Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases

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THE PARADOX OF PURPOSELESSNESS
IN THE CONSTITUTIONAL RACIAL
DISCRIMINATION CASES

David Crump*

CONTENTS

I. UNCONSTITUTIONAL RACIAL DISCRIMINATION:
The Supreme Court's Approach................................. 289
A. Intent and Impact: From Yick Wo to
Washington v. Davis................................................. 289
   1. Yick Wo v. Hopkins............................................. 289
   2. Washington v. Davis............................................. 292
B. The Arlington Heights Case: Evidence Rules for
Proving Discriminatory Intent.................................... 299
C. “In Spite of, and Not Because of”: From Feeney to
Hernandez ........................................................................ 303
D. Batson v. Kentucky and Its Progeny: The Court
Comes Full Circle......................................................... 307

II. THE PARADOX: PURPOSELESSNESS IS
IRRELEVANT, AND YET, IT IS DETERMINATIVE................. 308

III. THE RELATIONSHIP BETWEEN INTENT AND EVIL:
FROM THE STAR WARS LEGENDS TO THE SUPREME
COURT'S RACIAL DISCRIMINATION DECISIONS.................. 311
A. “Accidental” Discrimination: An Oxymoron?.................. 311
B. Black and White Views of Intent and Impact.................. 315

* A.B. 1966, Harvard College; J.D. 1969, University of Texas. Newell H. Blakely Professor of Law, University of Houston Law Center. The Author wishes to thank Raymond C. Marshall, current president of the California Bar Association, for a series of conversations that motivated the writing of this Article, with the customary disclaimer that none of its deficiencies are his responsibility. We may not agree on everything, Ray, but you have changed my thinking.
IV. PURPOSELESSNESS AND PRAGMATISM AS VALUABLE EVIDENCE IN RACIAL DISCRIMINATION CASES

In the wonderful Star Wars legends (which occupy roughly the same place in today’s popular culture as the Iliad did in Homer’s time), Boba Fett is a bounty hunter.1 Exiled from his own planet, doing a job that is needed but not respected, Boba Fett accepts contracts to “collect” wanted people (or rather, wanted creatures) in the name of an uncertain, shifting justice, depending on which planet has contracted for his services.2 Boba Fett has a highly developed vocabulary, in which he expresses a precise (if cramped) philosophy of evil:

Evil exists; it is intelligence in the service of entropy. When the side of a mountain slides down to kill a village, this is not evil, for evil requires intent. Should a sentient being cause that landslide, there is evil; and requires Justice as a consequence, so that civilization can exist.3

“[E]vil requires intent.”4 Boba Fett’s concept is a frontiersman’s amalgamation of individual responsibility with fatalism.

The Supreme Court has something in common with Boba Fett. Its decisions about de facto racial discrimination require proof of intentional discrimination to establish a case of racial inequity redressable

2. See id. at 279-80.
3. Id. at 277-78. The Author acknowledges with appreciation that John David Crump, then age eleven, called the Author’s attention to this passage. The analysis here set forth relies on the Author’s prior writing. See DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 588-89 (3d ed. 1998).
under the Fourteenth Amendment. In other words, disparate impact is not enough under the Constitution. The analogy to Boba Fett’s philosophy is not exact, of course, and the Supreme Court decisions differ among themselves. It is clear, however, that even if a government agency serves people of one race with different overall effects than people of another, the Court will not consider this circumstance alone as proof of illegality. In fact, even if the disparity arguably is unnecessary, and even if its eradication has been prevented only by governmental indifference, one can interpret the de facto discrimination decisions to deny redress under the Fourteenth Amendment in the absence of positive proof of intent. Boba Fett probably would approve.

Nevertheless, a careful reading of the Supreme Court’s de facto discrimination decisions raises a nagging suspicion that outcomes depend upon factors that are not expressed, or even factors that the Court has rejected. Some of the decisions blandly cite prior authority while

5. See infra Part I. For a typology of different kinds of constitutional tests that the Supreme Court has applied to different circumstances, see Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 67-73 (1997). Professor Fallon identifies eight kinds of tests: (1) forbidden-content tests, (2) suspect-content tests, (3) balancing tests, (4) nonsuspect-content tests, (5) effects tests, (6) appropriate-deliberation tests, (7) purpose tests, and (8) aim tests. See id. at 67-73. Actually, he identifies nine, if one also counts combinations and permutations of the first eight. See id. at 74. Professor Fallon also shows how the tests differ, their strengths and weaknesses, their relative prominence, and other aspects of these different approaches. See id. at 75-77.

6. See infra Part I. One major debate that the discrimination cases present is whether the test should be based upon effects or purpose, with the Court opting, at least on the surface, for the latter. See infra Part I.A.2. A separate issue is whether the Court means what it says, i.e., whether its purpose test really is sometimes an effects test. See infra Part III. There are some commentators who have suggested that this choice is not the important issue, because the outcomes of the cases, correctly reasoned, should not differ according to whether the test concerns effects or purpose. See Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 289 (1997). As Professor Selmi helpfully observes:

What the Court means by intent is that an individual or group was treated differently because of race. Accordingly, a better approach is to concentrate on the factual question of differential treatment. In this way, the key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states.

Id.; see also Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (explaining that often the most probative evidence of intent involves the use of objective evidence to show what really happened rather than an examination of an actor’s state of mind).

This Article is more concerned, however, with deficiencies in the Court’s use of its chosen model, i.e., deficiencies in the way it explains and applies its intent test. Even if the Court is playing a slightly different game than one might prefer, it would play it better if its deck included all 52 cards. The Court’s evidence decisions, which tend to eliminate part of the deck, are particularly problematic.

7. See infra Part II.

8. See supra note 3 and accompanying text.
departing from the holding of that authority without explanation. The decisions in some instances suggest that results may depend upon evidentiary inferences that cannot logically be drawn. Perhaps the factor that lies behind these discrepancies is the elusiveness of defining prohibited discrimination. In short, the meaning of the word "intent," and its relationship to evil, may not be nearly so clear as Boba Fett or the Supreme Court would have them.

This Article examines the meaning of intent or purpose, and the evidence that can be used to prove it, in the Supreme Court’s de facto racial discrimination decisions. The first part of the Article analyzes the reasoning and holdings of the decisions, with particular emphasis upon the presence or absence of government justification by nondiscriminatory purpose. The second part identifies a paradox in the decisions: the government’s purposelessness, or failure to articulate a race-neutral explanation, is treated in some cases as irrelevant or nearly so, whereas in other cases, this factor is determinative. However, the opinions do not explain this phenomenon.

The third part of the Article explores the elusive definition of discriminatory intent or purpose in the Supreme Court’s decisions and its relationship to the evil of racial discrimination. A final section sets out the Author’s conclusions, which include the proposition that the cases are more heavily influenced in their outcomes by context than the Court


10. In particular, Davis, 426 U.S. at 238-39, and Arlington Heights, 429 U.S. at 264-65, both imply that lack of a race-neutral explanation for differential impact can be inferred from the mere fact that the differential is severe, when in fact the absence of explanation is independent of the severity of impact.

11. Cf infra Part III.A (discussing the possibility that accidental or unintended discrimination can be evil and harmful). The difficulty is exacerbated by the indefinite variety of contexts in which the issue arises. See Nancy J. King, Batson for the Bench? Regulating the Peremptory Challenge of Judges, 73 CHI.-KENT L. REV. 509, 532 (1998) (concluding that peremptory challenges to judges result in the increased risk that such challenges will be used to discriminate between judges on the basis of race); Wesley D. Few, Note, The Wake of Discriminatory Intent and the Rise of Title VI in Environmental Justice Lawsuits, 6 S.C. ENVTL. L.J. 108, 117-20 (1997) (analyzing the role of intent in environmental litigation involving racial issues).

12. For an alternative theory about the "incoherence" of the decisions, see Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065 (1998). Professor Foster sees the jurisprudence in this area not merely as containing departures and discrepancies but as seemingly incoherent. See id. at 1068-70. Her conclusion is that placing the different treatments of intent along a scale according to consistency with democratic process principles explains the differences and provides a coherent theory of the intent doctrine. See id. at 1175. The present Article is concerned, instead, with the evidentiary principles applied by the Court in the context of its present rhetoric. See id. at 1077 (analysing the evidentiary scheme used by the Court in its Arlington Heights decision).
has recognized. The concept of discriminatory "intent" or discriminatory "purpose" takes on different, shifting meanings in different opinions, and it includes unconscious or accidental discrimination in some cases. This is particularly true when the government's racially disparate actions, although unintended, are purposeless and preventable.

I. UNCONSTITUTIONAL RACIAL DISCRIMINATION: THE SUPREME COURT'S APPROACH

The Supreme Court's definition of unconstitutional de facto racial discrimination is set forth in relatively few major cases, stretching from *Yick Wo v. Hopkins* in 1886 to such cases as *Georgia v. McCollum* in the 1990s. The clearest single proposition that emerges from these cases is that discriminatory impact, or different actual distribution of benefits and burdens among racial groups, is not sufficient to demonstrate unconstitutionality. Evidence of discriminatory purpose or discriminatory intent is required. All of the cases, however, treat differential impact as some evidence of purpose or intent, or as one factor in the mix.

The most curious aspect of the decisions is the way in which each one evaluates the significance of differential impact on the one hand, and the weight given to other evidentiary factors on the other. The cases are inconsistent. As we shall see in a later section, below, lack of a legitimate purpose for government action is treated as irrelevant in some of the cases, or at least it is assigned little weight. In others, lack of legitimate purpose is determinative.

A. Intent and Impact: From *Yick Wo* to Washington v. Davis

1. *Yick Wo v. Hopkins*

At first blush, *Yick Wo v. Hopkins* looks like an easy case. In its result, perhaps it is, because the disparate application of the law to
members of different races was so clear and striking. San Francisco ordinances gave the board of supervisors discretion to refuse consent to operate laundries, except in buildings of brick or stone. This policy ostensibly served fire prevention and other purposes. The record established that "there were about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China, and . . . 310 were constructed of wood, the same material that constitutes nine-tenths of the houses in the city of San Francisco." The board had given permits to all non-Asian applicants except one, however, it had refused them to all Asian applicants.

Yick Wo, a native of China, had operated a laundry in the same wooden building for twenty-two years and had satisfactory inspections by fire wardens, but he was denied permission by the supervisors to continue operations. He was convicted and fined ten dollars for violation of the ordinance. The Supreme Court reversed the conviction, emphasizing the differential impact upon the races:

The facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of [the] equal protection of the laws . . . .

Yick Wo usually is viewed as a case in which the Supreme Court concluded that disproportionate impact was so dramatic that it furnished clear proof of unconstitutional discrimination. However, in actuality, there is another, separate factor that really determines the result in Yick Wo. The racial effects of the supervisors' actions were devoid of any justification. Given the opportunity, the government could advance no legitimate explanation for the disproportion. In fact, it was this factor, the purposelessness of the differential effect, that was determinative.

20. See id. at 359 (explaining that the city of San Francisco arrested more than 150 Chinese-Americans for operating a laundry without the required consent of its board of supervisors, but failed to arrest non-Chinese-Americans guilty of the same offense).
21. See id. at 357.
22. See id. at 360.
23. Id. at 358-59 (citing Yick Wo's petition).
24. See id. at 359.
25. See id. at 358.
26. See id. at 357.
27. Id. at 373.
28. The Supreme Court, in fact, has analyzed Yick Wo in these terms. See infra note 74 and accompanying text.
It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on . . . . The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.  

In other words, differential impact was not the battleground in *Yick Wo*. Differential impact was not even a contested issue. Rather, it was admitted. The real issue, instead, centered upon the legitimate purpose for a regime with differential racial effects, or rather the lack of such a purpose. Furthermore, if the text of the opinion is taken literally, the Supreme Court placed the burden of demonstrating legitimate purpose upon the government. The Court stated, for example, that “[n]o reason whatever, except the will of the supervisors, is assigned” for the denial of permission to Yick Wo, and also, that “[n]o reason for it [differential racial impact] is shown.”

This separate inquiry into justification, even after a showing of substantial disparate impact, is a logical necessity. There are cases in which government action distributes benefits virtually totally to members of one race or gender, and yet government acts without any racial motive. This circumstance occurs whenever the problem attacked by government is concentrated within the members of one race. For example, sickle-cell anemia is so peculiar to African-Americans that it virtually is confined to members of that race. Any government program for treatment of sickle-cell anemia will benefit black citizens nearly to the exclusion of whites. Therefore, if impact alone were sufficient to prove unconstitutionality, the government could do nothing to address sickle-cell anemia.

Such a result would be absurd, because the government’s purpose in attacking sickle-cell anemia may not involve race at all, but instead may be to safeguard all citizens by treating or eradicating every disease

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30. See id.
31. Id.
32. Id.
33. See CRUMP ET AL., supra note 3, at 594 (explaining the racially differential impact of a sickle-cell anemia program and posing its legality as a problem for students to analyze).
that affects their health. However, unless this purpose is considered independently, a sickle-cell treatment program would be as unconstitutional as the supervisors' rulings in *Yick Wo v. Hopkins*. In fact, nearly every government program produces some differences in impact upon the races, because individual differences in physiology, culture, and wealth are distributed unevenly by race. For these reasons, it was appropriate that the Court in *Yick Wo*, after first recognizing the disparate racial impact of the law, determined the case by separately considering the inadequacy of the government's justification.

From this reading of *Yick Wo*, one might conclude that a substantial racial impact would create a prima facie inference of unconstitutional discrimination, or at least that it would require an inquiry into the legitimacy of the government's purpose. One might surmise, again from the reasoning in *Yick Wo*, that the government would bear the burden of demonstrating this justification for its actions. But perhaps this formulation teases too much out of the casual language of the Supreme Court's opinion. The rhetoric in *Yick Wo* does not deal precisely with proof requisites, sufficiency of a prima facie case, or burdens of proof. And ultimately, the Supreme Court rejected the framework just suggested, in which a prima facie case based upon impact triggers a duty of justification by the government. Nine-tenths of a century later, the Court not only buried the burden-shifting theory that racial impact requires proof of legitimate justification, but it ushered in a curious and unclear notion of intent or discriminatory purpose.

2. *Washington v. Davis*

In *Washington v. Davis*, two African-American applicants sued because their efforts to become District of Columbia police officers were rejected on the basis of recruiting procedures that included a written personnel test. They contended that the test bore no relationship to

34. See discussion *infra* Part LC (explaining that the government's action, in other words, may be justifiable by reference to the "in spite of, and not because of" principle).

35. See *Yick Wo*, 118 U.S. at 366. If, for example, the lack of a race-neutral explanation were properly inferred solely from the severity of the impact, it would be inferred in the sickle-cell case, because the impact is almost completely defined by race.

36. See *Washington v. Davis*, 426 U.S. 229, 248 (1976) (explaining that if neutrally designed statutes were rendered invalid for benefiting or burdening one race more than another, the effect would be "far reaching").

37. See *supra* notes 29-32 and accompanying text.

38. See *supra* notes 29-32 and accompanying text.

39. See *Davis*, 426 U.S. at 242.


41. See *id.* at 232-33.
job performance and excluded a disproportionately high number of African-Americans. The district court noted the absence of any claim of intentional discrimination, but it found that: (a) the number of black police officers was not proportionate to the city’s population mix; (b) a higher percentage of African-Americans failed the test than their white counterparts; and (c) the test had not been validated to establish its reliability as a job performance predictor. Nevertheless, the district court held for the government against the rejected applicants, because forty-four percent of new police recruits were African-American, the department had affirmatively solicited African-Americans, the test was useful in predicting training performance, and it was not designed to discriminate against otherwise qualified persons.

The Court of Appeals, however, reversed. It applied a test established in Griggs v. Duke Power Co., which had construed Title VII of the Civil Rights Act of 1964. In Griggs, the Court held that in statutory actions under Title VII, the plaintiff could establish a prima facie case by demonstrating that an employment practice resulted in differential racial impact. This proof, in statutory actions, entitled the plaintiff to judgment in a manner analogous to a mandatory presumption, unless the employer justified the employment practice by minimally sufficient proof that it was substantially related to job performance. The Court of Appeals reasoned that the then recently decided Griggs standard, which had been established in Title VII statutory cases, should apply to constitutional cases as well. The Court of Appeals also could have relied upon Yick Wo for a more general statement of this framework, as is shown in the previous section of this Article.

42. See id. at 235.
43. See id.
44. See id.
45. See id. at 237.
47. See 42 U.S.C. § 2000e-2(a)(1) (1994) (making it illegal for any employer to discriminate against an employee or potential employee on the basis of race, color, religion, sex, or national origin).
48. See Griggs, 401 U.S. at 429.
49. Cf. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981) (analogizing the proof framework to the effect of a “legally mandatory, rebuttable presumption”). A presumption, typically, is the mandatory inference of a presumed fact from unrebutted establishment of a base fact. Its effect is to place upon the opponent the burden of producing evidence of an explanation contrary to the presumed fact. See id.
50. See Griggs, 401 U.S. at 432.
52. See supra notes 29-30 and accompanying text.
The Supreme Court reversed and definitively rejected the prima-facie-case-burden-of-justification framework that the Court of Appeals had borrowed from Title VII jurisprudence. First, the Court emphasized the distinction between statutory standards and constitutional requirements. By definition, a constitutional requisite is a minimum standard, and a statutory requirement may exceed the constitutional minimum. Specifically, the Court declared:

As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

In distinguishing between constitutional and statutory standards, the Court was on sound ground. A statutory standard can be rejected if it does not work, and the legislature can adjust it to make it more or less exacting, but a constitutional holding forbids any lesser statutory requirement and embeds the proscription in concrete.

In fact, Congress has tinkered with the Griggs framework and Title VII standards in many different ways since Davis was decided. The Court went on, however, to treat the issue of discriminatory purpose in a way that confused the issue. For example, it criticized the Court of Appeals as having enunciated a standard by which plaintiffs "may focus solely on the racially differential impact of the challenged hiring or promotion practices" while "not concern[ing] themselves with the employer's possibly discriminatory purpose." However, the Court of Appeals did not hold this. Instead, it had held that the government's purpose was a potentially determinative issue, and the real quar-

54. Id. (footnote omitted).
55. This phenomenon is one justification for the principle that a court should avoid a constitutional holding if there is an alternate ground for a decision. See United States v. Security Indus. Bank, 459 U.S. 70, 78 (1982). It also underlies the concept that stare decisis is less rigid in constitutional cases, where "correction through legislative action is practically impossible." Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932)).
58. Id. at 238.
rel that the Supreme Court evidently had with the Court of Appeals was its placement of the burden of proof of race-neutral purpose on the employer. The Court went on to say that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." However, the Court of Appeals had not held that a law would be unconstitutional "solely" upon proof of racially disproportionate impact. Its holding meant, as Yick Wo had seemed to say, that disproportionate impact would lead to unconstitutionality if, and only if, the government failed to advance any legitimate justification for it.

The Davis Court then referred to two lines of discrimination cases that were fundamentally different from employment issues, specifically, those concerning racial discrimination in juries and in public schools. In the jury cases, for example, "the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause." Instead, proof of systematic exclusion is required, or proof of "unequal application of the law to such an extent as to show intentional discrimination." In the school desegregation cases, the fact that "there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." Instead, proof of "purpose or intent to segregate" was required.

The jury and school desegregation cases, however, were sharply distinguishable from the problem before the Court in Davis. Those cases

59. See id. at 238-39.
60. Id. at 239.
61. See Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). The Court's conception, that unexplained disparate impact raises no presumption of discrimination, is debatable on intuitive grounds. For example, as Professor Selmi argues, although in a different context:

[A] strong argument can be made that [Justice O'Connor] has the presumption exactly backwards. Absent some explanation, the expectation should be that diverse groups would seek jobs in roughly similar proportions. After all, is there any reason to believe that in a nondiscriminatory setting African-Americans would not desire to enter the construction industry with the same interest or intensity as their white counterparts? Selmi, supra note 6, at 282. Professor Selmi adds that this inference does not mean that there is no justification for a given disproportion; it only means that there should be an inquiry into the explanation for it. See id.
62. See Davis, 426 U.S. at 239-40.
63. Id. at 239.
64. Id. (citing Akins v. Texas, 325 U.S. 398, 404 (1945)).
65. Id. at 240.
66. Id. (citing Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973)).
involved de jure segregation, unlike the employment test in *Davis.* Af-

ican-Americans had been excluded from juries and from white schools pursuant to explicitly discriminatory governmental policy, not as the re-

sult of ambiguous applications of a neutral standard. This difference was

significant. In the jury and school desegregation cases, proof of an ini-

tial discriminatory purpose was not at issue, because it was a matter of

explicit governmental policy. Accordingly, the degree of differential

impact was not determinative (indeed, it was irrelevant), and the ab-

sence of legitimate purpose was obvious. The use of these lines of

cases to solve the problem in *Davis* was dubious.

Having thus muddled the issue, the Court proceeded to examine

questions closer to those actually presented. It made the point that de

jure discrimination is not required, and that de facto discrimination can

also be unconstitutional. "A statute, otherwise neutral on its face, must

not be applied so as invidiously to discriminate on the basis of race." The

Court also denied "that a law’s disproportionate impact is irrele-

vant," citing *Yick Wo* with approval. More closely on point, the Court

observed, "an invidious discriminatory purpose may often be inferred

from the totality of the relevant facts, including the fact, if it is true, that

the law bears more heavily on one race than another." However, the

Court was stunningly vague about where the line was to be drawn to

distinguish such a case from one of nondiscrimination.

The Court grappled with the real issue, the relationship between

impact and purpose, in the following language:

It is also not infrequently true that the discriminatory impact . . . may

for all practical purposes demonstrate unconstitutionality because in

various circumstances the discrimination is very difficult to explain on

nonracial grounds. Nevertheless, we have not held that a law, neutral

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67. For example, the Court cited *Strauder v. West Virginia,* 100 U.S. 303 (1879), which in-

volved de jure exclusion of African-Americans from juries. See *Davis,* 426 U.S. at 239. The Court

also cited *Keyes,* 413 U.S. at 189, which concerned the tracing of current racial impact to de jure

segregation in the past. See *Davis,* 426 U.S. at 240.

68. "The differentiating factor between *de jure* segregation and so-called *de facto* segrega-

tion . . . is purpose or intent to segregate." *Davis,* 426 U.S. at 240 (quoting *Keyes,* 413 U.S. at

208).

69. These conclusions follow from the government’s explicit statement of racially discrimi-

natory policy.

70. See *Davis,* 426 U.S. at 241.

71. *Id.* (referring to *Yick Wo v. Hopkins,* 118 U.S. 356 (1886)).

72. *Id.*

73. See *id.*

74. *Id.* at 242.

75. See infra notes 76-79 and accompanying text.
on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.\textsuperscript{76}

This passage is confusing because it implies, contrary to the Court's other reasoning, that there are some cases in which discriminatory impact alone can suffice. "[D]iscriminatory impact . . . may for all practical purposes demonstrate unconstitutionality . . . .\textsuperscript{77} Why? "[B]ecause in various circumstances the discrimination is very difficult to explain on nonracial grounds."\textsuperscript{78} One would think that, in such an instance, the unconstitutionality flows not from the "discriminatory impact," but rather from the fact that it is "difficult to explain on nonracial grounds." However, the Court's statement of this proposition implies, instead, that it was the degree of impact on the races, not the lack of justification, that controlled. At the same time, the Supreme Court's rejection of the Court of Appeals' approach, which placed upon the government the burden of justifying its actions,\textsuperscript{79} seemed to make the lack of a legitimate purpose irrelevant.

Above all, the opinion in \textit{Washington v. Davis} raised obvious difficulties in application. For example, one might hypothesize a situation in which the historical justification for a practice, although nondiscriminatory, had disappeared with time, and yet the practice was maintained as a result of bureaucratic inertia, or for that matter covert racism, even though it produced viciously discriminatory impact without any current justification. \textit{Davis} seems to mean that this result is constitutional. One also might imagine a purposelessly bureaucratic choice between two alternative ways of achieving a legitimate goal, which a bureaucrat exercises in favor of the alternative that produces the greatest degree of racial discrimination. Again, \textit{Davis} would uphold such a purposeless government choice.

Furthermore, by emphasizing the requirement of "\textit{purpose or intent} to segregate," with italics in the opinion, the Court overlooked the problem of unconscious bias.\textsuperscript{80} A particular government decision-maker

\textsuperscript{76} \textit{Davis}, 426 U.S. at 242.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} See id. at 236-37.
\textsuperscript{80} See infra Part III.A (discussing “accidental” discrimination); see also Selmi, \textit{supra} note 6, at 287-88 (arguing that the Court's approach fails to detect “subtle” discrimination, even when it fits the Court's conception of “intent”).
may have the purpose and intent to carry out a legitimate governmental function in a manner that is evenhanded as to the races, but may discriminate against individuals as a result of unrecognized bias. Indeed, it is possible that this situation existed in Yick Wo v. Hopkins. Washington v. Davis would do nothing to smoke out government action of this kind. Finally, there remained the problem of applying vague concepts defining mind-sets of individuals, such as "purpose" or "intent," to large bureaucracies such as government agencies, in which the right hand may not know what the left hand is doing and different individuals may have different purposes. Some of these factors led Justice Stevens to concur separately because he wanted "to suggest 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."

Finally, Davis is facially inconsistent with Yick Wo, although it cites that case with approval. Yick Wo had emphasized the lack of any legitimate governmental purpose for the differential impact. Indeed, this purposelessness factor was determinative in Yick Wo, since the differential impact was uncontested. Furthermore, in Yick Wo, the Court appeared to place the burden of justification upon the government once a severe differential impact had been admitted or proved. In other words, Yick Wo seemed to adopt precisely the same concept of a prima facie case provable by differential impact, coupled with the same placement of the burden of justification upon the defendant, as Griggs later adopted in Title VII cases. This was the framework that Washington v. Davis definitively rejected. And it did so without distinguishing Yick Wo or explaining its approval of that case, except to say, erroneously,

81. The proof of discrimination was based upon the aggregate of the factual decisions made by the board of supervisors by their individual votes. See Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). If each of the supervisors believed himself or herself to be free of prejudice, but all (or a majority) were heavily, but unconsciously prejudiced against Asian-Americans, a differential racial impact could have been expected. This result might have occurred even if the supervisors did not intend to discriminate or even if they tried hard not to do so.
82. See infra Part III.A (discussing discrimination by bureaucracies).
83. Davis, 426 U.S. at 254.
84. See id. at 241.
85. See Yick Wo, 118 U.S. at 374 (explaining that the discrimination against Chinese-Americans by San Francisco's board of supervisors was admitted).
86. See id.
87. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (concluding that in a Title VII action, an employer bears the burden of demonstrating that any requirement bear a "manifest relationship to the employment in question").
88. See Davis, 426 U.S. at 238-39.
that the differential impact was determinative in that case, when actually the purposelessness of the impact, rather than its severity, was the true determinant in *Yick Wo*.

**B. The Arlington Heights Case: Evidence Rules for Proving Discriminatory Intent**

A year after *Davis*, the Court revisited the standard for unconstitutional racial discrimination in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*. In particular, the Court explored various factors that could be considered as evidence in determining discriminatory intent. In so doing, it solved at least one of the practical problems raised by *Davis*. However, it left the important question, whether lack of legitimate purpose was to be proved by the plaintiff, rebutted by the defendant, or treated as irrelevant, in greater confusion than before.

In *Arlington Heights*, the Metropolitan Housing Development Corporation ("MHDC") was a nonprofit developer that contracted to purchase a tract upon which to build racially integrated low-and-moderate-income housing. To do so, it needed to have the village planning committee grant it a zoning change from a single-family to a multiple-family classification. At public hearings, both supporters and opponents mentioned that the project would be racially integrated. Opponents also argued that the area traditionally had been single-family and that rezoning would violate the village's policy of using multiple-family classifications primarily as a buffer between single-family and commercial or industrial zones. The commission denied rezoning, and MHDC sued.

The district court found no unconstitutional discrimination. Specifically, the district court reasoned that the village had acted to maintain its zoning plan and to protect property values, not with a racially discriminatory purpose. The Court of Appeals reversed, holding that

90. See id. at 265-66 (examining such factors as whether the legislature's discriminatory purpose was a motivating factor in its decision and if so, explaining that the usual judicial deference accorded to such decisions would not be adhered to).
91. See id.
92. See id. at 256.
93. See id. at 257.
94. See id. at 257-58.
95. See id. at 258.
96. See id. at 259.
97. See id.
the "ultimate effect" of the rezoning denial was racially discriminatory.\textsuperscript{98} In so doing, the Court of Appeals adopted reasoning dependent upon racially disproportionate impact.

The Supreme Court reversed the Court of Appeals and upheld the village's action. Its criticism of the Court of Appeals was simple: "Our decision last Term in \textit{Washington v. Davis} ... made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact."\textsuperscript{99} However, this holding did not resolve the case before the Court. Two critical questions remained. First, if the multiple actors in a government decision-maker act with multiple purposes, some legitimate and some discriminatory, how should these mixed motives be evaluated or compared? And second, what kinds of evidence could be used to prove the decisive, but elusive, determinant known as "discriminatory purpose"?

The Court resolved the first issue by applying a "motivating factor" test. The Court's reasoning was pragmatic:

\textit{Davis} does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.\textsuperscript{100}

Thus, inability to prove that racial discrimination was the only purpose, or even the most important one, would not be fatal to the plaintiff's case. Proof that racial discrimination was one of the purposes, or "a motivating factor," would be sufficient. Perhaps there is room to criticize this motivating factor test on the ground that it contains more ambiguity about the quantitative comparison between legitimate and discriminatory motivations than is necessary. For example, does the illegal motivation need to be sufficiently strong so that its eradication would have changed the result? However, the motivating factor test has

\textsuperscript{98} See \textit{id.} at 259-60.
\textsuperscript{99} \textit{Id.} at 264-65 (citation omitted).
\textsuperscript{100} \textit{Id.} at 265-66 (footnote omitted).
survived, and perhaps it has been applied as a kind of producing or proximate cause approach that works as a practical matter.\footnote{Cf. David Crump, From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions, 68 WASH. L. REV. 753, 787-90 (1993) (discussing causation in the context of school desegregation decisions and concluding that the Court has in fact adopted a standard that resembles proximate causation).} In any event, the motivating factor test is not the most significant problem raised by Arlington Heights.

More importantly, Arlington Heights addressed the evidence that could be used to prove racially discriminatory purpose or intent. The Court began with language reminiscent of its “totality of the circumstances” approach in Davis. “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”\footnote{Arlington Heights, 429 U.S. at 266.} This statement makes sense so far as it goes. The Court’s more specific work, however, consisted of identifying three types of evidence that could supply the requisite proof.\footnote{See id. at 266-68. One can argue that the real thrust of the Court’s decisions, taken as a whole, concerns not the standard by which discrimination is determined, but the way in which different kinds of evidence are to be viewed. Cf. Selmi, supra note 6, at 283 (contending that models used by the Court did not identify what acts should be classified as discriminatory, but instead offered guidelines dealing with what kinds of evidence would prove the indicia of discrimination).} Significantly, the weakness of the government’s proffered justification, the factor that controlled the outcome in Yick Wo, is not among the three.\footnote{See Arlington Heights, 429 U.S. at 266 (declaring that “[a]bsent a pattern as stark as that in . . . Yick Wo, impact alone is not determinative, and the Court must look to other evidence” (footnote omitted)).}

The first type of evidence of discrimination approved by the Court is the severity of the discriminatory impact:

The impact of the official action—whether it “bears more heavily on one race than another,”—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . But such cases are rare.\footnote{Id. (citations omitted).}

Again, as in Davis, the Court treated purposelessness of the government action as a corollary of racial impact. It was to be determined from the “pattern” of racial differentiation, or in other words from impact, and evidently it was not a separate factor in its own right.

The second and third evidentiary factors identified by the Court were historical in nature:
The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . For example, if the property involved here always had been zoned [multiple-family] but suddenly was changed to [single-family] when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action . . . .

These historical factors might indeed be relevant evidence in some cases. However, in a case involving severe differential impact on the races coupled with weak government justification, the historical factors might not point to anything of significance. Yick Wo is such a case.

Thus, Arlington Heights, like Davis, cites Yick Wo, but is inconsistent with it. Neither of the modern decisions affords any independent significance to the strength or weakness of the government's claimed legitimate purpose. Both treat this factor as an inference to be made from the severity of the racial impact, although logically it cannot be so inferred. Lesser differences in impact might be racist in motivation, whereas a virtually 100% impact upon members of one race can be nondiscriminatory if the problem that concerns the government is completely confined to those persons. By contrast, Yick Wo appears to

106. Id. at 267-68 (citations and footnotes omitted).
107. See Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (invalidating a decision by San Francisco's board of supervisors which denied laundry licenses to all Chinese-Americans for no apparent reason, except the will of the supervisors). Another, more difficult case is City of Memphis v. Greene, 451 U.S. 100 (1981). In that case, the city closed a street running through a white residential area that also had served a contiguous area that was predominantly African-American. See id. at 102. There were no overt historical indications of racial intent, and the Supreme Court upheld the city's action. See id. For an effective criticism of this opinion, see Selmi, supra note 6, at 306-09. Professor Selmi sees the decision as "no easy task." Id. at 308. Moreover, he points out that the failure to focus on the absence of justification, based on comparative traffic patterns, neighborhood population, or the like, truncated the Court's inquiry and meant that the absence of explicit racist statements achieved an inappropriate dominance. See id.
108. See Arlington Heights, 429 U.S. at 266.
109. See supra notes 76-79, 102-07 and accompanying text.
110. Cf. supra notes 33-35 and accompanying text (discussing the issues raised by a governmental program concerning sickle-cell anemia).
suggest that the government’s “reason for it [the discriminatory impact]” is the subject of a separate evidentiary inquiry, as to which the burden of proof is upon the government. Thus Arlington Heights contains a more egregious example of the sloppy reasoning that also infected Davis. The identification of the three factors of severity of impact, historical background, and legislative or administrative history, omits the factor of the strength or weakness of the government’s ultimate justification of the action, the factor that was determinative in Yick Wo. The sloppiness in Arlington Heights is more harmful than that in Davis precisely because Arlington Heights is a decision about evidence and proof.

The weakness of this reasoning in Arlington Heights becomes clearer when it is compared to another line of cases, the “in spite of,” and not “because of” cases. In these cases, unlike Davis and Arlington Heights, the strength of the government’s legitimate purpose was treated as determinative. Reconciling Davis and Arlington Heights, on the one hand, with the “in spite of” and not “because of” cases, on the other hand, is difficult if not impossible.

C. “In Spite of, and Not Because of”: From Feeney to Hernandez

In Personnel Administrator v. Feeney, Massachusetts gave a hiring preference to veterans for state positions if they obtained passing scores on an employment test. More than ninety-eight percent of veterans were men, and thus the preference “operat[ed] overwhelmingly to the advantage of males.” Nevertheless, the Court upheld the Massachusetts law, primarily because it was enacted “in spite of,” and not “because of” its disparate impact upon men and women. As the majority saw it, “[t]he dispositive question . . . is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts [law].” However, all of the his-

111. Yick Wo, 118 U.S. at 374.
112. See id.
113. See discussion infra Part I.C.
115. See id. at 263.
116. Id. at 259.
117. See id. at 279.
118. Id. at 276. This formula gives rise to the “reversing the groups” inquiry, which was proposed by Professor Strauss. See David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 956-57 (1989). This approach asks, simply, whether the government’s action would have been different if the person(s) seeking the particular benefit had been of the other group—i.e., if they had been white, rather than African-American, or male rather than fe-
historical evidence authorized by *Arlington Heights* pointed to the conclusion that the law was not motivated by a purpose of discriminating against women. Instead, its justification was assistance to veterans of the armed forces.

*Feeney* arguably makes pragmatic sense, but doctrinally it was a departure from *Davis* and *Arlington Heights*. As *Davis* put it, the "seriously disproportionate exclusion of [a protected group] . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Arlington Heights* puts this factor in terms of "a clear pattern . . . [that] emerges from the effect." Both decisions, in other words, view governmental purpose as an inference to be made from severely disproportionate impact, even though it is illogical to make such an inference. If the Court had followed that course of reasoning in *Feeney*, where ninety-eight percent of the benefits flowed to one group, it would have inferred discriminatory purpose. Indeed, Justices Marshall and Brennan dissented on grounds related to this criticism.

In summary, *Feeney* salvaged a classification with significant differential impact by considering the strength of the justification that the government had proved, and thus it adopted a variation of precisely the framework that the Court had rejected in *Davis*.

Later, in *McCleskey v. Kemp*, the Court considered McCleskey’s claim that black defendants who killed white victims had the greatest likelihood of receiving the death penalty. McCleskey presented a study
purporting to show that, even after taking account of thirty-nine nonracial variables, defendants charged with killing white victims were significantly more likely to receive death sentences than defendants charged with killing blacks. The Court rejected this argument, first, on the ground that the proffered study was methodologically flawed and could not properly support such a conclusion. However, as a second reason for rejection, the Court adopted the "in spite of, and not because of" reasoning:

McCleskey suggests that the... study proves that the State as a whole has acted with a discriminatory purpose. He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But "[d]iscriminatory purpose"... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely 'in spite of,' its adverse effects upon an identifiable group.

The Court found "no evidence... that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose." It therefore upheld the Georgia law and McCleskey's death sentence.

Aside from the flaws in McCleskey's evidence and the significant issue of the viability of sociological studies as constitutional determinants, it is not easy to distinguish McCleskey from Yick Wo v. Hopkins. Each involved a racially neutral statute or ordinance. Both, at least if McCleskey's study is credited, involved prejudice on racial grounds by decision-makers applying the two laws. In Yick Wo, the statistics were so dramatic that they could have been read as excluding the possibility of good faith purpose (as opposed to unconscious racial bias), whereas the possibility existed in McCleskey that jurors acting in good faith were influenced by prejudice of which they were unaware. It is possible,

126. See id. at 287.
127. See id. at 297.
128. Id. at 297-98 (alteration in original) (quoting Feeney, 442 U.S. at 279).
129. Id. at 298.
130. See id. at 299.
131. In Yick Wo, the statute at issue stipulated that before a person could maintain a laundromat in San Francisco, it had to obtain permission from its board of supervisors. See Yick Wo v. Hopkins, 118 U.S. 356, 357 (1886). In McCleskey, the statute at issue was one authorizing capital punishment. See McCleskey, 481 U.S. at 284 n.1.
132. In Yick Wo, the same decision-makers decided all 320 permit questions. See Yick Wo,
even probable, that none of the juries covered by the Georgia study acted with conscious bias, assuming arguendo the validity of the study. Perhaps, then, the reconciliation of Yick Wo and McCleskey lies in recognizing that unconscious bias is far more difficult to eradicate. Government cannot operate if its institutions can be shut down merely upon proof that human decision-makers are imperfect.

Perhaps it makes more sense, however, to examine the strengths of the government’s purposes as a means of distinguishing McCleskey from Yick Wo. In the former case, the State’s purpose was to identify and punish its most serious murder cases, a purpose that Georgia arguably carried out in as exacting a manner as was governmentally reasonable. In Yick Wo, on the other hand, the ordinance could not be supported by its ostensible purposes, and it was administered not in accordance with its stated criteria, but by variances from them. The difference in relative strengths of the legitimate purposes for the two laws, in other words, arguably supports the difference in results.

Finally, in Hernandez v. New York, the Court used “in spite of, and not because of” reasoning in the context of the Batson claim alleging racial discrimination in a prosecutor’s peremptory challenges against two Latino venirepersons. The prosecutor’s explanation was that he was “very uncertain that they would be able to listen and follow the interpreter,” because they spoke Spanish. The prosecutor added that he had no reason to want to exclude Hispanics, because “[e]ach of the complainants is [a] Hispanic.” The plurality of the Supreme Court reasoned, “even if we knew that a high percentage of bilingual jurors [who largely were Hispanic]... would be excluded under the prosecutor’s criterion, that fact alone would not cause the criterion to fail the

118 U.S. at 358-59. Thus, they were able to compare the results in all instances, and they would have had difficulty in avoiding the knowledge that their actions created a severe racial impact unjustified by any neutral criterion. In McCleskey, on the other hand, each juror presumably addressed only one case. Individual jurors, therefore would not know the comparative rates of death sentences for persons of different races and would not be confronted as the supervisors were in Yick Wo with a glaring and unexplainable disparity.

134. See Yick Wo, 118 U.S. at 374 (discussing how plaintiffs met every requirement of the law, but were still denied permits due to the actions of the city’s supervisors).
137. See Hernandez, 500 U.S. at 356.
138. Id.
139. See id.
140. Id. at 357.
race-neutrality test."$^{141}$ This was so because “disparate impact should be
given appropriate weight in determining whether the prosecutor acted
with a forbidden intent, but it will not be conclusive in the preliminary
race-neutrality step of the Batson inquiry.”$^{142}$

D. Batson v. Kentucky and Its Progeny: The Court Comes Full Circle

In the Batson line of cases, of which Hernandez is a part, the Court
prohibited racially-motivated peremptory challenges to prospective ju-
rors. The first landmark in the line of cases, Batson v. Kentucky,$^{143}$ re-
versed a criminal conviction and remanded for an inquiry into the
prosecutor’s motivation.$^{144}$ In contradistinction to its holding in Wash-
ington v. Davis, the Court held that “a defendant may establish a prima
facie case of purposeful discrimination in selection of the petit jury
solely on evidence concerning the prosecutor’s exercise of peremptory
challenges at the defendant’s trial,”$^{145}$ or, in other words, by showing
disproportionate impact. “For example, a ‘pattern’ of strikes against
black jurors included in the particular venire might give rise to an infer-
ence of discrimination.”$^{146}$ Once this disparate impact had been shown,
the Court held, the burden shifted to the government to articulate a jus-
tification, in precisely the framework that the Court had rejected in
Davis.$^{147}$ Specifically, the Court held:

Once the defendant makes a prima facie showing, the burden shifts
to the State to come forward with a neutral explanation for challenging
black jurors. ... [T]he prosecutor’s explanation need not rise to the
level justifying exercise of a challenge for cause. But the prosecutor
may not rebut the defendant’s prima facie case of discrimination by
stating merely that he challenged jurors of the defendant’s race on the
assumption—or his intuitive judgment—that they would be partial to
the defendant because of their shared race. ... The prosecutor there-
fore must articulate a neutral explanation related to the particular case
to be tried. The trial court then will have the duty to determine if the
defendant has established purposeful discrimination.$^{148}$

As part of its authority for this evidentiary framework, the Court

$^{141}$ Id. at 362.
$^{142}$ Id.
$^{143}$ 476 U.S. 79 (1986).
$^{144}$ See id. at 100.
$^{145}$ Id. at 96.
$^{146}$ Id. at 97.
$^{147}$ See id.
$^{148}$ Id. at 97-98 (citations and footnotes omitted).
cited, of all cases, *Washington v. Davis*. The opinion does not adequately explain how that case, which rejected such a framework, supported it in *Batson*, or why a different framework was called for.

In *Edmonson v. Leesville Concrete Co.*, the Court extended the *Batson* holding to all civil litigants, and later, in a more controversial holding, also extended it to criminal defense lawyers in *Georgia v. McCollum*. However, as the discussion above of *Hernandez* shows, the Court required only the most minimal kind of supervision over the adequacy of the proffered justification, holding that a criterion of dubious merit, bilingualism, could serve as a justification, even if it excluded "a high percentage of . . . jurors." Given the historic function of the peremptory challenge, perhaps this approach was sensible. However, the *Batson* line of cases fails to clarify the general evidentiary significance of the importance of the government's claimed legitimate purpose, and it mandates an evidentiary framework that is inconsistent with *Davis*. In one line of cases, the government's failure to advance a legitimate purpose is outside of the evidentiary framework and seemingly irrelevant, while in the other, the government’s failure to demonstrate a legitimate purpose will usually be determinative.

II. THE PARADOX: PURPOSELESSNESS IS IRRELEVANT, AND YET, IT IS DETERMINATIVE

Against this background, one can see a paradox in the racial discrimination decisions. Simply stated, it is that evidence of purposelessness in the government’s action is, on the one hand, irrelevant as proof of intent to discriminate or nearly so. However, on the other hand, purposelessness is determinative of discriminatory intent.

*Davis* and *Arlington Heights* seem to consign the purposelessness factor to immateriality, or at best, to treat it illogically, as an inference

149. See id. at 93-96 (citing *Davis*).


151. See id. at 631.

152. 505 U.S. 42 (1992). The decision was more controversial because it held that criminal defense lawyers, who obviously have functions opposed to the state, legally were state actors in exercising peremptory challenges. See id. at 54. In addition to the paradoxical appearance of this conclusion, criminal defense lawyers could cite the Sixth Amendment right to counsel as a countervailing doctrine that arguably required loyalty to their clients in their exercise of this function.


to be drawn from differential impact. Even if the government advances no explanation for a severely disparate racial effect, even if it admits that it cannot offer any justification, that fact, after Davis, does not seem to advance the ball toward the goal line for the plaintiff at all. A substantially disparate impact places no burden of proof upon the government. Instead, the plaintiff must make out positive proof of racially discriminatory intent, rather than inferring it from the lack of a legitimate purpose. Under Arlington Heights, this proof may be established from a list of factors that includes disparate impact and historical anomalies, but that curiously omits any explicit recognition of the government's failure to advance any legitimate purpose.

On the other hand, Yick Wo, as well as the "in spite of," and not "because of" cases, seems to adopt a radically different framework of proof. In these cases, once disparate impact has been shown, the government's failure to establish a legitimate purpose is determinative. The peremptory challenge cases go even further in the same direction. Specifically, Batson and its progeny allow a prima facie inference of discriminatory purpose to be established by disparate impact alone, and once this circumstance is established, the government's failure to articulate a race-neutral explanation is determinative. The burden of proving justification is explicitly placed on the government. This holding is diametrically opposed to Davis.

Perhaps the resolution of this paradox lies in recognizing that purposelessness always is a factor in the mix of proof. Arguably, it is a factor even in Davis and Arlington Heights, particularly since both cite Yick Wo with approval. Both decisions mention the possibility that a

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155. The notion that the Court's decisions are irreconcilable by its rhetoric has been suggested elsewhere. See Foster, supra note 12, at 1065 (suggesting that the intent doctrine is seemingly "incoherent" but can be explained by democratic process principles); see also Selmi, supra note 6, at 285 (suggesting that the key to the decisions is not the "various proof structures" or "legal standards" but rather "the Court's expectations"). The present Article sees a different flaw, namely, the uneven treatment of purpose when the government might have relevant evidence of its purpose, but neither party actually advances definitive information on the subject. This "purposelessness" factor could be addressed by the Court with less change in its framework than other proposals might require.


159. See Batson, 476 U.S. at 97.

severe racial disparity in impact may be unexplainable, although they imply, illogically, that the absence of neutral explanations can be inferred from the disparity itself. By this reading, the failure in *Davis* and *Arlington Heights* to treat purposelessness as an independent evidentiary factor reflects only sloppy opinion-writing. Neither decision explicitly excludes consideration of purposelessness, and *Davis* seems more concerned with rejecting the rigid Title VII framework as inconsistent with the generality of constitutional interpretation than with specifying the proper evidentiary considerations. *Arlington Heights* perhaps can be seen as a decision that defines permissible evidentiary criteria from the specific facts before the Court, which in that instance did not include purposelessness, because the government there could articulate zoning justifications for its actions.

This resolution of the paradox, however, fails to take account of the Court’s rhetoric in *Davis* and *Arlington Heights*, both of which seem to undervalue the purposelessness factor. Furthermore, it fails to account for the Court’s refusal to recognize explicitly so seemingly important a factor as the government’s failure to articulate a justification. And finally, it remains unclear why the peremptory challenge cases, *Batson* and its progeny, should create a presumption-like finding of discrimination from disparate impact, or why the “in spite of, but not because of” cases come out as they do. Why are the Court’s approaches to the purposelessness factor so different in different contexts, and so seemingly inconsistent?

Perhaps a more complete resolution of the paradox lies in recognizing that the Court employs shifting concepts of what is meant by discriminatory “intent” or discriminatory “purpose,” depending upon the context. The relationship between intent or purpose on the one hand and the evil of discrimination on the other is not so clear as the Court in some cases would have it. Furthermore, the meaning of terms such as intent and purpose, at the most basic level, is shifting and unclear. The Court’s zigzag course, in summary, may be a result of its efforts to grapple with the difficulty of defining the relationship between intent and evil, exacerbated by different levels of skill in addressing that difficulty in the different cases.

161. See *Arlington Heights*, 429 U.S. at 266; *Davis*, 426 U.S. at 248.
162. See *Davis*, 426 U.S. at 238-39.
163. See *Arlington Heights*, 429 U.S. at 269-70.
164. See supra Part I.D.
165. See supra Part I.C.
III. THE RELATIONSHIP BETWEEN INTENT AND EVIL:
FROM THE STAR WARS LEGENDS TO THE
SUPREME COURT’S RACIAL DISCRIMINATION
DECISIONS

A. “Accidental” Discrimination: An Oxymoron?

“[E]vil requires intent.” So says Boba Fett, and so say the Supreme Court’s racial discrimination decisions. But is it really true that evil requires intent? One wonders how Boba Fett would react if he were employed to “collect” a fugitive charged with an accidental homicide, such as involuntary manslaughter. His choices would be to refuse morally justifiable employment, amend his philosophy, or content himself with observing that foolish consistency is the hobgoblin of small minds.

What does “intent” mean, and for that matter, what does “evil” mean? Contrary to Boba Fett’s concept, can a natural disaster be considered “evil” at least in some senses? Maybe the notion that deliberate decisions must underlie a mountain slide before it can be called an evil thing is too narrow. Suppose there is a person somewhere who could have prevented the mountain from sliding (or who could have warned Boba Fett’s hypothetical villagers), but this person did not do so, and the reason was pure indifference. Isn’t this omission “evil”? Are drunk drivers evil, and if so, is it because they act intentionally, at least in some sense? Actually, our law contemplates that people or institutions can produce evil results unintentionally, through negligence. Our courts make a major effort to address harm caused by negligence. Indeed, we impose liability in some instances upon actors who are free of fault completely, such as in product liability cases. We do not confine our deterrence mechanisms by a narrowly defined concept of intent.

166. Moran, supra note 1, at 277.
167. See id.
169. This discussion is based upon the Author’s prior writing in CRUMP ET AL., supra note 3, at 588-89.
170. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 160 (5th ed. 1984) (discussing negligence liability). For another conception of this issue, see Selmi, supra note 6, at 287-88 (suggesting that the Court’s decisions fail to detect “subtle” discrimination even when it would fit the Court’s definition of intent). Professor Selmi suggests that the issue “rests not in a preoccupation with intent, which generally plays a minor role in the Court’s analysis, but rather in the Court’s limited vision of what constitutes discrimination.” Id. at 287-88. The present Article reaches similar conclusions, but through a different analysis.
171. See KEETON ET AL., supra note 170, at 677 (discussing products liability).
In fact, the evil of invidious discrimination can be the result of accident, just as the evil of physical injury can be. The characteristic that we normally describe as “bias” or “prejudice” is more likely to be inadvertent than to be intentional. Furthermore, invidious discrimination that results from unconscious bias can produce harmful effects, just as negligence and defective products can cause injuries. And finally, careful decision-makers confronting the possibility of bias can make efforts to compensate for it, just as automobile drivers can make efforts to avoid negligence and manufacturers can reduce the incidence of accidentally produced defective products. One method of doing so is to remain consciously aware of the possibility of bias and to compensate for it. For example, “anchoring” is the tendency to prefer initial hypotheses over later ones even after contrary evidence has appeared. The fallacy of “availability” is assessment of the frequency of an event based upon the facility with which occurrences can be detected. Careful decision-makers can reduce their susceptibility to these fallacies.

Perhaps the law should encourage the correction of unconscious bias, just as it encourages the avoidance of negligence. Scholarship on the subject suggests that it could do so by inducing decision-makers to seek out and analyze their own prejudices. Further, it could do so by requiring explanation of decisions, although these techniques are imperfect. If the law were to adopt this approach, it might well choose a framework such as the “prima facie case, burden-shifting” approach of Griggs, which is the approach in statutory Title VII cases. This is the approach that the Supreme Court rejected for constitutional cases.

Why has the law not chosen this “prima facie case, burden-shifting” course, which would systematically discourage unconscious discrimination? A partial answer may lie in the Supreme Court’s observation in Davis that constitutional standards are different. In Griggs, where the Court adopted its relatively strict burden-shifting principle,

174. See id. at 1127-28 (discussing “availability”).
175. See id. at 1131.
177. See Kidd III v. Illinois State Police, No. 97-2835, 1999 WL 8529, at *8 (7th Cir. Jan. 12, 1999) (explaining that once a plaintiff files suit under Title VII, he or she bears the burden of making a prima facie showing of discrimination and once that burden is met, the burden shifts to the former employer who must show a legitimate non-discriminatory reason for the discharge).
179. See id. at 239.
the Court was acting pursuant to congressional enactment.\textsuperscript{180} It is understandable that the Court was reluctant to adopt a one-size-fits-all approach to racial discrimination outside the statutory context of employment, and to fix it in the concrete of a constitutional holding. Additionally, part of the answer may lie in the concern that, in constitutional cases, unlike statutory actions under Title VII, it is government, rather than private actors whose conduct is to be limited.\textsuperscript{181} Valuable initiatives by government might be hampered or even prevented by efforts to stamp out unconscious bias which, after all, may in many contexts be anomalous, debatable, and impossible to eradicate in any event.\textsuperscript{182}

In some contexts, however, where the possibility of unconscious bias is particularly strong and a requirement of explanation of purpose is an appropriate means for deterring it, the Court has adopted this approach. For example, the peremptory challenge cases based upon \textit{Batson} involve thousands of partisan decision-makers for which the requirement of articulation of neutral purpose should usually be feasible. Perhaps this circumstance explains why \textit{Batson} and its progeny adopt the \textit{Griggs} burden-shifting approach,\textsuperscript{183} but \textit{Davis} and \textit{McCleskey} do not.\textsuperscript{184}

Sometimes it will be hard to prove intent on the part of a large bureaucracy such as a government agency. In such a group, there are people of varying political philosophies and responsibilities, and a given instance of disparate racial impact may not be traceable to a particular policy, let alone to a person with racial animus of a kind that can be labeled as “intent.” In Justice Stevens concurring opinion in \textit{Washington v. Davis}, for example, he observed:

\begin{quote}
[Governmental action . . . is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper
\end{quote}

\begin{itemize}
\item \textsuperscript{181} See supra note 54 and accompanying text.
\item \textsuperscript{182} See supra notes 125-30 and accompanying text (discussing the \textit{McCleskey} case).
\item \textsuperscript{183} See \textit{Batson v. Kentucky}, 476 U.S. 79, 97 (1986) (explaining that once a “defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors”).
\item \textsuperscript{184} See \textit{McCleskey v. Kemp}, 481 U.S. 279, 292 (1987) (explaining that a defendant in a criminal case who brings a claim based on an equal protection violation has the burden of proving the presence of purposeful discrimination); \textit{Davis}, 426 U.S. at 238-39 (declaring that the constitutional standards for reviewing claims of race discrimination are not similar to the standards applicable under Title VII).
\end{itemize}
motive affected the deliberation of a participant in the decisional proc-

ess.

....

... I agree, of course, that a constitutional issue does not arise every
time some disproportionate impact is shown. On the other hand, when
the disproportion is as dramatic as in ... Yick Wo v. Hopkins, it really
does not matter whether the standard is phrased in terms of purpose or
effect.185

In summary, the concept of intent or purpose is difficult to apply to
an organization with disparate decision-makers, particularly when an
illegal intent or prohibited purpose, or a subterranean motivation, is at
issue. Necessarily, the Court must be addressing something different
from the type of intent or purpose that one would ascribe to an individ-
ual, when it speaks of a legislature or governmental agency that is al-
leged to have discriminated intentionally.

Perhaps these considerations underlie partly the difference between
Yick Wo and Davis. It is possible in Yick Wo that there was no
"intentional" discrimination by any member of the board of supervisors,
in the sense that none may have consciously or deliberately used a deci-
sionmaking process expressly based upon race.186 It is possible for a
skewed result disadvantaging members of a given race to result simply
from unconscious bias. The Yick Wo Court did not eliminate the possi-
bility that the disparity there resulted from an amalgamation of uncon-
scious biases in the crevices of the decisionmaking process, as opposed
to articulated or intentional racism.187 In fact, the Court did not make its
decision depend upon the possibility that the result could have flowed
either from conscious or from unintentional prejudice.188 Instead, it held
that the administration of the ordinance had been "so unequal and op-
pressive as to amount to a practical denial by the State of ... equal pro-
tection."189 Central to this conclusion was the Court's observation that
"[n]o reason whatever, except the will of the supervisors"190 could be

185. Davis, 426 U.S. at 253-254 (citation omitted).
186. See supra notes 81, 132 and accompanying text (examining this possibility).
187. See Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (discussing how the disparity in en-
forcement may not only proceed from prejudices, but "from partisan zeal or animosity, from fa-
voritism and other improper influences and motives easy of concealment").
188. See id.
189. Id.
190. Id. at 374.
advanced to justify the result.\textsuperscript{191}

\textbf{B. Black and White Views of Intent and Impact}

Opinion polling shows that blacks and whites in America disagree fundamentally on the central question of the definition of racism.\textsuperscript{192} On some questions related to racism, blacks and whites seem to have similar conceptions. On the question of whether racial discrimination is tied to intent, however, or whether it can be unconscious and accidental, blacks and whites are sharply divided.\textsuperscript{193}

African-Americans, in polls, tend to see racism as an ongoing and pervasive condition of American life,\textsuperscript{194} while whites tend to think of it as individual actions or attitudes of bigotry that are the exception rather than the rule.\textsuperscript{195} Thus, whites tend to use the word “racism” to refer to explicit and conscious belief in racial superiority. African-Americans mean something different by racism: a set of practices and institutions that result in the oppression of black people.\textsuperscript{196}

It is possible that these two views would lead to two sharply different perspectives on disproportionate impact and the requirement of intent. The first view, held by the majority of whites, tends to support a requirement that constitutional violations be predicated on discriminatory intent, as the Court held in \textit{Davis}.\textsuperscript{197} The second view, held by the majority of African-Americans, would afford more determinative sig-

\begin{itemize}
\item \textsuperscript{191} See id.
\item \textsuperscript{193} Cf. Morin & Duke, supra note 192, at A24 (explaining how only a third of whites see racism as a barrier to black advancement, but seven out of 10 blacks believe that it is).
\item \textsuperscript{194} See id. (discussing the belief held by many African-Americans polled in a race relations study by the \textit{Washington Post} that “subtle forms of racism and outright white advantage remained barriers to blacks”).
\item \textsuperscript{195} In fact, such a view can best be seen in the fact that whites who participated in a focus group study on race relations acknowledged that while discrimination is still prevalent today, many suggested that African-Americans could achieve more if they fully embraced hard work values. See id.
\item \textsuperscript{196} See id. Thus, Professor Selmi suggests that the Supreme Court’s failure to redress “subtle” discrimination has less to do with a “preoccupation with intent . . . [than with] the Court’s limited vision of what constitutes discrimination.” Selmi, supra note 6, at 288. In short, Professor Selmi argues “it is not the Court’s doctrine that has limited its vision, but the Court’s vision has limited its doctrine.” Id.
\item \textsuperscript{197} See Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that a law that has a racially disproportionate impact is not unconstitutional unless it reflects a racially discriminatory purpose).
\end{itemize}
nificance to disproportionate impact even when direct proof of intent is lacking, especially when evidence of a legitimate purpose also is lacking. This latter description arguably fits the approach of *Yick Wo*.  

Probably no better example of this divergence of views can be found than the recent controversy over the disproportionate racial makeup of United States Supreme Court clerks. Of the 428 clerks hired by the current Justices, only seven have been African-American. This emotionally charged issue culminated in a demonstration by nearly a thousand people in front of the Court on the opening day of its current term, protesting what they saw as blatant racial discrimination. National Association for the Advancement of Colored People President ("NAACP") Kweisi Mfume crossed a police barricade to deliver a stack of resumes of allegedly qualified minority law students, and he and eighteen others were arrested for entering the off-limits steps to the courthouse. "The justices don't want to see us as law clerks," said one NAACP official, but rather "as basketball stars."  

However, the Justices' view of the controversy is as different from the NAACP's as night from day. CBS producer Stephanie Lambidakis asked Justice Antonin Scalia why he had never hired a black law clerk. Scalia answered, "Why do you think?" and walked away. Lambidakis persisted, asking what the public should know about the Justice's own clerk-hiring process. Scalia turned and responded, "They should know that it is rigorously fair" and "[t]hat I hire the best and brightest that I can find." Lambidakis asked, "Without regard to race?" Justice Scalia walked away, disgusted, and responded, "Of course, without regard to race. Of course, without regard to race."  

Paradoxically, both sides of this controversy may very well be corre-

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198. *See* *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (declaring that where a state fails to present a reason for a law which results in having a practical effect on a certain group of people, such a law cannot be upheld).


200. *See* id.

201. *Id.*

202. *Id.*

203. *Id.* (citing NAACP official Rev. Jamal Bryant).

204. *See* id.

205. *Id.*

206. *See* id.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*
rect, within each side's own frame of reference. The African-American view of the clerk controversy is encapsulated in the remarks of Democrat Representative Albert Wynn of Maryland, who maintained that “[t]he numbers speak for themselves.” This approach echoes the reasoning in *Yick Wo v. Hopkins*, where numbers were sufficient proof and individual intent was not determinative. Representative Wynn added that if the explanation “we’d like to hire more minorities, but they just don’t apply” doesn’t work for a police department, it shouldn’t work for the Supreme Court. In summary, the African-American view of this controversy is likely to be that irrespective of what is in the mind of any individual Justice, the Court's hiring process is discriminatory.

On the other hand, the Court's defenders predictably argue that the statistics alone produce an inadequate basis for conclusion. They insist that the makeup of the applicant pool is also important. And Justice Scalia’s responses to the media, denying individual acts of discrimination, reflect the pattern characteristic of non-minority thinkers, based upon intent. Given the intent model, it is understandable that Justice Scalia responds as he does to what he may correctly perceive, within the intent model, as unfair accusations. The trouble, then, is that the Supreme Court and its critics are speaking different languages, exactly as the polls of black and white Americans suggest they would be.

These polling data raise a further possibility, one that is disheartening. It probably means that many African-Americans and Anglos are not even talking about the same problem when they discuss racial discrimination. The lack of a common definition may make it more difficult for them to seek solutions.

C. Anomalies in the Historical Approach

One particularly troublesome evidentiary factor is the heavy emphasis of historical data in *Arlington Heights*. This kind of evidence has the potential for invalidating laws that are not based on racial bias or
upholding laws that are racially discriminatory.\textsuperscript{219} One need only imagine the hypothetical election of an avowed racist to a state legislature. If this individual were to support a racially neutral proposition such as the budget for a mental health agency, and incidentally mention his invidiously discriminatory views, a heavy emphasis of this factor could lead to the invalidation of a necessary and appropriate enactment.\textsuperscript{220} Another, perhaps wilder, hypothetical is that of the legislator who opposes a racially neutral law for non-racial reasons, but who is outvoted, and therefore adopts the tactic of praising the bill by appeals to racist reasons on the floor of the legislature. The legislator thus creates a kind of "poisoned pill," one that later can be used to invalidate the law that the legislator has pretended to support, but in fact dislikes. Overemphasis of the historical factor might make this imaginary tactic successful.

A variation on these possibilities can be examined by analysis of the sickle-cell anemia problem considered earlier in this Article.\textsuperscript{221} When confronted with the possibility that government expenditures for such a program might be unconstitutional because of racially disparate impact, most students tend to reject the argument out of hand. A sickle-cell eradication program simply must be constitutional.\textsuperscript{222} The reasoning of the "in-spite-of-but-not-because-of" cases tends to support this instinctive reaction.\textsuperscript{223} But \textit{Arlington Heights} makes the problem more difficult. If, for example, this particular governmental agency had no sickle-cell program in the past, or if it has increased funding significantly this year, it can be accused of a "departure" from historical practice, a factor that \textit{Arlington Heights} says is indicative of discriminatory intent.\textsuperscript{224} An even greater anomaly arises if one imagines an African-American elected official who campaigns on a platform favoring greater government benefits to his constituents, and who champions the sickle-cell program be-

\textsuperscript{219} For example, \textit{Yick Wo} is a case in which a historical approach might have led to a holding of nondiscrimination. \textit{See Yick Wo v. Hopkins, 118 U.S. 356, 357-58, 373 (1886) (explaining that the law the city's board of supervisors used to exclude Chinese-Americans was neutral and there was no indication that racial animus was a factor in its enactment).}

\textsuperscript{220} \textit{Cf. Hunter v. Underwood, 471 U.S. 222, 233 (1985) (relying on Arlington Heights in invalidating a law passed many years earlier upon a legislative record that demonstrated racial motivation, but reserving the question of whether an identical law passed today, without such a motivation, would be constitutional).}

\textsuperscript{221} \textit{See supra notes 33-35 and accompanying text.}

\textsuperscript{222} The Author has posed this problem in constitutional law classes for students to analyze.

\textsuperscript{223} \textit{See Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (explaining how the concept of "discriminatory purpose" suggests that a decision-maker decided on a certain course of action "because of," and not merely "in spite of").}

cause he wants to “do more” for the people who elected him who are primarily African-Americans. Arlington Heights seems to make this legislative speech into clear evidence of racial discrimination, even though the conclusion seems dubious. As Justice Stevens put it, “[i]t is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.”

Historical evidence of the kind approved in Arlington Heights leads to a further possible anomaly when one considers legislation initially adopted for race-neutral reasons that have ceased to exist, but which has severely disparate impact. Arlington Heights and Davis would uphold such a law, even though the only reason for retaining it is bureaucratic inertia or indifference to racial discrimination. The differential treatment of sentences for possession of powder and crack cocaine is a controversial issue that, according to the beliefs of some, might raise this problem. When adopted, the federal government’s much more severe sentence for crack possession reflected a race-neutral conclusion that this substance was more dangerous to users and more productive of violence than powder cocaine in analogous quantities. A high percentage of persons convicted of crack possession are African-American, and powder cocaine convictions are heavily white. Imagine that, sometime in the future, definitive evidence demonstrates that the opponents of the sentencing differential were correct. In other words, imagine that incontrovertible evidence surfaces showing that crack is no more harmful or dangerous than powdered cocaine. In such a case, government’s failure to remove the sentencing differential might well be seen as reflecting

225. This conclusion follows, according to Arlington Heights, because “[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body.” Id. at 268.

226. At some point, however, a legislator’s motive crosses the line into racial discrimination. See infra note 233 and accompanying text.


228. See Crump et al., supra note 3, at 594-95 (posing this question as a problem for students in constitutional law course); see also United States v. Armstrong, 517 U.S. 456, 458, 470 (1996) (denying discovery in support of claim of selective prosecution based upon statistical evidence of disparate impact). But cf. State v. Russell, 477 N.W.2d 886, 888, 890 (Minn. 1991) (striking down state’s sentencing differences under state equal protection grounds; declaring that “[d]isparate treatment of crack and powder cocaine users is not justified on the basis of crack’s greater dangerousness when there is evidence that powder cocaine could readily produce the [same] effects”).


230. See id.
purposelessness or conscious indifference to racially discriminatory results. The Davis approach, however, would mean that the continued maintenance of such a discriminatory differential would be perfectly constitutional. This is particularly so, given the heavy emphasis in Arlington Heights on historical evidence predating enactment. Such a result would be dubious.

These anomalies do not suggest that historical evidence should be treated as irrelevant. At some point, a legislator’s support for a program that assists constituents of a particular ethnicity may cross the line into territory prohibited by the Fourteenth Amendment, and conversely, the racially neutral purpose of the cocaine sentencing differential at the time of its adoption furnishes at least some evidence of its continuing validity. The point, then, is not that Arlington Heights is wrong in considering historical indications as relevant evidence, but that both Davis and Arlington Heights place too little emphasis on the weight of the government’s evidence of legitimate purpose.

D. The Hardest Cases: The Example of “Driving While Black”

The hardest cases are those in which the statistics give rise to a suggestion of unjustifiable racial impact without proof as compelling as that in Yick Wo, but in which neutral explanations also are possible but unprovable, and in which judicial intervention might create chaos in essential government functions. McCleskey v. Kemp arguably fits this

231. The United States Sentencing Commission proposed an amendment, for possible adoption by Congress, that would equalize sentencing. See id. Attorney General Janet Reno, with backing of federal prosecutors, has opposed the change on the ground that crack is more addictive, more associated with violence, and more destructive for “the most vulnerable members of society.”


233. For example, imagine that the hypothetical legislator referred to above as supporting a sickle-cell anemia program because it will benefit his African-American constituents, adds that he favors reducing the budget for research into combating Tay-Sachs disease because it almost exclusively benefits white citizens, and very few of his constituents are white. This record arguably would support more strongly a holding of unconstitutionality. Would a politician ever make a remark of this kind? The answer is yes. See Julie Mason, Wong Says Health Department Lacks Diversity: Councilwoman Sees Too Few Asians and Hispanics, and Too Many Blacks, HOUSTON CHRON., June 24, 1998, at 21A. This article reported about a “strongly worded letter” from Houston city councilwoman Martha Wong to the city’s mayor complaining that “[t]here is an obvious overrepresentation of African-American employees [in the city’s Health and Human Services Department].”

234. See Reske, supra note 229, at 30 (explaining that the difference in sentencing between crack and powder cocaine reflects a general belief that crack leads to much more violence).
The so-called "driving while black" phenomenon provides an example that may be even more intractable.

1. The Argument that Traffic Stops Reflect Racial Discrimination

Among African-Americans, it is widely accepted that traffic stops for driving infractions are racially influenced. In the vernacular, it sometimes is alleged that the disparity results from stops that are based on no violation other than the "offender's" act of driving while black. The NAACP regards this problem as sufficiently serious to have called for a letter-writing campaign in support of Congressional action, and individual African-Americans can cite histories of traffic stops that do indeed appear on their face to be racially oppressive. In 1992, the

235. See McClesky v. Kemp, 481 U.S. 279, 286 (1987) (discussing the claim of an African-American defendant that the state of Georgia's capital sentencing process was conducted in a racially discriminatory manner, relying on a statistical study purporting to show that "defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases"). Another kind of difficult case is illustrated by City of Memphis v. Greene, 451 U.S. 100 (1981). In Memphis, the city of Memphis "closed the main thoroughfare between an all-white enclave and a predominantly [African-American] area of the city." Id. at 135 (Marshall, J., dissenting). However, the majority upheld the city's decision in large part because the record revealed no racially discriminatory motive by the city council. See id. at 126.

In McCleskey, one basis of the Court's opinion was the inadequacy of the statistical proof of discrimination. See McCleskey, 481 U.S. at 297. The statistics, in other words, were insufficient to persuade the Court that race-neutral explanations were lacking. And the issue concerned the state's response to its most serious murder cases by its administration of the death penalty. See id. at 319. The Court could have inferred that the state had done all that was practical, given the competing considerations, to guide juries toward legitimate bases for verdicts. The question in McCleskey was particularly poignant because it concerned death sentences. But if the state had been forced to abolish capital punishment because of the statistical proof in McCleskey, there was no reason to suppose that equivalent disparities would not have appeared in whatever alternate sentences the state might have authorized, unless it were to cease redressing homicides altogether.

236. See Erin Texeira, Racially Motivated Traffic Stops May Be Easier to Prove with Bill: Driving While Black Measure Will Be Considered by U.S. Senate, HOUSTON CHRON., Aug. 16, 1998, at 8A; see also Driving While Black, BOSTON GLOBE, Aug. 17, 1998, at A10 (editorializing in support of legislation); cf. John Lamberth, Driving While Black: A Statistician Proves that Prejudice Still Rules the Road, WASH. POST, Aug. 16, 1998, at C1 (expressing opinion of statistician who found that African-Americans were stopped in great disproportion to their numbers on the country's roads).

237. See Texeira, supra note 236, at 8A.

238. See id.

239. Proponents of congressional action included Jawad Abdulla, a Baltimore Police Department employee, who alleged more than a dozen traffic stops in several states since 1974 and attributed them to his dark skin and dreadlocks. See id. In support of legislation nicknamed the "Driving While Black" bill, Representative John Conyers, Jr., (D-MI) indicated that "[a]lmost every African-American man will be the subject of this sort of unfair treatment at least once, if not many times." Id.
American Civil Liberties Union studied a forty-eight mile stretch of Interstate 95 from just north of Baltimore to the Delaware border. The numbers showed that African-Americans were fourteen percent of drivers but seventy-two percent of those subjected to traffic stops.

In response to resulting litigation in Maryland alleging a violation of equal protection based on this kind of evidence, United States District Judge Catherine Blake (fortunately) orchestrated a partial settlement that required state troopers to compile similar statistics. From mid-June of 1996 through March 1998, African-Americans were nearly one-third of those stopped and accounted for more than half of searches and fifty-eight percent of arrests. However, thirty-seven percent of officers assigned to this roadway were black, and so was the commander.

In the Congress, Representative John Conyers (D-MI) has sponsored a so-called “Driving While Black” bill, which has passed the House on a unanimous voice vote. If passed by the Senate, it would require the Justice Department to compile statistics of traffic stops and searches. It avoids, however, the defining of statistical evidence that would suffice to support a claim for unlawful racial discrimination, and it does not make proof of a race-based claim more readily available than it is under the Supreme Court’s current equal protection decisions, because it expressly provides that the results are not admissible evidence in judicial or administrative proceedings. The purpose, therefore, is to obtain information that can be used as the basis for legislation or to induce self-examination by police forces.

2. The Counter-Arguments and Counter-Counter Arguments Based on Refined Statistics

The driving while black hypothesis is difficult to analyze because statistical evidence, by definition, is not tailored to individual cases, but is dependent upon inferences about group behavior, or upon inferences that might pejoratively be labeled “stereotyping.” The inference of
racial discrimination from the traffic stop statistics arguably supports 
such an inference about the behavior of state troopers as a group. The 
trouble is, such reasoning from statistics invites counter-arguments 
about possible neutral explanations that, although they sound offen-
sively stereotypical, are no more so than the original inference of dis-
iscrimination from statistics.

Specifically, an opponent of the discrimination inference can point 
out that African-Americans are disproportionately represented in crime 
statistics generally, not merely in traffic offenses. There is no clear 
reason to deduce that this cultural phenomenon necessarily is confined 
to more serious offenses, just as there is no compelling argument for 
extending it to traffic stops. In other words, there is a potential neutral 
explanation that government cannot clearly establish, but that propo-
nents of the discrimination inference probably cannot definitively refute. 
Likewise, African-Americans, as a matter of gross statistics, are eco-
nomically less fortunate as a group than members of other races. This 
economic difference may mean that, as less wealthy citizens, they are 
less likely to have the wherewithal to afford up-to-the-minute main-
tenance of their automotive equipment, such as brakes, taillights and 
mufflers, and thus they may be subjected to a race-neutrally higher inci-
dence of that percentage of traffic stops that flows from the resulting 
kinds of infractions. Unless we examined the percentages of stops at-
tributable to this kind of offense in each racial category, we could not 
definitively answer this argument of opponents, and indeed we could 
not do so convincingly even then.

250. See generally Sourcebook of Criminal Justice Statistics Online, Table 4.10 (visited Aug. 
28, 1998) <http:/lvvw.albany.edu/sourcebook1995/tostL_4.html#4_f (showing percent arrested 
by race for various crimes where percent for “black” category is consistently higher than percent 
represented in general population). For an even more dramatic example of sociological and cul-
tural differences that produce different behavioral statistics by racial categories, see infra notes 
264-70 and accompanying text (reporting that government loan default rates by blacks are more 
than twice those for whites).

251. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, MONEY INCOME IN 
THE UNITED STATES: 1996 (WITH SEPARATE DATA ON VALUATION OF NONCASH BENEFITS) 1-4, 

252. Even if statistics were available for this subcategory of traffic stops, and even if they 
were assigned by race, and even if they reflected significant disparity, we probably still would be 
able to know whether the true correlation happened to be with race or with race-neutral cultural 
and economic factors. But cf. Lambert, supra note 236, at C1 (expressing opinion of statistician 
employed by attorneys for the arrested parties, to the effect that by randomly surveying drivers to
These hypothetical counter-arguments, based as they would be upon cultural and economic generalizations about African-Americans, would sound offensive. They unquestionably would partake of stereotyping. But they also would furnish an alternative inference that opponents of the discrimination hypothesis should be expected to advance, and in reality, the opponents legitimately could argue that such arguments are no more stereotypical than the original inference of racism. From the point of view of the honest state trooper, the inference of discrimination in traffic stops from racial impact may be the aspect of the argument that is most stereotypical and offensive. The law enforcement officer, in other words, might see the accusation against him or her of racism from statistics as more offensive and stereotypical than the neutral-explanation arguments based on cultural and economic differences that also are based on statistics.

Can these difficulties, then, be overcome by a plaintiff attempting to prove discrimination in traffic stops? The Maryland litigation actually has generated more particularized evidence, from which the plaintiffs argue that a sound inference of discrimination can indeed be drawn. The plaintiffs' analyst devised a study that focused upon the number of drivers observed by race, the number observed speeding, and the number stopped. The analyst explains the results as follows: “African Americans made up 13.5 percent of the turnpike’s population and 15 percent of the speeders. But they represented 35 percent of those pulled over. . . . [B]lacks were 4.85 times as likely to be stopped as were others.”

Perhaps these data do better support an inference of discrimination than numbers of drivers and stops alone. To do so, however, they must determine their races, their speeds, and their incidence of stops, one may support a valid inference “that racial profiling is prevalent”). Perhaps one can make this inference by assuming that the offense of speeding occurs at the same rate in all races as all other kinds of violations, including, e.g., equipment violations. Perfect, incontrovertible proof by statistics based upon an unassailable study design is impossible in this context, after all, and less-than-perfect proof is all that is available.

253. As a spokesperson for the Maryland State Police saw the matter: “[W]e were being accused of only stopping African-Americans, and that just wasn’t the case . . . . Each case is based on its own circumstances.” Texeira, supra note 236, at 8A.

254. See Lamberth, supra note 236, at C1 (containing opinion-editorial piece by plaintiffs’ analyst).

255. The analyst refers to himself as a “professional statistician.” Id. However, he is also identified as being “in the psychology department [at] Temple University.” Id. Therefore, instead of resolving the issue of this individual’s appropriate specialty or expertise, this Article adopts the neutral term “analyst.”

256. Id.
be accompanied by the assumption that the observations of speeding accurately represent all legitimate reasons for traffic stops. In effect, the study uses the offense of speeding as a surrogate for all other kinds of violations or reasons for a stop, including those involving equipment, lane changes, or absence of signaling.\textsuperscript{257} If these other kinds of violations happen not to exhibit the same racial distribution as speeding offenses, an inference of discrimination might be inappropriate.\textsuperscript{258} Perhaps, however, speeding accounts for such a high percentage of violations that the potential error is small, or perhaps the plaintiffs can advance reasons for inferring that the racial distribution of offenders is likely to be reasonably consistent for different kinds of legitimate reasons for stops, in which event this potential flaw might not prevent these numbers from furnishing sound evidence.\textsuperscript{259}

However, there is another countervailing consideration in the statistical proof. The plaintiffs’ analyst also reports that searches during traffic stops produce identical rates of contraband for black and white drivers:

More telling are the numbers of those people who are stopped and searched by the Maryland State Police who have drugs. This data... indicates that of those drivers and passengers searched in Maryland, about 28 percent have contraband, whether they are black or white. The same percentage of contraband is found no matter the race.\textsuperscript{260}

This observation appears to be arguable evidence of nondiscrimination, although the plaintiffs’ analyst reports it without labeling it as such.\textsuperscript{261} If African-Americans were selected on a discriminatory basis for a significantly higher percentage of searches, this fact would mean that many of the searches were unjustified by any indications that they would produce contraband. One would expect a lower percentage of

\begin{itemize}
  \item \textsuperscript{257} It is possible that different reasons for stops might show different racial distributions. There are potential bases for inferring the statistical possibility of different African-American participation in some kinds of reasons for stops than others. \textit{See supra} notes 250-51 and accompanying text. Empirical observations would be a better basis for a conclusion about this issue, but the point is that lacking such observations, proponents of the discrimination hypothesis cannot refute the proposition that reasons for stops other than speeding might exhibit different racial distributions than stops for speeding. Of course, every experimental design is subject to some criticism, and the real issue is whether these criticisms affect the reliability of the plaintiffs’ conclusions. It is difficult to determine whether they do from the available data.
  \item \textsuperscript{258} The disparate incidence of stops, then, might be “in spite of” and not “because of” race. For an analysis of cases addressing the “in spite of” and not “because of” issue, \textit{see supra} Part I.C.
  \item \textsuperscript{259} The analyst’s editorial does not address this issue. \textit{See} Lambert, \textit{supra} note 236, at C1.
  \item \textsuperscript{260} \textit{Id.}
  \item \textsuperscript{261} \textit{See} id.
\end{itemize}
searches of blacks, then, to discover drugs. The observation that "[t]he same percentage of contraband is found no matter the race" is an indication that searches are correlated with probable presence of drugs, not with race. This set of numbers, then, furnishes arguable evidence that the searches, at least, are nondiscriminatory, although there also may be alternative explanations. In short, inferences about discrimination from statistics alone may sometimes be valid, but they need to be considered with care, and in particular, one must guard against undervaluing alternate possibilities.

This set of conflicting inferences resembles the controversy several years ago that concerned mortgage lending rates. Proponents of an inference of discrimination advanced arguments based on the lower percentages of African-Americans than whites among potential borrowers whose applications were accepted. Since black applicants were rejected at higher rates than whites, the proponents reasoned, racial discrimination probably was the cause. Such a statistic could, if unexplained by factors other than race, justify at least an inquiry about discrimination. Opponents of this inference, on the other hand, pointed out that the default rates were the same for both groups. If racial discrimination indeed were the causal factor underlying the different rejection rates, one would expect that loans to blacks would produce lower default rates. Similar default rates are at least some evidence, even if arguably not incontrovertible evidence, that lenders reacted to the

262. Id.
263. If, for example, an officer were to search African-Americans intentionally at a higher rate because of a perception that they engaged in drug offenses at a higher rate—in other words, if an officer were to use race as a proxy for probable cause to believe drug offenses actually existed—this conduct would be racially discriminatory, even if the searches ultimately produced the same percentages of contraband between white and black drivers. This inference cannot be drawn, however, from the fact of similar percentages of contraband alone.
264. See Jonathan R. Macey, The Lowdown on Lending Discrimination, WALL ST. J., Aug. 9, 1995, at A8 (explaining how the former head of the Civil Rights Division of the Justice Department contends that discrimination is pervasive in lending practices by banks, largely basing such conclusion on statistical studies).
265. See Jonathan R. Macey, Banking by Quota, WALL ST. J., Sept. 7, 1994, at A14 (reporting that regulators and activists concluded that subtle forms of racism still exist after a finding by the Federal Reserve Bank of Boston which showed that "banks appeared to approve slightly more high-risk applications from whites than from blacks").
266. Cf. supra Part I.A.1 (discussing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
267. See Macey, supra note 265, at A14 (reporting that default rates for white and black mortgage loan applications are equivalent across census tracts).
268. One would assume, in other words, that lenders were accepting only black borrowers who were exceptionally well qualified, while accepting less qualified whites.
269. Incontrovertible evidence is difficult to obtain in such a study. First, "[n]o statistical analysis is perfect." Macey, supra note 264, at A8. The Federal Reserve study was criticized for
predictability of defaults by potential borrowers rather than to their races.\textsuperscript{270} Again, sociological, cultural, or economic characteristics may be differently distributed across the population by race and may account for these numbers. And again, inferences from statistics alone, while not categorically imprudent, must be used with care. It should be added that statistical evidence may be cumulative of other evidence, as in the case, discussed in the next section, of New Jersey’s police chief, but the point is that one must look at all of the evidence.

Perhaps we are doomed always to face this difficulty in confronting racial issues in America.\textsuperscript{271} Inferences of racism often are based on gross generalizations that nevertheless sometimes may support them, and the same can be said of race-neutral counter-inferences. The reason, in part, is that such inferences rarely furnish absolute, definitive proof in individual cases. The drawing of conclusions of either racism or race-neutrality by a judicial decision-maker in such a case is likely to be influenced more by predisposition than in the usual case of fact-finding,\textsuperscript{272} and understandably it may be viewed by whichever party loses as a political decision rather than a judicial one.

3. The Limits of the Judicial Role and the Possibility of Legislative Alternatives

There is another difficulty with the kind of issue exemplified by the driving while black problem. Judicial remedies for such a question are likely to prove either ineffectual, if they are restrained, or impractical, if they are intrusive. The solution of compiling statistics seems likely to lead only to the same “never-never-land” conundrum of competing arguments.\textsuperscript{273} On the other hand, judicial superintendence of traffic stops sufficiently heavy-handed to counteract the disparate statistics and to race-norm the numbers seems likely to devastate the enforcement of traffic laws, without the possibility of proof that it has removed the alleged racism that was unprovable definitively in the first place, while arguably creating new kinds of racial unfairness.\textsuperscript{274} For example, after

\textsuperscript{270} If so, the differential impact was “in spite of” and not “because of” race.

\textsuperscript{271} See supra Part III.B (discussing the difference between black and white views of racism).

\textsuperscript{272} Cf. supra notes 172-78 and accompanying text (discussing the nature and correction of bias).

\textsuperscript{273} See supra notes 249-52 and accompanying text.

\textsuperscript{274} Judicial intervention of this kind would substitute race-based criteria for certain of the
the Maryland litigation about traffic stops, figures in 1996 showed a reduction of searches of African-Americans to 56.7 percent, and an increase in searches of whites to 28.4 percent. The proof actually is to be construed as having supported an inference of discrimination, this result is desirable. If, however, as the Maryland State Police continued to contend, there was no racial discrimination underlying the searches, and the differences resulted "in spite of" and not "because of" race, the shift is undesirable and, in fact, discriminatory. If this interpretation is correct, the police have been motivated by the prospect of damage liability and negative press to search whites on lesser indications of contraband than blacks. It is difficult, then, to avoid the conclusion that the numbers probably reflect some unjustified searches based on race because of the intervention of the law. At the same time, Maryland reduced its drug interdiction force by half, an arguably undesirable result that coincided with the litigation. The effective enforcement of traffic laws and other laws whose violation is detectable from traffic stops is important enough to all citizens of all races, so that its continued vitality may be justifiable even if the allegation that it is racially flawed remains unrebuted, particularly given the practical difficulties of judicial remedies for race-norming such government functions. In summary, the racial discrimination hypothesis in this instance is difficult to prove by statistics, is subject to counter-arguments that also are difficult to prove, and might defy judicial redress even if the proof were accepted.

When faced with a problem of this kind, a court can resort to no single kind of evidence and can hope for no solution other than working hard and carefully. There are some cases, such as Yick Wo v. Hopkins, in which the statistics speak so clearly about discrimination, the weakness of neutral explanations is so obvious, and the crafting of judicial solutions is sufficiently practical, so that failure to act would be judicial abdication. There are others, such as McCleskey v. Kemp, in which the statistical proof is ambiguous, neutral explanations are available, and judicial intervention is imprudent because a court could reasonably infer that government has done its practical best to limit racial discriminants in essential government functions. These concerns may underlie the

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276. See id.

277. See id.

278. See McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (explaining that without strong and
judicial restraint expressed in *Washington v. Davis*, although that case is deeply flawed by its undervaluing of evidence of lack of race-neutral government explanations.

Also, these concerns mean that legislative responses such as a remedial “driving-while-black” bill may be more appropriate than judicial remedies. Congress has the power to define proof standards and to create incentives that are denied the judiciary. Furthermore, Congress can repeal or revise its decisions more easily if experience shows them to be unwise. The executive branch also has power to address these issues and may sometimes do so better than the judiciary. Recently, New Jersey Governor Christine Todd Whitman terminated the State Police Superintendent on the ground that his comments and actions were “inconsistent with our efforts to enhance public confidence in the state police.” The governor’s concern also was with the need for law enforcement to be “carried out free of bias.” It would have been difficult to furnish clear proof justifying action in a judicial forum, because the information upon which the termination was based consisted of statistical inferences combined with the superintendent’s statements to the effect that minority groups were more likely to be arrestees in drug trafficking activity. The superintendent also denounced racial profiling, and he declined to acknowledge that racially discriminatory procedures operated in his command. In any given locality, cultural patterns may produce illegal activities that are predominantly minority-race or non-minority race, and therefore the superintendent’s actions and remarks would not fur-

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279. For example, Congress has the power to enforce the Equal Protection Clause. See U.S. Const. amend. XIV, § 5; see also Katzenbach v. Morgan, 384 U.S. 641, 643-44, 658 (1966) (upholding Voting Rights Act section that overrode state law to extend the franchise to non-English-speaking graduates of Puerto Rican elementary schools on the ground that it was permissible legislation for the purpose of enforcing the Equal Protection Clause); cf. City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (striking down Religious Freedom Restoration Act on the ground that, although Congress’s power is broad, it “contradicts vital principles necessary to maintain separation of powers and the federal balance”). Since the driving while black bill would interfere with only one arena of state power, related to traffic stops, and because it is designed to address a core concern of the Equal Protection Clause, racial discrimination, one might argue that it falls within Congress’s section 5 power. There also are other possibilities for how Congress could demonstrate that it falls within their constitutional power. One such possibility is its commerce power. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (upholding public accommodations sections of Civil Rights Act of 1964 on the basis of the commerce power). Another is its spending power. See South Dakota v. Dole, 483 U.S. 203, 205, 212 (1987) (upholding holdback of highway funds from states that allowed possession of alcoholic beverages by persons under twenty-one on the basis of the spending power).

nish clear evidence of racially discriminatory intent in a judicial forum. The executive, however, had power to consider other factors, including public confidence, and could act upon political choice issues when the judiciary could not.

E. Democratic Process Concerns: Pragmatic Limits on Preoccupation with Purposelessness

This analysis suggests that there is another, more subtle factor at work in these decisions that frequently does not receive express analysis in the opinions. In some cases, the effort to enforce anti-discrimination norms completely would disproportionately hamper legitimate activities of government. Thus, for example, if we were to scrutinize too closely the motives of the previously hypothesized African-American legislator who sponsored a sickle-cell program, and in particular, if we were to adopt a hair-trigger model for proof that her motive was discriminatory, we might interfere with appropriate legislative initiatives. Just by subjecting this legislator to the power of a court and requiring her to articulate an explanation sufficient to satisfy the judiciary, we might discourage the action and elevate one branch over another.281

But worse yet, by an insistence on a test that would identify every potentially wrongful motive, we would interfere with the democratic process in a fundamental way.282 The sickle-cell legislator’s efforts to serve her constituents fits a democratic ideal that is contemplated by the same Constitution that prohibits the discrimination.283 The appropriate service of this legislator’s (African-American) constituents on the one hand, and her arguably more suspect efforts to “do something for” her constituents as African-Americans, on the other, are so closely related that a court might not be able to distinguish them reliably or to redress the alleged violation if it were to find one.284

281. See supra notes 221-25 and accompanying text. There probably are some cases in which this kind of testimony is called for, but they should be limited by judicial awareness of the consequences. Thus, Arlington Heights allows for the possibility that in “extraordinary” cases, legislators’ testimony might be received, while emphasizing their rarity and the availability of legislative privileges. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977).

282. For a general discussion of the relationship among intent, discrimination, and democratic theory, see Foster, supra note 12, at 1070-71.

283. Supreme Court decisions purport to reinforce this constitutional value. See Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) (applying congressional election provisions of the Constitution in order to require districts to be equal as nearly as practicable).

284. Nevertheless, a court might be required in a particular case to make a decision of this kind.
Different, but related, issues are raised by other difficult cases such as *McCleskey* and the driving while black problem. In *McCleskey*, if one were to find a violation, it would be difficult to conceive a complete judicial remedy unless the State were either to abolish jury determinations of death sentences or to abolish capital punishment. In the driving while black situation, systematic judicial responses that would race-norm the statistics might interfere unacceptably with government's responsibility to enforce traffic laws that benefit members of all races. Some of these problems might be reduced by limits upon remedies even if violations were found, but the point is that the judicial restraint built into *Davis* may, to some degree, reflect an appropriate deference to democracy and its institutions.

This concern, however, cannot justify the reduction of government purposelessness to near irrelevance that *Davis* implies. There will be some cases in which necessary discretion produces inevitable instances of racial disparity that cannot fully or unambiguously be explained by reference to race-neutral factors. In such an instance, a court conducting a complete examination of the evidence would not ignore the government's inability to provide a justification. Rather, it would recognize this factor, and yet it would recognize pragmatic limits upon the weight it should be given. Pragmatic limits, therefore, may arise from evidence that the government's failure to advance an explanation may reflect the difficulty of assembling proof, or the inherent difficulty of inferring discrimination reliably even from known facts, or the design of demo-

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286. *See* McCleskey v. Kemp, 481 U.S. 279, 297-98 (1987) (explaining that due to the "uniqueness" of the decisions involved, a court would not infer that the state's administration of its capital punishment system was pursuant to any discriminatory purpose without strong proof).
289. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (implying that before a law will be held unconstitutional because it has a racially disproportionate impact, it must be considered whether or not it "reflects a racially discriminatory purpose").
290. For example, criminal jury trials probably cannot be purged of all possibility of racial bias without abolishing juries, and even race-neutral law enforcement with an inevitable degree of disproportionate impact will be difficult to justify. These concerns may underlie the holding in *McCleskey*, 481 U.S. at 297-98.
291. For example, the statistical proofs that might be desirable, in an ideal world, from either side in a case concerning allegedly discriminatory traffic stops would be Herculean in the real world. *See supra* Part III.D (describing the driving while black problem).
292. For example, *City of Memphis v. Greene*, 451 U.S. 100 (1981), remained a difficult case even though most of the facts were undisputed. In *Memphis*, the Court faced the question of whether a decision by the city of Memphis to close a street leading to an all white community from a predominantly black neighborhood violated the Thirteenth Amendment. *See id.* at 102-03.
HOFSTRA LAW REVIEW

IV. PURPOSELESSNESS AND PRAGMATISM AS VALUABLE EVIDENCE IN RACIAL DISCRIMINATION CASES

Many of the difficulties with the Davis and Arlington Heights formulation would be mitigated if the Supreme Court were to recognize two additional factors as relevant evidence. One factor is the absence of proof that the government's action actually serves a legitimate purpose. Another factor is the pragmatic difficulty in the particular case of measuring, or calibrating, or correcting that purpose.

Yick Wo v. Hopkins is consistent with this conclusion, in that it makes the absence of evidence of legitimate purpose determinative in a case of severe differential impact. The "in spite of" and not "because of" cases, such as Personnel Administrator v. Feeney and Hernandez v. New York fit this approach, because they allow evidence of legitimate purpose to overcome the inference of discrimination that otherwise might arise from severe disparate impact. As for Davis and Arlington Heights, they are troublesome cases that confuse the issue. They do not prohibit evidence of purposelessness. However, the rejection of the absence of justification as evidence in Davis, and the omission of the purposelessness factor in Arlington Heights, tend to undervalue this consideration. Furthermore, the suggestion in both cases that absence of legitimate purpose can arise from the severity of the impact, is flatly illogical, and it further tends to depreciate the significance of this independent factor.

Davis was correct in reasoning that the rigid Title VII formula was not necessary in constitutional cases. In particular, it was not necessary in constitutional cases to create a mandatory presumption of unconstitutionality upon proof of disparate impact in a government pro-

293. See supra Part I.C (discussing McCleskey).
295. See supra Part I.C.
296. See Washington v. Davis, 426 U.S. 229, 248 (1976) (refusing to adopt a rule that would invalidate a neutral law, absent some type of compelling justification, if it results in having a disproportionate racial impact).
298. See Davis, 426 U.S. at 239.
gram, and there is no particular reason to shift the burden of production to government on the issue of legitimate purpose. Absence of proof of legitimate purpose, or weaknesses in that proof, can be considered together with evidence of impact and historical practice. Likewise, evidence of the pragmatic quality of efforts at eradicating the impact or pragmatic difficulties in proving it can be considered as one factor together with others.

Davis and Arlington Heights are dubious decisions, however, to the extent that they undervalue evidence that the government lacks a legitimate explanation for a significant difference in racial impact. Both decisions imply, illogically, that purposelessness is not an independent evidentiary factor, but rather is subordinate to severity of impact and historical inferences or is an inference to be drawn from severity. The jurisprudence would be improved if the Court were to recognize that the government’s lack of an articulable explanation for the disparate impact is relevant, as are all of the pragmatic circumstances that impede its eradication or explanation. This evidence need not be determinative and need not result from a presumption-like shifting of the burden, so long as it is given the weight it deserves in each given case. This approach would resolve the inconsistency in the Supreme Court’s decisions. It also would result in discouragement of unintentional and institutional discrimination in those instances in which it is achievable,299 and it would better reconcile black and white views of the meaning of racial discrimination.300

299. See supra Part III.A.
300. See supra Part III.B.