (critiquing intent doctrine for its inaccurate representation of how racism actually operates). This is no doubt true, but does not negate the role that doctrine appears to have played in smoothing the way to the Justices' ultimate adoption of the particular intent-based regime that they endorsed in cases like *Davis* and *Feeney*.

[420] *See* Schraub, *supra* note 19, at 1286–87 ("[L]egal argument is often metaphorical, and that attribute often intoxicates legal actors into forgetting the motivating vision for the claim in favor of the superficial poetry."); *cf.* Linos, *supra* note 409 (arguing that an early context-based divide in United States and European Union anti-discrimination doctrine led to a path dependency that significantly shaped their subsequent divergent development).

used for both progressive and non-progressive ends.[421] Indeed, intent is only one of several doctrines that opponents of racial justice initially opposed but later sought to deploy to their own ends.[422] But while, as Jack Balkin suggests, our own individual doctrinal commitments may sometimes drift with doctrine's ideological shifts, the Court's (and even individual Justices') commitments may not.[423] In that way, doctrine may shape the course of constitutional development in ways that diverge from its original normative underpinnings.

This dynamic creates difficult challenges for social movements and others who seek to influence the normative content of the law's trajectory. If ideological drift is common, as history suggests, success in institutionalizing doctrinal frameworks may well lead to cooptation by those with different normative aims. And especially in contexts such as intent, where a movement's original doctrinal objectives have not yet been fully achieved, it is difficult to know how a social movement and other strategic actors should proceed. Was it wrong in the early 1970s for the Court's race liberals to continue to pursue the institutionalization of an intent-based regime? Even with the benefit of hindsight, it is difficult to know for sure. Perhaps a constitutional corpus in which *Palmer*, rather than *Arlington Heights*, served as our touchstone for racial equality would be a better one—but the accuracy of this perspective is far from clear.[424]

But if the prescriptive conclusions one can draw from the history of intent are less than clear, its predictive ramifications are more apparent. As intent and other subsequently coopted civil rights doctrines remind us, it is in the nature of law that doctrines developed in a particular context will be picked up and deployed by new actors.[425] Where the law's content has been

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[421] *See* Parts I–V. *See generally* TUSHNET, *supra* note 19, at 130–32 (describing ideological drift); Ryan Williams, *The Paths to* Griswold, 89 NOTRE DAME L. REV. 2155, 2171 (2014) (providing an example of ideological drift); Balkin, *supra* note 19 (describing ideological drift).

[422] *See* Balkin, *supra* note 19, at 872–73 (identifying colorblindness); *see also* Schraub, *supra* note 19, at 1277–90 (same, and noting efforts by desegregation's opponents to deploy social science evidence in the aftermath of *Brown*).

[423] *Compare* Balkin, *supra* note 19 (presuming that individual doctrinal perspectives will shift with the advent of ideological drift), *with* TUSHNET, *supra* note 19, at 130–32 (suggesting that organizations and individuals may not shift their perspective on doctrine as its ideological valence shifts); Williams, *supra* note 421, at 2171 (showing that individual doctrinal perspectives do not always shift with the advent of ideological drift on the Court); *and supra* Parts I–V (same).

[424] Of course, the Court could have sought to institutionalize both intent *and* effects as permissible bases for constitutional invalidation. But this hypothetical alternative ignores the fact that the best opportunities for institutionalizing effects, most notably in *Keyes*, also overlapped with a time frame when permissive intent-based invalidation remained in doubt. By the time that intent-based invalidation became fully institutionalized, it appears that most of the Justices on the Court—either because of the doctrinal trajectory or the political backdrop—viewed the moment for institutionalizing effects doctrines as having passed. *See supra* notes 416–19 and accompanying text.

[425] *See supra* Parts II–V; *see also* sources cited *supra* note 422 (detailing other civil rights doctrines later coopted).

defined by a social movement's own successes, it is on the contours of those successes that battles over meaning will be fought.[426] Thus, the history of intent reminds us that it is predictable that doctrines once thought to serve a particular vision of the good will evolve to reflect other competing groups' normative aspirations. And so too is it predictable that groups seeking constitutional change will ultimately be bound by their victories, just as their losses may also constrain.[427]

Today, efforts to normatively repurpose intent doctrine continue. Facially race-neutral measures intended to ameliorate racial segregation or inequality—long thought to be exempt from meaningful constitutional scrutiny—are increasingly being challenged by conservative litigation organizations under the rubric of intent.[428] But so too racial justice advocates are

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[426] *See supra* Parts II–IV; *cf.* Forum for Academic & Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (relying extensively on *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), which recognized the right of the Boy Scouts to exclude a gay scout troop leader, *see id.* at 655–66, to find that universities had the right to exclude military recruiters who discriminated on the basis of sexual orientation), *rev'd*, 547 U.S. 47 (2006); Lee, *supra* note 201, *passim* (describing ways that the narrowing of state action doctrine—a "conservative" turn in the doctrine—in turn helped to deflect possible constitutional challenges to private-employer affirmative action plans).

[427] *Cf.* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (providing an account of the ways that doctrinal losses can ultimately be transformed by social movements into a catalyst for reform).

[428] *See, e.g.*, Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 599–600 & n.292 (2014) (collecting cases in which this argument has been raised, as well as documenting the increasing signs that certain Justices may be receptive to it).

Although facially race-classifying affirmative action programs obtain the lion's share of public attention, facially race-neutral efforts to ameliorate racial segregation or disadvantage are at least as ubiquitous and probably more so. For example, high profile measures such as No Child Left Behind and Texas's Top 10% program have been wholly or partially motivated by a desire to ameliorate racial segregation or racial disadvantage. *See, e.g.*, Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOWARD L.J. 243, 245 (2004) (No Child Left Behind); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1369–70 (2010) (Top 10% program). Consequently, subjecting such measures to strict scrutiny would vastly expand the realm of government measures subject to rigorous Equal Protection challenge in the courts. *See generally* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L. REV. 2332, 2333–34 (2000) (in an early influential piece on this issue, making this argument).

The application of strict scrutiny to this context would also profoundly upend the existing doctrinal consensus, which has generally assumed that such race-neutral measures do not trigger such scrutiny. *See, e.g.*, R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 578–79 (2003). Moreover, doing so would render race-related strict scrutiny itself internally incoherent, as the Court has traditionally assumed as a part of its narrow tailoring analysis that such facially race-neutral measures are the "least restrictive means" of effectuating racially ameliorative objectives (and that such objectives are legitimate). *Cf.* Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, 134 S. Ct. 1623, 1660 (2014) (Sotomayor, J., dissenting) (noting that facially race-neutral measures must be considered first in order for facially race-based affirmative action to survive strict scrutiny).

Nevertheless, such arguments are increasingly being made by conservative litigation organizations, and there are also signs that at least some Justices on the Court are increasingly receptive to them. *See, e.g.*, Eyer, *supra*, at 537, 599–600 n.292; *see also* Brian T. Fitzpatrick, *Is the Future of Affirmative Action Race Neutral?*, in A NATION OF WIDENING OPPORTUNITIES? THE

endeavoring to engage in their own normative cooptation, arguing in response that *Feeney* forecloses these challenges by intrinsically defining intent as a purpose to harm.[429] Thus, even today, disputes over intent doctrine's normative legacy remain robust, with both sides claiming the doctrine for their own contemporary litigation goals.

How these contemporary disputes will ultimately be resolved remains uncertain. But their importance is clear. Until a new Equal Protection regime is institutionalized, it is the struggle for the soul of existing doctrine that matters.[430] And so it is that intent doctrine—and *Brown*'s other doctrinal sequelae—continue to reside at the center of contemporary racial justice disputes, at the heart of the struggle for Equal Protection's meaning.[431]

Conclusion

As Michael Klarman has recently argued, "at least . . . in landmark cases [such as *Brown* and *Windsor*] . . . constitutional doctrine seems not to matter very much to the Justices."[432] And indeed, a reader of *Brown* and *Windsor* (and of Klarman's account of *Brown*'s internal deliberations) may be struck by the lack of a clear role for doctrine, by the Court's failure to ground its arguments in the traditional lawyerly rubric of doctrinal argumentation.[433] Thus, Klarman's account, like many common accounts of intent doctrine's genesis, suggests a regime in which the Court is driven primarily by extrinsic factors, such as broader political shifts and the identity of the Justices, rather than by law.

But if Klarman's account provides a plausible characterization of the Justices' approach in truly landmark decisions, it seems a much less apt description of how the Justices fill in the vast and important interstices of constitutional law that result. As a fuller history of intent doctrine suggests, outside of the context of landmark decisionmaking, doctrine can matter

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Civil Rights Act at Fifty (Samuel Bagenstos & Ellen Katz eds., 2014) (making the argument that facially race-neutral programs should be subjected to strict scrutiny).

[429] *See, e.g.*, Hayden v. Cnty. of Nassau, 180 F.3d 42, 50–51 (2d Cir. 1999); *see also* Siegel, *supra* note 385, at 669.

[430] *Cf.* Haney-López, *supra* note 6, at 1876 (arguing that "equal protection will not again advance racial justice until colorblindness and malicious intent are overthrown").

[431] *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2523 (2015) (suggesting in dicta that disparate-impact doctrine might create constitutional concerns if it "cause[d] race to be used and considered in a pervasive way"); Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (relying on intent doctrine to suggest that Title VII's disparate-impact provisions may violate Equal Protection); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in judgment) (accepting the majority's move to apply colorblindness doctrine to restrict facially race-based efforts to promote integration, but resisting the idea that intent doctrine might apply to compel strict scrutiny of even facially race-neutral measures).

[432] *See* Michael Klarman, Windsor *and* Brown: *Marriage Equality and Racial Equality*, 127 Harv. L. Rev. 127, 142 (2013).

[433] *Id.*; *see also generally* United States v. Windsor, 133 S. Ct. 2675 (2013); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

greatly in the law's trajectory, providing both the impetus for and the shape of foundational constitutional developments.[434] Moreover, contrary to what a pure legal realist account would suggest, intent's long history suggests that doctrine can indeed shape individual Justices' constitutional commitments in important ways, even where its current application conflicts with their bare desires to see a particular outcome.[435]

For a social movement seeking constitutional change, this account—suggesting doctrine's importance—may be cause for both celebration and concern. For although doctrine's salience to the Justices may give it power to effectuate constitutional change, so too may it give a movement's opponents an effective mechanism for retrenchment. As the contested history of intent doctrine suggests, few doctrines are impervious to normative redeployment. And such redeployment, unlike direct resistance, may well prove persuasive to the Court, even as it ultimately yields effects deeply divorced from the normative objectives of the doctrine's original proponents.

Thus, the long history of intent doctrine reminds us that it is not only politics, but also law, that has fundamentally affected the normative shape of modern Equal Protection doctrine. And, so reminded, we may be better positioned not only to understand Equal Protection's past, but also to shape its future.

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[434] *See supra* Parts I–V; *see also* Linos, *supra* note 409, at 135 (noting that path dependency arising from early doctrinal choices may result in "large shifts" resulting from "small and chronologically distant precedents"); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 106 (1997) ("Constitutional doctrine and the tests by which it is partly constituted matter enormously. Doctrine not only determines outcomes in the lower courts, but also shapes the course of decision in the Court itself.").

[435] *See supra* Parts III–V.