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Introducing the Jury Exception: How Equal Protection Treats Juries Differently

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INTRODUCING THE JURY EXCEPTION: HOW EQUAL PROTECTION TREATS JURIES DIFFERENTLY

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INTRODUCTION

For nearly a century after the Fourteenth Amendment was passed, Equal Protection did little to protect people of color. With one exception: the jury box. Throughout the last hundred and thirty years, beginning with the seminal 1879 case of *Strauder v. West*

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Virginia[1] and continuing to the present, the Supreme Court has consistently affirmed its protection of blacks on jury venires, grand juries, and petit juries.[2] This course has not been an unblemished one, but overall it is emphatically the most protected area of Equal Protection jurisprudence.

But that's not all. Jury jurisprudence is the only area of Equal Protection jurisprudence that employs something akin to a disparate impact standard and uses a burden-shifting test.[3] The only other areas of civil rights law that use a similar test are those in which Congress intervened: Title VII and Section 2 of the Voting Rights Act.

The Supreme Court's jury jurisprudence is simply different from all other areas of Equal Protection law. The Court has protected juries from discrimination during eras where it did not find discrimination in any other area. Further, jury jurisprudence enjoys a privilege no other area of Equal Protection jurisprudence receives—a burden-shifting test and the ability to prove discrimination with statistics.

Even as the courthouse doors have shut or narrowed in other areas of law, the jury has continued to be protected. Scholars have discussed the special role of the jury, noted the high number of jury cases where courts found discrimination, and kept *Batson v. Kentucky*[4] relevant in the legal discourse; but no one has drawn these together. Together the effect is startling. Juries receive an unparalleled amount of substantive and procedural solicitude.[5] This Note explains why this is so.

This Note proceeds in several parts. Part I examines the state action doctrine—much critiqued, but no longer a hurdle for most Equal Protection plaintiffs. I contend that there are two unexplored aspects of the doctrine that shed light on why the jury cases receive

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1. 100 U.S. 303 (1879).

2. The jury venire, also known as the jury pool, is the overall group selected by jury commissioners. Both the grand jury and petit juries are drawn from this pool. The grand jury's role is to issue indictments; the petit jury, or the trial jury, hears the individual cases and determines verdicts.

3. *See infra*, text accompanying notes 430–33; s*ee also* Hernandez v. New York, 500 U.S. 352, 362 (1991) (stating that disparate impact should be given "appropriate weight"); *see generally* Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. Davis L. Rev. 1359 (2012).

4. 476 U.S. 79 (1986).

5. The only article I came across that comes close to making this claim is Joel H. Swift, *The Unconventional Equal Protection Jurisprudence of Jury Selection*, 16 N. Ill. U. L. Rev. 295 (1996). Swift discusses how the *Batson* jurisprudence is "unconventional", but makes no attempt to explain why. *Id.*

such unique treatment. First, that the actor's identity—whether institutional or individual, a single jury commissioner, a coffee shop owner, or all prosecutors in the state of Georgia—has an impact on the state action analysis. Where the actors are more numerous and the decision making more diffuse, courts generally are less likely to find an Equal Protection violation. Second, I posit that courts have informally adopted two tiers of scrutiny for state action analysis, and that racial discrimination claims pass that threshold more easily. Thus, when the Court turns to the search for invidious intent, the state action doctrine acts not merely as a threshold, but as an implicit factor in the Court's Equal Protection analysis.[6] Part II discusses the different standards the courts use: discriminatory intent for Equal Protection cases, disparate impact for Title VII, and the results test for Section 2 of the Voting Rights Act. I then illustrate the failure of the intent doctrine in the selective prosecution context.

In the last three parts of the Note, I turn to jury jurisprudence itself. Part III surveys the history of jury jurisprudence, which shows the force and duration of the Court's battle against jury discrimination. The first two subparts address discrimination in the jury venire and grand jury. The third subpart discusses discrimination in the trial jury. Specifically, it describes how *Batson* and its progeny revoked the prosecutor's traditional unfettered discretion with peremptory strikes and implemented a burden-shifting test to make such claims relatively simple to prove. Part IV briefly recaps and compares jury jurisprudence to other areas of Equal Protection law. Finally, Part V provides explanations of why this jurisprudence is different. The Court has never explicitly stated that juries should be treated differently or explained why the jury receives special treatment. However, the dicta offers a hint—many of the jury cases glowingly cite the jury as essential to a functional democracy. It is also a narrow area of law to defend, and so more protection for juries may strike cautious Justices as safe, unlikely to open the floodgates. More cynically, I argue that the Court is intolerant of discrimination in jury selection because it happens right before their eyes and violates the sanctity of the courtroom. Because the jury is at the heart of the judicial branch—the fact finder to whom it cedes deci-

6. The terms "discriminatory intent," "invidious intent," "invidious discrimination," and "purposely discrimination" are used interchangeably by the Supreme Court and the courts of appeal. *See* K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL RTS. J. 525, 531–32 (2001). They will be used in this Note interchangeably as well.

sion-making authority—the Justices of the Supreme Court have voted to defend their turf.

I.
THE UNSTATED FUNCTION OF STATE ACTION

The state action doctrine has been designated "a conceptual disaster area."[7] It certainly operates erratically and often defies its stated terms, and this has led to an abundance of scholarship offering reconciliation and explanation. In this Part I argue that the state action analysis in fact does something quite different from what it purports. It claims to be a threshold test, sifting claims that are cognizable as Fourteenth Amendment violations from those that are merely private discrimination. Instead, the state action inquiry often acts as an implicit factor in the Equal Protection analysis, whereby claims with discrete and identifiable actors are more likely to succeed than those with a diffuse group of actors.[8] There is an additional factor at play, albeit not one explicitly acknowledged by the Supreme Court: in cases where racial discrimination is involved, a lower degree of state action is found sufficient.[9] State action doctrine is thus both two-tiered—those involving racial discrimination and those that do not—and actor-dependent—those involving discrete and identifiable actors and those involving a diffuse group of actors. The doctrine does not act as a threshold; it acts as an intuitive holding cell from which the Court determines whether the claim at issue should be set free.

The origin of the state action doctrine is commonly attributed to the *Civil Rights Cases*, a consolidated set of five cases in which the Court, through an eight justice majority, found the Civil Rights Act of 1875 unconstitutional.[10] The Act prohibited individuals from de-

7. Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). Black's statement, and his article, are still heavily discussed and cited. Into the 1980s, Black's article ranked twelfth among the most-cited law review articles, Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1550 (1985), and as of 2012 it was still ranked at 94, Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 100 MICH. L. REV. 1483, 1489 (2012). For recent scholarly exploration of Black, see Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779 (2004); *Developments in the Law – State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1255 (2010).

8. I more fully flesh out this argument in Part II.C.

9. Judge Friendly advanced this theory in his opinions, as well as in Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1291 (1982).

10. The Civil Rights Cases, 109 U.S. 3 (1883).

nying access to public accommodations, facilities, transportation, theaters, and other places of public amusement on the basis of race.[11] First considering the Fourteenth Amendment, the Court found that the enforcement power was limited to providing "modes of relief" against state legislation or state action; it did not permit the promulgation of a code regulating private rights.[12] It noted that "[p]ositive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws."[13] Erwin Chemerinsky argues that the Court was assuming that the states would provide common law remedies for private discrimination and violations of rights—an assumption that proved false.[14]

The Court sought to distinguish individual acts of discrimination, which it conceptualized as "private wrongs" and interferences with "the enjoyment of the right in a particular case,"[15] from the "abrogation and denial of rights."[16] According to Justice Bradley, the Constitution is only intended to remedy that wholesale abrogation, and such a denial is only possible *where the action is supported by state authority or sanction*.[17]

Justice Bradley's standard for what counts as state action is a rigorous one. Its application would severely constrict the scope of judicial oversight, permitting only the most overt state-sanctioned discrimination to pass through the threshold for Fourteenth Amendment scrutiny. Since the *Civil Rights Cases*, however, that standard has largely lacked teeth.[18] While the Court never over-

11. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

12. The Civil Rights Cases, 109 U.S. at 11.

13. *Id.*

14. Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 515–16 (1985); *see also* Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149, 185 (1935) ("[T]he court's assumption [was] that arbitrary exclusion of the negroes was contrary to state law."); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 Rutgers L. Rev. 387, 400 (1967). Chemerinsky's view is supported by Justice Bradley's assertion that legislation under the Fourteenth Amendment "must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect." The Civil Rights Cases, 109 U.S. at 11–12.

15. The Civil Rights Cases, 109 U.S. at 17.

16. *Id.*

17. *Id.*

18. Black, *supra* note 7, at 84–85 (noting that as of 1967, the last time the Supreme Court had explicitly rejected an Equal Protection claim under the state action doctrine was in *Hodges v. United States*, 203 U.S. 1 (1906)). It is also worth noting that when Congress sought to act in the same field again—that is, to ban discrimination in public accommodations in Title II of the Civil Rights Act of 1964—the Court briskly shunted aside the state action problem by holding that

ruled the *Civil Rights Cases*, it expanded the scope of state action, finding more and more types of activity to be state action without clarifying the principles behind the doctrine.[19]

The White Primary Cases provide a good example of this expansion. In a set of cases straddling 1927–53, the Supreme Court found that a statute prohibiting blacks from voting,[20] state Democratic parties' rules prohibiting blacks from joining the party,[21] and private political party's rules prohibiting blacks from joining[22] were all state action. In the latter cases where the actors were private political officials, the most that can be said was that there was state inaction—the state had failed to stop the private actors from instituting discriminatory rules.[23] But that same state inaction permitted monopolization of the electoral process, since these parties' primaries were the only ones that mattered. In these cases the Court seemed sensitive to the growing centralization of political power and to the unique concerns presented by party integration into the state apparatus.[24] The state action in these cases was tenuous at best, but the Court balanced the absence of formal state action against the troubling, continued presence of racial discrimination in the political process. Consequently, the doctrine was manipulated to eliminate the barrier to judicial review in order to eradicate the barriers blocking the threshold to political participation.[25]

This pattern continued in *Shelley v. Kraemer*.[26] Like the White Primary Cases, *Shelley* had little state action on its face. It concerned restrictive covenants, specifically provisions that prohibited blacks from buying or occupying certain properties. These covenants were executed between private individuals and were widely used to keep

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such regulation was permitted under the Interstate Commerce power. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).

19. *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 250; *see also Developments in the Law – State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1258 (2010).

20. Nixon v. Herndon, 273 U.S. 536, 540–41 (1927).

21. Nixon v. Condon, 286 U.S. 73, 89 (1932); Smith v. Allwright, 321 U.S. 649, 664 (1944).

22. Terry v. Adams, 345 U.S. 461, 484 (1953).

23. *See id.*; *Smith*, 321 U.S. at 664; *Nixon*, 286 U.S. at 88.

24. This idea had its roots in a lecture given by Samuel Issacharoff, in his course titled "The Law of Democracy" at New York University School of Law (Feb. 15, 2011).

25. *See Developments in the Law – State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1258 (2010).

26. 334 U.S. 1 (1948).

certain neighborhoods lily-white.[27] The petitioners in *Shelley* were African American renters and homeowners litigating against property owners who had gone to local courts to enforce the covenant.[28] The lower courts ordered the petitioners to vacate and further enjoined them from occupying the property in the future.[29] The Court found that the covenants in and of themselves were voluntary, private, and outside the scope of the Fourteenth Amendment,[30] such that the only state action at issue was the court order.

The Court found it indisputable that the lower court's order qualified as state action.[31] It began by noting that the state action doctrine applied to actions taken by all branches of government—administrative, executive, legislative, and judicial.[32] It rejected arguments that the action was immunized either because it was only a state common law policy or because the pattern of discrimination initially was defined by private agreements.[33] Those factors were not determinative; by permitting the judiciary to enforce these contracts, "the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights."[34] Or as Arthur Leff put it, "behind every [American] Judge stands ultimately the naked power of the 101st Airborne."[35] Considered in such a light—where private choices are constrained by the equally private, but fully enforceable, rights of others—the Court held that the judicial orders in question bore the "clear and unmistakable imprimatur of the State."[36]

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27. *See, e.g.*, Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POLI. SCI. Q. 541 (Winter 2000-01).

28. *Shelley*, 334 U.S. at 6.

29. *Id.* at 6–7.

30. *Id.* at 13. Restrictive covenants were not banned per se until the passage of the Fair Housing Act in 1968. Civil Rights Act of 1968, Pub. L. No. 90-284 (codified at 42 U.S.C. § 3601 (1968)). Although no longer enforceable, a recent study by the University of Washington–Seattle's Civil Rights and Labor History Project identified racially discriminatory language in the deeds of 400 properties in Seattle and its suburbs alone. The legacy persists. *See* Greg Latshaw, *Racism Shadows Property Covenants*, USA TODAY (Aug. 3, 2010), http://www.usatoday.com/news/nation/2010-08-03-racistcovenants03_ST_N.htm.

31. *Shelley*, 334 U.S. at 14.

32. *Id.* at 15.

33. *Id.* at 20.

34. *Id.* at 19.

35. Arthur Allen Leff, *Law and*, 87 YALE L.J. 989, 997 (1978).

36. *Shelley*, 334 U.S. at 20.; s*ee also* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923). At the time, it was widely thought that *Shelley* made all private conduct state action. *See, e.g.*, Donald M. Cahen, Comment, *The Impact of* Shelley v. Kraemer *on the State Action Concept*, 44

In *Burton v. Wilmington Parking Authority*, decided during the height of the Civil Rights Era, the Court squarely admitted that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an impossible task which this Court has never attempted. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[37] The Court found that a coffee shop that leased space from the municipal Parking Authority was a state actor because as tenant, the coffee shop was dependent on the Parking Authority landlord.

In the decades since *Burton*, several lines of jurisprudence have evolved, but no clear rule has emerged. The interdependence cited in *Burton* has become the first of three major strands. This first strand—commonly referred to as a "symbiotic relationship"—governs cases in which the government has "so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in the challenged activity."[38] A

CAL. L. REV. 718, 733 (1956). After all, it seemed to hold that any private infringement on individual rights, as long as it was permitted by state law and then brought into court, was state action. While the decision has been called "irresistibly correct," see William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 44 (1961), it also would seem to be "a repudiation of the state action principle altogether"—although BeVier and Harrison point out that *Shelley* has been interpreted narrowly, Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1798, 1801 (2010). Certainly there are questions of scale. There is little doubt that a homeowner has control over whom she will permit to visit her house. David Strauss uses this very example as an illustration of why *Shelley* is doctrinally unsound, and notes that time has shown those fears to be unfounded in practice. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 967 (1989). But where there is a more widespread, and legally enforceable, rule that forbids people of a certain race to live in certain areas, *Kraemer* will kick in and find unconstitutional state action. *See* Alstyne & Karst, at 45–46. Alstyne and Karst further discuss the built-in assumptions that call the homeowner's ejection of the unwanted guest of color: "The state is *not* neutral in preferring control over private property ahead of full racial equality in this circumstance; rather, it has 'structured' its legal system by making a choice of values." *Id.* (quoting Terry v. Adams, 345 U.S. 461, 484 (1953) (Clark, J., concurring)). It became clear over time that the Supreme Court was unwilling to expand *Shelley* past its facts, which Chemerinsky compellingly argues has led to irreconcilable precedents. After all, if it only takes court action to create state action, then any discrimination enforced by a court should be considered state action under *Shelley*. Chemerinsky, *supra* note 14, at 526.

37. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (quoting Kotch v. Bd. of River Port Pilot Commr's, 330 U.S. 552, 556 (1947)).

38. *Burton*, 365 U.S. at 725 (alteration in original).

number of these cases have involved the use of state property,[39] but the chief concern is whether the state places "its power, property and prestige" behind the private discrimination, thus becoming a joint participant in the discrimination.[40]

The second strand covers a group of cases commonly known as the "public function" cases. These cases encompass a fairly broad range of activities and find state action when the state delegates a power "traditionally exclusively reserved to the State" to a private party, thereby endowing the private conduct with the imprimatur of the state.[41] What the Court considers a public function is surprising. For example, in *Jackson v. Metropolitan Edison Co.* the provision of utilities was found to be outside the scope of the "public function" test.[42] The appellant demanded notice and a hearing before her services were terminated, but the Court held that a private company need not comply with Due Process.[43]

A few years later, *Flagg Brothers, Inc. v. Brooks*[44] clarified an issue *Jackson* left ambiguous: whether the activity need only be "traditionally associated with sovereignty"[45] or instead "traditionally *exclusively* reserved to the State."[46] *Flagg Brothers* was essentially a takings case. The Brooks family had been evicted and their furniture moved by the city marshal into the Flagg brothers' warehouse.[47] Several

39. *See, e.g.*, McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971) (finding a symbiotic relationship regarding an apartment building built under supervision of the Federal Housing Authority); Hammond v. Univ. of Tampa, 344 F.2d 951 (5th Cir. 1965) (finding that admissions practices of a private university evinced a symbiotic relationship where the university used city buildings and city land).

40. *Burton*, 365 U.S. at 725.

41. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

42. *Id.* at 352–53.

43. The Court did look to other factors, such as the extensive state regulation of utilities and the partial monopoly on the provision of electricity, but found that they did not satisfy the requirement that there be a "sufficiently close nexus between the State and the challenged action of the regulated entity." *Id.* at 351. The decision hinged on several contentions—the most critical of which was a blind, unexamined reliance on two Pennsylvania state decisions from the late 1800s, where the courts had ruled that providing an essential public service was neither a state function nor municipal duty. *Id.* at 353. The Court did not probe into the logic of these antique Pennsylvania decisions or inquire whether the underlying premises had changed. It simply cited them. From this faulty foundation, rooted in a very different era of public utilities, the Court proceeded to reject any expansion of state action to activities vital to public life, but which were not themselves a traditional government service.

44. 436 U.S. 149 (1978).

45. *Jackson*, 419 U.S. at 353.

46. *Id.* at 352 (emphasis added).

47. *Jackson*, 436 U.S. at 152.

months later, the bill unpaid, the warehouse notified Mrs. Brooks that if the account were not paid in ten days, the furniture would be sold.[48] The warehouseman's power to proceed directly to executing the lien, without first holding a hearing or involving the sheriff, was granted by a New York statute.[49] Unlike *Shelley*, the alleged violators never sought to enforce their claim in court—they did not need to, since the statute allowed them to bypass this step. So instead, the Brooks filed a claim under 42 U.S.C. § 1983 in district court, seeking damages and an injunction.[50]

The Supreme Court held that exclusivity was the essential factor.[51] Traditional association of an activity with government is insufficient for a delegation of authority to a private actor to be considered state action.[52] The Court stated that the areas of true exclusivity were few, and listed elections (the White Primary Cases) and running a town (the company town)[53] as two examples.[54] Paul Brest questions whether even these seemingly clear-cut examples are as obvious as they appear.[55] After all, the "function" in the White Primary cases was not *conducting* the election, but rather *determining the results* of the election—blacks could vote in the general election, just not in the Democratic party's primaries. But the Democratic party's primaries were "the only meaningful elections in Texas."[56] And while the company at issue in *Marsh* owned all the property in the town, from sidewalks to sewers,[57] it did not carry out many of the other functions municipalities generally do. It did not tax, hold elections, or operate libraries or schools.[58] In the end, Brest argues, this account is inherently indeterminate and invites manipulation.[59]

The Court also rejected the proposition that the State's mere authorization, encouragement, or acquiescence makes something state action.[60] Writing for the majority, Justice Rehnquist pointed

48. *Flagg Bros.*, 436 U.S. at 153.
49. *Id.* at 155.
50. *Id.* at 153.
51. *Id.* at 159.
52. *Id.* at 154–55, 157–58, 163.
53. Marsh v. Alabama, 326 U.S. 501 (1946).
54. *Flagg Bros.*, 436 U.S. at 158.
55. Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1327–29 (1982).
56. *Flagg Bros.*, 436 U.S. at 159.
57. *Marsh*, 326 U.S. 501, 502 (1946).
58. Brest, *supra* note 55, at 1328.
59. *Id.* at 1327, 1329.
60. *Flagg Bros.*, 436 U.S. at 164–65.

out that to permit such a view would swallow the rule and convert all private action to state action, since the state is always either denying or granting relief, whether by acting or failing to act.[61] Justice Rehnquist seemed to link the presence of state action to the overtness of the official involvement.[62] The decision distinguished other Supreme Court cases that involved self-help and garnishment statutes by citing the ministerial assistance of court clerks who had ordered summonses in those cases.[63] The statutes are very similar, but the Flagg brothers did not enlist any officials to aid them, and Mrs. Brooks named no state officials as defendants. The state involvement in this case came solely from the authorizing statute. In dissent, Justice Stevens pointed out the irony: it was the state's nominal supervision that made the action unconstitutional in the prior cases; the statutes were ruled unconstitutional because they put the power in the hands of private actors and had abdicated effective state control.[64] But when the statute remains and the official supervision is entirely *removed*, that action is now private and so constitutional review is precluded.[65]

It seems achingly contrived to say that the Flagg brothers—who were able to bypass court involvement in enforcing the lien because a statute so authorized them—were not state actors, while the holders of the restrictive covenants in *Shelley* became state actors as soon as they walked through the courthouse doors. Hinging judicial review on such a nominal distinction attributes massive consequences to what is likely unintended legislative decision making, and certainly was no part of a comprehensive legislative judgment. It also incentivizes the legislature to pass more statutes like that in *Flagg Brothers*, and put more power into the hands of private actors—less governmental supervision may lead to more constitutional violations.

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61. *Id.*

62. *Id.* at 157.

63. *Id.* (distinguishing North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)).

64. *Id.* at 174–75.

65. *Id.* at 175 (Stevens, J., dissenting). The Court also looked to the availability of other remedies in making its determination. Characterizing *Flagg Brothers* as a dispute-resolution case, the Court noted that other options, such as replevin, were possible, thus the threatened sale was not the sole potential remedy. *Id.* at 160. The availability of other remedies—not simply a judicial appeal, but an alternative mechanism to resolve the dispute—permitted the Court to comfortably reject the notion that this action should be characterized as sovereign. After all, the sovereign is that which coerces, from whom there is no external recourse.

Taken as a whole at face value, the case law is confounding. Judge Friendly suggests that some of the confusion can be cleared up by looking to race.[66] Because racial discrimination is particularly pernicious, he argues, courts ought to be especially vigilant in demanding that states avoid supporting discriminatory private conduct.[67] Therefore, "while a grant or other index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of 'state action' when the action in question is alleged to affront other constitutional rights."[68] The result in *Jackson*, he posits, would have been different if the power company had refused to provide service to blacks.[69] Friendly's comment suggests that even though tiers of scrutiny are not formally present in the state action analysis, that calculation lurks below the surface. This argument goes far to explain the disparities between *Burton*, on the one hand, and cases such as *Jackson* and *Flagg Brothers*, on the other.

Judge Friendly's position has been taken up by a number of circuit and district courts, from his own Second Circuit to the District of Columbia, the Ninth Circuit, and the Northern District of Ohio.[70] It has also been recognized by scholars.[71]

However, another pattern emerges from the case law. A finding of state action is a prerequisite for engaging in an Equal Protection analysis; as with any threshold test, a negative finding permits the courts to bow out early rather than let the case progress. In borderline cases, and especially where the discrimination affects less protected groups (such as the utility holders in *Jackson*), the state action doctrine creates leeway for judicial minimalism. It permits a court to rule at the outset that the connection to government is too attenuated and to avoid the protracted and fact-intensive scrutiny of an Equal Protection analysis.

That attenuation is the other piece of this puzzle. In the last fifty years, the test for state action shifted from seeking an actor to

66. Friendly, *supra* note 9, at 1291.

67. *See, e.g.*, Weise v. Syracuse Univ., 522 F.2d 397, 406 (2d Cir. 1975).

68. Grafton v. Brooklyn Law Sch., 478 F.2d 1137, 1142 (2d Cir. 1973)

69. Friendly, *supra* note 9, at 1291.

70. *See* Ripon Soc'y, Inc. v. Nat'l Republican Party, 525 F.2d 567, 619–20 (D.C. Cir. 1975) (Bazelon, J., dissenting); Weise v. Syracuse Univ., 522 F.2d 397, 405 (2d Cir. 1975); *Grafton*, 478 F.2d 1137; Adams v. S. Cal. First Nat'l Bank, 492 F.2d 324, 341 (9th Cir. 1973); Anderson v. Randall Park Mall Corp., 571 F. Supp. 1173, 1175 (N.D. Ohio 1983).

71. *See, e.g.*, Dilan A. Esper, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 683, 714 (1995).

examining the function.[72] The *Civil Rights Cases* and *Shelley* looked for an action by an actual employee of the state—a legislative statute, an official's stamp of approval, a judge's order. Even as late as *Flagg Brothers* the remnants of this approach lingered, as the Court sought at least a nominal state actor, clerk, or notary. Where an actor can be found—an evil jury commissioner or the owner of the Eagle Coffee Shop who refuses to serve blacks—a judicial finding of state action is straightforward. But where the power and the actors are more diffuse, blame is harder to mete out. So the actor requirement became stretched over time, from robust to flimsy, until it crumbled altogether. In those ruins, the Court set up a roosting spot for its inchoate worries about policing diffuse discrimination. Since state action is a threshold requirement, it permits courts to cut certain cases off at the pass. The doctrine's very incoherence makes it suitably malleable.

II.
THEORIES OF INTENT

A. The Evolution of Equal Protection Intent Doctrine

The Equal Protection intent standard is now firmly ensconced in the jurisprudence. But neither the basic premise nor its contours were inevitable. The Supreme Court had a number of options available and the *Davis* and *Feeney* decisions were dictated more by sociopolitical context and expedience than judicial precedent. This Section recounts and critiques the development of the purposeful discrimination test.

The Supreme Court did not directly address the question of motive in Equal Protection until *Palmer v. Thompson*.[73] When it did—despite being confronted with a vehemently divided circuit court opinion—the Court refused to address it head-on. The case involved the swimming pools of Jackson, Mississippi.[74] In 1962, a district court provided declaratory relief to three plaintiffs that the pools be integrated.[75] In response, the city closed all the pools, announcing that integrated pools would be a threat to public safety and could not be economically operated.[76] The Fifth Circuit, sitting en banc, affirmed 7-6 that closing the pools was not an Equal Pro-

72. This scrutiny of function rather than actor opened the door for unexpected innovations in the jury jurisprudence. *See infra* text accompanying notes 531–39 (discussing *Edmonson v. Leesville Concrete Co., Inc.*).

73. 403 U.S. 217 (1971).

74. *Palmer*, 403 U.S. at 218–19.

75. Clark v. Thompson, 206 F. Supp. 539, 542 (S.D. Miss. 1962).

76. Palmer v. Thompson, 419 F.2d 1222, 1225 (5th Cir. 1969).

tection violation. The majority looked to a sliding scale of public functions; while closing the pools was indisputably a state action, it noted that providing public pools is a discretionary public function. The court decided that there is no constitutional right to swimming pools and thus no Equal Protection claim to them can be made.[77]

Turning to the plaintiff's claims of racial motive, the majority found the city's assertion of economic viability sufficient.[78] The court noted that "even though such motive *obviously stemmed* from racial considerations, we know of no prohibition to bar the City from taking such factors into account and being guided by conclusions resulting from their consideration."[79] The concurrence explored this somewhat further, distinguishing "mere racial motivation" from "racially discriminatory purpose."[80] While public officials may consider race, they just may not do so with invidious intent.[81] The six dissenting judges noted that the public safety excuse had been rejected by the Supreme Court in *Cooper v. Aaron*, the Little Rock school case.[82] They also noted that the pools had never been operated economically; they had consistently operated at a loss, with entrance fees that were intentionally kept low.[83] The dissenters found it astonishing that the court could accept the flimsy excuses the city professed after such a long exposure to so many forms of discrimination.[84]

The Supreme Court largely echoed the majority's analysis. That this was state action was certain, but that the Fourteenth Amendment does not guarantee access to swimming pools was equally so. The Court also refused to consider a theory based on *Reitman v. Mulkey*,[85] that the closing of the pools authorized or encouraged discrimination, saying that the record failed to support such a claim.[86]

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77. *Id.* at 1226.

78. *Id.* at 1227–28.

79. *Id.* at 1228 (emphasis added).

80. *Id.* at 1229.

81. *Id.* at 1228; *see also id.* at 1229 (Bell, J., concurring).

82. *Palmer*, 403 U.S. at 1230 (Wisdom, J., dissenting) (citing Cooper v. Aaron, 358 U.S. 1, 16 (1958)).

83. *Id.* at 1231.

84. *Id.* at 1229.

85. Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (holding a California state constitutional amendment which authorized racial discrimination in the private housing market to be unconstitutional because it would "encourage and involve the State in private discriminations").

86. Palmer v. Thompson, 403 U.S. 217, 223–24 (1971).

Turning to the racial motivation claim, the Court stated succinctly that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[87] It described briefly the "pitfalls" and "futility" of taking such an approach, since it would be "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."[88] Beyond this, the Court declined to consider intent.

This perspective on intent is tidily in line with a case decided just three months prior, *Griggs v. Duke Power Co.*[89] *Griggs* was a Title VII employment discrimination case, and accordingly, the Court was applying a statutory—not a Fourteenth Amendment—analysis.[90] However, the Court's approach to intent between these two cases was consistent. The district court and the court of appeals had both examined whether there was discriminatory intent behind the employer's adoption of a high school diploma requirement and found none.[91] Duke Power Company, which had previously been intentionally segregated, instituted a requirement after *Brown v. Board of Education* and Title VII that in order to work in some departments, employees must pass a number of examinations.[92] Incumbent white employees were exempted from this requirement.[93] While there was no documentation indicating that this requirement was adopted with the express purpose of segregating the departments, there was also little doubt that this would be the effect.[94]

The Supreme Court held that intent was not the critical question and reversed. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[95] Courts must look to the consequences of employment practices, and deter-

87. *Id.* at 224.

88. *Id.* at 224–25. For further exploration of the problem of discerning legislative intent, see Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–18 (1997); Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, IN LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 336 (Andrei Marmor ed., 1995); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) (discussing problems of agenda setting).

89. 401 U.S. 424 (1971).

90. The importance of this distinction will be addressed in length in Part II.B.

91. *Griggs*, 401 U.S. at 428.

92. *Id.* at 427–28.

93. *Id.* at 427.

94. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 719 (2006).

95. *Griggs*, 401 U.S. at 432.

mine if the procedure acts to "'freeze' the status quo of prior discriminatory employment practices"[96] or whether the employer has successfully carried its burden and proven that the mechanism serves a legitimate business purpose.[97]

At the time, *Griggs* was viewed as establishing that disparate impact alone was sufficient to establish a violation of Title VII.[98] An intent requirement was roundly rejected, as it had been in *Palmer*, but to opposite effect. Refusal to see discriminatory intent in *Palmer* had meant that all the pools in Jackson stayed closed, both for blacks and whites. In *Griggs*, the lower courts' intent requirement was struck down and the roadblock to integrating the workplace with it.

Michael Selmi observes that the question of intent had not been the focus in the lower court opinions or in the briefs for *Griggs*.[99] Most of the analysis below had concerned the tests themselves and which practices would be found to violate Title VII.[100] To the extent that intent had been discussed, it was to equate "unvalidated" tests—that is, tests without a valid business justification—with intentional discrimination.[101] But between 1971 and 1976 there was considerable discussion in the courtroom and the academy regarding intent. *Washington v. Davis* references dozens of cases decided during that period that employed a disparate impact theory.[102] The year before *Palmer*, John Hart Ely published the first major analysis of the role of intent in constitutional law.[103] He examined impact and motive theories and rejected the "dominant motive" inquiry.[104] Instead, he proposed that where there is room for discretion, the inquiry should be whether the decision maker employed unconstitutional criteria in making a choice.[105] Immediately after *Palmer* was handed down, Paul Brest published an article cataloging the case's failures and criticizing Ely for giving insuffi-

96. *Id.* at 430.

97. *See* 42 U.S.C. § 2000e-2(h).

98. Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 961–62 (1993).

99. Selmi, *supra* note 94, at 722–23

100. Griggs v. Duke Power Co., 420 F.2d 1225, 1231–35 (4th Cir. 1970); Griggs v. Duke Power Co., 292 F. Supp. 243, 249–250 (M.D.N.C. 1968).

101. *Griggs*, 420 F.2d at at 1232; Selmi, *supra* note 94, at 722–23.

102. Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (citing 17 district court and court of appeals cases applying disparate impact to areas including public employment, zoning, and public housing).

103. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970)

104. *Id.* at 1267.

105. *Id.*

cient guidance on how to implement judicial review of motivation.[106]

It was Brest's blueprint that the Court eventually adopted,[107] but it was certainly not the only path the Court could have chosen. David Strauss concisely outlines the five possible models that were available to the Court arising primarily out of *Brown v. Board of Education* and *Strauder v. West Virginia*: lack of impartiality, subordination, stigma, second-class citizenship, and encouragement of prejudice.[108] Each model has its advocates and critics, but the first has clearly won the day.

In *Washington v. Davis*, the Court conclusively stated that disparate impact analysis may be used in Title VII cases, but not in Equal Protection.[109] *Davis* was in many ways similar to *Griggs*. For instance, both cases involved tests—in the case of *Davis*, a literacy test required by the Washington, D.C. police department.[110] The plaintiffs did not claim discriminatory intent, only that the test bore no relation to job performance and that it had a highly discriminatory impact in screening out black applicants.[111] The court of appeals ruled that the impact alone was sufficient to establish a constitutional violation; the court did not look for intent.[112]

The Supreme Court reversed. Inscrutably rejecting precedents to the contrary, from *Palmer* to the jury discrimination cases[113] to dozens of district and appellate court cases,[114] Justice White held that a plaintiff must prove discriminatory intent to prevail on an Equal Protection claim.[115] He elected to follow a course that had been laid out in *Keyes v. School District No. 1*, which distinguished de jure from de facto segregation by looking to intent to segregate.[116]

106. Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95.

107. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.12 (1977) (citing Brest during the Court's discussion of the *Arlington* factors).

108. Strauss, *supra* note 36, at 940–46.

109. Washington v. Davis, 426 U.S. 229, 246–48 (1976).

110. Today, this case would be litigated under Title VII. But *Davis* was filed in 1970 and Title VII was not held to be applicable to public employees until 1972. *See* Davis, 426 U.S. at 236 n.6. The tests were thus challenged on constitutional grounds.

111. *Id.* at 235.

112. *Id.* at 237.

113. *See, e.g.*, Hill v. Texas, 316 U.S. 400 (1942); Avery v. Georgia, 345 U.S. 559 (1953); *infra* notes 424–38.

114. *See* laundry list, *supra*, note 113.

115. Washington v. Davis, 426 U.S. 229, 239–42 (1976).

116. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205 (1973).

Various considerations may have influenced the Court's decision. Perhaps foremost is the floodgates argument. The majority opinion itself bluntly states that a generally applicable impact rule "would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[117] The Court cited a laundry list of cases that had been decided on an impact standard since *Griggs*.[118] That list was daunting, and that was after only four years of litigation. Some of those cases had made it up to the Court, and so the justices had gotten a glimpse of what the future might hold. Selmi additionally points to other shifts in the civil rights movement, including the judicial headache over school busing culminating in *Milliken v. Bradley*, in which the Court had essentially admitted impotence.[119]

By the time it decided *Davis*, the Court had already granted certiorari in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[120] In fact it had granted that petition six months prior to handing down *Davis*, and when *Davis* came down other disparate impact petitions were still pending.[121] *Arlington Heights* concerned rezoning. The suburb had traditionally been zoned for single-family housing and in 1971 there were proposals to build low- and moderate-income, multiple-family buildings. The construction was to be subsidized in part with federal funds, which required affirmative marketing for racial integration. Approximately 40% of Chicago residents eligible to move into this housing were black. In 1970, only twenty-seven of the suburb's 64,000 residents were black.[122] The rezoning meetings drew large crowds, some of which were demonstrably and vocally opposed to the proposal.[123] After the hearings, the board denied the rezoning proposal by a 6-1 vote.[124]

The Supreme Court reaffirmed that racially discriminatory intent must be proven for Equal Protection claims and gave more

117. *Davis*, 426 U.S. at 248.

118. *Id.* at 244 n.12.

119. *See* Selmi, *supra* note 94, at 727–28. In *Milliken v. Bradley,* 418 U.S. 717 (1974), the Court backed away from policing school integration, stating that it was now a matter of private choice rather than state action. *Id.* at 746–47.

120. 423 U.S. 1030 (1975) (cert. granted Dec. 15, 1975).

121. Certiorari was denied in *Tyler v. Vickery* on June 14, 426 U.S. 940 (1976), exactly a week after *Davis* was decided.

122. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 255 (1977).

123. *Id.* at 256–59.

124. *Id.* at 258.

concrete guidance to plaintiffs and courts regarding what evidence would establish discriminatory purpose. The Court stated that disparate impact could be considered, but would not be determinative.[125] It laid out what have come to be known as the "Arlington Factors:" (1) the historical background of the decision, particularly if it reveals a series of actions taken by the decision maker for invidious purposes; (2) the specific sequence of events leading up to the challenged decision, which may shed light on the decision maker's purposes; (3) departures from the normal procedural sequence that demonstrate that improper motives played a role in the decision; (4) substantive departures by the decision makers, particularly if the factors usually considered important by the decision makers strongly favor a decision contrary to the one reached; and (5) legislative and administrative history behind the challenged decision, such as contemporary statements by decision makers or reports.[126]

This evidentiary scheme assumes that the relevant mental state is connected to tangible objective factors and that scrutinizing the historical and social background could enable a court to decipher the decision maker's intent.[127] That's quite an assumption. It presupposes that relevant information has been recorded, can be extracted, and will be available in sufficient bulk to meet the burden of proof. Scholars exposing the difficulty of this standard are numerous[128] and a whole field of scholarship has developed around unconscious stereotyping.[129] Anthony Page, later quoted by Justice

125. *Id.* at 264–65.

126. *Id.* at 267–68.

127. *See* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1077 (1998).

128. *See, e.g.*, Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 114–16 (1977); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 548–49 (1977); Robert G. Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. REV. 961, 1001; Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

129. *See, e.g.*, Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century:*

Breyer, put it simply: "[G]ood people often discriminate, and they often discriminate without being aware of it . . . subtle forms of bias are automatic, unconscious, and unintentional. The implication of these subtle forms of bias is that people—observers and actors alike—cannot so easily detect, name, and control them. They escape notice."[130]

In his concurring opinion in *Davis*, Justice Stevens tried to soften the blow. He submitted that:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker.[131]

The Court, however, vetoed the foreseeability approach only three years after *Davis* in *Personnel Administrator of Massachusetts v. Feeney*.[132] Helen Feeney had received top scores in several Massachusetts civil service exams, but because Massachusetts law had a lifetime, absolute preference for veterans, she had repeatedly been denied positions.[133] Over 98% of veterans were male, which the Court attributed to the federal statutes and policies that had restricted women's enrollment in the armed forces, as well as to the fact that women have never been subjected to a military draft.[134] As a result of these policies, both the Supreme Court and the lower courts forthrightly acknowledged that this rule overwhelmingly benefited males and had a "devastating impact" on women's employment opportunities.[135]

But that was not enough, the Court explained. Perhaps if there were no neutral way to explain the law, this impact could be

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Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine, 40 CONN. L. REV. 1175 (2008).

130. Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160–61 (2005) (internal citations omitted). Justice Breyer quoted this language with his concurring opinion in *Miller-El v. Dretke*, 545 U.S. 231, 268 (2005).

131. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

132. 442 U.S. 256, 279 (1979).

133. *Id.* at 264.

134. *Id.* at 269–70.

135. *Id.* at 260, 269–70.

enough, but the reasons behind the law could not plausibly be explained as invidious.[136] Rather, as noted in a footnote, their intent was beyond question: "[v]eterans' preference laws have been challenged so often that the rationale in their support has become essentially standardized."[137] Such preferences were intended as a reward for military service and to ease the transition back to civilian life.[138] And so, though it would be "disingenuous to say that the adverse consequences of this legislation for women were *unintended*, in the sense that they were not volitional or in the sense that they were not foreseeable," discriminatory 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."[139] The Court stated that it was inevitable that the Massachusetts rule would heavily disadvantage women, albeit hiding this concession in a footnote.[140] Inevitability may generate an inference of intent, but that inference is only "a working tool, not a synonym for proof;" where other evidence support invidiousness, "the inference simply fails to ripen into proof."[141] In other words, inevitable does not mean intentional.[142]

As Marjorie Weinzweig points out, the effect of *Feeney* is to sever the objective from the subjective.[143] The new intent requirement goes far beyond that described in *Davis*. Sheila Foster argues that "in *Feeney* objective factors may be 'signs' or 'symptoms,' but not alone constitutive of intent. Proving intent here requires an 'isolated "inner" mental event' separate from the social and historical context in which the action arises."[144] Proof of external factors is not enough. Proof that disparate consequences were plainly fore-

136. *Id.* at 275.

137. *Id.* at 265 n.12.

138. *Id.* at 265.

139. *Id.* at 278–79 (emphasis added).

140. *Feeney*, 442 U.S. at 279 n.25 (calling the impact on women an "unavoidable consequence" of the policy).

141. *Id.*

142. *Id.* at 278.

143. Marjorie J. Weinzweig, *Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem*, 1 LAW & INEQ. 277, 293–94 (1983).

144. Foster, *supra* note 127, at 1083–84 (citing Weinzweig, *supra* note 143, at 293–94 and 302–03).

seeable, or even inevitable, is not enough. Instead, discrimination must have been a considered goal.[145]

The *Feeney* standard has been compared to the "specific intent" required by criminal law.[146] As laid out in *Feeney*, intent is equivalent to the highest mens rea of "purposely," and above "knowingly," "recklessly," and "negligently."[147] The Model Penal Code defines "purposely" as having the "conscious object to engage in conduct of that nature or to cause such a result."[148] Applying *Feeney* means delving into the minds of the decision makers and demonstrating that they were acting with deliberate malice toward a protected group. Unlike in criminal law, where mental state can be inferred from the attendant circumstances,[149] *Feeney* prohibits such inferences. As Weinzweig explains, a "separate, additional inference is required to establish the existence and nature of the intent *itself*. No connection necessarily exists between the symptoms and the true subjective event—the intent: the intent might *not* be discriminatory no matter how strong the evidence of discrimination provided by the symptoms."[150] While the *Davis* rule can be viewed as reflecting the common law tradition of not subjecting a party to liability without establishing causation and culpability,[151] *Feeney* represents an evisceration of all the lower mental states, commonly used in torts and criminal law, as factors in the Equal Protection context. It is the equivalent of deciding that someone can be punished only for murder with malice aforethought, but there is no liability—civil or criminal—for manslaughter.

Pam Karlan argues that we should expand the scope of culpability.[152] Instead of limiting scrutiny to purpose-or-nothing, she proposes a two-part test. First, a foreseeability analysis to determine whether the actors had an actual or a constructive awareness that their actions posed a substantial risk of harm to a protected group.[153] Second, a liability analysis in which the court would ex-

145. Foster, *supra* note 127, at 1082.

146. *See id.* at 1085; Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 121–22 (1983); *see also* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113 (1989).

147. *See* MODEL PENAL CODE § 2.02(2) (1962).

148. *Id.* at §2.02(2)(a).

149. *See, e.g.*, United States v. Bailey, 444 U.S. 394, 417 (1980) ("The key elements are capable of objective demonstration; the *mens rea*, as discussed above, will usually depend upon reasonable inferences from those objective facts.").

150. Weinzweig, *supra* note 143, at 294.

151. K.G. Jan Pillai, *supra* note 6, at 530.

152. Karlan, *supra* note 146, at 112.

153. Karlan, *supra* note 146, at 128.

pand its focus and assess the actor's culpability for taking that risk in light of countervailing concerns and the interests of third parties.[154] This is essentially an evaluation of how compelling the stated government interest is, although even a truly compelling interest would not survive scrutiny if the harm to a protected group were sufficiently grave.

In operation, the *Davis-Feeney* standard has proven insurmountable, blind to the realities of how bias and discrimination operate. As this discussion illustrates, this path was by no means the only possible result. But since handing down the intent test, the Court has not once found discrimination against non-whites.[155]

B. Statutory Departures from the Equal Protection Intent Doctrine

As mentioned above, *Davis* explicitly stated that the statutory standard in *Griggs* would not be extended from Title VII to the Fourteenth Amendment. The statutory standard persists in two areas of statutory civil rights law: Title VII and the Voting Rights Act. This Section will give a brief overview of those two lines of jurisprudence.

1. Title VII

The original language of Title VII did not contain a disparate impact standard. Disparate impact arose from Equal Employment Opportunity Commission guidelines,[156] was adopted by several lower courts, and then received a stamp of approval from the Supreme Court in *Griggs*.[157] When Congress amended Title VII in

154. *Id.* at 129–30.

155. Ian Haney Lopez, The Sixteenth Annual Derrick Bell Lecture on Race in American Society: Justice Undone: Color Blindness after Civil Rights (November 2, 2011) (at 33:07) (video recording *available at* http://www.law.nyu.edu/news/LOPEZ_IAN_HANEY_DERRICK_BELL_LECTURE) [hereinafter Haney Lopez, Justice Undone] ("Since the court articulated this test in 1979 and 1980, the Supreme Court has never, not once, not one single time, found discrimination against non-whites."); *see also* Ian F. Haney Lopez, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1783 (2012) (providing a more in-depth elaboration of this fact).

156. 29 C.F.R. §1607.3 (1970).

157. *See* Griggs v. Duke Power Co., 401 U.S. at 424, 432 (1971) (". . . good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."); *see* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 506 (2003) [hereinafter Primus, *Round Three*].

1991, it incorporated the words "disparate impact" into the statute, placing the doctrine on firmer footing.[158]

In 1973, the Court adopted a burden-shifting test for Title VII cases.[159] *McDonnell Douglas* laid out a fairly complete model: The plaintiff must first establish a prima facie case by showing that he is a member of a racial minority, that he applied to and was qualified for a job, was rejected, and that after his rejection the position remained open and the employer continued to seek applicants from people with similar qualifications.[160] Once the prima facie case is made out, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[161]

Over the next two decades, the doctrine expanded, contracted, and shifted. The first expansion came in *International Brotherhood of Teamsters v. United States*, which enunciated a framework for litigating pattern or practice cases.[162] The Court explicitly approved of the use of statistics to establish a prima facie case, although it did caution that statistics are rebuttable and that testimony about individual experiences makes for a stronger case.[163] In *Watson v. Fort Worth Bank & Trust*, the Court attempted to restrict the scope of claims by holding that plaintiffs must be able to identify the specific practice that is challenged.[164] When tests and subjective criteria are used, it is difficult to isolate a single discrete practice; the Court openly acknowledged this, recognizing the requirement would only be straightforward for standardized tests.[165] But it nevertheless decided that "the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[166] A final shift came in *Price Waterhouse v. Hopkins*, which approved mixed-motive cases.[167] Thereafter, plaintiffs would not have to prove that the discrimination was the *sole* influence in the employer's decision as long as it was a motivating factor.[168]

158. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (1991) (codified as amended at 42 U.S.C. § 2000e–2 (2012)).

159. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

160. *Id.*

161. *Id.*

162. 431 U.S. 324, 339–40 (1977).

163. *Id.* at 338–40.

164. 487 U.S. 977, 994 (1988).

165. *Id.*

166. *Id.*

167. 490 U.S. 228, 258 (1989).

168. *Id.* at 241–42.

In 1991, Congress amended Title VII and revised the Court-created model, approving some rules and eliminating others.[169] Congress codified both *McDonnell Douglas* burden-shifting[170] and the *Price Waterhouse* mixed-motive framework.[171] The *Watson* requirement that plaintiffs must isolate a single practice was removed, as long as a plaintiff can demonstrate that the elements of the decision-making process cannot be separated.[172] Congress did not specifically address the use of statistics in proving disparate impact, but congressional approval can be presumed given that other areas it found problematic were addressed—a form of endorsement by omission.[173]

Recent cases have put Title VII in jeopardy, suggesting that we may be in a new period of contraction. After *Ricci v. DeStefano*,[174] it will be more difficult for employers to resolve disparate impact problems internally without creating disparate treatment violations against their nonminority employees.[175] And *Wal-Mart Stores, Inc. v. Dukes*[176] created obstacles for plaintiffs seeking class certification.[177] But the basic structure of the doctrine remains and for the moment, at least, is not in jeopardy.[178] Disparate impact—a model

169. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 2000e (2012)).

170. *See id.* at § 105.

171. *See id.* at § 107(a).

172. *See id.* at § 104.

173. *See* Primus, *Round Three*, *supra* note 157, at 517.

174. 557 U.S. 557 (2009).

175. In *Ricci*, a group of white New Haven firefighters sued the city of New Haven regarding its promotion practice. The city had suspended the promotion process after realizing that the written test had a severe adverse impact on the black applicants. The resulting decision found that New Haven had violated Title VII's prohibition on disparate treatment, which puts employers between a rock and a hard spot—it is now more difficult to avoid creating a disparate impact while also avoiding treating one group of employees disparately. *See* Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (discussing in detail the background of *Ricci v. DeStefano*) [hereinafter Primus, *The Future*].

176. 131 S. Ct. 2541, 2547–2554 (2011). In *Wal-Mart*, approximately 1.5 million women sought class certification in order to sue Wal-Mart for discrimination against women. *Id.* at 2547. The Court denied certification on the basis that the company had not acted on grounds that apply generally to the whole class. *Id.* at 2552. It decided that in order to pursue a Title VII class action there must be a specific, company-wide policy of discrimination. *Id.* at 2553–54.

177. *See* Tristin K. Green, *The Future of Systemic Disparate Treatment* Law, 32 BERKELEY J. EMPL. & LAB. L. 395 (2011).

178. Justice Scalia, concurring in *Ricci*, stated that "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them." Ricci v. DeStefano, 557 U.S. 557, 595–96 (2009). For a candid prognosis of the

where discrimination can be established with statistics, and without proving specific invidious intent on the part of the actors—has survived.

2. The Voting Rights Act

Four years after *Davis*, the Court turned to the question of intent in voting rights cases. In *City of Mobile v. Bolden*, the Court decided that the Voting Rights Act ("VRA") of 1965 required a showing of discriminatory intent. The plaintiffs had challenged the at-large elections in Mobile, Alabama under Section 2 of the VRA and the Fourteenth and Fifteenth Amendments, claiming that they impermissibly diluted the voting strength of black voters.[179] The Court held that plaintiffs bringing a claim under any of those provisions needed to show discriminatory intent.[180] It found that rights under Section 2 were coextensive with the Fifteenth Amendment—both are violated only by purposeful discrimination[181]—and reiterated the *Davis* standard for Fourteenth Amendment claims. Specific to voting rights, it elaborated that "a plaintiff must prove that the disputed plan was conceived or operated as a purposeful device to further racial discrimination."[182] In response to the lower courts' examinations of the history of discrimination, it pithily replied that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."[183]

Bolden provoked immediate congressional response. In 1982, Congress amended the VRA, clarifying that Section 2 prohibits any voting practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[184] The amendments clarified two issues in particular. First, the Dole Amendment provided that the VRA does not guarantee a right to have members of a protected class elected in numbers equal to the class's proportion in the population.[185] A pure dispar-

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future of Title VII, see Primus, *The Future*, *supra* note 175, at 1341. Primus argues that while there is one reading of *Ricci* that could prove fatal to disparate impact claims, there are two equally plausible readings that allow for its survival. *Id.*

179. City of Mobile v. Bolden, 446 U.S. 55, 58 (1980), *superseded by statute*, Voting Rights Act of 1965, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in* Thornburg v. Gingles, 478 U.S. 30 (1986).

180. *Id.* at 60–61, 74.

181. *Id.* at 62.

182. *Id.* at 66 (internal quotation marks omitted).

183. *Id.* at 74.

184. Voting Rights Act of 1965, Pub. L. No. 97-205, § 1973, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. § 1973 (2012)).

185. *Id.*

ity theory was thus ruled out. Second, the intent approach was roundly rejected. Accompanying the amendment was a 250-page Senate Report that made scathingly clear "that proof of discriminatory intent is not required to establish a violation of Section 2."[186] Furthermore, the Senate concluded that the "intent test places an unacceptably difficult burden on plaintiffs."[187] The test "asks the wrong question"[188] and was "unnecessarily divisive," "threatening to destroy any existing racial progress in a community."[189] Instead, the report laid out various factors courts ought to consider, commonly known as the "Senate factors."[190] The report discusses in great depth how profoundly Congress disagreed with the *Bolden* decision. It proclaims that requiring discriminatory purpose was in violation of legislative intent, of the Court's own precedents, and in defiance of common sense.[191] Senator Strom Thurmond—who spoke for twenty-four hours and eighteen minutes in vehement opposition to the Civil Rights Act of 1957, to date the longest filibuster ever conducted by a single senator[192]—spoke in support of the amendments.[193]

Despite this strikingly clear language, the implementation of the new test faced some difficulties. The first post–Dole Amendment case to come before the Court was *Thornburg v. Gingles*.[194] The plurality opinion by Justice Brennan echoed the Senate Report; the concurrence, by Justice O'Connor, seemed to keep in question whether the results test, when applied to vote dilution, might perhaps warrant an intent inquiry after all.[195] Since *Gingles*, the First, Second, Fifth, and Eleventh Circuits have required vote-dilution plaintiffs to prove that their injuries resulted from race-based decision making.[196]

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186. S. REP. NO. 97–417, at 2 (1982).

187. *Id.* at 16.

188. *Id.* at 36.

189. *Id.*

190. *Id.* at 28–29.

191. *Id.* at 16–18, 26–27.

192. *Filibuster and Cloture*, UNITED STATES SENATE. http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (last visited Mar. 12, 2014).

193. S. REP. NO. 97–417, at 88 (1982).

194. 478 U.S. 30 (1986).

195. *See id.* at 100 (O'Connor, J., concurring in part); *see also* Randolph M. Scott-McLaughlin, *The Voting Rights Act and the "New and Improved" Intent Test: Old Wine in New Bottles*, 16 TOURO L. REV. 943, 959 (2000).

196. Goosby v. Town Bd. of Town of Hempstead, N.Y., 180 F.3d 476, 483 (2d Cir. 1999); Teague v. Attala Cnty., Miss., 92 F.3d 283, 295 (5th Cir. 1996); Uno v. City of Holyoke, 72 F.3d 973, 983 (1st Cir. 1995); S. Christian Leadership Confer-

However, apart from the struggles with vote dilution, the transition to a results test in other areas of voting rights largely has been smooth. In *Johnson v. De Grandy*, the Court established that *Gingles* acted as a prima facie case of impermissible discrimination; after a case had been made out, the burden shifts to the defendants to prove a race-neutral rationale.[197] And when the constitutionality of the VRA has been challenged, Section 2 has been consistently upheld.[198]

Recently, courts have begun to backslide on the commitment to the results test. This trend is notable in a 2010 Ninth Circuit felon disenfranchisement case, *Farrakhan v. Gregoire*.[199] The Court had held in *Allen v. State Board of Elections* that Congress intended the "procedure" language to have a broad scope, so that the VRA should be interpreted to apply to a wide range of practices and should provide the "broadest possible scope" in combating racial discrimination.[200] In *Farrakhan*, a group of prisoners in Washington state rallied to this call and challenged the state's felon disenfranchisement law under Section 2. They argued that since Section 2 provides that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," a felon disenfranchisement law, if proven to have a racially disparate impact, should qualify as impermissible.[201]

The plaintiffs in *Farrakhan* based their claim on one of the Senate Report factors: "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process."[202] They produced extensive documentation in support of

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ence of Ala. v. Sessions, 56 F.3d 1281, 1293–94 (11th Cir. 1995); Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994). For an analysis of these cases, see Scott-McLaughlin, *supra* note 195, at 960–78; see also Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 407 (2012).

197. Johnson v. Grandy, 512 U.S. 997, 1024 (1994).

198. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2619 (2013) ("Section 2 is permanent, applies nationwide, and is not at issue in this case"); *see also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009); Lopez v. Monterey Cnty., 525 U.S. 266 (1999).

199. 623 F.3d 990 (9th Cir. 2010).

200. Allen v. State Bd. of Elections, 393 U.S. 544, 566–68 (1969); *see also* Chisom v. Roemer, 501 U.S. 380, 403–04 (1991).

201. Farrakhan v. Washington, 338 F.3d 1009, 1012–13 (9th Cir. 2003).

202. S. REP. NO. 97–417, at 28–29 (1982).

their claim that there was racial discrimination in the Washington criminal justice system.[203] The reports demonstrated that African Americans in Washington state were subject to disparate bail practices and higher rates of charging and searches.[204] They also demonstrated that African Americans in Washington state were over nine times more likely to be in prison than whites, even though the ratio of black to white arrests for violent offenses was only 3.72 to 1.[205] And they contended that these disparities were caused by organizational practices that could not be explained in race-neutral terms.[206]

The district court found the reports to be "compelling evidence of racial discrimination and bias in Washington's criminal justice system."[207] It found the experts' conclusions and statistical analysis to be relevant and persuasive.[208] The defendants did not contest the evidence. After considering the plaintiffs' evidence, the district court concluded that it "ha[d] no doubt that members of racial minorities have experienced racial discrimination in Washington's criminal justice system."[209]

The only further inquiry should have been whether such discrimination can rightly be said to "result in a denial or abridgement" of the right to vote. Striking the "deny and abridge" language, Congress instead prohibited voting qualifications and prerequisites that "*result* in a denial or abridgement" of the right to vote.[210] The purpose of this change was "to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' "[211] and to relieve plaintiffs of the heavy burden of proving intentional discrim-

203. These reports included the WSMJC 1999 study entitled *The Impact of Race and Ethnicity on Charging and Sentencing Processes for Drug Offenders in Three Counties of Washington State*; the Final Report of Dr. George Bridges, Ph.D., also commissioned by the WSMJC, entitled *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-trial Detention Practices in Washington*; and ST. OF WASH. SENTENCING GUIDELINES COMM'N, DISPROPORTIONALITY AND DISPARITY IN ADULT FELONY SENTENCING (2003).

204. Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *4–6 (E.D. Wash. Jul. 7 2006).

205. Farrakhan v. Gregoire, 590 F.3d 989, 1009, *reh'g en banc*, 623 F.3d 990 (9th Cir. 2010).

206. *Farrakhan*, 590 F.3d at 1010.

207. *Farrakhan*, No. CV-96-076-RHW, 2006 WL 1889273, at *6.

208. *Id.*

209. *Id.*, at *9.

210. 42 U.S.C.A. § 1973(a) (emphasis added).

211. Thornburg v. Gingles, 478 U.S. 30, 35 (1986); *see* S. REP. NO. 97–417, at 205 (1982).

ination imposed by *Mobile v. Bolden*.[212] But the Ninth Circuit instead read back into the VRA the precise requirement explicitly rejected by Congress. It required that plaintiffs raising a VRA challenge "at least" show intentional discrimination.[213] They may in fact have raised the bar above that of *Bolden*, since they reserved judgment on whether such intent, if established, would then be sufficient to prove a Section 2 violation.[214]

If followed, the *Farrakhan* ruling would vitiate the VRA and render it duplicative of the remedies provided by the Fourteenth Amendment. It is too soon to tell whether this particular case was an anomaly—a case that tread on the murky ground at the intersection of criminal justice and politics and which reflects little more than that turbulence. But it aptly demonstrates the delicate balance between the courts and Congress on these matters. Perhaps evidence of intentional discrimination makes a case seem safe, a matter incontestably meriting judicial intervention. Whatever the reason, the trend is clear: Even where Congress unambiguously dictates otherwise, judges gravitate back toward intent and discriminatory purpose.

C. The Equal Protection Intent Test at Work: Selective Prosecution

The Title VII and VRA jurisprudence showcases the battle between Congress and the Court regarding discrimination and intent. But in the end, an equilibrium was reached and the results codified. Today, both areas of law permit some scrutiny of the numbers, employ some kind of burden-shifting test, and do not demand proof of intentional discrimination. But *Farrakhan* demonstrates what can happen in discrimination suits even when there is a statutory safety net.

The selective prosecution cases powerfully illustrate what happens without one. Discriminatory prosecution claims present challenging questions of power, accountability, and discretion. Generally speaking, that prosecutors are state actors is beyond question: they are executive officials wielding power. However, the diffusion of power here is enormous. Prosecutors constitute a class of thousands, both Assistant District Attorneys ("ADAs") and Assistant U.S. Attorneys ("AUSAs"), across the United States, who have over-

212. Chisom v. Roemer, 501 U.S. 380, 394 (1991); Ruiz v. City of Santa Maria, 160 F.3d 543, 557 (9th Cir. 1998); S. REP. NO. 97–417, at 16 ("proof of discriminatory purpose should not be a prerequisite to establishing a violation of Section 2 of the Voting Rights Act").

213. Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010).

214. *Id.* at 993–94.

lapping jurisdictions. The initial decision to prosecute may come from either office and cases may be transferred from one office to the other based on resources and policy decisions. Even a single case may be handled by a series of prosecutors, and those individuals may not participate in the prior or subsequent decisions of, for example, reducing charges or disclosing exculpatory evidence.[215] The chain-of-command question can also obfuscate the "who's acting?" analysis. Some offices may have only a vague policy guiding charging decisions, while others may require that all decisions to seek the death penalty be cleared with the head of the office. Examining the decisions of a subordinate prosecutor over time may then yield data that does not accurately reflect how that individual would act independent of institutional hierarchy.

However, even when the prosecutorial power is shared between individuals, that power is tremendous, "virtually unparalleled in terms of both breadth and consequences."[216] Justice Jackson, who served as a prosecutor for many years, stated that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[217] No other official can "invoke society's harshest sanctions on the basis of ad hoc personal judgments."[218]

To provide a specific example of what that power and discretion look like, the petitioners in *McCleskey v. Kemp* deposed Lewis R. Slaton, who had been the District Attorney for eighteen years in the county where McCleskey was tried and sentenced.[219] He testified that during his entire term there were no guidelines at all; nothing advising when to seek an indictment for murder rather than a lesser charge, when to accept a guilty plea, or when to reduce or dismiss charges.[220] ADAs informed him "when they saw fit" and were never required to explain any decision, including when they decided to seek or not seek the death penalty.[221] While Slaton did occasionally pull files to check on the progress of cases, he never told his ADAs he did this.[222] In sum and substance, there were no efforts made to

215. *See* Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1433 (1987).

216. *Id.* at 1430.

217. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

218. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981).

219. McCleskey v. Kemp, 481 U.S. 279, 357 (1987) (Blackmun, J., dissenting).

220. *Id.*

221. *Id.*

222. *Id.* at 358.

create consistency between prosecutorial decisions or to identify or remedy potentially discriminatory abuses of discretion.[223]

Unreviewable action generates systemic costs. It promotes ad hoc decision making and inconsistent and unpredictable outcomes.[224] It creates space for politics in lieu of justice. In counties where district attorneys are elected, it permits prosecutors to focus their efforts in ways that will please the politically powerful members of their constituencies. As Randall Kennedy points out, to the extent that minorities are less likely to be vocal or to participate in politics and elections, it means that the district attorneys are not held accountable to that part of the electorate.[225]

Despite this outrageous lack of accountability from within the office, prosecutorial discretion remains unchecked by courts. Prosecutors receive absolute immunity from 42 U.S. § 1983 suits as long as they were acting within the scope of their duties.[226] As executive officials, prosecutors' actions are accorded deference under the doctrine of separation of powers. The Court has repeatedly stated that "the decision to prosecute is particularly ill-suited to judicial review" and that the decision rests entirely within the prosecutor's "broad discretion."[227] In *Wayte v. United States*, in addressing the judiciary's influence over prosecutorial discretion, the Court cited the concerns of delay, chilling law enforcement efforts, and undermining effectiveness by exposing governmental enforcement policy.[228] The Court hamstrung itself by deliberately bypassing opportunities for prosecutorial accountability, even in an era where other actors in the criminal justice system—the police, magistrates, sentencing judges, parole boards, and correctional officials—have had their power curtailed.[229] James Vorenberg details the scope of that dis-

223. Kristen Nugent, *Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure*, 64 U. MIAMI L. REV. 175, 180 (2009).

224. Vorenberg, *supra* note 218, at 1554–57.

225. Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1419–20 (1988).

226. Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976).

227. Wayte v. United States, 470 U.S. 598, 607 (1985); *see also* United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

228. *Wayte*, 470 U.S. at 607–08.

229. *See* M. FRANKEL, CRIMINAL SENTENCES 5 (1973) ("[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."); Vorenberg, *supra* note 218, at 1521–22 (citing 18 U.S.C. §§ 3141-3150 (1984) (Bail Reform Act; pre-trial detention only permitted if defendant is a danger to their community; flight risk is no longer a permissible factor)); *see generally* Vitek v.

cretion and confirms that that power has remained essentially unreviewable.[230]

In the late 1980s, a coalition of veteran Legal Defense Fund attorneys brought a case that exposed these problems to the Court. *McCleskey v. Kemp*[231] involved one of the most thorough and respected statistical studies ever completed of the criminal justice system.[232] Professor David Baldus studied the full records of nearly 2,000 murder cases in Georgia, from police reports to prison records, using questionnaires that ranged from 42 to 120 pages long, the former containing 595 variables for consideration.[233] After controlling for the nonracial variables believed most likely to play a role in capital punishment in Georgia, Professor Baldus found that the odds of being condemned to death were 4.3 times greater for defendants who killed a white person than for defendants who killed a black person.[234] While the district court rejected the study as flawed, the court of appeals accepted it as valid, as did the Supreme Court.[235]

McCleskey challenged the constitutionality of such a system under the Eighth and Fourteenth Amendments. His Equal Protection claim was simple: the Baldus study presented robust evidence that the administration of the death penalty in Georgia was tainted

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Jones, 445 U.S. 480, 487–88 (1980) (an inmate must be provided a hearing with procedural due process safeguards prior to transfer from state prison to mental hospital); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (establishing minimum due process safeguards for prison disciplinary hearings); Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam) (stating that prison authorities lack discretion to deny an inmate's right to a reasonable opportunity to practice his religion in a manner similar to those who follow conventional religions); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 551–63 (1978) (arguing that sentecing reform efforts will fail without simultaneous efforts to curtail prosecutorial power); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 822–26 (1975);.

230. Vorenberg, *supra* note 218, at 1523.

231. 481 U.S. 279 (1987).

232. Kennedy, *supra* note 225, at 1399–1400 ("Professor Richard Berk, a member of the National Academy of Sciences' Committee on Sentencing Research, testified that the Baldus study has 'very high credibility' and 'is far and away the most complete and thorough analysis of sentencing that [has] ever been done.' Similarly, several leading scholars in the field have collectively affirmed that the Baldus investigations 'are among the best empirical studies on criminal sentencing ever conducted.' Second, the Baldus study is consistent with conclusions reached by a solid body of prior research.") (alteration in original).

233. *Id.* at 1397 n.30.

234. *McCleskey*, 481 U.S. at 287.

235. *Id.* at 291 n.7.

by racial discrimination.[236] Even if individual decisions could be explained away, the study showed that the overall pattern was clearly infected with racial bias when considered en masse.[237] Having made this showing, he asked the Court to shift the burden to the state.[238]

In one of the most criticized and controversial decisions of the last few decades,[239] the Supreme Court rejected this claim.[240] Presented with the most rigorous study of sentencing to date, the Court decreed flippantly that "at most, the Baldus study indicates a discrepancy that appears to correlate with race."[241] This is a fundamental misstatement of what a multiple regression analysis does. The Court had been presented with correlation studies in *Washington v. Davis*, *Arlington Heights*, and *Feeney*, and apparently failed to recognize the distinction between a multiple regression analysis and a correlation study.[242] A multiple regression analysis determines the causal influence of a variety of factors and measures the impact of each on the final result. It does this by noting how the dependent variable is affected when only one independent variable is changed. The Baldus study compiled 230 relevant, nonracial variables that might have accounted for why the defendant received the

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236. *Id.* at 291–92.

237. Kennedy, *supra* note 225, at 1406.

238. *See* Brief for Petitioner, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), 1986 WL 727359, at *26–27 [hereinafter McCleskey's Brief].

239. *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 370–93 (1990); SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 159–211 (1989); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 480 (1995) ("The Supreme Court decision in *McCleskey v. Kemp* is a badge of shame upon America's system of justice."); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1159–60 (1991); Sheri Lynn Johnson, *Unconscious Racism and the Criminal* Law, 73 CORNELL L. REV. 1016, 1016 (1988); Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 151; Daniel R. Ortiz, *supra* note 146, at 1142; Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 510 (1994) (arguing that the Supreme Court accepted racial bias as inevitable in capital punishment). Even *McCleskey*'s author, Justice Powell, came to wish that he could change his deciding vote in that case. *See* David Von Drehle, *Retired Justice Changes Stand on Death Penalty; Powell Is Said to Favor Ending Executions*, WASH. POST, June 10, 1994, at A1.

240. *McCleskey*, 481 U.S. at 292.

241. *Id.* at 312.

242. Marc Price Wolf, *Proving Race Discrimination in Criminal Cases Using Statistical Evidence*, 4 HASTINGS RACE & POVERTY L.J. 395, 403 (2007).

death penalty, isolated the effects of those factors, and then measured the effect of the victim's race on whether a defendant received a death sentence.[243] The Baldus study thus did prove, to a fairly high degree of certainty, that race had an actual causal effect on the meting out of capital sentences.

The Court began the Equal Protection analysis by stating that the intent requirement applies, and cited a lack of particularity on two grounds: that McCleskey had not pointed to a *particular actor* who had acted with discriminatory purpose, and that he had not demonstrated that there was discrimination in *his specific case*.[244] After considering the diffusion of authority in criminal cases—the distribution of power between various prosecutors' offices and the petit juries—the Court essentially found it would be impossible to hold prosecutors accountable.[245] Kristen Nugent contends that this argument is specious because there is a clear *first* decision maker—the district attorney—who makes the original determination to pursue the death penalty.[246] That initial decision severely narrows the number of defendants who eventually are sentenced to death. In citing the dynamics of prosecutorial power, the Court accorded dispositive weight to a factor it had never explicitly articulated before—the diffusion of power.

In other categories of cases, where decisions are made by similarly stable and identifiable decision makers, the Court has acknowledged that statistics are compelling evidence.[247] In Title VII cases, employers have dozens of people making hiring decisions as well as separation between those coming up with the policies and the personnel implementing those criteria. Similarly, in the jury discrimination cases, many people, over many years, have a hand in developing the criteria for selecting the jury venire. The Court noted these cases, but had no problem in attributing those discrete decisions to the supervising entity.[248] Only when it comes to regulating prosecutors did the Court decide that the diffusion of responsibility should protect discriminatory decision makers.

In other areas of constitutional analysis, the Court has replaced the requirement of a specific state actor with the *Burton* state action doctrine that looked to the function. Here, decades after *Burton*,

243. *Id.* at 404.

244. *McCleskey*, 481 U.S. at 292–93.

245. *Id.* at 294–95 and 295 n.15 ("It is also questionable whether any consistent policy can be derived by studying the decisions of prosecutors.").

246. Nugent, *supra* note 223, at 224.

247. *Id.*

248. *McCleskey*, 481 U.S. at 295 n.15.

the Court essentially used an outmoded version of the state action test to block the possibility of finding discrimination.[249] The combination of diffuse actors and a need to smoke out specific intent proved lethal to McCleskey's claim.

The other main issue the Court identified was that in this case, unlike other times where the Court has accepted statistics as proof of discriminatory intent (e.g., venire-selection and Title VII cases), the state had not had an opportunity to explain the statistical disparity.[250] Of course, this is question-begging. McCleskey explicitly stated that he was presenting a prima facie case and requested that the burden shift to the state to rebut it.[251] But the Court replied that rebuttal was out of the question. Because prosecutors are vested with discretion, public policy dictates that they cannot be asked to explain themselves.[252]

Finally, Justice Powell, writing for the majority, candidly admitted that he was worried:

> McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.[253]

The four dissenting justices characterize this as "a fear of too much justice."[254] Beyond the general rejoinder that it is egregious to close the courtroom doors based on such a fear, Randall Kennedy argues that this fits into a pattern that the Court began in *Washington v. Davis*:

> The Justices have made the violations they are willing to recognize dependant on the remedies they are willing to provide. They have tailored declarations of rights to fit their perceptions of acceptable remedies. Unpersuaded in *McCleskey* that an acceptable solution could be found, the Court obviated the

249. *Id.* at 292–98. The Court does not explicitly go through the state action analysis, but those concerns underlie the entire Equal Protection discussion.

250. *Id.* at 296.

251. *See* McCleskey's Brief, *supra* note 238, at *26–27.

252. *McCleskey*, 481 U.S. at 296–97.

253. *Id.* at 314–15 (internal citations omitted).

254. *Id.* at 339 (Brennan, J., dissenting).

remedial question simply by declining to find a constitutional problem.[255]

The Court established a few impossible standards in *McCleskey*. The first regards the burden of proof required to establish an Equal Protection claim. Burdens are set at "preponderance" for most constitutional claims.[256] "Clear and convincing" is used for other claims and "beyond a reasonable doubt" for criminal cases. But deference to prosecutorial discretion led the Court to raise the burden of proof for these cases: "Because discretion is essential to the criminal justice process, we would demand *exceptionally clear proof* before we would infer that the discretion has been abused."[257] To prove prosecutorial misconduct, the Court requires something more than clear and convincing, though perhaps less than beyond a reasonable doubt.

The second, more crippling blow regards *what* proof the Court demands. To win an Equal Protection case, a criminal defendant must prove that the prosecutors acting in his case were consciously and purposefully discriminating against him on the basis of race.[258] This is an insurmountable requirement for a number of reasons. First, direct proof of invidious intent is extremely hard to find, which is why courts began allowing the use of statistical evidence to prove discrimination in the first place.[259] Officials rarely express prejudice openly and do not often have an occasion to write down their motives.[260] Second, discrimination is often unconscious;[261] it is the product of ingrained social biases, which give rise to the unintended consequences of differential treatment or selective indifference.[262] What the race-of-victim disparities clearly demonstrate is that "decision-makers, whether consciously or not, do not value the lives of black victims at the same level as they value the lives of white

255. Kennedy, *supra* note 225, at 1414–15. Kennedy's argument on rights and remedies parallels my contention in Part I on the utility of state action; *McCleskey* keenly illustrates the benefit of employing the state action doctrine to sift out these demanding, far-reaching cases. Here, where the state action was obvious and the Court could not rely on a threshold issue to gracefully bow out, it was forced to do so in a much more conspicuous and embarrassing way.

256. Lee & Bhagwat, *supra* note 239, at 159.

257. *McCleskey*, 481 U.S. at 297 (emphasis added).

258. *Id.* at 292–93.

259. Sandra L. Simpson, *Everyone Else Is Doing It, Why Can't We? A New Look at the Use of Statistical Data in Death Penalty Cases*, 12 J. Gender Race & Just. 509, 524 (2009).

260. Kennedy, *supra* note 225, at 1405.

261. *See* Lawrence, *supra* note 129, at 328–44.

262. Lee & Bhagwat, *supra* note 239, at 155.

victims."[263] Lee and Bhagwat further note that the multivariate regression shows that "[r]ace is thus a causal factor with respect to government decision making in this context, in the sense that it is a but-for cause, even if it is not the motive for the decision or even in the conscious awareness of the various actors."[264] Thus, requiring the plaintiff to present proof of purposeful discrimination essentially insulates most discrimination.

Finally, as Steven Reiss methodically explicates, using an intent standard is both inimical and injurious to the prosecutorial system.[265] Prosecutors are required to act as both ministers of justice and as the state's advocate against the defendant.[266] Yet as Reiss points out, "[p]rohibitions couched in terms of the prosecutor's mental state tend to exacerbate this tension by forcing the prosecutor to justify, in neutral terms, actions that often are prompted by adversarial instincts."[267] Likewise "[w]hen the prosecutor's mental state is the fulcrum of the constitutional restrictions on her actions," the appearance of justice is undermined and the system will inevitably seem irrational and unfair.[268] This discourages trust and fair play between the parties and motivates gamesmanship rather than the impartial pursuit of justice.

Reiss also points out that this test presents structural and uniformity challenges. The mixed-motive problems presented in employment cases are also at play here. Multiple actors might be making decisions at different points of the same case, and each actor may have multiple reasons for deciding to file charges, call someone before the grand jury, or seek the death penalty.[269] Further, the requirement of subjective intent is hard to square with the Court's preference for objective tests in evaluating alleged Fourth and Fifth Amendment violations.[270] The police, of course, are also

263. *Id.*
264. *Id.*
265. Reiss, *supra* note 215, at 1429–35.
266. *Id.* at 1430.
267. *Id.*
268. *Id.* at 1431.
269. *Id.* at 1433–34.
270. Reiss, *supra* note 215, at 1440; *see also* Devenpeck v. Alford, 543 U.S. 146 (2004) (probable cause measured objectively); Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (rationale for an arrest is determined objectively); Florida v. Jimeno, 500 U.S. 248 (1991) (consent measured objectively); Berkemer v. McCarty, 468 U.S. 420 (1984) (custody objectively determined); Rhode Island v. Innis, 446 U.S. 291 (1980) (interrogation objectively determined); Katz v. United States, 389 U.S. 347 (1967) (search is where there are subjective expectations of privacy that are objectively reasonable); Miranda v. Arizona, 384 U.S. 436 (1966) (both custody and interrogation are objectively determined).

executive officers and are due their fair share of deference and discretion. Reiss argues that "the courts are no more institutionally competent or constitutionally empowered to 'police the police' " than they are to police prosecutors.[271] Practically speaking, prosecutorial practice is, in fact, less dynamic and subject to concerns that are more familiar to judges, and thus easier to gauge.

The elusive, probably nonexistent, proof of specific intent is required up front. The *McCleskey* Court severely limited—or perhaps barred—the possibility of a burden-shifting test. After all, there will always be "a legitimate and unchallenged explanation for the decision [that] is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."[272] Therefore, "absent far stronger proof," there is no need for rebuttal.[273] Establishing a prima facie case generally only requires that the plaintiff establish certain factors: the plaintiff's race, a particular pattern, and qualifications for the job.[274] Once established, the burden shifts to the defendant to demonstrate a race-neutral reason. The burden the Court places on criminal defendants, however, is both heavy and out of sync with other areas of law.

As discussed above, the proof in *McCleskey* is about as authoritative as can be demonstrated by statistical analysis of readily available information. There could only be a few ways to get stronger proof: narrow the scope of the study to a particular prosecutor, gather evidence that meets the *Arlington Heights* factors, or get depositions and discovery from the prosecutors' offices in the hopes of uncovering an internal memo or notes that might reveal discriminatory purpose.

John Blume, Theodore Eisenberg, and Sheri Lynn Johnson surveyed cases where the defendants attempted to do the first two.[275] They profile the case of Earl Matthews,[276] who presented an

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271. Reiss, *supra* note 215, at 1441.

272. McCleskey v. Kemp, 481 U.S. 279, 296–97 (1987).

273. *Id.*

274. In *Gingles*, for example, the Court determined that the three conditions are: (1) The minority group is sufficiently large and geographically compact; (2) The minority group is politically cohesive; and (3) The white majority votes sufficiently in a bloc to enable it to defeat the minority-preferred candidate. These are fairly objective, straightforward factors, possibly even discernable from a close look at the Census without needing to do sophisticated statistical analysis. Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

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

276. Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997).

in-depth multiple regression analysis of both his individual prosecutor and the prosecutor's office of Charleston County, South Carolina. The study revealed that the chief prosecutor sought the death penalty in ten of twenty-five murder cases in which the defendant was black and the victim was white, but he only sought the death penalty in two of seventy murder cases in which both the defendant and victim were black.[277] This statistical discrepancy would occur by chance less than one time in a thousand.[278]

Matthews also presented testimony from police officers and several former prosecutors in that office.[279] They testified that contemporaneous to Matthews's prosecution they had personally observed discriminatory treatment of cases based on race and overheard numerous racist comments.[280] Matthews also presented evidence that met other *Arlington Heights* factors, such as departures from normal practice and historical background.[281] The court found that the prima facie case was not made and denied Matthews's motion for discovery.[282]

Blume, Eisenburg, and Johnson also reviewed additional cases from South Carolina, Florida, Missouri, Nevada, California, and Illinois that presented county-specific, statistical evidence, in addition to other testimony, and found not a single instance where the criminal defendant prevailed on the basis of statistical evidence.[283] They point out that the Baldus study was so thorough because it was a statewide study and thus had a data set of over 2,000 cases.[284] "To insist that prosecutorial discrimination studies control for many factors about a case, while requiring that they be conducted at the county level and yield statistically significant results, asks the impossible of most defendants, and of all defendants outside large urban areas."[285]

The final option for getting proof of selective prosecution—discovery—has been foreclosed by the Court. In *United States v. Armstrong*,[286] the defendants alleged that the U.S. Attorneys' office selectively prosecuted blacks for crack cocaine offenses. They filed a motion requesting discovery, presenting several affidavits and re-

277. Blume et al., *supra* note 275, at 1782.
278. *Id.*
279. *Id.* at 1783–84.
280. *Id.*
281. *Id.* at 1784–85.
282. *Id.* at 1788.
283. Blume et al., *supra* note 275, at 1807.
284. *Id.* at 1801.
285. *Id.*
286. 517 U.S. 456 (1996).

ports.[287] One was from the Federal Defender office, stating that every crack case it had defended in 1991 was against a black defendant, and another was from a counselor at a drug treatment center attesting that there were equal numbers of white and minority users of crack cocaine.[288] The motion for discovery was granted, the government refused to comply, and the case was dismissed. Since the Ninth Circuit affirmed the dismissal, the discovery battle was a live issue before the Supreme Court.[289]

Ignoring that while discovery only requires gathering documents, rebutting a prima facie case requires legal work, the Court decided that the costs of each were roughly equivalent.[290] Based on this skewed premise, it decided that rigorous scrutiny, which applies to the elements of a selective prosecution claim, demands corresponding rigor for evaluating discovery motions.[291] Ultimately, the Court decided that in order to meet the threshold for discovery, defendant must produce "some evidence of differential treatment of similarly situated members of other races or protected classes. In the present case, if the claim of selective prosecution was well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents."[292]

As the Court went on to note, this requires defendants to investigate whether similarly situated persons of other races "were known" to federal officials, but not prosecuted.[293] How, exactly, to prove that someone was "known" to federal officials without even cursory discovery is mysterious, and the Court made no attempt to explain how this can be accomplished. Reiss points out that this creates a Catch-22: a defendant cannot obtain discovery without making the requisite threshold showing of discrimination, but "making a sufficient preliminary showing of discriminatory intent may be impossible without some discovery."[294]

With all these forces marshaled in opposition, it is unsurprising that courts have universally rejected claims of racially discriminatory prosecution and sentencing. With insurmountably high barriers for discovery, proving specific and purposeful discriminatory

287. *Id.* at 459–61.
288. *Id.*
289. *Id.* at 461.
290. *Id.* at 468.
291. *Id.*
292. Armstrong, 517 U.S. at 470.
293. *Id.*
294. Reiss, *supra* note 215, at 1373–74.

intent, establishing a prima facie case, and the apparent impossibility of asking the state to rebut a prima facie case, these cases appear doomed.[295]

The only hope for such cases might be the passage of a statute to change the state of affairs. Such a statute, the Racial Justice Act ("RJA"), was passed in the House of Representatives in 1990 and 1994, but was twice defeated in the Senate and never became law.[296] The RJA was intended to correct *McCleskey* and would have allowed capital defendants' Equal Protection claims upon a statistical showing of racial disparity in their states' capital punishment systems.[297] That would have created a prima facie case without having to prove discriminatory intent. The state would then be permitted to rebut, but if the rebuttal were unpersuasive, the death sentence would be overturned.[298] In 2009, a racial justice act was passed in North Carolina[299] and, based on that act, a judge overturned Marcus Robinson's death sentence in April 2012.[300]

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295. For a review of the current state of affairs, see Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34 (2007); John H. Blume et. al., *supra* note 275, at 1771; Simpson, *supra* note 259.

296. The Racial Justice Act was introduced in Congress in 1990, 1991, and 1994. The Act first passed the House of Representatives in 1990 as part of The Comprehensive Crime Control Act of 1990 ("CCCA"), H.R. 5269, by a vote of 218 to 186. H.R. REP. NO. 103-458, at 1 (1994). In the Senate, CCCA was passed on October 22, 1990, but The Racial Justice Act was removed from it before it passed. 136 Cong. Rec. S16479 (1990). On June 20, 1991, the Senate struck the Racial Justice Act of 1991 from the Violent Crime Control Act, by a vote of 55 to 41. 137 Cong. Rec. S8296–01 (1991). In the House, The Racial Justice Act of 1991 was rejected during deliberation of the Crime Bill on October 22, 1991, by a vote of 223 to 191. H.R. REP. NO. 103-458, at n.1 (1994). The House passed The Racial Justice Act as part of the Omnibus Crime Control Act by a vote of 285 to 141 on April 21, 1994. 140 Cong. Rec. H2608 (daily ed. Apr. 21, 1994). The Racial Justice Act never became law as it was struck down by the Senate by a vote of 58 to 41 on May 11, 1994. Racial Justice Act, H.R. 4017, 103d Cong. (1994); Katharine Q. Seelye, *Senate, in 58-41 Vote, Bars Race-Based Death Row Pleas*, N.Y. TIMES, May 12, 1994, at A22.

297. H.R. REP. NO. 103-458, at 10 (1994).

298. *Id.*

299. N.C. GEN. STAT. § 15A-2011 (2009).

300. *See* David Zucchino, *North Carolina Judge Vacates Death Penalty Under Racial Justice Law*, L.A. TIMES, Apr. 20, 2012, http://www.latimes.com/news/nationworld/nation/la-na-racial-justice-20120421,0,1984594.story.

III.
JURIES

Jury cases are the sole area of Equal Protection jurisprudence to escape the morass detailed above. From the earliest days of the Fourteenth Amendment, jury selection has been protected by the Supreme Court to a degree unmatched by any other area of Equal Protection law.[301] It produced the foundational discrimination decision in American history, *Strauder v. West Virginia*.[302] And while it reached a nadir during the height of Jim Crow, from 1896 to 1935, the Court has protected the jury from racial discrimination reliably between 1879 to 1896 and from 1935 to the present.

In Part II, I surveyed the landscape of Equal Protection jurisprudence, as well as the two main statutory areas the Court has permitted Congress to protect more vigorously. The last forty years have been a bleak era for Equal Protection claims as the Court steadily closed the courthouse doors. Since handing down the *Davis-Feeney* purposeful discrimination test in the late 1970s, the Supreme Court has not once found discrimination against non-whites.[303] It has, however, consistently expanded its protections of jurors during these last decades in both jury venires and petit juries.

Jury jurisprudence is graced by an additional honor: it is the only area of Equal Protection case law that enjoys a burden–shifting test, first set out in *Batson v. Kentucky*.[304] While never formally ruled out for other Equal Protection claims, *McCleskey* set the initial burden so high that essentially any plaintiff who established a prima facie case already ran the race and was at the finish line.[305] Since *McCleskey*, the phrases "prima facie" and "burden-shifting" have simply dropped out of the Supreme Court's Equal Protection jurisprudence. Such a scheme has only survived in the VRA voting and redistricting cases and in Title VII employment discrimination.[306]

In this Part, I delineate both branches of the "juries are special" jurisprudence. I first survey the jury cases from *Strauder* to *Batson*, to illustrate the duration of the dedication the Court has shown to this line of Fourteenth Amendment cases. I then briefly digress

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301. The area claiming second place are the Chinese and Japanese citizenship cases. However, there were only a handful of these.

302. 100 U.S. 303 (1880).

303. Haney Lopez, Justice Undone, *supra* note 155 ("Since the court articulated this test in 1979 and 1980, the Supreme Court has never, not once, not one single time, found discrimination against non-whites.").

304. 476 U.S. 79 (1986).

305. *See supra* Part II.C for a discussion of *McCleskey*.

306. *See supra* Part II.B.

into the jury pool cases. Initially, those cases were decided on Fourteenth Amendment grounds, but have more recently migrated into the Sixth Amendment. However, they still fit snugly into the Fourteenth Amendment jurisprudence and help to provide a more complete picture. Next, I discuss *Batson* and its progeny, and the ever-expanding scope of *Batson* claims. I explain how the *Batson* burden-shifting test works and how its requirements have softened. I then problematize the Court's stance on juries and evaluate the jurisprudence in light of the requirements of the state action and purposeful discrimination doctrines. Finally, I explore the rationales for why juries have been accorded this special treatment.

A. Jury Discrimination Cases: The History

African Americans were rarely able to access the criminal justice system before the Civil War.[307] Slaves were tried in specially constituted all-white tribunals,[308] white masters were immunized from prosecution, and the law barred black victims from seeking redress.[309] The first time an African American served on a jury was in 1860.[310] The Civil Rights Act of 1866 was believed to guarantee jury service as a civil right, thus throughout Reconstruction juries became integrated in the South.[311] Guaranteeing the rights of blacks to sit on juries was considered the surest way to protect black victims from unjust prosecutions, a desire which was a persistent theme during debates on the Thirteenth and Fourteenth Amendments.[312] This debate heightened during the Ku Klux Klan prosecutions, since integrated juries were believed to be critical to the success of those convictions.[313] But at the same time, the Supreme Court pushed back on expanding federal prosecutorial power. In *United States v. Cruikshank*, the Court reversed the verdicts of the

307. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 18, 20 (1990).

308. *See id.* at 17 n.70, 22 n.94–96.

309. *See* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 124–25 (7th ed. 1994); LORENZO J. GREENE, THE NEGRO IN COLONIAL NEW ENGLAND (1974); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 8–9, 250, 253–56, 263 (1978); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812, at 101–34 (1968).

310. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 884 (1994).

311. Colbert, *supra* note 307, at 49–50.

312. James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 916–17 (2004).

313. *Id.* at 924–26.

Klansmen who participated in the Colfax Massacre, one of the bloodiest instances of mob violence in U.S. history.[314] The Court held that private terror was beyond the federal government's power to punish.[315] In response, Congress passed the Civil Rights Act of 1875 to ensure that blacks had the right to serve on state juries.[316]

The Court addressed the constitutionality of the 1875 Act in *Strauder v. West Virginia*.[317] West Virginia had a statute on the books that restricted jury service to white men. Taylor Strauder, a black man who had been convicted of murder by an all-white jury and sentenced to death, challenged the constitutionality of the state statute.[318] The Court turned first to the Fourteenth Amendment, holding that while it is worded as a negative, the Fourteenth Amendment vests an affirmative right against discriminatory legislation.[319] The Court then found that the state statute is without a doubt the kind of discrimination that the Fourteenth Amendment intended to prohibit. The Court discussed the essential importance of juries to the administration of justice, but framed the issue as the right to a jury that has been selected in a nondiscriminatory manner, distinguishing this from a right to a jury composed of people of the same race.[320] In one of the Court's most forceful formulations of antidiscrimination principles, the Court found:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[321]

Under these principles, the Court approved the jury guarantees of the 1875 Civil Rights Act as fully within the reach of Section 5 of the Fourteenth Amendment.[322] But the Court did qualify the reach of their holding, noting that states may still impose other restrictions and qualifications for jury service and that it would not

314. 92 U.S. 542, 559 (1875).
315. *Id.* at 550.
316. Colbert, *supra* note 307, at 62–63.
317. 100 U.S. 303 (1880).
318. State v. Strauder, 11 W. Va. 745 (1877).
319. *Strauder*, 100 U.S. at 307–08.
320. *Id.* at 305.
321. *Id.* at 308.
322. *Id.* at 308–09 and 312.

restrict states' discretion generally.[323] Those qualifications simply cannot be based on race.[324] Benno Schmidt argues that "this concession was an open invitation to racist officials for the systematic exclusion of blacks."[325]

What *Strauder* did not do was clarify the standard for removal to federal court—the specific remedy *Strauder* and countless other black defendants sought.[326] The Court held that a defendant could remove a case to federal court if his civil rights would be denied in state court, but such removal could only be effected before trial.[327] Removal was approved in this case because the West Virginia statute made it clear that Strauder would be denied a properly composed jury. However, Justice Stone failed to articulate when it could be assumed pretrial that a person would be denied civil rights. This question came to the fore in the second opinion that came down that day, *Virginia v. Rives*.[328]

The defendants in *Rives*, Burwell and Lee Reynolds, had also been tried by an all-white jury, which was drawn in turn from an all-white jury venire. But there was no statute in Virginia that mandated that this be so; it was simply the way things were. The Reynolds brothers had not alleged discriminatory misconduct on the part of any state officials; they simply asked that some blacks be put on the jury.[329] They petitioned federal judge Alexander Rives for removal to federal court and he accepted jurisdiction.[330] But the lack of a statute proved dispositive.[331]

Justice Strong acknowledged that state action could come from any branch of government and that if an official had disregarded the neutral statute and selected only whites for the venire, that would qualify as unconstitutional state action.[332] But to qualify for removal the violation needs to be *certain* before trial.[333] This certainty Justice Strong assumed that this would not come to pass: "In such a case it ought to be presumed the court will redress the

323. *Id.* at 310.

324. *Id.*

325. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1435 (1983).

326. *Strauder*, 100 U.S. at 312.

327. *Id.* at 309–12 (interpreting Rev. Stat. § 641 (1875).

328. 100 U.S. 313 (1879).

329. *Id.* at 314–15.

330. *Id.* at 316.

331. *Id.* at 319–20.

332. *Id.* at 319, 321.

333. *Id.* at 321.

wrong."[334] The Court saw pretrial removal as preemptive and wanted to give state courts the opportunity to address discrimination.[335] Thus, the Court held that a violation becomes ripe for federal review only once the trial judge ignores it and the state appellate courts fail to correct it.[336] The proper remedy would then be for the Supreme Court to swoop in and correct the error.[337]

There are both critiques and justifications for the *Rives* decision. The evidence in the case was anecdotal. Especially in contrast to the statutorily sanctioned discrimination in *Strauder*, *Rives* must have looked like a weakly supported claim. The Reynolds brothers were essentially asking the Court to take judicial notice of racism, which the Court was not willing to do. The central role of the removal claim surely triggered federalism concerns and considerations of comity must have motivated the Court's decision to restrict the availability of federal courts for state prosecutions of black defendants. On a more visceral level, Tony Amsterdam argues that the inquiries that would ensue would have "smack[ed] of trying the loyalty of the state judges to their constitutional obligations."[338] And so an unwillingness to engage in this kind of "inconvenient and judicially embarrassing" inquiry, as well as a desire to avoid disrupting and delaying state proceedings by initiating preliminary factual litigation in federal courts, likely led the Court to adopt a more administrable and impersonal approach to removal.[339]

But it is certain that the Court opted to read the removal statute narrowly and to construe it as mandating ripeness.[340] Schmidt regards this Catch-22 as eliminating the systemic administrative and judicial violations of civil rights from federal removal jurisdiction. Discrimination that is "winked at":

> [M]ay lack the self-evident tangibility and controlling force of positive law, but neither is it appropriately viewed as an isolated, unexpected judicial error that crops up in a particular case. Where systemic administrative discrimination is permitted to continue undisturbed by the state courts and is the basis

334. *Rives*, 100 U.S. at 322.

335. *Id.* at 321–22.

336. *Id.* at 322.

337. *Id.*

338. Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 858 (1965).

339. *Id.*

340. *See* Brando S. Starkey, *Criminal Procedure, Jury Discrimination & the Pre-*Davis *Intent Doctrine: The Seeds of a Weak Equal Protection Clause*, 38 AM. J. CRIM. L. 1, 9 (2010).

> upon which a claim of expected denial rests for purposes of a removal petition, surely "the presumption is fair" that the state courts will *not* correct the denial. It flies in the face of reality to view such discrimination as "a denial first made manifest at the trial of the case," in the words of *Rives*.[341]

In *Ex parte Virginia*,[342] the Court may have been trying to light the way for future claims. This case was the aftermath of *Rives*. Federal prosecutors indicted Virginia judges for failing to include black jurors on the jury lists in violation of Section 4 of the 1875 Civil Rights Act.[343] The case came to the Court as a habeas petition from the state judges in federal custody.[344] The judges did not try to explain away their actions, but only challenged the constitutionality of the Civil Rights Act. Since the Court had decided in *Strauder* that the Act was constitutional, it remained only to confirm that selecting jurors was state action. The Court stated bluntly that it was, and would be even if that duty were delegated to a private person,[345] and thus denied the petitions.[346]

The next year, in *Neal v. Delaware*,[347] the Court nimbly followed the course laid out in *Rives* and *Ex parte Virginia*. As there was no discriminatory law on the books, the Court, under *Rives*, found that removal had properly been denied.[348] But no blacks had *ever* been called as jurors, either for the grand or petit jury.[349] Because the judges had supervised and sanctioned this—had, in fact, stated that "the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries"[350]—they were guilty of same offense as the Virginia judges.[351] The indictment should have been quashed or the panels dismissed.[352] Instead, the state court asked Neal to prove that there had been discrimination. Neal responded by asking the court to call the jury commissioners and court clerks to testify; the court refused.[353] He submitted an affidavit stating the facts of exclusion as

341. Schmidt, Jr., *supra* note 325, at 1435.
342. 100 U.S. 339 (1879).
343. *Id.* at 340.
344. *Id.*
345. *Id.* at 348.
346. *Id.* at 349.
347. 103 U.S. 370 (1880).
348. *Id.* at 387–93.
349. *Id.* at 381.
350. *Id.* at 393–94.
351. *Id.* at 394.
352. *Id.*
353. *Neal*, 103 U.S. at 395.

he knew them, to which the state did not respond.[354] Justice Harlan, in the first formulation of the test later established in *Batson*, held that the defendant's affidavit:

> [P]resented a *prima facie* case of denial . . . of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States.[355]

Justice Harlan seemed to be pushing back on Justice Stone's carte blanche regarding qualifications. The officials had purportedly based their decisions on the "sober and judicious persons" requirement in the Delaware Constitution.[356] Of course, it is easier to veto exclusion when it is backed by a point-blank statement that "no blacks could ever qualify."

This was an ideal case to bring to the Court. First, blacks were completely excluded from the jury. Second, officials made absurd statements on the record. Third, the defendant tried to follow the rules and was refused a full and fair opportunity to do so. In hindsight, the ideal facts of this case likely made it more difficult for defendants facing less egregious circumstances to succeed in the future.

The next jury victory was in *Bush v. Kentucky*.[357] Justice Harlan, writing for the majority, began by expressing his regret and embarrassment about the sparse record.[358] Incredibly, the Supreme Court decided to engage in its own scrupulous examination of the evidence, and the decision turned upon that highly fact-dependent scrutiny.[359] After the enactment of the Fourteenth Amendment, the state legislature of Kentucky passed two separate statutes restricting jury service to whites, reenacting a prohibition that had previously

354. *Id.* at 396–97.
355. *Id.* at 397.
356. *Id.* at 388.
357. 107 U.S. 110 (1883).
358. *Id.* at 110–11.
359. *Id.* at 110–14, 122–23.

been part of the law.[360] The Kentucky Supreme Court struck the legislation down both times, but the second decision came down after the grand jury that indicted Bush had been impaneled, although before the actual petit jury for Bush's trial was selected.[361] The sheriff had actually been explicitly ordered to select jurors "without regard to race, color, or previous conditions of servitude."[362] As in *Neal* and *Rives*, no black jurors were selected.[363] The court presumed that the jury commissioners had been intently following the court battle, and "in the absence of any evidence that the selection of grand jurors . . . was in fact made without discrimination against colored citizens," the Court decided that "it should be assumed that the jury commissioners . . . followed the statutes of Kentucky so far as they restricted the selections of grand jurors to citizens of the white race."[364]

Some scholars dismiss this case as decided on a technicality, which of course it was.[365] But to dismiss it as such ignores several important points. First, the justices were willing to sift through the confusing and incomplete record themselves, in great depth, in order to find a way to overturn the conviction. This is not the kind of scrutiny the Court gave to other discrimination cases. In those cases, facts were simply accepted or rejected summarily.[366] Second, although this was not explicitly stated, the burden had shifted to the state.[367] In the absence of proof to the contrary, the petitioners won.

The next spate of cases, which hit the Court between 1896 and 1904, demonstrate a clear pattern: petitions for removal were denied and motions to quash were granted. *Gibson v. Mississippi*,[368] *Smith v. Mississippi*,[369] and *Murray v. Louisiana*[370] were all removal

360. *Id.* at 119–20 (citing and discussing two Kentucky statutes, one from 1852 and one from 1873, with the latter superseding the former, that denied jury service to people of color).

361. *Id.* at 121–22.

362. *Id.* at 113.

363. *Id.* at 113–14.

364. *Id.* at 122.

365. *See* Starkey, *supra* note 340, at 15.

366. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 470 (1996); McCleskey v. Kemp, 481 U.S. 279, 308 (1987); Palmer v. Thompson, 403 U.S. 217, 223–24 (1971).

367. *Bush*, 107 U.S. at 122 ("[I]n the absence of any evidence that the selection of grand jurors in May, 1880, was in fact made without discrimination against colored citizens, because of their race . . . .")

368. 162 U.S. 565 (1896).

369. 162 U.S. 592 (1896).

370. 163 U.S. 101 (1896).

cases that were decided within a month of one another in 1896. *Murray* and *Gibson* involved motions to quash that had been improperly presented.[371] Smith's motion to quash was considered insufficient, even though it largely resembled the motion presented in *Neal*. To varying degrees, all three cases presented demographic evidence and testimony regarding how many blacks lived in the county and how many had been called to serve as jurors.[372] But because the Court held strictly to procedure, it refused to consider that form of evidence and testimony.[373] Since the laws were not facially discriminatory, removal was held to be improper and all three cases were affirmed.

The judgments in *Carter v. Texas*[374] and in *Rogers v. Alabama*,[375] both writs of error on motions to quash, were reversed and remanded. Carter's motion detailed the demographic facts of exclusion without allegations of discriminatory purpose.[376] Before being arraigned, he read the motion aloud in open court and then asked for leave to present witnesses who could confirm the facts.[377] Leave was denied and Carter appealed.[378] A unanimous Court reversed and remanded.[379] In *Rogers*, the motion to quash had been denied and stricken from the record as too prolix.[380] The motion was two pages long.[381] Another unanimous Court found this to be an improper denial of the defendant's constitutional rights and reversed.[382]

But the tide turned. In 1898 the same lawyer who had represented the defendants in *Gibson* and *Smith* brought a case challenging the Mississippi Plan.[383] In 1890, Mississippi had implemented the infamous literacy tests and poll taxes designed to preclude blacks from voting without explicitly contravening the Reconstruction Amendments.[384] Because voter-registration books were then used as a guide in making jury lists, this had the effect of excluding

371. *Id.* at 108; *Gibson*, 162 U.S. at 584.

372. *Murray* assembled the most comprehensive record in any jury case in the fifty years after Reconstruction. *See* Schmidt, Jr., *supra* note 325, at 1467.

373. *Gibson*, 162 U.S. at 584; *Smith*, 162 U.S. at 600; *Murray*, 163 U.S. at 106.

374. 177 U.S. 442 (1900).

375. 192 U.S. 226 (1904).

376. *Carter*, 177 U.S. at 444.

377. *Id.*

378. *Id.* at 444–45.

379. *Id.* at 449.

380. *Rogers*, 192 U.S. at 229–30.

381. *Id.* at 230.

382. *Id.* at 231.

383. Williams v. Mississippi, 170 U.S. 213 (1898).

384. *See* Starkey, *supra* note 340, at 20.

blacks from serving on juries.[385] The U.S. Supreme Court found the jury selection laws constitutional in *Williams v. Mississippi*,[386] despite the Mississippi Supreme Court's statement: "Restrained by the federal constitution from discriminating against the negro race, the [Mississippi legislature] discriminated against its characteristics and the offenses to which its weaker members were prone."[387] The Court concluded that the laws "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them," and affirmed the conviction.[388]

The Court seemed to demand proof of intent. In *Martin v. Texas*[389] and *Thomas v. Texas*,[390] the Court employed far greater deference to the state courts and began requiring that the defendant prove specific acts of official discrimination.[391] Both of those cases were affirmed.

These cases certainly have mixed outcomes and it is difficult to discern a unified theory that explains them all. But despite some negative cases, the Court's overall track record in this area is remarkable: in the era of the *Civil Rights Cases*, *United States v. Cruikshank*, and *Plessy v. Ferguson*, the Supreme Court regularly found jury discrimination. There is no other category of cases where the Court ruled so frequently and forcefully in favor of the petitioners.[392]

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385. MISS. CODE ANN. § 2358 (1892) ("How List of Jurors Procured. The board of supervisors at the first meeting in each year, or a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the circuit court for the next two terms to be held more than thirty days afterwards, and as a guide in making the list, they shall use the registration–books of voters; and it shall select and list the names of qualified persons of good intelligence, sound judgment and fair character, and shall take them as nearly as it conveniently can from the several election districts in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors.").

386. *Williams*, 170 U.S. at 225.

387. Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896).

388. *Williams*, 170 U.S. at 225.

389. 200 U.S. 316 (1906).

390. 212 U.S. 278 (1909).

391. *Martin*, 200 U.S. at 338–39; *Thomas*, 212 U.S. at 281–83.

392. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 47, 55 (2004) ("The only civil rights victories of the Plessy era were a few Court reversals of convictions of black defendants who had been denied opportunity to prove race discrimination in jury selection.").

The stage was dark between 1909 and 1935. But that changed dramatically in *Norris v. Alabama*.[393] It was the second Scottsboro Boys case to reach the Court and a brilliant performance by Norris's attorney convinced the Court to activate the *Neal* dicta—that total exclusion creates a prima facie case of discrimination.[394] The Court literally took out magnifying glasses to examine the forged jury rolls, where the names of blacks had been tagged on after the venire had already been selected.[395] One justice was heard to whisper, "Why it's as plain as punch!"[396] The response of the commissioners—that they had not found any blacks qualified to serve as jurors—was considered a "sweeping characterization" that the Court found "impossible to accept."[397] As in *Bush v. Kentucky*, the Court eschewed the usual practice of appellate deference to fact finding and pored over the evidence themselves. Having done so, they simply announced a factual finding of discrimination.[398]

In the years following, the Supreme Court found jury discrimination based on total exclusion in Oklahoma,[399] Kentucky,[400] Louisiana,[401] Texas,[402] Mississippi,[403] North Carolina,[404] and then twice more in Alabama, thirty-two years after *Norris*.[405] In a pair of Texas cases, the Court expanded the principle from total exclusion to highly disproportionate exclusion.[406]

Two cases that bookend this period demonstrate the limited impact of these decisions on the everyday reality of racial discrimination. In 1906, the Court granted certiorari on a Tennessee case challenging the systematic exclusion of blacks from the jury.[407] The

393. 294 U.S. 587 (1935).

394. Neal v. Delaware, 103 U.S. 370, 397 (1880).

395. Schmidt, Jr., *supra* note 325, at 1478 (describing how the Justices, one by one, examined the rolls under a magnifying glass as a handwriting expert explained the forgery).

396. *Id.* at 1479.

397. *Norris*, 294 U.S. at 599.

398. Schmidt, Jr., *supra* note 325, at 1480.

399. Hollins v. Oklahoma, 295 U.S. 394 (1935).

400. Hale v. Kentucky, 303 U.S. 613 (1938).

401. Pierre v. Louisiana, 306 U.S. 354 (1939).

402. Hill v. Texas, 316 U.S. 400 (1942).

403. Patton v. Mississippi, 332 U.S. 463 (1947).

404. Brunson v. North Carolina, 333 U.S. 851 (1948).

405. Coleman v. Alabama, 389 U.S. 22 (1967); Anderson v. Alabama, 366 U.S. 208 (1961).

406. Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940).

407. *See* United States v. Shipp, 203 U.S. 563, 571 (1906) (describing the basis for granting the habeas petition and the subsequent actions that led to the contempt charge). For more of the history of this case, see Wendy Brown-Scott, *Important Lessons from History*, 8 BUFF. HUM. RTS. L. REV. 147, 158 (2002).

Court sent a telegram to the local sheriff, two days before the execution had been scheduled, with this news.[408] The next evening a mob broke into the jail and lynched the defendant, Ed Johnson, and left a note on his mutilated body reading, "To Justice Harlan. Come get your nigger now."[409] The sheriff was brought before the Supreme Court on an unprecedented contempt charge, but when he was released from his sentence he was welcomed home by a crowd of 10,000 that greeted him as a hero.[410] In 1951 the Court unanimously reversed the verdict of *Shepherd v. Florida* based on jury discrimination and the case was retried.[411] On the way to a change-of-venue hearing before the second trial, the arresting sheriff apparently suffered a flat tire on the back road he was inexplicably taking and was forced to shoot the defendants in self-defense when they allegedly attacked him—while handcuffed. Shepherd was killed. Shepherd's codefendant survived and was again sentenced to death. That sentence was denied certiorari.[412]

The cases after *Norris* show the Court trying to hone its analytic process, though not without some hiccups. The Court briefly adopted a policy of restarting the clock each time it ruled discrimination unconstitutional in a particular state, in order to see whether the state officials were learning from their mistakes. This meant that it would only consider discrimination that had occurred after its most recent decision. Thus, Justice Reed, writing for the Court in *Akins v. Texas*, decided that the relevant period to examine was the three years since it had decided *Hill v. Texas* in order to determine whether the recently appointed jury commissioners had mended their ways.[413] But the Court retreated from this approach in *Reece v. Georgia*, in which it considered evidence of eighteen years of discrimination.[414]

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408. Klarman, *supra* note 392, at 56.

409. *Id.*

410. *Id.* at 56–57.

411. Shepherd v. Florida, 341 U.S. 50 (1951).

412. Klarman, *supra* note 392, at 277.

413. Atkins v. Texas, 325 U.S. 398, 405 (1945); *see also* Swift, *supra* note 5, at 320.

414. Reece v. Georgia, 350 U.S. 85, 87–88 (1955). However, the Court had not at that point ruled on a Georgia jury discrimination case, so perhaps some very specific sense of notice—that it applies only to one state at a time—guided the Court's decision. It had, however, been twenty years since *Norris v. Alabama*, 294 U.S. 587 (1935), had been decided, so the Court might have found that notice sufficient.

Akins v. Texas and *Cassell v. Texas*[415] seemed to mark where the Court was willing to draw the line. In an attempt to stay just barely on the constitutional side of the line drawn in *Smith*, Texas had implemented a policy that placed one token black person on each grand jury. In *Smith* the Court had ruled that calling only five black jurors over seven years, and usually placing them at slot sixteen when generally only the first twelve served on the jury, was flagrantly unconstitutional.[416] The commissioner who testified in *Akins*, which was decided only five years later, was not particularly wily; he candidly admitted, "I did not have any intention of placing more than one negro on the grand jury,"[417] but the Court affirmed the state court's findings of fact that found no discriminatory intent.[418] In *Cassell*, the particular list in question had no blacks on it at all. The commissioners testified that this was because "they chose only whom they knew, and that they knew no eligible Negroes."[419] Four justices found that such a system was intentionally discriminatory, another three thought that it might have arisen because the commissioners did not realize they were required to have more than one black person on each panel.[420] Tokenism was overturned, but without unequivocal language condemning it.

But in *Hill v. Texas*, the Court found that discriminatory impact alone can be enough to cause an Equal Protection violation, even if the state actor did not actively seek to cause that discriminatory outcome, but merely failed to prevent it.[421] The search for intent was winding down. Advancing the *Hill* reasoning in *Avery v. Georgia*, the Court put an affirmative obligation on jury commissioners to follow a "course of conduct" that did not "operate to discriminate in the selection of jurors on racial grounds."[422] It also held that once a prima facie case of discriminatory impact has been established, it is the state's obligation to rebut it with sufficient evidence.[423]

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415. 339 U.S. 282 (1950).

416. Smith v. Texas, 311 U.S. 128 (1940).

417. Akins v. Texas, 325 U.S. 398, 406 (1945).

418. *Id.* at 403–04, 407.

419. *Cassell*, 339 U.S. at 290.

420. *Id.* at 296 (speculating that there might have been a "misconception by the grand-jury commissioners of the requirements of this Court's decisions").

421. Hill v. Texas, 316 U.S. 400, 404–05 (1942). In *Hill*, the prima facie case was made out by the statistics; the commissioners failed to rebut it with their argument that they did not personally know any blacks qualified for jury service and had not sought to learn whether there were any. *Id.* at 404.

422. Avery v. Georgia, 345 U.S. 559, 561 (1953) (citation and internal quotation marks omitted).

423. *Id.* at 562.

Increasingly, the Court also was willing to evaluate that impact in depth and examine statistical disparities between blacks eligible to serve and those actually called. In *Brown v. Allen*, the Court was content to defer to whatever selection procedures the state chose to adopt—here, the poll and tax lists from which the juror lists were sourced.[424] Blacks were 33% of the total population, but only 18% of the jury-eligible population. The Court stated that "variations in proportions of Negroes and whites on jury lists from racial proportions in the population have not been considered violative of the Constitution where they are explained and not long continued."[425] Finding that there was an explanation for how few blacks were serving on juries—blacks constituted a much smaller percentage of those poll and tax lists—the Court looked no further. That changed eleven years later in *Arnold v. North Carolina*, where the Court found that the statistical disparity between the population and the eligible jurors was enough to establish purposeful racial discrimination.[426]

One of the most remarkable developments was the Court's willingness to expand the categories of individuals it considered protected by the Fourteenth Amendment when it came to their right to serve on a jury. In *Thiel v. Southern Pacific Co.*, the Court reversed a judgment in a civil case because the jury commissioner had refused to include working class men on the jury lists.[427] The Court has never found that the poor are protected by the Fourteenth Amendment, but an exception was made for jury service. And in *Hernandez v. Texas*, the Court for the first time found that Mexican Americans were also protected by the Fourteenth Amendment.[428] The proof paralleled *Norris v. Alabama* and showed that based on surnames, 14% of the population of Jackson County was Mexican American, but no Mexican Americans had been called for jury service for the last twenty-five years.[429]

Building off of the precedent in *Hernandez* and *Arnold*, in *Castaneda v. Partida* the Court formally established a burden-shifting test for jury discrimination cases.[430] The Court held that the sub-

424. Brown v. Allen, 344 U.S. 443, 473–74 (1953).

425. *Id.* at 471.

426. Arnold v. North Carolina, 376 U.S. 773, 774 (1964). The discrimination in *Arnold* was more extreme and was compounded by the fact that the poll tax numbers accurately reflected the overall population. But the Court based its ruling on the disparity between jury composition and population, not the poll tax list. *Id.*

427. Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946).

428. Hernandez v. Texas, 347 U.S. 475, 479 (1954).

429. *Id.* at 480–81.

430. Castaneda v. Partida, 430 U.S. 482, 494–95 (1977).

stantial underrepresentation of an identifiable group constituted a denial of Equal Protection.[431] The Court laid out that a prima facie case can be established as follows: (1) the group must be a recognizable, distinct class, singled out for different treatment; (2) there must be substantial underrepresentation, which may be proven by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors over a significant period of time; and (3) the selection procedure must be susceptible to abuse or not racially neutral.[432] This proof of substantial underrepresentation creates "a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut."[433]

Castaneda came only one year after *Washington v. Davis* and was decided only two months after *Arlington Heights*. Justice Blackmun recognized that those cases ruled that disproportionate impact is not enough to prove an Equal Protection violation, but then quoted the language from both cases that indicated jury discrimination is an exception to that rule.[434] While the Court termed the *Castaneda* test a proof of "discriminatory purpose," the test requires no actual showing of intent. The Court threaded the needle of *Arlington Heights* and seized upon the language that "[s]ometimes 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."[435] It affirmed that when it comes to racially discriminatory jury selection, "the systematic exclusion of Negroes is itself such an unequal application of the law as to show intentional discrimination."[436]

The *Castaneda* Court decided that a disparity of 40% established a prima facie case and that the state had failed to rebut it.[437] The Court found that the Texas jury-selection system violated Equal Protection based purely on disparate impact evidence.[438]

B. Jury Pool Jurisprudence

In *Smith*, the Court explained that "[i]t is part of the established tradition in the use of juries as instruments of public justice

431. *Id.* at 494.
432. *Id.* at 494–95.
433. *Id.*
434. *Id.* at 493 (citing Washington v. Davis, 426 U.S. 229, 241 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.13 (1977)).
435. *Arlington Heights*, 429 U.S. at 266.
436. *Davis*, 426 U.S. at 241 (internal citations omitted).
437. Castaneda v. Partida, 430 U.S. 482, 499 (1977).
438. *Id.* at 495–96, 500–01.

that the jury be a body truly representative of the community."[439] Based on this language, another type of case began making its way to the Court. After the Sixth Amendment's right to a jury trial was incorporated against the states in *Duncan v. Louisiana*,[440] defendants began to challenge discrimination on Sixth and Fourteenth Amendment grounds.[441] The plurality opinion in *Peters v. Kiff* indicated that the Court would be amenable to finding that an individual has standing to challenge Sixth Amendment violations where a group had been systematically excluded from the jury pool.[442] The "fair cross-section" jurisprudence developed rapidly thereafter. Today these cases are litigated under the Sixth Amendment's fair cross-section doctrine,[443] not under Fourteenth Amendment Equal Protection.

The foundational cases addressed the exclusion of women from the jury pool. In the first case, *Glasser v. United States*, the only women who had been included on the jury lists in the Northern District of Illinois were women who belonged to a political group that had organized allegedly pro-prosecution classes on how be a juror.[444] The Court denied this claim based on lack of proof, but articulated "the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."[445] Four years later, in *Ballard v. United States*, the defendants claimed that their convictions were invalid because of the complete exclusion of women and the Supreme Court agreed.[446] Deciding the case not on constitutional principles, but, instead, based on its supervisory powers, the Court found that the exclusion of women could be prejudicial.[447] Notably, the Court focused not on the possible harm to the individual defendant, but on the systemic harm: the exclusion of women from juries causes "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."[448] Individual harm need not be shown.

439. Smith v. Texas, 311 U.S. 128, 130 (1940).

440. Duncan v. Louisiana, 391 U.S. 145, 158 (1968).

441. *Duncan* was not retroactive, however, and so for a few years the cases that came before the Court were appeals from pre-*Duncan* trials. It took a few years for a trial that had taken place post-*Duncan* to make its way to the Supreme Court.

442. Peters v. Kiff, 407 U.S. 493, 500 (1972).

443. *See infra*, text accompanying notes 461–74.

444. Glasser v. United States, 315 U.S. 60, 83–84 (1942).

445. *Id.* at 86.

446. Ballard v. United States, 329 U.S. 187, 193 (1946).

447. *Id.* at 195–96.

448. *Id.* at 195.

This case also moved the Court toward another surprising leap of faith: the value of viewpoint diversity and that such diversity may improve the quality of justice.[449] As the Court put it, "[t]he truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both . . . a flavor, a distinct quality is lost if either sex is excluded."[450]

Increasingly, racial exclusion cases used demographic statistics to demonstrate discrimination based on disparity.[451] In *Whitus v. Georgia*,[452] *Jones v. Georgia*,[453] and *Sims v. Georgia*,[454] the Court inspected the percentage of blacks in the population, compared it to the percentage that were on the jury lists, and found that these were systems where:

> the opportunity for discrimination was present and [the Court] cannot say on this record that it was not resorted to by the commissioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion.[455]

Even in the absence of proof that anyone had purposefully discriminated—indeed, the jury commissioners testified, without contradiction, that they had not considered race in making their selections[456]—when the disparities reached a certain threshold the Court was now willing to find that they stated a prima facie case of purposeful discrimination.[457] Further, citing *Norris*, the Court found that "[w]hile the commissioners testified that no one was included or rejected on the jury list because of race or color this has been held insufficient to overcome the prima facie case."[458] The

449. *See* Tanya E. Coke, *Lady Justice May Be Blind, But Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 360 (1994); Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1574 (2007).

450. *Ballard*, 329 U.S. at 193–94.

451. *See* Arnold v. North Carolina, 376 U.S. 773, 774 (1964); Jones v. Georgia, 389 U.S. 24 (1967); Whitus v. Georgia, 385 U.S. 545, 550–552 (1967); Eubanks v. Louisiana, 356 U.S. 584, 586–87 (1958); Reece v. Georgia, 350 U.S. 85, 87–88 (1955); Hernandez v. Texas, 347 U.S. 475, 480–82 (1954); *see also* Hill v. Texas, 316 U.S. 400, 403–404 (1942); Smith v. Texas, 311 U.S. 128, 128–29 (1940); Pierre v. Louisiana, 306 U.S. 354, 359 (1939).

452. 385 U.S. 545, 552 (1967).

453. 389 U.S. 24, 25 (1967).

454. 389 U.S. 404, 407–08 (1967).

455. *Whitus*, 385 U.S. at 552.

456. *Id.* at 549.

457. *Id.* at 551.

458. *Id.*

Court affirmed this view in *Turner v. Fouche* and *Alexander v. Louisiana*, finding that opportunity to discriminate, paired with a disparate impact, established a prima facie case.[459] Both convictions were overturned.[460]

The Court transferred the fair cross-section requirement to the Sixth Amendment in *Taylor v. Louisiana*.[461] *Taylor* challenged an "opt-in" system in Louisiana, where women were automatically excluded from jury service unless they had filled out a form indicating an affirmative desire to serve.[462] Men were not subject to this rule. Due to this system, the jury list was only 10% female in a district where women comprised 53% of the population.[463] Justice White found that this system violated the Sixth Amendment.[464] The Sixth Amendment required a jury be impartial; if the state depended on a selection process that systematically excluded certain groups of a community, that system is by definition unrepresentative of the community.[465] Further, the Court seemed to find this automatic exclusion antithetical to the fundamental promise of the Sixth Amendment. The structural safeguard of the jury is that it "guards against the exercise of arbitrary power" by "mak[ing] available the commonsense judgment of the community . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[466]

A few years later, the converse of the *Taylor* system was also found to violate the Sixth Amendment in *Duren v. Missouri*.[467] Missouri had adopted an opt-out system, where the questionnaires that were mailed out included a paragraph prominently addressed "TO WOMEN" stating that any woman who did not wish to serve would be excused.[468] As Andrew Leipold put it, "[t]hat the underrepresentation was caused by the women themselves (they asked to be excused) was irrelevant, because the selection process *allowed*

459. Alexander v. Louisiana, 405 U.S. 625, 630–31 (1972); Turner v. Fouche, 396 U.S. 346, 360 (1970).

460. *Alexander*, 405 U.S. at 634; *Turner*, 396 U.S. at 364.

461. Taylor v. Louisiana, 419 U.S. 522, 528–31 (1975).

462. *Id.* at 523.

463. *Id.* at 524.

464. *Id.* at 531.

465. *Id.* at 531.

466. *Id.* at 530.

467. Duren v. Missouri, 439 U.S. 357, 369–70 (1979)

468. *Id.* at 361.

the skewing of the jury pool to occur."[469] The court established a clear test for future claims:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[470]

This test is functionally identical to the Equal Protection test laid out in *Castaneda*. The first step requires that the excluded group be identifiable and the second demands comparative underrepresentation, provable by demographic statistics alone.[471] The third step of both requires some demonstration of how the procedure works, and that the exclusion is due to systemic factors (*Duren*) or is susceptible to abuse (*Castaneda*). The only difference is that the third step in *Castaneda* creates an inference of discriminatory purpose, while under *Duren* the Sixth Amendment does not require intent. As the *Duren* Court notes, the third step in an Equal Protection challenge "is subject to rebuttal evidence either that discriminatory purpose was not involved or that such purpose did not have a determinative effect . . . . In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion *itself* demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section."[472] The rebuttal in a Sixth Amendment case is harder to meet: the state must justify the constitutional infringement by demonstrating that attaining a fair cross-section is incompatible with a significant state interest.[473] The Court's explanation in *Duren* hinted strongly that Sixth Amendment challenges would be easier to pursue than Equal Protection claims, and petitioners have taken the hint.[474]

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469. Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 971 (1998).

470. *Duren*, 439 U.S. at 364.

471. Castaneda v. Partida, 430 U.S. 482, 494 (1977).

472. *Duren*, 439 U.S. at 368 n.26 (emphasis added).

473. *Id.* at 368–69.

474. *See, e.g.*, Berghuis v. Smith, 559 U.S. 314 (2010); United States v. Orange, 447 F.3d 792, 797–800 (10th Cir. 2006); United States v. Weaver, 267 F.3d 231, 234 (3d Cir. 2001); Johnson v. McCaughtry, 92 F.3d 585, 590–95 (7th Cir. 1996); United States v. Rogers, 73 F.3d 774, 775–77 (8th Cir. 1996); United States v. Jackman, 46 F.3d 1240, 1248 (2d Cir. 1995); Ramseur v. Beyer, 983 F.2d 1215, 1235–39 (3d Cir. 1992); United States v. Maskeny, 609 F.2d 183, 189–90 (5th Cir. 1980);

C. Batson *and Its Progeny*

In 1965 the Supreme Court first addressed the issue of the peremptory strike. Peremptory strikes have been used as far back as ancient Rome and were traditionally seen as "almost essential for the purpose of securing perfect fairness and impartiality in a trial."[475] They have likewise been a refuge for discrimination. In *Swain v. Alabama*, the prosecutor had struck the six blacks remaining in the jury venire, resulting in an all-white jury sentencing Robert Swain to death for raping a white woman.[476] For the first time, the Court acknowledged that peremptory strikes could be infected with racial discrimination.[477] In such a case, the Court stated, strikes would be impermissible.[478] However, the Court provided an evidentiary standard that was fatal to any such claim. First, the baseline presumption is that the prosecutor has acted without prejudice.[479] That presumption is not overcome simply by showing that all blacks were removed from the jury.[480] Nor is it overcome by showing they were removed *because of* their race—after all, the prosecutor might believe the case turns on a racial issue.[481] The Court held that the presumption can only be overcome by proving that:

> [T]he prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the

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United States v. Butler, 615 F.2d 685, 686 (5th Cir. 1980). Challenges in state courts also usually proceed under the Sixth Amendment. *See, e.g.*, Washington v. People, 186 P.3d 594, 600–06 (Col. 2008); Diggs v. United States, 906 A.2d 290, 293 (D.C. 2006); Williams v. State, 125 P.3d 627, 631 (Nev. 2005); People v. Burgener, 62 P.3d 1, 26–27 (Cal. 2003); Azania v. State, 778 N.E.2d 1253, 1259–60 (Ind. 2002); State v. Gibbs, 758 A.2d 327, 334 (Conn. 2000); Lovell v. State, 702 A.2d 261, 279 (Md. 1997); State v. Williams, 525 N.W.2d 538 (Minn. 1995); State v. Dixon, 593 A.2d 266, 271 (N.J. 1991); State v. Lopez, 692 P.2d 370, 373–74 (Idaho Ct. App. 1984). *But cf.* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141 (2012) (noting a disturbing recent pattern of courts confounding Sixth Amendment and Equal Protection challenges and erroneously denying valid Sixth Amendment claims for want of proof of systematic discrimination).

475. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 145 (James Appleton Morgan ed., Frederick D. Linn & Co., 2d ed. 1875) (1852).

476. Swain v. Alabama, 380 U.S. 202, 210, 231–33 (1965).

477. *Id.* at 223–24.

478. *Id.*

479. *Id.* at 222.

480. *Id.*

481. *Id.* at 222–23.

> result that no Negroes ever serve on petit juries . . . In these circumstances . . . it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.[482]

As the Court later stated in *Batson*, this burden was "crippling."[483] In the twenty-one years between *Swain* and *Batson*, only two cases succeeded. Both were in Louisiana, decided one month apart in 1979; their success was likely due to a particularly receptive Louisiana Supreme Court and compelling testimony on two especially egregious prosecutors in Baton Rouge.[484]

A few other courts tried challenging the status quo. The first was in the District of Connecticut in 1976.[485] After a defense attorney protested that the prosecution had used all its peremptory strikes to eliminate black jurors, Judge Jon Newnan asked the prosecutor whether he wanted to state a nonracial reason for challenging the four black prospective jurors.[486] The prosecutor declined and Judge Newnan gave the defense permission to evaluate the jury records from the previous two years in the district.[487] Severe statistical discrepancies were found and Judge Newnan reinstated the struck jurors.[488] While the reinstatement was reversed by the Second Circuit, the battle cry had been sounded.[489] State supreme courts in Massachusetts and California soon followed the District of Connecticut's lead, electing to provide a more achievable standard under their state constitutions.[490]

Prompted by these lower court decisions, critical commentary from scholars,[491] and dissatisfaction with *Swain* from within the

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482. *Swain*, 380 U.S. at 223–24.

483. Batson v. Kentucky, 476 U.S. 79, 92 (1986).

484. State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979). In both cases, extensive testimony was presented on how each prosecutor systematically used peremptory strikes to strike blacks. Interestingly, Washinton and Brown's trials were before the same judge, who provided the defense counsel in *Brown* with evidence on the composition of other East Baton Rouge juries; this evidence was read into the record. *Brown*, 371 So. 2d at 752.

485. *See* United States v. Robinson, 421 F. Supp. 467, 469 (D. Conn. 1976).

486. RANDALL KENNEDY, RACE CRIME AND THE LAW 198 (1997).

487. *Id.*

488. *Id.*

489. *Id.* at 199.

490. *See* Commonwealth v. Soares, 387 N.E.2d 499, 514–16 (Mass. 1979); People v. Wheeler, 583 P.2d 748, 764 (Cal. 1978).

491. *See* Batson v. Kentucky, 476 U.S. 79, 90 n.14 (1986) (citing scholarly criticism). For further criticism from the interregnum see John Andrew Martin, *The*

Court,[492] the Court in *Batson* changed its position on this venerated bastion of prosecutorial discretion. Citing a bizarre combination of the jury cases as well as *Davis* and *Arlington Heights*—but not *Feeney*—the Court held that Equal Protection forbids prosecutors from striking jurors on account of their race, without exception.[493] Backtracking directly from its language from *Swain*, the Court now found that "[a] person's race simply is unrelated to his fitness as a juror."[494]

To achieve this new tier of protection, the Court dramatically altered the *Swain* standard. To establish a prima facie case of discriminatory jury selection, the defendant need only present evidence concerning the prosecutor's actions at his own trial.[495] The requirement of showing a consistent pattern was eliminated. A prima facie case under *Batson* has three parts: First, the defendant must show that he is a member of a cognizable racial group and that the prosecutor exercised peremptory challenges to remove from the panel members of the defendant's race.[496] Second, the defendant "is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[497] Third and finally, the defendant must show that the above facts, and any other relevant circumstances, raise the in-

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Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury, 4 HOUS. L. REV. 448 (1966); Comment, Swain v. Alabama*: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1175 (1966) (arguing that *Swain* gave the states a "blank check for discrimination"); Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967); Note and Comment, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 334 (1965) (arguing that *Swain* should have gone further and required fair procedures for selecting jurors). Other excellent articles discussing that period include Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 164 (1989) [hereinafter Alschuler, *The Supreme Court and the Jury*]; Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will Batson Cover Disability Based Strikes?*, 57 ALB. L. REV. 289, 306–09 (1993) (describing Swain as "powerful in principle, pathetic in practice").

492. Justices Marshall and Brennan dissented from the denial of certiorari in *McCray v. New York*, 461 U.S. 961, 963–70 (1983). In a separate opinion regarding the denial of certiorari, Justices Stevens, Blackmun, and Powell indicated that they were interested in reconsidering *Swain*, but wanted more time for it to percolate in the laboratories of the states. *Id.* at 961.

493. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

494. *Id.* at 87 (internal quotations and citations omitted).

495. *Id.* at 95.

496. *Id.* at 96.

497. *Id.*

ference that the prosecutor struck members from the venire on account of their race.[498] The Court gives as examples of relevant circumstances a pattern of strikes against black jurors or comments during voir dire.[499]

Once the prima facie case is established, the burden shifts to the state to rebut it with a race-neutral explanation for its actions.[500] The explanation must be something more than a mere denial, a statement of intuition, or an affirmation of good faith; the prosecutor must give "clear and reasonably specific" explanations for the challenges in question.[501] The trial court then evaluates whether a case of discrimination has been established.[502]

Criticism of *Batson* is plentiful.[503] Scholars argue that it leaves far too much room for pretext, that it fails to clarify the proper

498. *Id.*

499. *Batson*, 476 U.S. at 97.

500. *Id.*

501. *Id.* at 98, n.20.

502. *Id.* at 98.

503. *See, e.g.*, Alschuler, *The Supreme Court and the Jury*, *supra* note 491, at 199 (criticizing *Batson* for acting only symbolically against racism, without doing enough to alter the preemptory challenge); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 44–46 (2001) (methodically identifying and answering a number of empirically testable assumptions about the mechanics of the peremptory strike that authors claim underlie the *Batson* decision); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 524 (arguing that *Batson* is part of a "flawed methodology for eliminating racist influence in the jury selection process and supported by naive assumptions regarding the influence of race on the judicial process"); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 214 (2003) (arguing that *Batson*'s burden-shifting framework actually makes trial judges "more willing to accept proffered race-neutral explanations for alleged discriminatory use of peremptory challenges, no matter how suspect"); Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 863 (1997) (arguing that *Batson* further deindividualized the jury selection process); Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 638–41 (1994) (proposing the elimination of the peremptory challenge system); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1105 (1994) (asserting that "*Batson* has therefore become impotent in preventing discrimination"); David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 811–41 (1988); Robert W. Rodriguez, Comment, Batson v. Kentucky*: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755, 797 (1988) (arguing that *Batson* is an incomplete solution to the problem of exclusion on the basis of race during jury selection).

remedy,[504] that it does not account for unconscious racism,[505] that it preserves peremptory strikes when they should be abolished entirely,[506] and that it puts the burden entirely on the defense lawyer to note and raise the problem.[507] Whether the test laid out in *Batson* is an effective vehicle for combating racism is beyond the scope of this Note. Empirically, it is clear that the success rates of *Batson* challenges are very low.[508] Rather, the goal here is to note that barely ten years after *Davis* ruled that disparate impact is insufficient to prove an Equal Protection violation, the Court intentionally implemented something very much like that standard for jury discrimination cases.

This shift cannot be imputed to changes in Court membership: only one member of the Court had left in the interim.[509] And while *Batson* step three does ask the challenger to present any other evidence that implicates a discriminatory intent, that intent can be shown by pointing to the pattern alone. *Batson* violations take place at individual trials, so the "disparate impact" is scaled down to a single courtroom. But functionally, *Batson* is disparate impact writ small.

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504. Jason Mazzone, Batson *Remedies*, 97 IOWA L. REV. 1613 (2012); Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE. L.J. 93, 94–96 (1996).

505. Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 151–58 (2010); Anthony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 227–29 (2005). Anthony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 227–29 (2005).

506. Miller-El v. Dretke, 545 U.S. 231, 266–69 (2005) (Breyer, J., concurring); Batson v. Kentucky, 476 U.S. 79, 107–08 (1986) (Marshall, J., concurring); *see also* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 864 (1997); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502–03 (1995–1996); Page, *supra* note 505, at 245.

507. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 43 (2010), *available at* http://www.eji.org/node/397; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1839 (1994).

508. Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092 (2011) (surveying 269 federal decisions between 2000 and 2009 and finding that a new trial was only granted in 6.69% of those cases); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges,* 71 NOTRE DAME L. REV. 447, 468 Table F-4 (1995–1996).

509. Justice Stewart retired in 1981, and was replaced by Justice O'Connor. Chief Justice Burger retired five months after *Batson* was handed down in 1986.

Batson's impact did not end there. *Batson* gave birth to a group of cases that consistently expanded its scope. Decided the same day as *Batson*, *Turner v. Murray* held that at least in some cases—the case at hand being an interracial capital trial—trial judges have an affirmative duty to inquire into a juror's possible racial bias.[510] In 1991, four separate *Batson* cases came down. *Ford v. Georgia*[511] was especially surprising considering it was a habeas case, a procedural stage in which the Court is generally less willing to grant substantive review. But Georgia had set up an elaborate procedural rule that was designed to prevent appellate courts from reviewing *Batson* claims.[512] The Court granted certiorari and unanimously found that this rule did not constitute independent and adequate state grounds that could bar habeas review and that Georgia was required to hear *Batson* claims.[513]

Six weeks later the Court ruled in *Powers v. Ohio* that *Batson* claims could be raised regardless of the race of the defendant.[514] Larry Joe Powers, a white man, objected when the prosecution used seven of its ten peremptory strikes to remove the black people from the jury.[515] The record before the Court did not indicate whether any blacks actually sat on the trial jury or whether the defendant had stricken any blacks.[516] The question in *Powers* was standing: Could a white man have suffered constitutional injury by the removal of black jurors? The Court, in a poetic account of the importance of jury service to democracy, found that when jurors are excluded on the basis of race, it is the jurors' Equal Protection rights that have been violated.[517] A defendant has standing to challenge this violation because "racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process[,] . . . places the fairness of a criminal proceeding in doubt[,] . . . [and] invites cynicism respecting the jury's neutrality and its obligation to adhere to the law."[518] The first requirement of third-party standing, injury-in-fact, is met by this blow to the integrity of the system.[519] The second criterion, a close relation between the defendant and the juror, is met because both individuals have an interest in keep-

510. Turner v. Murray, 476 U.S. 28, 36–37 (1986).
511. 498 U.S. 411 (1991).
512. *Id.* at 417–18.
513. *Id.* at 424–25.
514. Powers v. Ohio, 499 U.S. 400, 409 (1991).
515. *Id.* at 403.
516. *Id.*
517. *Id.* at 411–13.
518. *Id.* at 412–13.
519. *Id.* at 411.

ing discrimination out of the courtroom.[520] The third criterion, that there is a barrier preventing the injured party from asserting his own rights, is met because of the structural problems of juror exclusion and of the proportion of the injury to the financial burden of undertaking litigation.[521] Powers soared past the standing barrier and his judgment was reversed.[522]

Two months after *Powers*, the Court weakened the *Batson* step two requirements in *Hernandez v. New York*.[523] The prosecutor claimed that he was striking Latino jurors because several witnesses would be testifying in Spanish and he doubted that they would defer to the court interpreter's translation.[524] The defendant argued that the prosecutor used language as a proxy for race, but the Court specifically said that it would not address that claim.[525] Instead, because this explanation was literally race-neutral, the Court found that it was legally race-neutral for the purposes of *Batson*.[526] The Court opted to stay blind to pretextual explanations, a trend that continued in *Purkett v. Elem*.[527] In *Purkett*, the prosecutor's explanation for striking black jurors was that they had goatees.[528] The Court found that the Eighth Circuit had erred in requiring that the explanation be at least "minimally persuasive."[529] The race-neutral explanation did not need to be "persuasive, or even plausible," it just had to be facially neutral.[530] For fourteen years, these two cases took much of the power out of *Batson*.

The final case, decided in 1991 and perhaps the most surprising of all, was *Edmonson v. Leesville Concrete Co*.[531] *Edmonson* was a civil case, so, to apply *Batson*, the court had to first find that private litigants were state actors so that Equal Protection could apply.[532] Just as *Powers* manipulated the normal standing requirements so that *Batson* could reach all defendants, *Edmonson* manipulated the state action doctrine so that *Batson* could reach all litigation. As in *Powers*, the Court acknowledged the dilemma directly. The Court

520. *Powers*, 499 U.S. at 413–14.
521. *Id.* at 414–15.
522. *Id.* at 416.
523. Hernandez v. New York, 500 U.S. 352, 361–62 (1991).
524. *Id.* at 356–57.
525. *Id.* at 360.
526. *Id.* at 361.
527. 514 U.S. 765 (1995).
528. *Id.* at 766.
529. *Id.* at 768.
530. *Id.*
531. 500 U.S. 614 (1991).
532. *Id.* at 619.

proceeded through the various state action tests in an orderly fashion. It found first that use of the courtroom fulfills "overt, significant participation of the government."[533] It then found that selection of a jury involves the performance of a traditional function of government.[534] The jury, it stated, "is a quintessential governmental body, having no attributes of a private actor."[535] Having found state action under both of the two primary tests, the Court merrily continued on and found that civil jury selection also qualified for state action under *Shelley v. Kraemer*.[536] *Shelley* seems the most applicable, considering it also found state action in a civil case where courts enforced private choices,[537] but the Court likely wanted *Edmonson* to fit comfortably into the more conventional state action rules. It reimagined the *Shelley* test as "whether the injury caused is aggravated in a unique way by the incidents of governmental authority" and held that this too was satisfied.[538] The Court, having completed the doctrinal analysis, turned to the other justifications for extending Fourteenth Amendment protection to civil cases and found that the courtroom must be safeguarded from discrimination.[539] That rationale will be explored in Part V.

The next few years saw even more expansion. The Court found that *Batson* symmetrically prohibits defense counsel from striking jurors based on race in *Georgia v. McCollum*.[540] Justice Scalia commented on the "sheer inanity" of this result: "Barely a year [after *Edmonson*], we witness its reduction to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state."[541] But the Court seemed to find that the juror's right to serve trumps the defendant's right to challenge jurors he or she sees as hostile. In *J.E.B. v. Alabama*, the Court extended *Batson* to gender-based discrimination.[542] A male defendant in a paternity suit objected to opposing counsel's removal of all male jurors, rendering the jury entirely fe-

533. *Id.* at 622–24.

534. *Id.* at 624–25.

535. *Id.* at 624.

536. *Id.* at 622.

537. Shelley v. Kraemer, 334 U.S. 1 (1948).

538. *Edmonson*, 500 U.S. at 622.

539. *Id.* at 628.

540. Georgia v. McCollum, 505 U.S. 42, 59 (1992).

541. *Id.* at 69–70 (Scalia, J., dissenting).

542. J.E.B. v. Alabama, 511 U.S. 127, 129 (1994).

male.[543] The Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[544]

Finally, in the last ten years the Court has reinvigorated all three steps of *Batson*. In *Johnson v. California*, the Court rejected the California Supreme Court's interpretation of *Batson* step one.[545] California had adopted a test that asked whether it was "more likely than not" that the strikes had been motivated by racial bias.[546] Working off of this test, a trial court did not require a prosecutor to explain himself after striking three blacks on the venire.[547] The defense's challenge, the California Supreme Court found, was insufficient because he had not established the prima facie case; the defense needed to show that there was "a strong likelihood" that discrimination had occurred, but had only pointed to the pattern.[548] The Supreme Court reversed. It found this standard was more demanding than it had intended:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.[549]

Johnson reinforced that *Batson* step one should be a relatively low hurdle.

Miller-El v. Dretke[550] and *Snyder v. Louisiana*[551] revitalized the *Batson* step two case law previously gutted by *Hernandez* and *Purkett*. In *Miller-El*, decided the same day as *Johnson*, the Court engaged in a fact-intensive analysis of the prosecutor's asserted reasons for striking a black venire member.[552] After examining the justifications, the Court found that "it blinks reality to deny that the State struck [the black jurors] because they were black."[553] More gener-

543. *Id.*
544. *Id.*
545. Johnson v. California, 545 U.S. 162, 168 (2005).
546. *Id.* at 164.
547. *Id.* at 165.
548. *Id.*
549. *Id.* at 170.
550. 545 U.S. 231 (2005).
551. 552 U.S. 472 (2008).
552. *Miller-El*, 545 U.S. at 240–52.
553. *Id.* at 266.

ally, the Court addressed the required caliber of the prosecutor's race-neutral explanation:

> [P]eremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.[554]

Snyder made the prosecutor's burden even heavier. The remarkable facts of the trial may have played a role. Allen Snyder had separated from his wife Mary in the summer of 1995.[555] The separation was rocky and Mary had been ignoring Allen's attempts to meet and talk.[556] One night, Mary was on a date with another man and as they returned home, Allen came up to their car and stabbed both of them multiple times.[557] The man died, Mary survived.[558] Allen Snyder was charged with first-degree murder.[559] The crime took place as the O.J. Simpson trial was happening and the prosecutor who took on the case made several public statements referring to this case as "his O.J. Simpson case."[560] The defense made a pretrial motion to preclude reference to O.J. Simpson, citing a phone call he had received the day before trial in which the TV reporter had asked for comment on " 'the O. J. Simpson trial' scheduled to begin the following day in Jefferson Parish, and 'confirm[ed] that it was the District Attorney's Office which had billed this trial with the by-now infamous moniker, and intimated that it was the reference that made the story newsworthy.' "[561] The prosecutor promised not

554. *Id.* at 252.

555. *Snyder*, 552 U.S. at 474.

556. *Id.*

557. *Id.* at 474–75.

558. For an excellent account, see Camille A. Nelson, Batson*, O.J., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1704 (2008).

559. *Snyder*, 552 U.S. at 475.

560. David G. Savage, *Citing Bias, Justices Reject Death Sentence*, L.A. TIMES, Mar. 20, 2008, at A11.

561. Brief for Petitioner, Snyder v. Louisiana, 552 U.S. 472 (2008), 2007 WL 2605447, at *8.

to do so.[562] But after striking all the black jurors on the venire, he reneged on that promise, telling the jurors that this case was "very, very, very similar" to the O.J. Simpson case where O.J. "got away with it" and bringing it up again in his rebuttal argument.[563] The all-white jury convicted Snyder and sentenced him to death.[564]

Despite the substantial briefing on these facts, the Court's opinion did not address the O.J. Simpson issue directly. *Miller-El* provided that courts could look to the broader circumstances of the trial[565] and this would have been an easy case in which to do so. But instead, the Court focused on the reasons the prosecutor professed for striking the black jurors and engaged in a side-by-side comparison with white jurors who had not been struck.[566] Few cases would be able to compare to *Snyder* in terms of an atmosphere of racism. By relying on juror-specific scrutiny, the Court set a precedent that prosecutors' peremptory challenges must always be subjected to rigorous scrutiny—as *Miller-El* dictated—regardless of whatever other circumstances exist. The Court here also refused to credit the trial court's ruling that the peremptory challenge was legitimate in the absence of an explanation of the decision by the trial judge.[567] In so doing, the *Snyder* Court indicated that deference is not applicable and that appellate courts should carefully review these rulings.[568]

Viewed together, *Miller-El* and *Snyder* also provided guidance on *Batson* step three. Both cases involved fact-intensive analyses by the Supreme Court, and scholars have argued that this is the paradigm that lower courts are expected to follow. Courts should not quickly accept the proposed nondiscriminatory reasons and instead must probe the facts to ensure that those reasons are legitimate and nonpretextual.[569] *Miller-El* also advanced a new factor that courts

562. *Id.* at *7–8.

563. *Id.* at *2.

564. *Snyder*, 552 U.S. at 476.

565. Miller-El v. Dretke, 545 U.S. 231, 253–66 (2005) (describing a number of patterns and practices that indicated discrimination).

566. *Snyder*, 552 U.S. at 479–84.

567. *Id.* at 479.

568. *See* John P. Bringewatt, Note, Snyder v. Louisiana*: Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283, 1299 (2010).

569. *See, e.g.*, *id.* at 1301; Heather Davenport, Note, *Blinking Reality: Race and Criminal Jury Selection in Light of* Ovalle*,* Miller-El*, and* Johnson, 58 BAYLOR L. REV. 949, 979 (2006) ("[T]he Court advanced—by way of example—the extremely detailed factual analysis that lower courts should undertake."); Jennifer Ross, Comment, Snyder v. Louisiana*: Demand for Judicial Scrutiny of the Use of Peremptory Challenges*, 4 DUKE J. CONST. L. PUB. POL'Y SIDEBAR 305, 305 (2009) ("*Snyder* demands a higher level of scrutiny from trial courts when they determine the pres-

should consider: in addition to a fact-intensive, juror-specific analysis, courts should look "beyond these comparisons to include broader patterns of practice during the jury selection."[570]

IV.
THE JURY JURISPRUDENCE IS DIFFERENT

As shown above, the jury jurisprudence operates in a different universe from the rest of Equal Protection law. The Court has protected the jury against discrimination even in eras when every other civil rights decision took a hands-off approach to discrimination. *Strauder* contains some of the most forceful indictments of discrimination that can be found in the United States Reports until the Warren Court.[571] *Strauder* has mystified generations of constitutional scholars: it is framed by the egregious *Cruikshank* opinion only four years earlier and the *Civil Rights Cases*, which invalidated much of the Civil Rights Act of 1975, only three years later.[572] Yet cases protecting the rights of blacks to serve on juries came before and after *Plessy v. Ferguson* and continued steadily throughout the 1930s up until, and during, the Civil Rights movement.[573]

The standard employed in these cases is unique. *Castaneda* permitted a defendant to show through disparate impact alone that an Equal Protection violation occurred. While jury pool cases have since been shifted over to the Sixth Amendment, *Castaneda* has not been overruled. In every other area of Equal Protection law, the Court refuses to accept statistical disparities as proof of intentional discrimination; in *McCleskey*, it even refused to accept an exceptionally exhaustive multiple regression analysis proving that race of the victim was a causal factor in whether someone was sentenced to death. *Castaneda*, in conjunction with the fair cross-section jurisprudence, ensures that systemic exclusion in the jury pool—large-scale jury discrimination—can be readily challenged.

In every other area of Equal Protection law, if an action is facially neutral but disparately impacts a racial group, the Court requires a separate showing of intent. That standard, after *Arlington Heights* and *Feeney*, has proved insurmountable: plaintiffs effectively need to present a smoking gun. They are required to prove something beyond actions and inferences. Conversely, intent need not

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ence of racially discriminatory intent and urges a more critical analysis of the race-neutral explanations proffered by lawyers using peremptory challenges.").

570. *Miller-El*, 545 U.S. at 253.

571. Schmidt, Jr., *supra* note 325, at 1414.

572. *Id.* at 1417–18.

573. *See supra* Part III.A.

be proven for *Batson* challenges. *Batson*, which addresses trial-level jury discrimination, established a burden-shifting test that puts much of the burden on prosecutors and courts. While imperfect in practice, in theory a defendant now need only point out that a cognizable group has been excluded. The second two steps of the prima facie case are the inference that the peremptory strikes system creates a space for discrimination and that the circumstances as a whole give rise to the inference of discrimination. While a claim's success will likely ride on whether the defense lawyer is able to tell a compelling story of discriminatory inferences, after *Johnson* it seems that judges ought always to infer discrimination when a pattern of racial strikes occurs. The burden then shifts to the prosecutor to proffer a race-neutral reason, and courts are to scrutinize in depth whether the explanation holds water and whether there are other circumstances that point to discrimination. This framework is similar to that used in voting rights and Title VII cases,[574] but bears no similarity to other areas of Fourteenth Amendment law.

The impossible barriers erected against other Equal Protection plaintiffs do not apply to the jury cases. Statistics can alone be proof of discrimination; elusive intent need not be smoked out. Principles of standing and state action were manipulated so that all defendants and all litigants can raise *Batson* challenges. Historically, and with regard to both large-scale and small-scale discrimination, the Court has established an alternate jurisprudence for juries.

Other Equal Protection litigants did seek to rely on the jury jurisprudence to bolster their claims—most notably in *McCleskey v. Kemp*. The petitioners cited *Batson* and *Castaneda* to support their claim that they had met the prima facie case and so the burden should now shift to the state to rebut.[575] But the Court rejected this possibility flat-out. It affirmed that the jury cases operated under a different standard, but that that standard was to be restricted to juries.[576] The Court lifted the jury jurisprudence out of the rest of Equal Protection and confirmed, implicitly, that juries are different.

V.
IS THE JURY DIFFERENT?: THREE EXPLANATIONS FOR THE COURT'S REMARKABLE JURY JURISPRUDENCE

There are various possible explanations for why juries have received such solicitous treatment from the Supreme Court. There is

574. *See supra* Part II.B.1–2.

575. *See* McCleskey's Brief, *supra* note 238, at *26–27.

576. McCleskey v. Kemp, 481 U.S. 279, 293–96 (1987).

the historical theory: This special respect for juries is not new. Juries were considered by the Founding Fathers to be a mainstay of democracy, essential as a check on judicial and executive power, useful as a means of educating citizens, and indispensible to a participative government. There are also more cynical explanations. The Court has been confronted with some truly egregious discrimination claims over the years, but many of them have implicated large groups of people and would have been exceedingly difficult to police. Jury claims are more discrete, and thus far easier to decide. Finally, the discrimination alleged in jury cases all takes place right in front of the judge's eyes. In this view, the Court just wants to keep its own house clean.

At the Constitutional Convention, protecting the right to a jury was perhaps the most consistent point of agreement between the Federalists and Anti-Federalists.[577] Alexander Hamilton wrote in The Federalist 83,

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[578]

Akhil Amar argues that "juries were at the heart of the Bill of Rights" and points out that juries were guaranteed in three amendments and their absence strongly influenced the judge-restricting provisions in three more.[579]

Alexis de Tocqueville, who has been heavily cited by the Court in its jury cases,[580] spoke eloquently of the importance of juries:

> The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs

577. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994).

578. THE FEDERALIST NO. 83 (Alexander Hamilton).

579. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183, 1190 (1991). Juries are featured in the Fifth, Sixth, and Seventh Amendments, and Amar argues that their absence affected the First, Fourth, and Eighth. *Id.*

580. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 272–73 (2005) (Breyer, J., concurring); Powers v. Ohio, 499 U.S. 400, 406–07 (1991).

> which are not exclusively their own, it rubs off that individual egotism which is the rust of society.[581]

Juries were seen as "free schools," and judges often would stray from the case at hand and educate the jurors about civic principles.[582] The jury was seen as a bastion of democratic governance—an experience of democracy in action matched only by voting.[583] The Court drew on these precepts in deciding the jury discrimination cases. If participation in the jury was such an essential part of citizenship, then no discrimination could be tolerated.

> Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.[584]

In *Smith v. Texas*, the Court went so far as to say that racial discrimination in jury service not only violates the Constitution, "but is at war with our basic concepts of a democratic society and a representative government."[585]

The jury was seen as a way to protect ordinary individuals from the arbitrary power of government. Blackstone called the jury "the grand bulwark of his liberties,"[586] language the *Strauder* Court quoted in harnessing its arguments against jury discrimination.[587]

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581. Alexis de Tocqueville, Democracy in America 266 (New York, G. Dearborn & Co. 1838).

582. *See* Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 Sup. Ct. Rev. 127, 132, 178 (discussing the early role of judges as educators and the tendency of early Supreme Court justices to inculcate civic virtues).

583. For an excellent and original application of First Amendment principles to jury discrimination, see Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 Mich. L. Rev. 2409 (2003). Tokaji argues that the Supreme Court sees jury service as "a forum for political participation on par with the ballot box." *Id.* at 2500.

584. Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975) (citing Thiel v. S. Pac. Co., 328 U.S. 217, 227 (Frankfurter, J., dissenting)) (alteration in original).

585. Smith v. Texas, 311 U.S. 128, 130 (1940).

586. 2 William Blackstone, Commentaries, *342, *349.

587. Strauder v. West Virginia, 100 U.S. 303, 308–09 (1880).

The protection provided by an unbiased jury also played a key role in the debates over the passage of the Civil Rights Act of 1875. One senator concluded that constitutional protections for black defendants would mean nothing without the right to sit on juries.[588] In *McCleskey* the Court held that "it is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' "[589]

A more cynical view would propose other factors that explain the jury jurisprudence. As Susan Herman points out, the Court relied heavily and "virtually exclusive[ly]" on the jury cases in response to challenges to racial discrimination in the criminal justice system.[590] For a simple reason: the courtroom is far easier to police. *McCleskey* presented the Court with a vision of reality so appalling that five justices ran in the other direction. The Court saw that McCleskey's claims, taken as true, "throw[ ] in serious question the principles that underlie our entire criminal justice system."[591] There was no bright line to draw; everyone was implicated, from the police, to the prosecutors, to the jurors. No realm of power was safe and any reform effort would have to be enormous in both scope and depth. In 1987, perhaps shaken by the thirty years spent trying to eliminate school segregation, the Court had no interest in assuming a new burden. Jury claims, in comparison, are straightforward. They are also narrow and more easily monitored. And so "[j]ustices who are concerned about slippery slope problems are more comfortable about deploying burden-shifting tests in a narrowly delimited area that is peculiarly within the control and expertise of courts, and the availability of a presumptive baseline of representativeness makes the burden-shifting argument stronger."[592]

Plus, there are strong precedents and rhapsodic language to draw upon.

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588. Forman, Jr., *supra* note 312, 927–28 (quoting statements by Vermont Republican Senator George Edmunds).

589. McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (citing Strauder v. West Virginia, 100 U.S. 303, 309 (1880)).

590. Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1815 (1993).

591. *McCleskey*, 481 U.S. at 314.

592. E-mail from Seth Kreimer, Kenneth W. Gemmill Professor of Law, U. Penn. Law School, to author (Apr. 15, 2012, 01:45PM EST) (internal citation to *Edmonson v. Leesville Concrete Co.* omitted) (on file with author). Kreimer further clarified that this was in part because "[j]ury jurisprudence is heir to the 'fair cross section' requirement, which (under some circumstances) imposes an outcome-based rule rooted in the notion of a 'jury of peers' directly from the Sixth Amendment. See most recently *Berghuis v. Smith*, 130 S. Ct. 1382 (2010)."

Herman argues that "the *Batson* line of cases acts as a lightning rod for all of the Court's unexpressed concerns about racism in the criminal justice system."[593] In her view:

> *Batson* is Justice Powell's attempt to provide the Court with a judicially modest, procedurally based response to racism. The solution Justice Powell offers, consistent with the Court's procedural responses to the Scottsboro convictions, is to combat racism by providing an opportunity for those who might be the subjects of discrimination to be represented in the decision-making process. Because the jury is the seat of representation in the criminal justice system, the Court concentrates on removing any racially based obstacles to jury service. Ideally, once juries are representative the courts may comfortably defer to jury verdicts, and the criminal justice system will no longer suffer taint."[594]

A challenge to jury discrimination is already, conveniently, part of a judicial process. The lawyers have been hired, the claims have been pleaded, and pretrial motions have been ruled on. There are parties in the courtroom with a stake in the outcome, to whom injury can accrue. In this context, a jury discrimination claim is just one more objection to make and appellate issue to raise. The marginal systemic costs are lower and the scene is already being played on the right stage.

With regard to state action, the set of actors involved is discrete: the jury commissioner; the prosecutor; the defense attorney; one, or perhaps a handful, of individuals; and a specific person to whom illegitimate actions can be traced, and perhaps quietly fired or ousted if the situation gets bad enough. The jury commissioner and the assistant prosecutor are not usually the most recognizable faces in politics; their fates can be sacrificed if need be.

Perhaps the most cynical view of all is that the justices reject discrimination in the courtroom because it takes place right in their laps. Schmidt points out that more than discrimination on railroad cars or in the voting booths; this is the kind of discrimination judges can appreciate.[595] In *Edmonson*, the Court points directly to this in two distinct ways. First, it notes what it terms a principle of judicial integrity, but could also be termed the embarrassment factor:

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593. Herman, *supra* note 590, at 1813.

594. *Id.* at 1813–14.

595. Schmidt, Jr., *supra* note 325, at 1420.

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.[596]

And second, the Court argues that the elimination of discrimination is essential in order to progress as a society and that "the quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility."[597] With their esteemed colleagues at the helm of such civil tutelage, "the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color."[598] And so the jury is returned to its origins, as a "free school" where the end of racial discrimination can be taught and propagated.

CONCLUSION

The Supreme Court's Equal Protection jurisprudence has had a rocky history. The early barriers to protection came from the state action doctrine, but that doctrine seems to have been subconstitutionally retrofitted to reflect the tiers of scrutiny: a more generous interpretation for racial minorities and a sterner eye for everyone else. More recently the *Davis* intent doctrine has proven an insuperable barrier for Equal Protection claims; it has successfully prevented all minority litigants from receiving judicial protection since its creation in the late 1970s. Protection, if it comes at all, comes largely from statutes, such as Title VII and the VRA. Section 4(b) of the VRA may now be unconstitutional,[599] but for the moment Section 2 remains intact.

Throughout all of this, the jury jurisprudence has remained strong and unique. Blacks on juries received protection even when they received none in public accommodations or public transit. The Court wrote forceful paeans to the virtues of jury service, and

596. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991).
597. *Id.* at 630–31.
598. *Id.*
599. Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013).

how it lies at the heart of democratic government, all through the end of the 19th Century and through most of the 20th—albeit with a sober pause from 1908 to 1935, the height of Jim Crow and lynchings.

The jury jurisprudence was immune from the blows of state action thanks to its sheltered position at the heart of the judicial branch. And it then proved immune to the barriers the Court tossed in the way of other areas of discrimination litigation: claimants could use statistical disparities to prove discrimination, and did not need to prove invidious intent. Instead, the Court provided an alternative burden-shifting test, which it progressively has made easier to satisfy over the last twenty-five years.

Whether because juries are core to democracy and political participation or because courts cannot stomach watching discrimination play out on their own turf, this area of Equal Protection jurisprudence is different. Whether action in this area has done anything to advance racial equality outside the courtroom, however, is a question for another day.