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Election Laws Disproportionately Disadvantaging Racial Minorities, and the Futility of Trying to Solve Today's Problems with Yesterday's Never Very Good Tools

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**ELECTION LAWS DISPROPORTIONATELY
DISADVANTAGING RACIAL MINORITIES, AND THE
FUTILITY OF TRYING TO SOLVE TODAY’S PROBLEMS
WITH YESTERDAY’S NEVER VERY GOOD TOOLS**

*Gary J. Simson**

ABSTRACT

In the final weeks leading up to the 2020 national election, scarcely a day seemed to pass without news of a challenge to, or court decision on, a state election law that, though race-neutral on its face, was likely to disproportionately disadvantage racial minorities. Sadly, state legislative activities since the election have offered little reason to believe that election laws disproportionately disadvantaging racial minorities are apt to become a thing of the past anytime soon. The number and variety of election laws disproportionately disadvantaging racial minorities have been on the rise for decades, and challenges to those laws on equal protection and other grounds have rarely been successful.

Much of the credit—or, more accurately, blame—for the challengers’ distinct lack of success in seeking to invalidate such laws under the Equal Protection Clause goes to an approach to disproportionate racial impact that the U.S. Supreme Court developed in three decisions in the mid-to-late 1970s. Although that approach has significance for many areas of law besides election law, election law may well hold the dubious distinction of being the area of law in which the approach has done the most damage.

After synthesizing the basic components of the Court’s approach, this Article discusses their practical implications in order to establish that the Court’s approach assigns little constitutional importance to disproportionate racial impact. The Article then argues that the Court’s assignment of little constitutional importance to disproportionate racial impact is at odds with the most basic understanding of the Fourteenth Amendment’s history as well as

* Macon Chair in Law and Former Dean, Mercer University School of Law; Professor Emeritus of Law, Cornell Law School. This Article develops ideas that I presented on February 6, 2020, at *Emory Law Journal’s* Randolph W. Thorer Symposium. I am grateful for the various helpful questions and comments I received at the symposium and for the excellent work of Editor-in-Chief Sam Reilly. As always, I greatly benefited throughout the writing process from discussing my ideas with Rosalind Simson. A preliminary version of parts of this Article appeared in Gary J. Simson, *Racially Neutral in Form, Racially Discriminatory in Fact: The Implications for Voting Rights of Giving Disproportionate Racial Impact the Constitutional Importance It Deserves*, 71 *MERCER L. REV.* 811 (2020).

equal protection theory. After proposing an alternative approach under the Equal Protection Clause to disproportionate racial impact, the Article applies it to election laws disproportionately disadvantaging racial minorities. The Article concludes with some observations about the immediate and long-term importance of its proposed rethinking of equal protection constraints.

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INTRODUCTION

In the final weeks leading up to the 2020 national election, with the presidency up for grabs and many hotly contested races in the Senate and House, scarcely a day seemed to pass without news of a challenge to, or court decision on, a state election law that, though race-neutral on its face, was likely to disproportionately disadvantage racial minorities. Such laws took a variety of different forms, ranging, for example, from a restrictive Alabama voter identification statute¹ to a Florida statute limiting ex-felons' voting rights² to an order by Texas's governor allowing only one drop box for absentee ballots per county.³ Whatever the law's particular form,⁴ its challengers commonly maintained that the disproportionate racial impact was a prime, if not exclusive, reason for the law's adoption and that the law should be struck down under the Fourteenth Amendment's Equal Protection Clause on that account. The law's defenders typically countered by denying that the law was designed to achieve a disproportionate racial impact and by claiming instead that it was designed to protect the election from voter fraud.

Sadly, state legislative activities since the 2020 national election have offered little reason to believe that election laws disproportionately disadvantaging racial minorities are apt to become a thing of the past anytime soon. Prompted, no doubt, by Democrat Joe Biden's November 2020 presidential victory and by two Democrats' victories in Georgia's much-anticipated January 2021 runoff elections for two U.S. Senate seats that the Republicans had long held and needed to continue to hold to retain their Senate majority, Republican-dominated legislatures in various states across the country have redoubled their efforts to ensure Republican electoral success by making voting less accessible. By late January 2021—less than a full month into states' 2021 legislative sessions—“state legislators ha[d] filed 106 bills to tighten election rules, generally making it harder to cast a ballot—triple the number at this time last year.”⁵ The bills generally replicated, or were modest variations of,

¹ See Greg Land, *Split 11th Circuit Panel OKs Alabama Voter ID Law*, DAILY REP. (July 21, 2020, 6:24 PM), <https://www.law.com/dailyreportonline/2020/07/21/split-11th-circuit-panel-oks-alabama-voter-id-law/>.

² See Patricia Mazzei, *Ex-Felons in Florida Must Pay Fines Before Voting, Appeals Court Rules*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html>.

³ See Glenn Thrush & Nick Corasaniti, *The Fight Over Absentee Ballots Intensifies Around Drop Boxes*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/13/us/politics/california-drop-boxes-voting-gop.html>.

⁴ As illustrated by the gubernatorial order mentioned in the preceding sentence, I use the term, “law,” in this Article to include not only statutes but, more broadly, the product of any governmental decision-making process.

⁵ Michael Wines, *After Record Turnout, Republicans Are Trying to Make It Harder to Vote*, N.Y. TIMES

the kinds of laws featured in the flurry of election law litigation that preceded the November election.⁶

Anyone with any sense of history could not possibly write off the disproportionate racial impact produced by such laws as simply coincidental. Laws disenfranchising racial minorities have a long and shameful history in the United States. Until the adoption of the Fifteenth Amendment in 1870, state laws denying African Americans the right to vote because of their race were commonplace.⁷ Furthermore, although the Amendment's prohibition on laws denying or limiting the right to vote "on account of race, color, or previous condition of servitude"⁸ seemed to promise racial minorities voting rights no less meaningful than the voting rights enjoyed by others, nothing of the sort has been realized. Over time, violence and intimidation gave way to subtler means of deterring and suppressing African Americans' vote, but it took the enactment of the Voting Rights Act of 1965⁹ to provide any real semblance of equality in voting rights. Moreover, even with that monumental piece of legislation in place, genuine equality in voting rights has proved elusive.¹⁰ As the U.S. Commission

(Jan. 30, 2021), <https://www.nytimes.com/2021/01/30/us/republicans-voting-georgia-arizona.html> (identifying NYU's Brennan Center for Justice as its source).

⁶ See *id.*; Michael Wines, *In Statehouses, Stolen-Election Myth Fuels a G.O.P. Drive to Rewrite Rules*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2021/02/27/us/republican-voter-suppression.html>. As this Article went to press, the Georgia legislature achieved a measure of notoriety by enacting a law that placed it at the vanguard of legislatures seeking to make voting less accessible. See Nick Corasaniti, *Georgia G.O.P. Passes Major Law to Limit Voting Amid Nationwide Push*, N.Y. TIMES (Apr. 2, 2021), https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html?campaign_id=57&emc=edit_ne_20210402&instance_id=28818&nl=evening-briefing®i_id=87354418&segment_id=54806&te=1&user_id=8fb142cd6a7c4bdf33b6353acbd5e909 ("Georgia Republicans on Thursday passed a sweeping law to restrict voting access in the state, introducing more rigid voter identification requirements for absentee balloting, limiting drop boxes and expanding the Legislature's power over elections. The new measures make Georgia the first major battleground to overhaul its election system since the turmoil of last year's presidential contest.").

⁷ See *Introduction to Federal Voting Rights Laws*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> (last visited Feb. 27, 2021).

⁸ U.S. CONST. amend. XV.

⁹ The Act, as amended, is codified at 52 U.S.C. §§ 10301–10314.

¹⁰ In one blow, the Supreme Court's invalidation in *Shelby County v. Holder*, 570 U.S. 529 (2013), of Section 4(b) of the Voting Rights Act greatly increased that elusiveness. Section 4(b) established a coverage formula designed to identify jurisdictions that, because of a history of racially discriminatory voting laws, may fairly be required to seek federal preclearance under Section 5 before putting into effect any change in their existing voting laws. To get preclearance under Section 5, a covered jurisdiction must prove that the change at issue "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 52 U.S.C. § 10304(a). Working in tandem, Sections 4(b) and 5 not only kept many racially discriminatory changes from going into effect, but at least as importantly, deterred lawmakers from adopting many contemplated changes of that sort.

This is not the place for me to articulate my reservations about *Shelby County*. By the same token, it is beyond the scope of this Article for me to offer my views on the proper resolution of the important issues under Section 2 of the Act raised in *Brnovich v. Democratic National Committee*, 948 F.3d 989 (9th Cir. 2020), *cert.*

on Civil Rights documented at length in a 2018 report, the number and variety of election laws disproportionately disadvantaging racial minorities have been on the rise for decades, and challenges to those laws on equal protection and other grounds have rarely been successful.¹¹

Much of the credit—or, more accurately, blame—for the challengers’ distinct lack of success in seeking to invalidate such laws under the Equal Protection Clause goes to an approach to disproportionate racial impact that the U.S. Supreme Court developed in three decisions in the mid-to-late 1970s.¹² Although that approach has implications for many areas of law besides election law, election law may well hold the dubious distinction of being the area of law in which the approach has done the most damage. Not only, as I argue below, has that approach repeatedly led to upholding election laws that deserved to be struck down, but in so doing, it has wreaked havoc in an area of law of the utmost importance. Time and again, the Supreme Court has characterized the right to vote as standing at the apex of individual rights in our constitutional system. In 1886, for example, the Court in *Yick Wo v. Hopkins* proclaimed that voting is a “fundamental political right” because it is “preservative of all rights,”¹³ and almost a century later in *Reynolds v. Sims*, the Court called the right to vote “the essence of a democratic society.”¹⁴

granted, 141 S. Ct. 222 (Oct. 2, 2020) (No. 19-1257), a case that the Court will be deciding in its current Term. Section 2, which places the burden of proving racial discrimination on the challenger, provides that, “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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.” 52 U.S.C. § 10301(a). I note, simply as a matter of prediction, that the likelihood that the Court in *Brnovich* will interpret Section 2 in a way that substantially fills the void created by the *Shelby County* Court’s neutering of Section 5 seems slim. See Richard Hasen, *A Partisan Battle in an Overreach of a Case*, SCOTUSBLOG (Feb. 22, 2021, 8:41 AM), <https://www.scotusblog.com/2021/02/a-partisan-battle-in-an-overreach-of-a-case/>; Adam Liptak, *Supreme Court Seems Ready to Sustain Arizona Voting Limits*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2021/03/02/us/politics/supreme-court-arizona-voting.html>.

¹¹ U.S. COMM’N ON C.R., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES (2018), www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

¹² In my view, the blame also lies with the approach that the Court has taken to election-law challenges predicated on the fundamental nature of the right to vote. To spell out my criticisms of that approach in this Article would take me far afield. I note, however, that much as I am persuaded that the Court in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), was correct in recognizing the fundamentality of the right to vote and in striking down the poll tax under review, I am no less persuaded that the Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), erroneously strayed from the method of analysis applied in *Harper* and wrongly upheld a voter identification requirement that failed to give the fundamental right to vote its due. For a proposed approach to deciding fundamental rights cases that draws on *Harper* and lends support for a different result in *Crawford*, see Gary J. Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN L. REV. 663, 678–81 (1977).

¹³ 118 U.S. 356, 370 (1886).

¹⁴ 377 U.S. 533, 555 (1964).

I begin in Part I by synthesizing the basic components of the Court's approach to equal protection challenges to laws disproportionately disadvantaging racial minorities. In Part II, I discuss the practical implications of those components in order to establish that the Court's approach assigns little constitutional importance to disproportionate racial impact. I argue in Part III that the Court's assignment of little constitutional importance to disproportionate racial impact is at odds with the most basic understanding of the Fourteenth Amendment's history as well as equal protection theory. In Part IV, I propose an alternative approach, and I apply the approach in Part V to election laws disproportionately disadvantaging racial minorities. I conclude in Part VI with some observations about the immediate and long-term importance of my proposed rethinking of equal protection constraints.

I. THE COURT'S APPROACH TO DISPROPORTIONATE RACIAL IMPACT

The approach that the Court for many years has taken to challenges under the Equal Protection Clause to laws disproportionately disadvantaging racial minorities emerged and took shape in the mid-to-late 1970s in three decisions, none involving election law. The first of the three, *Washington v. Davis*¹⁵ in 1976, involved an equal protection challenge to a police department's use of a written qualifying exam that Black applicants failed at a much higher rate than White applicants. The second, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁶ in 1977, involved an equal protection challenge to a village's refusal to rezone certain land to permit low- and moderate-income housing to be built—housing that undoubtedly would increase the percentage of racial minorities living in the village. The last of the three decisions, *Personnel Administrator v. Feeney*¹⁷ in 1979, involved an equal protection challenge to a law disproportionately disadvantaging women, not racial minorities, but the Court made clear that its methodology in deciding the case applied to disproportionate racial impact cases as well.¹⁸ The disproportionate impact at issue in *Feeney* stemmed from a Massachusetts statute that gave veterans, who

¹⁵ 426 U.S. 229 (1976).

¹⁶ 429 U.S. 252 (1977). For various perspectives on *Davis* and *Arlington Heights* by leading scholars, see Colloquium, *Legislative Motivation in Constitutional Law*, 15 SAN DIEGO L. REV. 925 (1978).

¹⁷ 442 U.S. 256 (1979).

¹⁸ See *id.* at 272–74, 278–79 (treating *Davis* and *Arlington Heights* as applicable to decide the constitutionality of both laws disproportionately disadvantaging racial minorities and ones disproportionately disadvantaging women, and explaining the *Davis-Arlington Heights* approach). For the view that *Feeney* went well beyond simply clarifying *Davis* and *Arlington Heights*, see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012). According to Professor Haney-López, *Feeney* was a “transitional case marking an abrupt rupture in intent doctrine.” *Id.* at 1825.

at the time were almost all men, a virtually insurmountable advantage over non-veterans in competing for civil service jobs. The Court rejected the equal protection challenge in all three cases.

Taken together, the opinions of the Court in the three cases establish an approach to laws having a disproportionate racial impact that consists of four basic components. First, the fact that a law disproportionately disadvantages racial minorities has no independent importance under the Equal Protection Clause, no matter how very disproportionate that disadvantage to racial minorities may be. In and of itself, showing that a law has a disproportionate racial impact does not establish a violation of the Clause nor even require the state to offer a weightier justification for the law than the Court's longtime, and minimally demanding, "rational basis" test requires.¹⁹

Second, if a law disproportionately disadvantages racial minorities, that disparate impact can be used to help prove the existence of an equal protection violation. A finding that a violation exists, however, ultimately must turn on whether the party challenging the law has persuasively shown that the law is the product of a racially discriminatory purpose.²⁰

Third, proof that a law disproportionately disadvantaging racial minorities is the product of a racially discriminatory purpose does not require showing that the lawmakers²¹ enacted the law entirely for such a purpose. The challenger must show that a racially discriminatory purpose is a but-for cause of the law's enactment. In terms of burdens of proof, the challenger has the burden of proving that a racially discriminatory purpose was a "motivating factor" in the law's enactment. If the challenger carries that burden, the burden shifts to the government to prove that the lawmakers also had one or more legitimate purposes in enacting the law and that they assigned sufficient weight to such purpose(s) that they would have enacted the law even if they had not considered the racially discriminatory purpose.²²

¹⁹ See *Davis*, 426 U.S. at 239, 242.

²⁰ See *id.* at 240–41.

²¹ I frequently refer in this Article to "lawmakers" and "lawmaking body." Taken literally, "lawmakers" obviously means more than one lawmaker, and "lawmaking body" strongly implies the same. I underline, however, that I use those terms for purposes of convenience and simplicity, and they should not be taken literally. The paradigm of lawmaking is a legislature or other multimember decision-making body enacting statutes, ordinances, regulations, or the like. In referring to "lawmakers" and "lawmaking body," I draw on that paradigm, but, as I make clear at certain points in the text, *see, e.g., infra* text preceding note 24 and following note 33, I do not mean in referring to "lawmakers" and "lawmaking body" to exclude individual officials with the authority to make governmental decisions. See *supra* note 4 (explaining "law" as used in this Article and citing a gubernatorial order as one kind of "law").

²² See *Arlington Heights*, 429 U.S. at 265–66, 270 n.21.

Fourth, the racially discriminatory purpose that the challenger must prove is a very distinct kind of “purpose.” Proof that the lawmakers could foresee at the time of enactment that the law would have a disproportionate racial impact but enacted the law nonetheless does not establish the kind of purpose that must be proved for a court to strike down a law as the product of a racially discriminatory purpose. Even if the challenger can show that it was highly foreseeable to the lawmakers that the law would have a highly disproportionate racial impact, that would not be enough. The key under the Court’s approach is proving that the lawmakers positively desired that disparate impact and counted it as a benefit in thinking about the costs and benefits of enacting the law.²³

II. THE MARGINALIZATION OF DISPROPORTIONATE RACIAL IMPACT

Even in the abstract, it should be quite clear that the above approach relegates disproportionate racial impact to rather minimal constitutional importance. To put the matter bluntly, the approach treats disproportionate racial impact as irrelevant except insofar as it may help the challenger try to make a showing—that the lawmakers would not have adopted the law if they had not counted the law’s harm to racial minorities as a plus—that is generally close to impossible to make.

When lawmakers vote for a law that they can foresee is likely to disproportionately disadvantage racial minorities, it is not unreasonable to assume that they were relatively indifferent to the likely disparate impact or saw it as a cost of enacting the law but not all that serious a cost. How often, though, do lawmakers vote for such a law because they regard the harm to racial minorities as a good thing—a positive reason for enactment, a selling point? I would like to think that the answer is “not very often,” but even if I am wrong, challengers almost invariably face a very uphill battle to establish that a law that disproportionately disadvantages racial minorities should be struck down as a violation of the Equal Protection Clause.

First, although the lawmaking body whose purposes are at issue may be a single government official with decision-making authority, it commonly is a legislature or other multi-member body. Even if a challenger can prove that several legislators voted for a law having a disproportionate racial impact out of

²³ See *Feeney*, 442 U.S. at 279 & n.25. For other critical perspectives of the Court’s approach in *Davis*, *Arlington Heights*, and *Feeney*, see Owen Fiss, *The Accumulation of Disadvantages*, 106 CALIF. L. REV. 1945 (2018); Haney-López, *supra* note 18; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

malice toward racial minorities, that almost never is enough to show that the legislature, as an entity, adopted the law for that reason.

Second, the likelihood that a challenger can produce probative evidence that *anyone* voted for a law because he or she welcomed its negative effect on racial minorities has become far lower since the mid-1970s, when the Court decided *Davis* and *Arlington Heights*. Prior to those decisions, it appeared that the Court would not strike down a law having a disproportionate racial impact even if the challenger could prove that the lawmakers were wholly motivated by a purpose of hurting racial minorities. Only a few years earlier, for example, the Court in *Palmer v. Thompson*²⁴ had rejected a challenge based on such a malicious purpose. According to the Court in *Palmer*, it simply had no latitude to consider the invidious purpose alleged by the challengers: The city government had defended the challenged law in terms of a neutral-sounding, economic purpose, and “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.”²⁵

In the era described in *Palmer* of no judicial inquiries into motive, lawmakers who thought that it might be politically advantageous to air in public their racist reasons for voting for a law could do so without fear that their statements would later be used in court to challenge the validity of the law. When the Court in *Davis* and *Arlington Heights* made clear that courts henceforth had authority to consider whether lawmakers actually were motivated by racially discriminatory purposes rather than the inoffensive purposes alleged by the state, lawmakers were forewarned, for future purposes, to keep their racist reasons to themselves. It is hardly surprising that the Court’s decision several years later striking down a state law on the basis of a record of unabashedly racist legislative statements in support of adoption came in a case involving a law adopted in 1901.²⁶

Third, as more sophisticated means of data collection and analysis have become available, lawmakers with racist purposes have become much more adept at devising laws that harm racial minorities while hiding the invidious purposes that are the laws’ actual reason for being. The area of election law may be in a class of its own as far as the number and variety of laws illustrating lawmakers’ enhanced abilities to camouflage a purpose of harming racial

²⁴ 403 U.S. 217 (1971).

²⁵ *Id.* at 224. As Justice White argued in dissent in *Palmer*, some of the Court’s prior cases are difficult to reconcile with the majority’s sweeping no-case-in-this-Court generalization. *Id.* at 263–70 (White, J., joined by Brennan & Marshall, JJ., dissenting).

²⁶ *Hunter v. Underwood*, 471 U.S. 222 (1985).

minorities. Writing for the Court in 1994, Justice Souter commented on “the demonstrated ingenuity of state and local governments in hobbling minority voting power,”²⁷ and the U.S. Commission on Civil Rights devoted the bulk of its almost 300-page report in 2018 to documenting the array of facially race-neutral means—voter ID laws, voter roll purges, polling place closings, and more—that states and localities have devised to diminish racial minorities’ voting power.²⁸ With “easier access” than potential challengers “to data and analysis regarding the impact of a particular change,”²⁹ state and local lawmakers have been able to craft, in Justice Ginsburg’s words, “more subtle second-generation barriers”³⁰ to racial minorities’ voting—barriers significantly more difficult to attack for invidious purposes than those devised in simpler, less data-driven, days.³¹

Fourth and lastly, although the Court in its decisions in the mid-to-late 1970s abandoned the notion that courts cannot consider an invidious purpose that the government will not concede figured into the law’s enactment, nothing that the Court said or did in those decisions suggested that a finding that the lawmakers had a purpose of harming racial minorities is one to be made at all lightly. In fact, such a finding cannot help but be an especially sensitive one for a court to

²⁷ *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (citing *McCain v. Lybrand*, 465 U.S. 236, 243–46 (1984)).

²⁸ U.S. COMM’N ON C.R., *supra* note 11.

²⁹ *Id.* at 279.

³⁰ *Shelby Cnty. v. Holder*, 570 U.S. 529, 593 (2013) (Ginsburg, J., joined by Breyer, Sotomayor & Kagan, JJ., dissenting).

³¹ Perhaps unrivaled as an illustration of how lacking in subtlety such barriers can be is the Alabama legislature’s 1957 statute that changed the boundaries of the City of Tuskegee from a square to what the Court in *Gomillion v. Lightfoot* called an “uncouth twenty-eight-sided figure.” 364 U.S. 339, 340 (1960). *Gomillion* and other Black Tuskegee residents alleged in the complaint that the statute had the effect of placing outside the city limits all except for a few of the city’s four hundred Black voters, but none of its White ones, thus ensuring a virtually all-White voting electorate in city elections. *Id.* at 341. The plaintiffs sought to enjoin enforcement of the statute as violating their Fourteenth and Fifteenth Amendment rights. The federal district court dismissed the complaint on the ground that it did not state a claim on which relief could be granted, and the federal court of appeals affirmed. The Supreme Court unanimously reversed and remanded. In an opinion by Justice Frankfurter joined in full by all but one Justice, the Court held that the complaint “amply alleges a claim of racial discrimination” and that “[i]f these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.” *Id.* at 341–42. On remand, the defendants conceded that the statute indeed had the alleged effect. Without conducting a hearing, the federal district court held that, under the reasoning in Justice Frankfurter’s opinion, the defendants’ concession established the statute’s unconstitutionality, and the court struck the law down. See Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections on Gomillion v. Lightfoot After Half a Century*, 50 WASHBURN L.J. 133, 141 (2010) (summarizing the history of the case on remand, including the district court’s opinion, which was not published in the Federal Supplement).

make, and courts understandably are slow, and require a lot of convincing, to be willing to make it.

For a court to hold a law unconstitutional based on a determination that the law abridges the freedom of speech guaranteed by the First Amendment³² or authorizes a degree of punishment for criminal conduct that is cruel and unusual under the Eighth Amendment³³ is hardly a holding that any lawmaking body would welcome. To some extent it implies that the lawmakers' understanding of the Constitution leaves something to be desired. For a court to hold a law unconstitutional based on a determination that the lawmakers adopted it out of a desire to harm racial minorities, however, is a very different matter. It makes a statement about the lawmaking body that is far worse—essentially a statement that the lawmaking body, if an individual acting alone, is an utterly deplorable person and, if a multimember body, is dominated by such wretched people.

III. HISTORICAL AND THEORETICAL DIFFICULTIES

In thinking about the proper resolution of constitutional issues, I always try to be mindful of the great constitutional law scholar Charles Black's many demonstrations of the importance in constitutional interpretation of keeping the big picture in mind and not losing sight of the forest for the trees. Sometimes that big picture was what Black called "structures and relationships created by the constitution in all its parts or in some principal part."³⁴ Other times it was basic historical facts or modern-day realities that legal scholars too engrossed in the details of legal doctrine might tend to overlook.³⁵

In thinking about disproportionate racial impact and the minimal constitutional importance that the Court has assigned to it, the big picture that keeps coming to mind for me and fueling my skepticism about the approach that took shape in the 1970s is what a unanimous Court has called "the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial

³² U.S. CONST. amend. I.

³³ *Id.* amend. VIII.

³⁴ CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969).

³⁵ In that regard, my longtime favorite is Black's answer to the question, "Then does segregation offend against equality?," that he posed in response to scholarly debate sparked by the series of Supreme Court decisions, starting with *Brown v. Board of Education*, 347 U.S. 483 (1954), that invalidated different forms of state-sponsored segregation: "[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated 'equally,' I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960).

discrimination emanating from official sources in the States.”³⁶ As the Court in *Strauder v. West Virginia* wrote a little more than a decade after the adoption of that amendment:

What is this [amendment] but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?³⁷

If we take as a given this basic understanding of the Fourteenth Amendment, how credible is it that the Court is honoring the intent behind the Amendment when the Court attaches as much importance as it does in *Davis* and *Arlington Heights* to the fact that, in seriously disadvantaging racial minorities, the lawmaking body has not explicitly used a racial classification? In my view, not very credible at all. First of all, consider the very significant harm that can be inflicted on racial minorities by facially race-neutral laws. Second, consider the potential for lawmakers to achieve by subterfuge and indirection much the same disadvantage to racial minorities as would be achieved by laws expressly classifying on the basis of race. In light of both of those considerations, I cannot help but be skeptical that the Court’s approach to disproportionate racial impact squares with the deep concern about state-mandated racial discrimination that history tells us was paramount in the minds of the framers of the Fourteenth Amendment.

Careful attention to the theoretical underpinnings of the doctrine of “suspect classification” that the Court first introduced in the area of race only adds to my skepticism. It militates strongly in favor of treating laws expressly disadvantaging racial minorities and laws disproportionately disadvantaging them as much more alike than the Court has treated them since *Davis* and *Arlington Heights*.

In challenging laws under the Equal Protection Clause, litigants have tried, with varying degrees of success, to persuade the Court to extend the doctrine of suspect classification to bases for classification besides race.³⁸ As a practical

³⁶ *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

³⁷ 100 U.S. 303, 307 (1880).

³⁸ The three bases for classification besides race that the Court has declared suspect are listed *infra* text accompanying note 41. Although the Court has not treated classifications based on sex or legitimacy of birth as suspect, it appears to treat them as at least suspicious, applying more than rational basis review. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976) (sex); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (legitimacy of birth). The Court has not ruled on the suspectness of classifications based on sexual orientation, even though there is a

matter, the stakes of success or failure in persuading the Court to treat a basis for classification as suspect are very high. Under the Court's precedents, laws classifying on a suspect basis get "strict scrutiny," and courts strike them down unless the government can make the exceptionally difficult showing that the classification is necessary to serve a compelling state interest.³⁹ On the other hand, if the basis of classification is not suspect, it almost invariably triggers only "rational basis" review, which is so very indulgent that invalidation is virtually never the result.⁴⁰

The Court has declared four bases for classification as suspect: race, national origin, alienage, and religion.⁴¹ The Court's methodology for deciding whether a basis for classification should be treated as suspect is not entirely clear. It appears, however, that the Court has taken as its starting point that the framers of the Equal Protection Clause sought above all to eliminate state-sponsored racial discrimination. Then, the Court essentially has identified several features of laws disadvantaging African Americans that, in the Court's view, best explain the framers' special concern with overturning such laws. Ultimately, the Court has decided whether a particular basis for classification deserves to be treated as suspect by considering the extent to which that basis for classification shares those features.⁴²

Although the Court has been unwilling to commit itself firmly to any one or more features of racial classifications as necessary or sufficient to qualify a basis for classification as suspect,⁴³ it has mentioned four features much more

strong case for treating such classifications as suspect. See Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 368–74 (2006). Although the Court has not indicated, expressly or implicitly, whether it regards many kinds of classifications as suspect, it has definitively characterized some as non-suspect and entitled only to rational basis review. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (illegal alienage); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312–13 (1976) (per curiam) (age).

³⁹ See, e.g., *Johnson v. California*, 543 U.S. 499 (2005); *Graham v. Richardson*, 403 U.S. 365 (1971).

⁴⁰ See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949). I say "almost invariably" in the text to allow for the Court's treatment of some classifications that it does not recognize as suspect as being at least untrustworthy and warranting a middle-tier form of review. See, e.g., *Craig*, 429 U.S. at 197 ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

⁴¹ See *Dukes*, 427 U.S. at 303 (listing race, religion, and alienage); *Graham*, 403 U.S. at 371–72 (listing race, national origin, and alienage).

⁴² See Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514, 518–19 (1994).

⁴³ The Court's unwillingness to commit itself in this regard is probably best captured by the Court's opening sentence in a lengthy textual footnote that may well be one of the Court's most informative discussions of what makes a basis for classification suspect: "Several formulations might explain our treatment of certain classifications as 'suspect.'" *Plyler*, 457 U.S. at 216 n.14. Perhaps I am being unfair to the Court, but it strikes me as unusual, to say the least, for the Court to tell us what "might" explain why it calls some classifications

frequently than any others as relevant to a determination of suspectness. Those features are: the disadvantaged group's relatively limited political power,⁴⁴ a high level of societal prejudice against the group,⁴⁵ a long history of laws disadvantaging the group,⁴⁶ and the group is defined by a characteristic that each of its members had at birth and has no capacity to change.⁴⁷ In the discussion to follow, I discuss all four features, but I focus primarily on the first because I believe it best explains what lies at the heart of the Court's development of the suspect classification doctrine.⁴⁸

The essence of lawmaking is classification—treating people in group *A* differently from people in group *B* to eradicate or diminish a certain societal problem or to achieve or advance a certain societal good.⁴⁹ (For the sake of clarity, I will simplify the discussion by focusing on the former type of classification—one aimed at eradicating or diminishing a problem.) The essence, in turn, of classification is comparative generalization—comparing the typical person in group *A* to the typical person in group *B* in terms of the relative likelihood that each contributes to the problem that the lawmakers are seeking to eradicate or diminish. If a classification is challenged on equal protection grounds, a court ordinarily applies “rational basis” review. The court looks no more closely at the classification than to ascertain that it rests on a plausible comparative generalization. If the court concludes that it does, which is virtually always the case, the court treats as utterly beside the point that the comparative generalization may be not much better than plausible and that the lawmakers could serve their goal of eradicating or diminishing the societal problem with much greater precision if they wished. The court basically trusts to the

suspect. If I were to tell you what “might” explain my thinking about something, I could not blame you for getting irritated and asking me whether I do not know what I am thinking or whether I simply do not want to tell you what it is.

⁴⁴ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Graham*, 403 U.S. at 372.

⁴⁵ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 443 (1985); *Plyler*, 457 U.S. at 216 n.14.

⁴⁶ See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam); *Frontiero v. Richardson*, 411 U.S. 677, 684–86 (1973) (plurality opinion).

⁴⁷ See, e.g., *Plyler*, 457 U.S. at 217 n.14; *Frontiero*, 411 U.S. at 686 (plurality opinion).

⁴⁸ The first feature appears to be the one that the Court has mentioned most frequently. In addition to the cases cited *supra* note 44, cases in which the Court has mentioned it include *Cleburne*, 473 U.S. at 445, and *Frontiero*, 411 U.S. at 686 & n.17 (plurality opinion). I readily concede that my perception that the Court has emphasized this feature may be clouded by my longtime belief that the Court should be emphasizing it. See Gary J. Simson, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1253–58 (1974). The fourth feature—unchangeable characteristic from birth—appears to be the one most peripheral to the doctrine. Most obviously, the Court has declared only four bases for classification suspect, and the fourth feature militates against holding two of the four bases—alienage and religion—suspect.

⁴⁹ For a seminal discussion of classifications and equal protection review, see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

lawmakers to decide fairly whether the benefits of serving its goal more precisely outweigh the costs.

The “strict scrutiny” that courts use when lawmakers classify on the basis of race or another “suspect” criterion is the polar opposite of rational basis review. The great deference to the lawmaking body that is the hallmark of courts’ exercise of rational basis review is replaced by insistence on a precise fit between the classification used and a governmental objective of compelling importance. A plausible comparative generalization is not remotely good enough. Instead, the government needs to show that the classification is predicated on a comparative generalization that is true 100% of the time: Everyone in group *A*—the disadvantaged group—must be more likely than everyone in group *B* to contribute to the problem that the lawmakers are seeking to eradicate or diminish. As already noted, while classifications subjected to rational basis review are virtually certain to survive, ones subjected to strict scrutiny are virtually certain to fall.

If the key to understanding what makes racial classifications suspect indeed is the disadvantaged group’s relatively limited political power—a feature vividly captured by Justice Stone’s reference to “discrete and insular minorities” in his famous *Carolene Products* footnote⁵⁰—the insistence on precision in racial and other suspect classifications makes perfect sense. What could be less trustworthy than a classification that singles out for disadvantage a group that lawmakers can feel free to burden with little fear of political retribution? In his classic discussion of equal protection review—a general discussion of the Equal Protection Clause not focused on racial or other suspect classifications as such—Justice Jackson eloquently made the basic point:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.⁵¹

⁵⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵¹ *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

By the same token, what better way to ensure that lawmakers have dealt fairly with a disadvantaged group with relatively limited political power than to insist on precision in classification? In the unlikely event that the government can prove precision in classification, it would dispel the suspicion that the lawmakers had casually made a group that they could disadvantage with relative impunity bear the brunt of the law.

The Court's approach to disproportionate racial impact in *Davis* and *Arlington Heights* essentially treats the suspicion aroused by lawmakers' use of racial classifications—the paradigm of suspect classifications—as having no bearing on the matter at hand. However, if lawmakers enact a law that they know is apt to disproportionately burden a group especially vulnerable to unfairness in the lawmaking process, suspicion of the legislative process seems very much in order. Concededly, less suspicion of the process is probably warranted than with a classification that singles out the group for disadvantage. After all, the fact that a law disproportionately disadvantages racial minorities, rather than classifies on the basis of race, means that the burden imposed by the law is not being borne entirely by racial minorities; and to the extent that the burden is being borne in part by others whose interests are better protected in the political process, there is less reason to suspect that the lawmakers are taking the course of least resistance and making racial minorities bear a burden that they should not be made to bear. The same degree of suspicion as given to suspect classifications therefore seems unwarranted, but the total lack of suspicion inherent in the *Davis-Arlington Heights* approach to disproportionate racial impact reflects an indefensible insistence on treating two things as entirely different that simply are not.

If, as the Court has maintained, a high level of societal prejudice against the disadvantaged group helps explain what makes a classification suspect,⁵² that feature too lends support to the notion that disproportionate racial impact has much more in common with racial classifications than the Court in *Davis* and *Arlington Heights* was willing to admit. In recent years, psychological and sociological studies of implicit or unconscious bias have shown that racial prejudice can operate more subtly and pervasively than we generally have assumed.⁵³ The prejudice that is the focus of those studies is not the virulent form of prejudice that *Davis* and *Arlington Heights* make the predicate for

⁵² See *supra* note 45 and accompanying text.

⁵³ See, e.g., MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

invalidating a facially race-neutral law that disproportionately disadvantages racial minorities—prejudice of a sort that counts a law’s harmful effect on racial minorities as a benefit, not a cost, of enactment. It is also not the kind of prejudice that undoubtedly emboldened lawmakers to establish and perpetuate segregated schools and other public facilities on the separate-but-equal pretense that such race-conscious lawmaking served people equally well regardless of whether they were Black or White. It *is* the kind of prejudice, however, that allowed the Village of Arlington Heights’s Board of Trustees to make a decision—refusing to rezone a parcel of land to allow for the construction of low- and middle-income housing—that the trustees could not help but know would disproportionately disadvantage African Americans by fencing them out of the trustees’ almost entirely White village.

Did any of the six Arlington Heights trustees who voted against the rezoning—only one voted in favor⁵⁴—do so because they took pleasure in harming African Americans? It is not inconceivable, but for now let us assume that the six trustees who voted against the rezoning did so because they were worried about the effect on property values and managed to convince themselves that the Black families that did not get to move into the proposed housing were not terribly harmed. For those trustees to treat as a cost, but not all that much of a cost, the highly foreseeable and serious harm to African Americans from the Board’s refusing to rezone is certainly not as bad as their treating it as a benefit of, and positive reason for, refusing to rezone. Even if those trustees did not regard that harm as a cost at all, but rather simply as a matter of indifference, their mindset was still better than the patently bigoted mindset that would see that harm as a plus. Either way, however, whether or not those trustees had the slightest inkling that racial prejudice was influencing their decision, it was. A facially race-neutral decision that foreseeably disadvantages racial minorities disproportionately may well not be as suspect for racial prejudice as a decision that explicitly classifies on the basis of race to the detriment of racial minorities. Nevertheless, *Davis* and *Arlington Heights* notwithstanding, disproportionate racial impact and racial classifications are not worlds apart.

A third feature that the Court has cited as helping to explain what makes a classification suspect—the existence of a long history of laws disadvantaging a group⁵⁵—also militates in favor of abandoning the sharp dichotomy that the Court has drawn between disproportionate racial impact and racial classifications. A group’s repeatedly coming out on the short end of the

⁵⁴ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 258 (1977).

⁵⁵ See *supra* note 46 and accompanying text.

lawmaking process is probably as good an indicator as can be found that the group is sorely lacking in political power. Just as a disadvantaged group's serious deficit in political power should spark suspicion of the fairness of the classification process, so should this strong indicator of such a deficit in power. If a law predictably has a disproportionate impact on a group that has been the victim of a long history of explicitly disadvantageous classifications, I have great difficulty understanding how anyone who regards that long history as a source of suspicion of legislative fairness could avoid looking with some suspicion at a law disproportionately disadvantaging the group. Yet, that is precisely what the Court in *Davis* and *Arlington Heights* managed to do when it treated disproportionate racial impact as a consideration of no independent constitutional importance.

Lastly, the Court's identification of unchangeable characteristic from birth as a key feature of what makes a classification suspect⁵⁶ also points toward recognizing the kinship between racial classifications and disproportionate racial impact that the Court in *Davis* and *Arlington Heights* firmly denied. If lawmakers disadvantage a group based on a characteristic unchangeable since birth, there is no reason to be any more or less suspicious than usual of the fairness of the lawmaking *process*. There is something offensive and unfair, however, about a *law* that disadvantages a group of people based on a personal characteristic, such as race, that they had no choice in acquiring and have no power to change. As Justice Brennan explained in a plurality opinion in *Frontiero v. Richardson*—an opinion that fell one vote short of becoming an opinion of the Court declaring sex a suspect classification—“the imposition of special disabilities” on the members of a group defined by “an immutable characteristic determined solely by the accident of birth” appears “to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’”⁵⁷ If expressly disadvantaging someone based on a characteristic unchangeable since birth indeed does have a certain offensiveness and unfairness to it, that offensiveness and unfairness do not disappear entirely simply because the lawmakers decide not to disadvantage everyone with that characteristic (as they could by an express classification), but opt instead to disadvantage a disproportionate number of people with that characteristic (as they could by means of a facially neutral law). The offensiveness and unfairness may be less, but at least where the disproportionate impact is foreseeable to the lawmakers at the time of enactment, they are not gone.

⁵⁶ See *supra* note 47 and accompanying text.

⁵⁷ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

In short, even though *Davis* and *Arlington Heights* suggest that disproportionate racial impact and racial classifications present entirely different problems, consideration of unchangeable characteristic from birth, like consideration of the three other features mentioned most prominently in the Court's discussions of what makes a classification suspect, points strongly toward recognizing that laws that, at the time of enactment, foreseeably will have a disproportionate racial impact have much in common with racial classifications.

Although such laws may not embody as fully as racial classifications the features that make racial classifications suspect, they do substantially embody those features. The strict scrutiny triggered by suspect classifications may not be in order, but a standard of review significantly more rigorous than rational basis surely is.

IV. AN ALTERNATIVE APPROACH

In keeping with the preceding analysis, I propose the following as a more appropriate and meaningful methodology than the Court's for resolving equal protection challenges to laws having a disproportionate racial impact:

1. A party challenging a law under the Equal Protection Clause based on the law's alleged disproportionate racial impact must prove, as a threshold matter, that the law in operation disadvantages racial minorities at a substantially higher rate than nonminorities. Failure to make that threshold showing requires dismissal of the challenge.
2. If the challenger makes the requisite threshold showing, the burden shifts to the government to prove that either:
 - a. At the time of adopting the law, the lawmakers⁵⁸ did not foresee, and reasonably could not have foreseen, the law's substantial disproportionate racial impact; or
 - b. As a means to an end, the law bears a substantial relationship to an important governmental interest.

If the government proves *a* or *b* or both, the challenge should be dismissed. Otherwise, the challenger prevails.

Most obviously, the above methodology, unlike the Court's, gives disproportionate racial impact independent constitutional importance.

⁵⁸ "Law" and "lawmakers," as used in this approach, should be understood with the same breadth as when those terms are used elsewhere in this Article. *See supra* notes 4 and 21 (explaining the usage of both terms).

Furthermore, although it does not treat a substantial disproportionate racial impact as triggering as much suspicion of legislative fairness as is triggered by a racial classification, it does treat the disparate impact as triggering significant suspicion. If the government is able to prove that the lawmakers did not foresee, and reasonably could not have foreseen, that the law would have a substantial disproportionate racial impact, the suspicion triggered by the impact is dispelled.

As I indicated throughout my discussion in Part III, none of the several features that the Court has cited as central to suspect classifications comes into play in a way that casts suspicion on legislative fairness unless the lawmakers were aware at the time of adoption that the law was likely to have a substantial disproportionate impact. I include a reasonableness element—“reasonably could not have foreseen”—in my proposed methodology to serve in a sort of prophylactic capacity to help ensure that a claimed failure to foresee is not decisive unless the claimed lack of foresight is real. Because lawmakers ordinarily have much greater access than the challenger to information shedding light on what they actually foresaw, it seems all too easy for them to prove lack of actual foresight even if that was not the case. A reasonableness element is also justified as a means of discouraging lawmakers from trying to insulate laws having a disproportionate racial impact from equal protection attack by adopting a strategy of willful ignorance as to whether such an impact is or is not likely to occur.

Under Step 2b, a law foreseeably having a substantial disproportionate racial impact survives equal protection review if the government can prove that the law has “a substantial relationship to an important governmental interest.” In prescribing that standard of review, I proceed on the assumption that, under the analysis in Part III of disproportionate racial impact and suspect classification theory, a middle-tier standard of review is more appropriate than either strict scrutiny or rational basis for laws that foreseeably disproportionately disadvantage racial minorities. The suspicion of legislative unfairness sparked by such laws is significant, but not as great as that sparked by racial classifications.

In holding that racial classifications must fall absent a showing of extraordinary justification, the Court implicitly seems to be saying that the only way that the enormous suspicion of legislative unfairness sparked by suspect classifications can be dispelled is by virtually conclusive evidence that the lawmakers acted with exemplary care, good faith, and lack of bias in singling out racial minorities for disadvantage. That virtually conclusive evidence would

come in the form of proof that the classification serves a governmental interest of the utmost importance as well as it could possibly be served.

In prescribing a middle-tier standard for laws that foreseeably have a disproportionate racial impact, I am suggesting that the significant, but lesser, degree of suspicion of legislative unfairness sparked by such laws may be dispelled by a less dramatic showing of governmental justification. If such a law indeed bears a substantial relationship to an important governmental interest, that in itself is good reason to believe that the law is not a reflection of bias and unfair stereotypes; and good reason, not the exceptionally cogent reason required by strict scrutiny, is enough to dispel the lesser degree of suspicion aroused.

In Step 2b, I very deliberately borrow the key terms, “substantial” and “important,” from the Court’s articulation in sex classification cases of the requisite means-end relationship and governmental interest.⁵⁹ I do so to make clear that Step 2b is not formulating a new standard of review. The standard of review that the Court unveiled in the 1970s in sex classification cases was obviously intended to describe some sort of midpoint between the rigors of strict scrutiny and the laxness of rational basis. For purposes of my proposed methodology, I see no need to suggest any kind of variation on that middle tier. Even though the Court’s application of that standard of review in sex classification cases may not be the epitome of consistency,⁶⁰ it does provide a

⁵⁹ In its initial articulation of the middle-tier standard of review that it has applied since the 1970s to sex classifications, the Court in *Craig v. Boren*, 429 U.S. 190, 197 (1976), stated that such classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.”

⁶⁰ Consider, for example, the Court’s application of that standard in two cases decided in the early 1980s, *Michael M. v. Superior Court*, 450 U.S. 464 (1981), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). By a 5-4 margin, the Court in *Michael M.* upheld a California statutory rape law making a male criminally liable for having sexual intercourse with a female under 18 who is not his wife, but imposing no such liability on a female for having sexual intercourse with a male under 18 who is not her husband. 450 U.S. at 472–73 (plurality opinion); 482–83 (Blackmun, J., concurring in the judgment). By the same margin, the Court in *Hogan* struck down Mississippi’s maintenance of a female-only state nursing school. 458 U.S. at 731. If asked to reconcile the different results in the two cases, I would not be tempted, to say the least, to do so by claiming that consistent application of the Court’s middle-tier standard for sex classifications called for the different results. Instead, the different results almost certainly reflect a more rigorous interpretation and application of middle-tier review by the majority in *Hogan* than by the majority in *Michael M.* For present purposes, I suggest that, rather than attempt to prove my thesis by detailed analysis of the Court’s application of the standard in the two cases, it is sufficient to note the Justices’ voting alignments in the two cases. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist voted together in the two cases to uphold the sex classifications, and Justices Brennan, Marshall, Stevens, and White voted together in the two cases to strike down the sex classifications. Justices Brennan, Marshall, Stevens, and White obviously were applying middle-tier review more rigorously in the two cases than Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist, and the results in the two cases turned on Justice Stewart’s participation in *Michael M.* and his retirement, and replacement by Justice O’Connor, by the time *Hogan* was handed down.

fair amount of guidance to courts.⁶¹

V. Election Laws Disproportionately Disadvantaging Racial Minorities: A Case Study in Unconstitutionality

If I were proposing a methodology calling for strict scrutiny of any law having a substantial disproportionate racial impact, its dramatic repercussions for election laws having such an impact would be immediately apparent. Although strict scrutiny may not be quite as “‘strict’ in theory and fatal in fact” as Professor Gerald Gunther famously suggested in his *Harvard Law Review* Foreword years ago,⁶² it is a more than formidable hurdle for any law to have to overcome.

My approach obviously is considerably more forgiving than strict scrutiny toward laws having a substantial disproportionate racial impact. The law stands if the government can prove either (a) the substantial disproportionate racial impact was not actually foreseen and was not reasonably foreseeable at the time of adoption, or (b) the law is substantially related to an important governmental interest. Nonetheless, the repercussions of applying my methodology to election laws having a substantial disproportionate racial impact may well be just as dramatic and immediately apparent as the repercussions of applying strict scrutiny. Few, if any, such laws would be likely to survive.

First of all, even if the lawmakers did not leave any sort of paper trail evidencing their actual awareness at the time of adoption that the election law was apt to have a substantial disproportionate racial impact, there will almost invariably be good reason for the court to find that, at the time of adoption, the lawmakers reasonably would have foreseen that the law would have such an impact. Perhaps most obviously, study after study has documented the substantial disproportionate impact on minority voters of the wide array of facially race-neutral voting barriers that increasingly have come into vogue in the past twenty to thirty years. After discussing a host of studies in detail, the

⁶¹ For a proposed approach to laws having a disproportionate racial impact that calls for a “flexible” standard of review based on a weighing of several factors, see Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

⁶² Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Based on “a systematic empirical study of strict scrutiny in the federal courts,” Professor Winkler has argued that strict scrutiny is not “the inevitably deadly test imagined by the Gunther myth and more closely resembles the context-sensitive tool described by [Justice] O’Connor” in affirmative action cases. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

U.S. Commission on Civil Rights in its 2018 report made the following official finding:

In states across the country, voting procedures that wrongly prevent some citizens from voting have been enacted and have a disparate impact on voters of color and poor citizens, including but not limited to: voter ID laws, voter roll purges, proof of citizenship measures, challenges to voter eligibility, and polling place moves or closings.⁶³

Furthermore, lawmakers need not be particularly scholarly to learn about such studies and what they show. In fact, it would take a concerted effort at willful ignorance for lawmakers *not* to be aware of the studies and their remarkably consistent results. Not only do those studies often get coverage in the popular press,⁶⁴ but by all indications, there seems to be a well-functioning communications network between lawmakers in different states who are contemplating the adoption of new restrictions on voting. After describing a number of types of restrictions, a columnist recently commented:

None of these obstacles is novel, but many have become more prohibitive since the Supreme Court struck down the heart of the Voting Rights Act in 2013, which was passed in 1965 to end the de facto disenfranchisement of African-Americans. The court . . . effectively eliminat[ed] the requirement that states with a history of racially discriminatory voting laws gain federal approval before making minor changes to voting procedures, like moving a polling place, or major ones, like redrawing electoral districts.

The consequences of that ruling have been stark: Hours after the decision came down, Texas enacted a strict photo ID law. Other states soon followed suit, and the seven years since have seen suspect poll closures, cutbacks to early voting, an uptick in illegal voter purges and other forms of voter suppression.⁶⁵

It also would be difficult to describe lawmakers' unawareness of the substantial disproportionate racial impacts likely to be produced by an array of voting barriers as "reasonable" when those impacts are so predictable to any lawmaker who pauses to think about the likely effects with a modicum of common sense. Several years ago, after describing seven types of common restrictions, another journalist explained:

⁶³ U.S. COMM'N ON C.R., *supra* note 11, at 282.

⁶⁴ See, e.g., Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> (reporting the results of a poll conducted by the Public Religion Research Institute and *The Atlantic*).

⁶⁵ Spencer Bokot-Lindell, *The Voter Suppression Tipping Point*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/opinion/voter-suppression-election.html>.

Due to socioeconomic disparities, these types of restrictions disproportionately impact minority voters. For example, since minority Americans are less likely to have flexible work hours or own cars, they might have a harder time affording a voter ID or getting to the right place (typically a DMV or BMV office) to obtain a voter ID, rely more on early voting opportunities to cast a ballot, or require a nearby voting place instead of one that's a drive, instead of a walk, away from home or work.⁶⁶

In short, the probability is slim at best that the government could prevail under my approach by showing that, in adopting an election law having a substantial disproportionate racial impact, the lawmakers did not foresee and reasonably could not have foreseen that impact.

If anything, the probability is even less that the government could prevail under my approach by showing that an election law having a substantial disproportionate racial impact is substantially related to an important governmental interest. As the U.S. Commission on Civil Rights observed in its 2018 report, those defending such laws almost invariably do so in terms of “prevent[ing] voter fraud,” and they typically claim to be targeting voter fraud of one or another of four kinds: “in-person voter fraud, noncitizen voting, double voting, and voter registration rolls that are ‘bloated’ and contain ineligible voters who should be removed.”⁶⁷ Given the importance of fair and uncorrupted elections to our system of government, there is no doubt that protecting elections from voter fraud is an important, and even compelling, governmental interest. However, the means-end relationship between the laws ostensibly adopted to thwart voter fraud and the government’s interest in preventing such fraud is not even arguably substantial. It verges on nonexistent. At most it qualifies as “rational,” and if so, that is only because the standard that the Court’s precedents set for a means-end relationship to qualify as “rational” is so very low.⁶⁸

In light of the frequency and insistence with which the defenders of voting barriers disproportionately disadvantaging racial minorities cite the prevention of voter fraud as those barriers’ reason for being, it is nothing less than stunning to discover that studies repeatedly show the prevention of voter fraud to be an

⁶⁶ German Lopez, *7 Specific Ways States Made It Harder for Americans to Vote in 2016*, VOX (Nov. 7, 2016, 1:20 PM), <https://www.vox.com/policy-and-politics/2016/11/7/13545718/voter-suppression-early-voting-2016>. The seven restrictions listed were voter ID requirements, early voting cuts, new requirements to register to vote, limits on mail-in ballots, provisional and absentee voting changes, polling place closures, and voter roll purges. The list was based on information provided by the Brennan Center for Justice, the Leadership Conference Education Fund, and Project Vote. *Id.*

⁶⁷ U.S. COMM’N ON C.R., *supra* note 11, at 102.

⁶⁸ *See supra* note 40 and accompanying text.

objective in search of a problem. Although the defenders of such barriers have done their best to create a “specter of widespread voter fraud,” voter fraud is best understood as “a largely nonexistent problem. Law enforcement investigations have repeatedly failed to find major wrongdoing in cases hyped for political gain, often based on sloppy data analysis.”⁶⁹ Writing about six weeks after the 2016 national election, one commentator observed:

After all the allegations of rampant voter fraud and claims that millions had voted illegally, the people who supervised the general election last month in states around the nation have been adding up how many credible reports of fraud they actually received. The overwhelming consensus: next to none.

...

No one doubts that election fraud has occurred and needs to be monitored. Election outcomes have been changed by officials who altered vote tallies, and in theory hackers could pick winners by playing havoc with voter rolls, voting machines or electronic reporting networks. But voter fraud, in which someone deliberately casts an invalid ballot or a ballot under someone else’s name, is exceedingly rare.⁷⁰

Summing up in an official finding the upshot of “[s]tudy after study, including from the Republican National Lawyers Association and a News21 analysis,” the U.S. Commission on Civil Rights in its 2018 report stated without qualification that those studies “confirm that voter fraud is extremely rare in the United States.”⁷¹ To put the matter bluntly, to defend voting barriers having a substantial disproportionate racial impact in terms of preventing voter fraud is itself probably best described as fraud. In any case, the relationship between those barriers and preventing voter fraud is far too tenuous to meet the substantial means-end requirement of my proposed approach.⁷²

⁶⁹ Daniel Victor, *Takeaways on Trump, Voter Fraud and the Election*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/09/30/us/politics/voter-fraud-disinformation.html>.

⁷⁰ Michael Wines, *All This Talk of Voter Fraud? Across U.S., Officials Found Next to None*, N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/2016/12/18/us/voter-fraud.html>.

⁷¹ U.S. COMM’N ON C.R., *supra* note 11, at 282.

⁷² For a detailed account of the use of claims of voter fraud—“a largely nonexistent problem”—to “gain partisan advantage” in the 2020 elections, see Jim Rutenberg, *The Attack on Voting: How President Trump’s False Claim of Voter Fraud Is Being Used to Disenfranchise Americans*, N.Y. TIMES MAG. (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html> (discussing the results of a “*New York Times Magazine* investigation, based on a review of thousands of pages of court records and interviews with more than 100 key players—lawyers, activists and current and former government officials”); see also Nick Corasaniti, Reid J. Epstein & Jim Rutenberg, *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html>.

CONCLUSION

Having urged a more expansive conception of equal protection than the one to which the Supreme Court has adhered since *Davis* and *Arlington Heights*, and having then applied that conception to urge the invalidation of the many types of election laws currently in vogue that disproportionately disadvantage racial minorities, I would be remiss not to expressly acknowledge that today's Supreme Court is not exactly the group most likely to embrace what I have had to say. To some extent, I have written this Article with the kind of attitude that I assume the Justices often take when they write a dissenting opinion: Just because a good idea is unable to win majority support on the Court today is no reason not to put it in writing and preserve it for a future (and, hopefully, more discerning!) Court to consider adopting someday.

I have also written this Article, however, with a more immediate object in mind. In the late 1970s, as it was becoming clear that the expansive approach to federal constitutional rights that characterized the Warren Court was fast becoming a thing of the past, Justice Brennan wrote an article on state constitutional law in the *Harvard Law Review* that became an almost instant classic.⁷³ A Warren Court stalwart who remained on the Court until 1990, Justice Brennan urged state courts not to “rest when they have afforded their citizens the full protections of the federal Constitution.”⁷⁴ “State Constitutions, too,” he reminded them, “are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law,” and he insisted that “[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law.”⁷⁵ I have no doubt that if Justice Brennan were alive today, he would repeat his exhortation and turn up the volume.

⁷³ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). As one scholar has noted, “Within just eight years, Brennan’s article had shot up the list of most-cited law review articles to the top twenty of all time, taking its place alongside many articles that had been in circulation much longer.” James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 357 (2016). The tremendous number of citations of the article may have had little or nothing to do with its brevity—roughly fifteen pages—but perhaps there is some lesson here to be learned.

⁷⁴ Brennan, *supra* note 73, at 491.

⁷⁵ *Id.* According to Professor Gardner, “Brennan’s pitch failed to gain much long-term traction among state judges.” Gardner, *supra* note 73, at 358. Nonetheless, the article’s impact on state court practices in the ten years after its publication was the sort that more ordinary authors of law review articles can only dream of: “In the quarter-century preceding publication of the article, state courts around the nation had issued fewer than fifty rulings in which they construed state constitutions to be more protective of individual rights than the U.S. Constitution—about two per year. In the decade following Brennan’s article, the pace of such rulings increased at least tenfold.” *Id.* at 357.

State constitutions typically include a guarantee of the equal protection of the laws.⁷⁶ I can think of few contributions that state courts could make to their state's legal system that would be as meaningful and important as interpreting their state constitution's equal protection guarantee to give disproportionate racial impact the independent importance that it has been denied for far too long.

⁷⁶ For a listing of various state constitutional equal protection clauses, see Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1, 49 n.197 (1993).