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Retooling the Intent Requirement under the Fourteenth Amendment

Henry L. Chambers, Jr.
University of Richmond, hchamber@richmond.edu

RETOOLING THE INTENT REQUIREMENT UNDER THE FOURTEENTH AMENDMENT

by HENRY L. CHAMBERS, JR.*

INTRODUCTION

The Fourteenth Amendment was passed in the aftermath of the Civil War to provide substantive equality to former slaves and their progeny.[1] However, rather than provide specific substantive rights to specific identifiable groups, the Fourteenth Amendment provides a structure of equality for all. Unfortunately, the intent requirement the Supreme Court has installed as a trigger for strict scrutiny review of state action under the Equal Protection Clause of the Fourteenth Amendment is not consistent with the Amendment's principles. However, the intent requirement is unlikely to be abolished. Thus, a presumption that a legislature intends the natural and probable consequences of its legislation should be added to better harmonize the intent requirement with Fourteenth Amendment principles.

The Fourteenth Amendment provides structural equality by first deeming all persons born or naturalized in the United States citizens of the United States and citizens of the state where they reside, then requiring both that states not abridge the privileges or immunities of citizens of the United States and that states affirmatively provide equal protection under the laws to any person within their jurisdiction.[2] Though the courts defined the legal rights protected by the Fourteenth Amendment rather narrowly in the aftermath of its passage,[3] the Fourteenth Amendment now applies to all governmental action.[4] The result is a modern

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* James S. Rollins Professor, University of Missouri-Columbia School of Law. The author wishes to thank the University of Missouri Law School Foundation which provided support for this essay's completion. Special thanks go to my wife, Paula, and our children for their patience.

1. *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389 (1982) (noting that the Fourteenth Amendment was an attempt to guarantee the Civil Rights Act of 1866 which "represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment"); *see also* Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1400-07 (2002) (discussing how the Thirteenth and Fourteenth Amendments were dovetailing attempts to provide equality to newly freed slaves).

2. *See* U.S. CONST. amend. XIV, § 1; AKHIL REED AMAR, THE BILL OF RIGHTS 163-80 (1998) (discussing text of Fourteenth Amendment and its implications).

3. For example, political rights were not covered by the Fourteenth Amendment. The Fifteenth Amendment was required to protect the political rights of the new citizens. *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). For a discussion of the broadening of the application of the Fourteenth Amendment to additional rights over time, see Chambers, *supra* note 1, at 1405-13 (noting that the Fourteenth Amendment has expanded to cover a wide range of rights).

4. State action triggers the equal protection clause. This essay addresses a subset of state action – legislation and legislative state action. For an overview of the state action doctrine, see Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1053 n.1 (1990) (citing much of the literature on the state action

Fourteenth Amendment that appears to require evenhandedness whenever the government acts.[5] However, the Fourteenth Amendment does not invariably stop governments from differentiating among their citizens;[6] it requires that any distinctions be justified. The more troublesome the differentiation, the more justified the distinction must be.

Three levels of justification exist under Equal Protection jurisprudence: rational basis scrutiny, intermediate scrutiny and strict scrutiny. Rational basis scrutiny is triggered whenever run-of-the-mill differentiation occurs[7] and requires only that the distinction that the legislature makes rationally relate to a legitimate government purpose.[8] Heightened scrutiny – intermediate or strict scrutiny – is triggered by differentiation based on specific grounds, such as sex or race.[9] Sex-

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doctrine).

5. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (noting that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

6. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."); Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.").

7. *See* Fitzgerald v. Racing Ass'n of Cent. Iowa, 123 S. Ct. 2156, 2159 (2003) ("The law in question . . . distinguishes for tax purposes among revenues obtained within the State of Iowa by two enterprises, each of which does business in the State. Where that is so, the law is subject to rational-basis review . . . ."); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (noting that "local economic regulation" is subject to rational basis review).

8. *See Nordlinger*, 505 U.S. at 11 ("In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, . . . the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, . . . and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.") (citations omitted). In making a determination that passes rational basis scrutiny, states can choose to prefer one activity over another and tax them accordingly. *See Fitzgerald*, 123 S. Ct. at 2158 (upholding Iowa's tax scheme for slot machines that set a maximum tax rate of 20% on riverboat slot machines and a maximum tax rate of 36% on racetrack slot machines); Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va., 488 U.S. 336, 344, (1989) (noting states' general ability to tax similar activities at different levels). However, a bare preference for one person over another is problematic under the Equal Protection Clause. *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000) (suggesting that mere dislike is not a rational basis for state action); *Romer*, 517 U.S. at 631-32 (imposing a broad and undifferentiated disability on a single named group lacks a rational relationship to a legitimate state interest); *Cleburne*, 473 U.S. at 440-41 (noting that the bare desire to harm a group does not qualify as a legitimate state interest to be furthered); *see also* Lawrence v. Texas, 123 S. Ct. 2472, 2485-86 (2003) (O'Connor, J., concurring) (discussing the role of bare desire to harm in equal protection jurisprudence). Even though the rational basis test does not appear particularly difficult to meet, it is not always met. *See Romer*, 517 U.S. at 635 (deciding state constitutional amendment limiting legal protections of gays and lesbians could not survive rational basis scrutiny); *Cleburne*, 473 U.S. at 446-50 (applying the rational basis test and deciding that the city's permit system for a group house for the mentally challenged did not pass the rational basis test).

9. *See Nordlinger*, 505 U.S. at 10 (noting that heightened review accompanies law that "jeopardizes exercise of a fundamental right or categorizes on the bases of an inherently suspect characteristic"). This essay does not explicitly address issues related to fundamental rights equal protection doctrine.

based classifications trigger intermediate scrutiny, requiring that the classification be substantially related to achieving important governmental goals.[10] Intermediate scrutiny requires that the government interest served be more important and the link between the ends to be served and the means used be tighter than that which is sufficient to survive rational basis scrutiny.[11] Racial classifications carry the largest taint and require the most justification.[12] Strict scrutiny—the level of scrutiny with which the remainder of the article will be concerned—requires that race-based differentiation serve a compelling state interest and be narrowly tailored to serve that interest,[13] guaranteeing that the reason for the differentiation is extremely important and that the link between the means chosen to meet the ends is extremely tight.[14]

Though strict scrutiny is difficult to survive, it is triggered only when a state actor engages in intentional or purposeful racial discrimination. Controversy surrounds whether such a trigger is necessary.[15] However, rather than resolve that

10. *See Cleburne*, 473 U.S. at 440-41 ("Legislative classifications based on gender also call for a heightened standard of review. . . . A gender classification fails unless it is substantially related to a sufficiently important governmental interest."); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). The anti-classification principle does not just protect women, it protects against all classifications based on gender. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) ("Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. . . . That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.").

11. *See Hogan*, 458 U.S. at 725-26 ("If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.").

12. They are the classifications most obviously at the heart of the Fourteenth Amendment. *See* Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945) (noting that the Fourteenth Amendment "was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color"). Alienage-based classifications also trigger strict scrutiny. *See Cleburne*, 473 U.S. at 440 (discussing a general rule that alienage-based classifications seldom are relevant to the achievement of any legitimate state interest and are subject to strict scrutiny). However, this essay focuses solely on race-based distinctions.

13. *See Cleburne*, 473 U.S. at 440 (noting that strict scrutiny requires that the classification be "suitably tailored to serve a compelling state interest").

14. However, that strict scrutiny must be met to justify race-based differentiation does not necessarily mean that the Fourteenth Amendment seeks or requires colorblindness. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1123 (2001) ("The broader purposes of this Article are to illuminate common misconceptions about equal protection doctrine and about racial inequality. Equal protection doctrine is thought to be colorblind. It is not. Far from actually implementing a regime of governmental colorblindness with rare exceptions for race consciousness, in some cases and in some ways the law permits the use of race and in other cases and other ways the law prohibits the use of race."); Chambers, *supra* note 1, at 1410-14 (noting that both race-consciousness and colorblindness have been thought to be consistent with Fourteenth Amendment principles when necessary to provide full substantive equality).

15. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351-53 (1987) (suggesting that intent hardly matters if the

issue, this short essay argues that the trigger should be augmented with the presumption, common in tort and criminal law, that an actor intends the natural and probable consequences of his actions.[16] The addition of the presumption does not resolve the conflict between the intent requirement and Fourteenth Amendment principles, but would allow the intent trigger to serve a purpose more consistent with the Fourteenth Amendment's grand purpose of fostering equality among citizens than it currently does.

Part I of this essay discusses the Amendment's intent requirement. Part II discusses the natural and probable consequences presumption that shapes intent inquiries in tort and criminal law. Part III explains why such a presumption should be applied to the Fourteenth Amendment intent inquiry.

I. THE FOURTEENTH AMENDMENT INTENT REQUIREMENT

Strict scrutiny is triggered under the Equal Protection Clause only if discriminatory intent or purpose motivates the subject legislation.[17] Purposeful discrimination need not be the only motivation for the legislation for strict scrutiny to apply, but it must have been a motivating factor in the legislation's passage.[18] However, purposeful discrimination does not require the purposeful intent to harm in a colloquial sense.[19] Fourteenth Amendment harm flows directly from a racial classification, not from additional harm that might accompany the classification.[20]

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elimination of stigma is the key concern of equal protection).

16. Though this approach was rejected in City of Mobile v. Bolden, 446 U.S. 55, 65-74 (1980), and Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-81 (1979), it should be reconsidered.

17. *See* Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982) ("Purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment."); *Bolden*, 446 U.S. at 66 (plurality opinion) ("This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."); Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). However, some have argued that intent should not matter. *See, e.g.*, *Bolden*, 446 U.S. at 107-08 (1980) (Marshall, J., dissenting) ("[T]here is simply no basis for the plurality's conclusion that under our prior cases proof of discriminatory intent is a necessary condition for the invalidation of multimember districting."); Chambers, *supra* note 1, at 1414-15 (noting that discriminatory intent was not originally a part of Fourteenth Amendment jurisprudence); *see also* Lawrence, *supra* note 15, at 318 ("This article reconsiders the doctrine of discriminatory purpose that was established by the 1976 decision, *Washington v. Davis*. This now well-established doctrine requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration.").

18. *See Arlington Heights*, 429 U.S. at 265-66 ("[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [to legislatures] is no longer justified.").

19. Indeed, a desire to harm is irrelevant to whether rational basis scrutiny is triggered. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (noting that the Village's subjective motivation was not necessary to claim a violation under Equal Protection Clause for rational basis purposes).

20. *See* Shaw v. Reno, 509 U.S. 630, 647-50 (1993) (noting that the equal protection harm is the racial classification and indicating there is no need to prove additional harm).

Thus, purposeful racial differentiation, rather than the intent to harm, should trigger strict scrutiny.[21]

The intent requirement emphasizes that a statute's disproportionate impact on a racial minority alone does not trigger strict scrutiny,[22] and avoids problems that might arise if disparate impact equal protection causes of action were recognized.[23] However, the trigger allows more than just legislation that fortuitously, randomly or unpredictably yields a disparate impact on racial minorities to avoid strict scrutiny;[24] it allows legislation supported by unconscious racism or somewhat veiled discrimination to avoid strict scrutiny.[25] That is troublesome, as the trigger

21. However, the existence of harm to those classified arguably is the real problem and should be addressed without regard to intent. *See* Lawrence, *supra* note 15, at 319 ("The second objection of the Davis doctrine is more fundamental. It argues that the injury of racial inequality exists irrespective of the decisionmakers' motives.").

22. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."); *Bolden*, 446 U.S. at 67-68 (plurality opinion) ("Although dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial voter dilution, the fact is that such a view is not supported by any decision of this Court.").

23. Those problems could include the invalidation of a substantial amount of legislation that unexpectedly yielded a disproportionate impact. Nonetheless, some argue that disproportionate impact should trigger constitutional scrutiny. *See, e.g.*, Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1840-41 (2000) ("Institutional racism necessitates disparate impact approaches; antidiscrimination laws or racial remediation strategies founded on models of intentional discrimination cannot and will not curtail institutional racism's harmful workings. The Supreme Court undermines efforts to bring about racial equality when it imposes a model of racism predicated on purposeful action, or worse, on the mere consideration of race."); *but see* Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 556-57 (1977) ("[U]nder DRI theory a law is presumptively unconstitutional, even though it employs no racial criterion of selection, if it has a disproportionate racial impact. . . . DRI theory thus moves beyond the traditional prohibition, the negative duty, of equal protection and imposes on government an affirmative obligation akin to its affirmative obligation under the first amendment."). For a recent take on the interplay between disparate treatment and equal protection, see Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L.REV. 493 (2003).

24. One can sense concern about fortuitous disparate impact when the Court declared that disparate impact alone was not enough to violate the Constitution. *See Washington*, 426 U.S. at 242 ("Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

25. Arguably, intent should not matter given that unconscious racism may be much more problematic than intentional discrimination. *See* Banks, *supra* note 14, at 1080 ("Conversely, the continued force of colorblindness as constitutional principle depends on suppression of awareness of the ways in which state actors use race and of the extent to which courts permit them to do so."); Haney Lopez, *supra* note 23, at 1827 ("Institutional racism theory stresses how racial institutions, whether followed in a script or path form, operate as taken-for-granted understandings of the social context that actors must adopt to make sense of the world, as well as to be accepted as bona fide members of that milieu. Under the sway of institutional racism, persons fail to recognize their reliance on racial notions, and indeed may stridently insist that no such reliance exists, even while acting in a manner that furthers racial status hierarchy."); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) (analyzing the sources of unconscious racism and its link to the ongoing debate

may leave too much discrimination unremedied.[26] Nonetheless, the intent requirement has become entrenched to the extent that it is unlikely to be abandoned. Thus, this essay focuses on restructuring the requirement rather than eliminating it.

A. The Intent of the Legislature

How to determine a legislature's intent for equal protection purposes remains an open question. The task begins with a statute's language, but does not end there, as the intent to discriminate need not be apparent on the face of the legislation.[27] Strict scrutiny may apply when legislation is discriminatory on its face, is neutral on its face but passed with a discriminatory purpose, or is neutral on its face but enforced in a discriminatory manner.[28] When discriminatory intent is not apparent

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concerning discriminatory purpose and disparate effect in equal protection literature); Lawrence, *supra* note 15 (arguing generally that unconscious racism should support strict scrutiny under the Fourteenth Amendment).

However, intent may matter in the equal protection realm if the question is how to affix blame. *See* Lawrence, *supra* note 15, at 324 (noting that the intent inquiry in equal protection jurisprudence requires that "a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged."). Attempting to fix blame rather than fix the problem can lead to other problems. *See* Johnson, 73 CORNELL L. REV. at 1036 ("[T]his involves a shift in focus from individual guilt to collective responsibility. The next stage requires recognition that racism is always wrong even when it is not morally blameworthy. In this next stage, we will attempt to control racial discrimination without first looking to whether we should condemn the discriminator."). The same may be true with respect to other styles of discrimination laws. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164-65 (1995) ("This failure [to adequately address all discrimination under Title VII] . . . stems from the assumption that disparate treatment discrimination, whether conscious or unconscious, is primarily motivational, rather than cognitive, in origin. This one-sided understanding of bias leads courts to approach every disparate treatment case as a search for discriminatory motive or intent.").

26. In addition, some have commented that the intent requirement is problematic, in part, because the requirement is too difficult to meet. *See* Johnson, *supra* note 25, at 1031 ("The dissatisfaction with the discriminatory purpose doctrine has several facets, but a recurring theme in the literature is the difficulty of proving discriminatory purpose.").

27. *See* Smith v. Doe, 538 U.S. 84, 92-93 (2003) ("We consider the statute's text and its structure to determine the legislative objective."); *id.* at 94 ("Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent."). This case arose in the context of a challenge to a sex offender registration program. *Id.* at 90. The Court needed to determine if the legislature's avowed civil program was in fact a criminal punishment. *Id.* at 92. After the court examined the Act's language and determined that it was intended to be a civil scheme, the Court examined the Act's effects to determine if it was punitive in spite of the legislature's intent. *Id.* at 95-103.

28. *See* Shaw v. Reno, 509 U.S. 630, 642-44 (1993) (discussing facially discriminatory and non-facially discriminatory legislation); Rogers v. Lodge, 458 U.S. 613, 617 (1982) ("The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, canceling out or diluting the voting strength of racial elements in the voting population."); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion) ("We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities."); *Washington*, 426 U.S. at 241 ("This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial

from the face of the statute, various factors are relevant to determining the intent of the legislature.[29] They include: how the legislation was passed,[30] its history,[31] the intent of individual legislators[32] and the legislation's effects.[33] Focusing on any single factor may have limitations,[34] but the legislation's effect is always important in determining intent, as focusing on a statute's effect focuses on what the legislature caused by enacting the legislation.[35]

B. The Content of the Test

Legislative effects are important to the Fourteenth Amendment intent inquiry, but the inquiry is not merely an effects test. Effects are important, but do not

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discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

29. *See generally* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (noting the various ways the Supreme Court has operationalized intent for Fourteenth Amendment purposes).

30. *See* Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

31. *See id.* ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes.").

32. *See id.* at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."). In Rogers v. Lodge, one justice wanted proof that some particular official had maintained the system because of discriminatory intent. 458 U.S. 613, 629-31 (1982) (Powell, J., dissenting).

33. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 283 (1979) (Marshall, J., dissenting) ("To discern the purposes underlying facially neutral policies, this Court has therefore considered the degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available.").

34. For example, focusing on the intent of individual legislators may be insufficient because doing so only identifies one or a handful of those whose intent may be relevant. *See Bolden*, 446 U.S. at 92 (Stevens, J., concurring) ("[A] political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group."). Given that a legislator may have several motives for passing legislation, the collective membership of a legislature will almost surely have numerous reasons for passing any particular enactment. *See* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 4 (2000) ("[E]ven at the individual level, it is often difficult to know or assess the precise reasons for an individual's action. Unconscious or subtle motives may guide us without our recognition of their influence."); *see also* Lawrence, *supra* note 15, at 319 ("Improper motives are easy to hide. . . . Moreover, where several decisionmakers are involved, proof of racially discriminatory motivation is even more difficult.").

35. Indeed, focusing on effects may be the best way to approach a difficult task. *Cf.* Hellman, *supra* note 34, at 3 ("[T]he intent doctrine has been criticized as incoherent because determining the intent of a group like a legislative body is both philosophically as well as practically problematic.").

compel a conclusion. Indeed, very similar evidence can lead to different conclusions respecting a legislature's intent. The result is a test whose content seems somewhat unclear,[36] as what constitutes proof of discriminatory purpose appears to be different in different contexts.[37] Indeed, even identifying what amounts to discriminatory purpose in a specific area, such as voting rights, is difficult. For example, *City of Mobile v. Bolden*[38] and *Rogers v. Lodge*[39] are voting rights cases in which the Court had to determine if at-large voting systems diluted the strength of a jurisdiction's minority voters.[40] The question in each case became whether the system used was maintained for discriminatory reasons.[41] Though the Court examined similar evidence, including the effects of the voting systems, it reached different conclusions with respect to intent in each case.[42]

In *Bolden*, the plaintiffs proved that the system at issue had yielded no black representatives, that elected officials ignored the concerns of black citizens, that there had been a history of official racial discrimination in Alabama, and that the mechanics of the voting system yielded discriminatory effects.[43] The plurality

36. Precision may be impossible to achieve as it may be impossible to explain precisely what intent or purpose requires. *See Feeney*, 442 U.S. at 279 ("'Discriminatory purpose,' however, 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."); Ortiz, *supra* note 29, at 1127-28 ("[T]he voting cases appear to require only a showing of disparate impact plus a showing that the jurisdiction has engaged in other types of discrimination in the past. In voting cases, the intent requirement does not demand any showing of actual discriminatory motivation in the decision to adopt or retain the at-large system.").

37. Though intent is required with respect to all forms of government decisionmaking subject to Fourteenth Amendment scrutiny, the content of intent changes depending on context. *See Washington*, 426 U.S. at 253 (Stevens, J., concurring) (noting that what evidence is required to prove purposeful discrimination may change depending on the type of constitutional case brought); Vikram David Amar, *Of Hobgoblins and Justice O'Connor's Jurisprudence of Equality*, 32 MCGEORGE L. REV. 823, 831-32 (2001) (noting that jury selection and voting rights cases have different intent levels than each other and than other constitutional claims); Ortiz, *supra* note 29, at 1127 (noting that the intent standard in voting rights cases is different than that in employment housing and jury selection cases).

38. 446 U.S. 55 (1980).

39. 458 U.S. 613 (1982).

40. *See Bolden*, 446 U.S. at 58 (noting that the challenges were based on the Fourteenth and Fifteenth Amendments and the Voting Rights Act); Rogers v. Lodge, 458 U.S. 613, 614 (1982) (treating the cases as a pure Fourteenth Amendment case and refusing to express view on the Fifteenth Amendment's requirements for constitutional violation).

41. *See Rogers*, 458 U.S. at 617 ("The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, canceling out or diluting the voting strength of racial elements in the voting population." (quoting Whitcomb v. Chavis, 403 U.S. 124, 142 (1971))); *Bolden*, 446 U.S. at 66 (plurality opinion) (noting that "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers (citations omitted) . . . [a] plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" (quoting *Whitcomb*, 403 U.S. at 149)).

42. *Bolden*, 446 U.S. at 70, 74; *Rogers*, 458 U.S. at 627.

43. *Bolden*, 446 U.S. at 73-74 (plurality opinion) ("First, the two courts found it highly significant that no Negro had been elected to the Mobile City Commission. . . . Second, the District Court relied in part on its finding that the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. . . . Third, the District Court and the Court

determined that the evidence did not support the claim of intentional discrimination.[44] In *Rogers*, the plaintiffs proved that the system yielded no black representatives, that discrimination stopped black political action, that elected officials ignored the concerns of black citizens and that discriminatory practices had been replaced with ostensibly colorblind ones that yielded the same effects.[45] The Court determined that the plaintiffs had proven purposeful discrimination.[46] In *Rogers*, the Court simply appeared more willing to allow the fact finder to infer purposeful discrimination from the effects of the subject voting system than it had been in *Bolden*.[47]

Bolden and *Rogers* suggest that the close evaluation of evidence is the key to determining intent and whether strict scrutiny is triggered.[48] As importantly, they suggest that though discriminatory effects are not always sufficient to prove purposeful discrimination,[49] they can be evidence of purposeful discrimination.[50]

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of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. . . . Finally, the District Court and the Court of Appeals pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out.").

44. *Id.* at 70, 74 (plurality opinion). Justice Marshall disagreed, arguing that the effect of the maintenance of the system was enough to support a Fourteenth Amendment violation. *See id.* at 139 (Marshall, J., dissenting) (suggesting that maintenance of a voting system with foreseeable discriminatory effects suggests a "racial indifference" that is sufficient to support a constitutional violation).

45. *See Rogers*, 458 U.S. at 623-24 (noting that "the fact that [no blacks] have ever been elected [in Burke County] is important evidence of purposeful exclusion" of blacks from the local political system); *id.* at 624-25 (noting that discrimination in Burke County had helped stop blacks from participating in the political process in Burke County); *id.* at 625 ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo."); *id.* at 625-26 (noting that elected officials were unresponsive to concerns of black citizens).

46. *Id.* at 626-27. Though the system in *Rogers* was conceived for neutral purposes, it was maintained for invidious purposes. *Id.*

47. *See id.* at 624-27 (deeming fact that no blacks had been elected in the county evidence of purposeful exclusion).

48. *See, e.g.*, *Bolden*, 446 U.S. at 70 (plurality opinion) ("But where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose.").

49. *See id.* at 67-68 (plurality opinion) (noting that disproportionate effects alone are insufficient to trigger strict scrutiny). Of course, the use of discriminatory effects to prove purpose is appropriate, as purpose may be proved through direct evidence, circumstantial evidence or a combination of the two. *See* Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *Rogers*, 458 U.S. at 618 (noting that discriminatory intent is necessary, but need not be proved through direct evidence).

50. *See Arlington Heights*, 429 U.S. at 266 (noting that where the application of race-neutral legislation yields stark effects, additional evidence may be unnecessary); Washington v. Davis, 426 U.S. 229, 241-42 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."); *id.* (noting that "in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor"); *id.* at 254 (Stevens, J., dissenting) ("My point in making

The best practical description of the discriminatory purpose test may be that it requires more than proof that the legislation in question has discriminatory effects,[51] but less than proof that the legislature desired to harm the group harmed by the legislation.[52] However, given that the inquiry is significantly driven by legislative effects, standardizing the impact those effects have on the inquiry could be helpful.

C. Intent as an Effects Test

That effects can be important in determining intent is hardly surprising, as an intent inquiry can arguably be rephrased as an effects test. A finding of discriminatory intent necessarily flows from race-conscious legislation because race-conscious legislation necessarily creates racial effects. Because the effects necessarily flow from the legislation, the effects are presumed to have been the legislature's purpose. The same is arguably true of colorblind legislation if it almost certainly creates a racially disparate impact.[53] Though we are more likely to believe that the discriminatory effect on a racial group is the purpose of a race-conscious rule, because the racial result always follows from the rule, if a racially disparate impact almost certainly follows from a colorblind rule, presuming the intent to cause racial effect is sensible.[54] The point is not that the legislature necessarily intended the racial effect, it is that the intent inquiry should be structured to consider the fact that discriminatory effects were almost sure to flow from the legislation. Examining how the intent inquiry is structured in other areas of the law may help illuminate the equal protection intent issue.

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this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."). In some contexts, proof of impact appears to be proof of discriminatory purpose. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 255-56 (1995) (noting that the intent requirement under the Fourteenth and Fifteenth Amendments may not be substantially more than a disparate impact analysis); Ortiz, *supra* note 29, at 1129 ("Whatever the Court's rationale, the overall result of these two approaches to motivation is to make intent largely coextensive with adverse impact in voting cases.").

51. *See* Ortiz, *supra* note 29, at 1127 ("[T]he voting cases appear to require only a showing of disparate impact plus a showing that the jurisdiction has engaged in other types of discrimination in the past. In voting cases, the intent requirement does not demand any showing of actual discriminatory motivation in the decision to adopt or retain the at-large system.").

52. Some have suggested that the recognition of unconscious racism should affect how much evidence is necessary to prove discriminatory intent. *See, e.g.*, Johnson, *supra* note 25, at 1019 (suggesting that sensitivity to unconscious racism in context should affect the strength of evidence required to allow a court to find discriminatory intent).

53. *See* Henry L. Chambers, Jr., *Getting it Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 22-24 (1996) (discussing how a rule's effect can determine whether it is deemed discriminatory); David A. Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L.J. 829, 883 (1993) (discussing what one can infer about legislative motives from the foreseeable effects of legislation).

54. The closeness of fit is an important concept. *See* Lawrence, *supra* note 15, at 346-47 ("The function of suspect classification doctrine is to expose unconstitutional motives that may have distorted the process. A statute that classifies by race is strictly scrutinized, because the requirement of 'close fit' between end sought and means used will reveal those instances where the actual motive of the legislature was to disadvantage a group simply because of its race.").

II. INTENT IN TORT AND CRIMINAL LAW

Intent is a state of mind arguably known only to the actor.[55] In tort and criminal law, intent inquiries are structured somewhat by the presumption that an actor intends the natural and probable consequences of his voluntary actions.[56] Presumptively, an actor who completes an action knowing that results will follow likely does intend those results, particularly if the actor could have chosen a different path that would not have yielded the same results. Though the presumption does not undoubtedly prove intent, it provides a functional way to assess intent.[57] Applying a presumption – an evidentiary shortcut – in determining legislative intent may be even more sensible than applying it to an individual's intent given that a legislature's intent may be more difficult to determine than an individual's intent.[58]

The "natural and probable consequences" presumption can be treated as a rebuttable presumption or as a permissible inference.[59] This treatment tracks how the presumption is used in tort and criminal law respectively. When the presumption is treated as a rebuttable presumption, proof that the consequences were the natural and probable consequences of the actor's actions may shift either the burden of persuasion or the burden of production regarding the issue of intent to the actor.[60] A shift in the burden of persuasion would require that the actor prove that she did not intend to cause the consequences. A shift in the burden of production would require that the actor provide evidence from which the fact finder could determine that no intent existed, with the plaintiff retaining the burden of persuading the fact finder that the actor intended the consequences.[61] Conversely,

55. *See* Bruce Ledewitz, *Mr. Carroll's Mental State or What is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 75 (2001) ("A mental state is a matter of what I want; what I know or what I will. Other subjects may gain an indirect understanding of these matters – indeed juries must do so – from what I say and do. But only I really know. It is, therefore, also the case that others may be mistaken in their impressions of my mental state, whereas my knowledge of my own mental state is self-evidently accurate.").

56. Of course, what a natural and probable consequence is not always readily apparent. *See* Roy v. United States, 652 A.2d 1098, 1105 (D.C. 1995) ("A natural consequence is thus one which is within the normal range of outcomes that may be expected to occur if nothing unusual has intervened. . . . A 'natural and probable' consequence in the 'ordinary course of things' presupposes an outcome within a reasonably predictable range.").

57. *See* Ledewitz, *supra* note 55, at 104-05 (arguing that in some contexts the use of a natural and probable consequences presumption merely describes what has already been proven).

58. In a search for the legislature's collective intent, there is no single actor whose intent is the "relevant" intent. Even if the legislature's collective intent is deemed the combined intents of individual legislators, there would always be reason for the legislature to assert that the majority that passed a law was motivated by nondiscriminatory purposes.

59. *See* Francis v. Franklin, 471 U.S. 307, 313-18 (1985) (discussing presumptions and inferences flowing from the natural and probable consequences presumption). A presumption can be given conclusive effect, such that proof of a predicate fact conclusively proves the presumed fact. However, treating the natural and probable consequences presumption in this way is untenable in the equal protection context.

60. *See* Sandstrom v. Montana, 442 U.S. 510, 515-16 (1979) (noting the distinction between the presumption that shifts the burden of production and the one that shifts the burden of persuasion).

61. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (discussing presumptions and burdens of production and persuasion in employment discrimination cases).

the presumption may merely yield a permissible inference of intent such that a fact finder is permitted to find intent based solely on proof that the results were the natural and probable consequences of the actor's actions.

The presumption is used differently in the tort and criminal law areas. In tort law, an actor intends that consequences occur when those consequences are nearly certain to follow from the actor's acts, whether or not the actor desires that the consequences occur.[62] Consequently, the presumption's application to tort law in the form of a rebuttable presumption makes sense, as the intent to do an act that will almost certainly lead to a particular result is sufficient for tort law to hold the defendant responsible for the resulting harm to the victim.[63] In addition, because tort law generally requires only a preponderance of the evidence, the presumption is particularly reasonable, as it can be deemed to be a presumption that it is more likely than not that an actor intends the natural and probable consequences of his actions.[64]

The presumption is also used in criminal law,[65] though in a somewhat limited manner.[66] Presumptions are generally disfavored in criminal law, in part, because each element of a crime must be proven beyond reasonable doubt.[67] The

62. *See* W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 8, at 34 (5th ed. 1984) ("The three most basic elements of this most common usage of 'intent' are that (1) it is a state of mind (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also in having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act."); James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 53 VAND. L. REV. 1133, 1138 (2001) (noting in the tort context: "An actor intends the consequence of an act when the actor desires that consequence to follow; and an actor intends the consequence, even if the actor does not desire the consequence, if she is aware that the consequence is certain to follow and goes ahead and acts with that awareness."). Others believe that this should not be the rule in tort law given the layman's understanding of intent. *See* Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent*, 53 VAND. L. REV. 1165, 1173 (2001) (arguing that intent should not encompass the mere belief that a consequence is almost certain to follow from a particular act).

63. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965) ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it."); *id.* at cmt. b ("All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.").

64. *See generally* Chambers, *supra* note 53, at 47-51 (discussing evidentiary burdens of proof).

65. *See, e.g.*, Smallwood v. State, 680 A.2d 512, 516 (Md. 1996) (noting that the fact finder may infer that the actor intended the natural and probable consequences of his actions).

66. *See* Ledewitz, *supra* note 55, at 100 ("At present, expansion of the use of presumptions of this sort in criminal law is likely to be found unconstitutional as a violation of due process. . . . Understood properly, presumptions in certain criminal law contexts do not threaten constitutional values.").

67. An overly robust presumption arguably dispenses with the actual proof of intent beyond a reasonable doubt. *See* Sandstrom v. Montana, 442 U.S. 510, 512 (1979) ("The question presented is whether, in a case in which intent is an element of the crime charged; the jury instruction; 'the law presumes that a person intends the ordinary consequences of his voluntary acts,' violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt."); *id.* at 524 ("Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption . . . or a conclusive presumption . . . and because either

presumption arguably short-circuits that process.[68] Though a criminal defendant may be found to intend consequences that are nearly certain to follow from his acts,[69] the presumption may only serve to create a permissible inference of intent or possibly to shift the burden of production to the defendant.[70] In addition, inferring intent can be somewhat tricky if the mens rea for a particular crime requires that an actor desired a particular result.[71]

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interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional."); *see also Francis*, 471 U.S. at 309 ("The question is whether these instructions, when read in the context of the jury charge as a whole, violate the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt."); United States v. Gaudin, 515 U.S. 506, 506 (1995) (noting that the Sixth Amendment and Due Process Clause are violated when the defendant is convicted without proof of every element of a crime beyond a reasonable doubt).

68. *But see* Ledewitz, *supra* note 55, at 102 ("If broadly utilized, this presumption [that one intends the natural and probable consequences of his actions] could operate precisely to avoid fruitless inquiry into mental processes that we really do not understand and probably do not much care about. However, today, this presumption is not used robustly. It is regarded as merely what is usually the case or as a fair inference rather than as a sound principle for understanding what intention means. This presumption is said not to shift the burden of proof to the defendant, when such shifting is just what should be done with the whole notion of mental states."). Some uses of the presumption are particularly sensible. *See Smallwood*, 680 A.2d at 516 ("When a deadly weapon has been fired at a vital part of a victim's body, the risk of killing the victim is so high that it becomes reasonable to assume that the defendant intended the victim to die as a natural and probable consequence of the defendant's action.").

Interestingly, the presumption can be used to hold some actors liable for actions he or she did not intend. *See Roy*, 652 A.2d at 1105 (noting accessorial liability "for the natural and probable consequences of the crime that he advised or commanded" even when those acts were not intended by accessory).

69. *See* United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978) ("Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent."); United States v. Bailey, 444 U.S. 394, 405 (1980) ("In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."); United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000) (noting that general intent is satisfied by knowledge of the results of one's actions).

70. *See Francis*, 471 U.S. at 314 (noting that presumption may afford permissible inference in criminal case, but expressly declining to determine the constitutionality of a presumption that shifts the burden of production to the criminal defendant); *Sandstrom*, 442 U.S. at 516-17 (appearing to suggest that a presumption that merely shifts the burden of production to criminal defendant may be constitutional); *see also* Virginia v. Black, 123 S. Ct. 1536, 1551-52 (2003) (discussing inferences in criminal cases).

However, the presumption's use as a permissive inference has been deemed problematic by the Court on occasion. *See* Morissette v. United States, 342 U.S. 246, 275 (1952) ("A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect.").

71. Often, the distinction between criminal intent levels does not matter, as a criminal actor may be criminally liable for purposely, knowingly or recklessly causing a result. *See* Ledewitz, *supra* note 55, at 78-80 (noting that purpose, knowledge or recklessness can support criminal liability under the Model Penal Code); *see also United States Gypsum Co.*, 438 U.S. at 445 (noting that the distinction between purpose and knowledge in criminal law is generally not substantial); *Bailey*, 444 U.S. at 404 (noting that the distinction between knowledge and purpose is generally unimportant because criminal liability is generally appropriate for either state of mind). Indeed, murder under the Model Penal Code does not

Though the natural and probable consequences presumption is utilized differently in the criminal and tort law areas, it is well established in both areas. The remaining question is whether the presumption can be appropriately used in the Fourteenth Amendment context.

III. THE PRESUMPTION AND EQUAL PROTECTION

A. Justifying the Presumption

Applying the "natural and probable consequences" presumption in the equal protection area is as sensible as applying it in the tort or criminal law areas.[72] An older vision of the intent trigger might suggest that the relevant intent was the intent to harm. Arguably, one could not necessarily presume intent to harm from legislation that merely yielded differential impact, though this is what is essentially done in the criminal and tort law areas. However, now that purposeful classification – the intent to treat one race of people differently than another – is the relevant intent under the Fourteenth Amendment, presuming intent from legislation known to be almost certain to yield a differential racial impact should be standard. The presumption would merely permit or encourage a finding of purposeful differentiation based on the legislature's knowledge that the legislation would almost certainly differentiate. Because the link between the proven fact (probable racial differentiation) and the presumed fact (intent to differentiate) is as tight in the equal protection area as in the tort and criminal law areas, applying the presumption in the equal protection area appears sensible.[73]

In addition, because legislators are not generally liable for their actions,[74] it would appear that the harm from presuming intent when intent did not exist would be less troublesome in the constitutional sphere than in the tort and criminal law areas.[75] Tort defendants can be held responsible for damages and criminal

distinguish between a homicide committed knowingly and one committed purposely. MODEL PENAL CODE § 210.2(1) (1995). However, the distinction can matter quite a bit with respect to the appropriate punishment for the actor. *See, e.g.*, MO. ANN. STAT. § 565 (2003) (providing different penalties for different levels of homicide based on different levels of intent).

72. *But see* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278 (1979) (rejecting the general use of the presumption: "The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions.").

73. Nonetheless, the Court has suggested that knowledge of consequences of action is not enough. *See Feeney*, 442 U.S. at 279 (noting that one needs more than awareness of results to satisfy the intent requirement).

74. *See* Bogan v. Scott-Harris, 523 U.S. 44, 54-55 (1998) (discussing legislative immunity).

75. Of course, in tort law, rectifying harm has little to do with a perpetrator's desire to harm. *See* KEETON, *supra* note 62, at 36-37 ("The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good."); Ann C. McGinley, *Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. PUB. POL'Y. 415, 478 (2000) ("In tort law, for intent to exist, the actor need not have a hostile attitude toward the victim or toward another and he need not have a desire to do any harm. In fact, the actor could be liable for an intentional tort even

defendants can lose liberty based in part on the presumption when it is used. When applied in the constitutional area, a presumption would merely help trigger strict scrutiny, which might help trigger the invalidation of legislation conceded to be harmful to a group of citizens.[76] Of course, there is harm in incorrectly invalidating legislation that is constitutional. However, the legislature would remain free to pass subsequent legislation to achieve the aims of the invalidated legislation, as long as it chose acceptable means.

B. Applying the Presumption and the Application's Effect

In the equal protection area, the presumption should be treated as a rebuttable presumption that places the burden of persuasion of proving a lack of intent to differentiate on the legislature once the plaintiff proves that disproportionate harm to racial minorities was a natural and probable consequence of the subject legislation.[77] The presumption would require that a legislature that knew its actions would have a racially disparate impact to be treated as though it intended the impact until proven otherwise. The legislature would be required to explain that it took its actions despite the impact, not because of it.[78] Even after the presentation

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though he or she desires to help the person who is harmed."); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 967 (1993) ("It is a fundamental tenet of our legal system that fault is not equated with an intent to cause harm. We recognize that people often cause substantial harm without any wrongful intent.").

76. When the acts that cause harm are fully-considered acts, as are legislative acts, any distinction between purpose and intent that might argue for a strict purpose requirement matters even less. *See United States Gypsum Co.*, 438 U.S. at 445-46 ("The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome.").

77. This would be an amplification of Justice Marshall's suggestion in *Bolden* that a natural and probable consequences presumption be used. *See* 446 U.S. at 137 (Marshall, J., dissenting) ("I would apply the common-law foreseeability presumption to the present cases. . . . Because the foreseeable disproportionate impact was so severe, the burden of proof should have shifted to the defendants, and they should have been required to show that they refused to modify the districting schemes in spite of, not because of, their severe discriminatory effect."); *see also Feeney*, 442 U.S. at 284 (Marshall, J., dissenting) ("Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme."). Some have argued for a natural and probable consequences presumption in particular areas of equal protection law. *See, e.g.*, Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1295-96 (1998) (arguing that a tort standard which creates a presumption of discriminatory intent is most appropriate). Interestingly, Professor Ortiz suggests that the intent requirement itself is an allocation of the burden of proof. *See* Ortiz, *supra* note 29, at 1134-35 ("In each area discussed, the intent requirement serves to allocate burdens of proof between the individual and the state."). Professor Ortiz argues that though intent is operationalized in different ways in different contexts, it serves largely as an evidentiary requirement that forces plaintiffs to present evidence of discriminatory intent or motivation before the government is required to respond with good reasons why it structured legislation as it did. *Id.*

78. *See* Bolden, 446 U.S. at 137-38 (Marshall, J., dissenting) ("The defendants would carry their burden of proof only if they showed that they considered submergence of the Negro vote a detriment, not a benefit, of the multimember systems, that they accorded minority citizens the same respect given

of evidence supporting the presumption, subject legislation could still be deemed constitutional in at least three ways. First, the legislature could prove that the effects of the subject legislation were not the natural and probable consequences of the legislation, and then argue that the legislation should survive rational basis review. Second, the legislature could prove that it had no intent to differentiate on racial grounds, and then argue that the legislation should survive rational basis review. Third, the legislature could argue that the legislation should survive strict scrutiny.

Not only is the natural and probable consequences test appropriate for approximating the collective intent of a legislature, it allows for more discrimination to be remedied under the Fourteenth Amendment. The Fourteenth Amendment is supposed to stop state actors from treating groups of citizens differently without good reason. When the result of state action is that citizens of one race are treated more poorly than citizens of another race, justification should be required. That justification should be stronger than the rational basis that is required for distinctions that do not yield systematic race-related harm. Indeed, a natural and probable consequences presumption would trigger somewhat heightened scrutiny of subject legislation, even if it did not always trigger strict scrutiny. In rebutting the presumption, the legislature would have to argue that some nondiscriminatory reason explained why the statute was structured as it was, despite the fact that the legislature knew its action would have a disproportionate impact on a particular race. This would require that a court focus on the reasons the legislature actually passed the legislation rather than allowing any theoretical justification, whether actually contemplated by the legislature or not, to justify the action.[79]

The presumption bridges an effects test and the current intent inquiry. The legislature's collective intent is reflected in the legislation it passes and the effect of that legislation. Indeed, it is unclear that legislative intent can be divorced from the effect that the legislature's actions cause. This makes applying the natural and probable consequences presumption as a first step in triggering strict scrutiny sensible.[80] The natural and probable consequences presumption provides a reasonable approximation of the purposeful differentiation required to trigger strict scrutiny. However, the presumption does not merely help determine intent when purposeful discrimination is difficult to discern, it reflects what is troubling about legislation that effectively differentiates groups without explicitly doing so. The use of the natural and probable consequences presumption should lead to a constitutional jurisprudence that focuses on the results legislation produces and

to whites, and that they nevertheless decided to maintain the systems for legitimate reasons.").

79. Currently, the Court allows justifications that may not have motivated legislators to help legislation survive rational basis scrutiny. *See, e.g.*, Fitzgerald v. Racing Ass'n of Cent. Iowa, 123 S. Ct. 2156, 2160 (2003) (noting possible, but unasserted, reasons the legislature may have had for providing differential tax rate on slot machines in riverboats versus slot machines in racetracks).

80. *See Bolden*, 446 U.S. at 139 (Marshall, J., dissenting) ("It only takes the smallest of inferential leaps to conclude that the decisions to maintain multimember districting having obvious discriminatory effects represent, at the very least, selective racial sympathy and indifference resulting in the frustration of minority desires, the stigmatization of the minority as second-class citizens, and the perpetuation of inhumanity.").

places the onus on legislative bodies to prove that harm to minority rights was not intended when those bodies knew that legislation would yield such results.[81] Ultimately, the use of a natural and probable consequences presumption should limit constitutional legislation to that which is not likely to harm the rights of particular groups of citizens or that which can survive strict scrutiny. This is the point of the Fourteenth Amendment, or at least it should be.[82]

CONCULSION

Given the malleability of the intent standard and the fact that fact finders may already be allowed to infer intent from discriminatory impact, a natural and probable consequences presumption might seem unnecessary. However, it is precisely because of the malleability and uncertainty of the intent standard that the presumption is necessary. Without specific approval of the use of the presumption, the Supreme Court's prior rejection of the presumption's use stands, even in the face of precedents that seem to allow evidence short of intent to support an inference of discriminatory intent. Instead, the presumption should be endorsed specifically as a method for determining intent and triggering strict scrutiny.[83] The addition of the presumption would allow the intent requirement to serve its immediate purpose of appropriately determining relevant intent while also serving the Fourteenth Amendment's broader purpose of delivering equality by eliminating state-sponsored discrimination.[84]

81. In some situations, this may already be the case. *See* Ortiz, *supra* note 29, at 1135 ("In the voting cases, intent requires that the individual show adverse impact in voting plus discrimination in other areas of life, and then shifts the burden to the state to offer a compelling reason for the electoral discrimination.").

82. *See* Hellman, *supra* note 34, at 4 ("[W]hile intent is relevant to assessing the moral culpability of legislative actors, courts ought to interpret the Equal Protection Clause to police how people are treated by their government. We ought to be interested in the permissibility of laws, not in the purity of legislative motives.").

83. Of course, the intent inquiry could be far more nuanced or even eliminated. *See* Haney Lopez, *supra* note 23, at 1730 ("Institutional analysis demonstrates that the current Supreme Court's reasoning is exactly backward: Racism occurs frequently – and perhaps predominantly – without any specific invocation of race, while the explicit consideration of race may have as its aim racism's amelioration rather than perpetuation.").

84. Unfortunately, finding equality may be the biggest task of all. *See* Banks, *supra* note 14, at 1080 ("Racial inequality is integral rather than peripheral to basic social processes, woven into our cultural fabric rather than placed on top of it. Racial equality jurisprudence, then, becomes a matter of choosing among inequalities, rather than of embracing equality.").