The Racially Disparate Impact of Restrictions on the Public Funding of Abortion: An Analysis of Current Equal Protection Doctrine

David Robert Baron
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DAVID ROBERT BARON

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I. INTRODUCTION

On January 15, 1989, a day on which many people in the
United States commemorated the sixtieth birthday of the Rev. Dr.

* B.A. 1988, University of Massachusetts at Amherst; J.D. 1992, Boston College Law
School. David Baron is an associate at the law firm of Ropes & Gray, in Boston, MA. The
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Martin Luther King, Jr., a fifteen-year-old black girl was brutally raped in Detroit.1 Identified as “Jane Doe” in the Michigan press and in the court documents surrounding her case, the teenager was visiting her aunt in the eastern part of Detroit when three adult men broke into her aunt’s apartment.2 Jane was attacked by all three of the men, who beat and raped her repeatedly.

Several days after the attack, Jane discovered that she was pregnant.3 Unable to afford an abortion out of her mother’s monthly welfare income of $421,4 Jane and her mother tried to schedule an abortion at a clinic or hospital that would accept payment through Medicaid.5 When they learned that Michigan had recently enacted a law prohibiting the use of Medicaid funds for abortion in cases not involving life-threatening pregnancy, Jane and her mother enlisted the help of the American Civil Liberties Union (ACLU) to challenge the new abortion funding restriction in the Michigan state courts.6

Central to Jane Doe and the ACLU’s case, Doe v. Babcock,7 was the claim that statutory restrictions on abortion unconstitutionally discriminate against women of color like Jane Doe.8 Grounding this claim in an emerging body of demographic research tending to show the disparate racial impact of abortion restrictions, Jane Doe and the ACLU claimed that the Michigan restriction on public funding for abortion worked an invidious form of discrimination by the state against constitutionally protected classes of minority citizens.9 Although this discrimination-based argument was not the only basis advanced by Jane Doe and her attorneys for the Michigan

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2 Kathleen Boland & Steve Marshall, Teen Rape Victim Stirs Abortion Debate, USA TODAY, Feb. 24, 1989, at 3A.
3 McNamara, supra note 1, at 1.
4 Id. Abortions cost $250 at most Detroit hospitals. For Jane Doe, however, who suffers from an “unevaluated and undiagnosed seizure disorder,” Doe v. Director of Dep’t. of Social Servs., 187 Mich. App. 993, 497 n.2 (1991), rev’d, 439 Mich. 650 (1992), the necessary procedures totalled $1000. Jane’s age and history of seizures also entailed substantial risks to her health were she to continue her pregnancy to term. Id.
5 Medicaid is a program that is jointly funded by the federal and state governments to provide necessary medical services for the poor.
6 Rape Victim Seeks Medicaid Abortion, CHI. TRIB., Mar. 9, 1989, at 3.
8 Id. at 11-13.
statute’s invalidity, it figured strongly in the party’s overall effort before the Michigan Supreme Court to have the restriction struck down on constitutional grounds.\(^\text{10}\)

*Doe v. Babcock* is not the first case in which statutory restrictions on abortion have been challenged as a form of government-sponsored discrimination against a constitutionally protected group.\(^\text{11}\) Particularly in the area of funding restrictions, advocates in the federal courts have also argued that the disparate impact of abortion restrictions on women and women of color violates the Constitution’s guarantee of “equal protection of the laws.”\(^\text{12}\) Indeed, as the Supreme Court of the United States has moved seemingly closer with each new opinion to no longer recognizing (or, at any rate, no longer enforcing) a “right to choose abortion”\(^\text{13}\) under the tradi-

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\(^\text{10}\) *Id.*. The claims of Jane Doe and the ACLU were based on the protections of the Michigan Constitution, however, and therefore bear only an analogous relationship to the issues raised in this article.


\(^\text{12}\) U.S. CONST. amend. XIV, § 1, cl. 4.

\(^\text{13}\) Despite the Court’s purported “reaffirmation” of *Roe* in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), it is beyond question that the Court went further in that opinion toward abandoning any recognizable “right” to an abortion than it has in any of its recent encounters with the abortion question. Explicitly, the Court reversed two of its settled decisions in the abortion area by allowing (1) a mandatory 24-hour waiting period for abortion, *id.* at 2825–26 (overruling Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 449–51 (1983)), (2) a requirement that doctors provide patients with information designed to influence the patient’s choice between childbirth and abortion, *Casey*, 112 S. Ct. at 2822–24 (overruling Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759–65 (1986); *Akon*, 462 U.S. at 442–45), (3) a requirement that information relative to a patient’s decision between childbirth and abortion be furnished by a physician rather than a qualified assistant, 112 S. Ct. at 2824 (overruling *Akon*, 462 U.S. at 446–49), and (4) a requirement that physicians record specific information concerning each patient’s background and each abortion performed, 112 S. Ct. at 2832–33 (overruling *Thornburgh*, 476 U.S. at 765–68). More striking, however, was the Court’s reversal of much of that was essential to the holding in *Roe*: the trimester framework for evaluating statutory restrictions on the abortion right and the applicability of “strict scrutiny” to statutory impingements on the abortion right itself. 112 S. Ct. at 2816–21. That the Court had the keen sense of irony to cast this bold retreat from *Roe* in terms of the doctrine of *stare decisis* should not—and, by all indications, will not—dissuade those on either side of the abortion debate from viewing the Court’s opinion in *Casey* as yet another step toward the eventual dismantling of *Roe*. *See*
tional rubric of substantive due process, such alternate bases for striking down abortion-restricting legislation have been raised by abortion advocates with ever-increasing frequency.

Challenges to statutory restrictions on abortion that have been based or based in part upon constitutional principles of equal pro-

also Rust v. Sullivan, 111 S. Ct. 1759 (1991) (upholding Title X provisions prohibiting doctors and other personnel in facilities receiving Title X funds from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

Dissenting in Webster, Justice Blackmun argued that the fears of abortion advocates for the future of the abortion right are eminently justified by the Court's present direction: Today, Roe v. Wade, and the fundamental constitutional rights of a woman to decide whether to terminate a pregnancy, survive but are not secure. Although the Court extricates itself from this case without making a single, even incremental, change in the law of abortion, the plurality [Rehnquist, C.J., White and Kennedy, JJ.] and Justice Scalia would overrule Roe . . . and would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term.

Webster, 492 U.S. at 537–38, 560 (Blackmun, J., dissenting) (citations omitted). In addition, the anti-abortion stance of the last two presidential administrations, Laura S. Stepp & Ann Devroy, Bush Cites Abortion “Tragedy” in Call to 67,000 Protestors, Wash. Post, Jan. 24, 1989, at A1 (“I think the Supreme Court's decision in Roe v. Wade was wrong and should be overturned. I think America needs a human life amendment.”) (statement of President Bush); the increasingly conservative composition of the lower federal courts, Eileen McNamara, If Permitted, Many States Would Ban Most Abortions, Boston Globe, Apr. 2, 1989, at 14 (President Reagan appointed more than half of the federal bench during his terms in office; most of these judges share his pro-life views); and the advanced age of Justice Blackmun—the author of the majority opinion in Roe and, with Justice Stevens, one of its last supporters—further suggest that abortion-rights advocates are justifiably concerned that the Court may withdraw its traditional support for the abortion right in future holdings. In light of the Court's most recent holding in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), however, its withdrawal from the abortion controversy seems likely to proceed incrementally rather than summarily. See also Webster, 492 U.S. at 537 (Scalia J., concurring) (“It . . . appears that the mansion of constitutionalized abortion-law, constructed overnight in Roe v. Wade, must be dissembled door-jamb by door-jamb. . . .”).

14 In Roe v. Wade, the Supreme Court held that the right to an abortion is “encompassed” by a woman’s constitutional right of privacy, 410 U.S. at 153, a right which is in turn protected by the Constitution’s guarantee of “liberty” under the Due Process Clauses of the Fifth and Fourteenth Amendments. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1, cl. 3. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972). Challenges to statutory restrictions on abortion have generally involved courts in refining one of these two central aspects of the Supreme Court’s holding in Roe. Both with respect to funding restrictions and administrative restrictions on the access of women to abortions, the abortion controversy in United States law has traditionally turned on the Court’s substantive definition of “liberty” under the Due Process Clauses and its designation of abortion and privacy as “fundamental rights” within the meaning of this broad constitutional guarantee.

15 See sources cited supra note 11. In Webster v. Reproductive Health Services, a group of amici representing a broad range of minority interests framed its essentially rights-based defense of Roe v. Wade in decidedly equal protection terms:

While women of all classes and colors will be endangered by any dismantling of the constitutional framework of Roe v. Wade, . . . the burden will fall most heavily and
protection have primarily focused on issues of unconstitutional gender discrimination;\(^\text{16}\) although in a few cases, particularly in the area of abortion funding, advocates have also relied to some degree on evidence of disparate racial impact.\(^\text{17}\) This article focuses on the legal underpinnings of this latter category of claims—those for which the case of Doe v. Babcock offers a representative fact pattern. Such challenges to restrictions on the public funding of abortion argue, in the most general terms, that abortion-restricting legislation of this type works a form of invidious discrimination against women of color that is (or, rather, should be) prohibited by the constitutional guarantee of equal protection.

This article observes that, although available demographic data tend strongly to indicate that restrictions on the public funding of abortion severely and predictably harm black women and other women of color in a manner disproportionate to their impact on women in the United States as a whole, constitutional antidiscrimination law in its current form does not support a claim that takes the disparate racial impact of public funding restrictions as its basis. Taking this aspect of the abortion funding controversy as an entry-point into the wider universe of current equal protection jurisprudence, this article further suggests that the expected failure of race-based equal protection claims in the abortion funding context is the necessary result of other, deeper, doctrinal failures that have emerged in the Supreme Court's administration of the Equal Pro-

\(^\text{16}\) But see CATHERINE MACKINNON, FEMINISM UNMODIFIED 249–51 n.21 (1987) (arguing that many plaintiffs have raised the issue of gender discrimination, but few have made it essential to their challenge, and that discrimination based on race or wealth have more frequently been squarely tested as bases for challenging abortion-restricting statutes).

\(^\text{17}\) See, e.g., Civil Rights Brief, supra note 15; see also Plaintiffs' and Proposed Intervenors' Amended Complaint, McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980) (No. 1804), rev'd sub nom., Harris v. McRae, 448 U.S. 297 (1980) (raising the issue of racial discrimination but apparently disregarding it before the Supreme Court). As Professor Laurence Tribe has noted, however, until relatively recently the ACLU has been reluctant to advance the abortion restrictions it has challenged in court. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1353 n.109 (2d. 1988).
tection Clause. That such claims are virtually certain to fail under current equal protection doctrine is taken throughout as an analytical and, to some extent, normative paradigm for examining the doctrine's constitutional adequacy.\(^{18}\)

A clear presentation of the factual case demonstrating the racially disparate impact of abortion funding restrictions is thus crucial to every part of this analysis. In Part II, data illustrating the disproportionate burden of funding restrictions on black women and other women of color will be presented and discussed in some detail. With these data as a foundation, Part III will then present an overview of equal protection analysis in the abortion funding context under existing law, parsing out both the "fundamental rights" and "suspect classification" components of this analysis. In Part IV, by focusing primarily on the "suspect classification" or "invidious discrimination" aspect of modern equal protection law, it will be argued that the principles the Court has evolved for adjudicating claims of racially disparate impact virtually require the rejection of such claims in the abortion funding context. Part V will draw from the analysis and legal commentary set forth in Parts III and IV in ultimately offering a principle for the Court's administration of the Equal Protection Clause that, it will be suggested, more adequately and defensibly addresses the reality of racially disparate impact.

II. RACIALLY DISPARATE IMPACT OF ABORTION FUNDING RESTRICTIONS: THE FACTUAL CASE

Since 1982, the federal government has restricted the use of federal funds for abortion to cases in which the woman's life would be endangered by carrying her pregnancy to term.\(^{19}\) In practice,
this restriction means that federal funding is available to indigent women seeking abortions in approximately 0.1% of all cases. Some states, however, have continued to provide additional Medicaid coverage for abortion under less restrictive circumstances, such as in cases of rape or incest, or where there is a substantial risk to maternal health or of severe fetal abnormality.

The assertion that women of color suffer disproportionately under restrictions on the public funding of abortion services turns on two distinct, although related, empirical observations concerning women of color in the United States: first, that women of color are vastly overrepresented among the poor and the extreme poor.


20 Gold & Daley, supra note 19, at 210. In 1990, combined state and federal funding of abortion services for low-income women totalled $65 million. Id. Of this amount, federal funding accounted for nearly 0.2%, at $119,000. Id.

21 In 1990, 14 states provided funding for abortion under the “medically necessary” standard. An abortion is defined as “medically necessary,” generally, when childbirth or continued pregnancy pose a significant risk to the physical or psychological health of the mother, as determined by a physician. Rachel B. Gold & Sandra Guardado, Public Funding of Family Planning, Sterilization and Abortion Services, 1987, 20 Fam. Plan. Persp. 228, 232 (1988). Five states are under court order to provide funding for all medically necessary abortions: California, Connecticut, Massachusetts, New Jersey, and Vermont; eight states do so voluntarily: Alaska, Hawaii, Maryland, New York, North Carolina, Oregon, Washington, and West Virginia. Gold & Daley, supra note 19, at 210. In addition, seven states which do not fund medically necessary abortions offer public funding for abortion services under less severe restrictions than the federal government, such as for cases of rape or incest, fetal defect, or psychiatric conditions representing a threat to the life of the woman: Colorado, Iowa, Minnesota, Pennsylvania, Virginia, Wisconsin, and Wyoming. Id.

22 In 1991, the poverty rate for blacks in the United States was 32.7%. U.S. Bureau of the Census, Poverty in the United States: 1991, Current Population Rep., Series P-60, No. 181, at 1 (1992). The percentage of black families living in poverty was higher if the head of the household was a woman, and higher still if the household included minor children. Id. at 1, 18. Also, in 1991 fully 49.7% of all Hispanic families headed by women lived below the federal poverty level. Id. at 1. Hispanic persons in the United States, as defined by the Census Bureau, are primarily persons of Mexican, Puerto Rican, and Central and South American descent. U.S. Bureau of the Census, The Hispanic Population in the United States: March 1988, Current Population Rep., Series P-20, No. 438 (1989). The figures for race and families living below the poverty level in 1991 show that families of color are 3.5 to 3.5 times more likely than white families to live in conditions of poverty. See Poverty in the United States: 1991, supra, at 1.

23 Even in comparison to white families subsisting below the federal poverty level, black and Hispanic families living in poverty often suffer more extreme forms of deprivation. For example, one representative sample of homeless families in New York City found these families to be 54% black, 40% Hispanic, and only 6% “other.” Beth C. Weitzman, Pregnancy and Childbirth: Risk Factors for Homelessness?, 21 Fam. Plan. Persp. 175, 176 n.* (1989).
in this country (and thus disproportionately in need of public assistance generally); and second, that women of color are substantially more likely than white women to seek and obtain abortions at some point during their lifetimes. Each of these observations has been well-documented over the last decade, and a sample of the available data has been set out in the footnotes. Taken independently, the disparity between women of color and other women in their need for abortion services and in their relative ability to pay for these services is striking. What is perhaps most remarkable, however, is that when income and the need for abortion services are examined together, the gap between women of color and other women grows even wider, such that the disparity between women of color and other women in their need for abortion services is highest among women who are least able to afford an abortion.

24 In the last decade, the number of abortions obtained by women in the United States has remained stable at approximately 1.6 million. Stanley K. Henshaw & Jennifer Van Vort, Abortion Services in the United States, 1987 and 1988, 22 Fam. Plan. Persp. 102, 103 (1990). In 1987, 31.4% of all abortions in the United States were obtained by “non-white” women, a proportion which has also remained fairly constant over this period. Stanley K. Henshaw & Jane Silverman, The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients, 20 Fam. Plan. Persp. 158, 159 (1988); Stanley Henshaw et al., Abortion Services in the United States, 1978–1979, 13 Fam. Plan. Persp. 6, 15 (1981). Adjusted for population, the data generated by these studies indicate that an Hispanic woman is 60% more likely than a white woman to have an abortion during her lifetime, Henshaw & Silverman, supra, at 158, whereas a “non-white” woman generally is twice as likely. Stanley K. Henshaw, Characteristics of U.S. Women Having Abortions, 1982-1983, 19 Fam. Plan. Persp. 5, 8 (1987). Although it is impossible with studies of this type to pin down the precise reason women of color seek and obtain abortions so much more frequently than white women, one factor significantly affecting both the abortion rate and birth rate of women of color is that their pregnancy rate (number of pregnancies/1000 women) is twice as high as that for white women, a statistic which has remained constant since 1978. Id. at 8. Reasoning from abortion rates and rates of unwanted childbirth among women in the United States, it is also logical to conclude that the rate of unintended pregnancy is similarly much higher for women of color. Id.; Unwanted Childbearing in the United States Declines, But Levels Still High Among Blacks, Singles, 17 Fam. Plan. Persp. 274, 274 (1985).

25 The disparity in the need for abortion services is highest among teenagers, Stanley K. Henshaw & Jennifer Van Vort, Teenage Abortion, Birth and Pregnancy Statistics: An Update, 21 Fam. Plan. Persp. 85, 86 (1989); James Trussell, Teenage Pregnancy in the United States, 20 Fam. Plan. Persp. 262, 264 (1988), Medicaid recipients, Henshaw & Silverman, supra note 24, at 162, and single mothers. Stanley K. Henshaw et al., A Portrait of American Women Who Obtain Abortions, 17 Fam. Plan. Persp. 90, 94 (1985). The pregnancy rates and abortion rates of black 15 to 19 year-olds, for example, are consistently twice as high as the rates of their white counterparts—a statistic that is comparable to the disparity between black and white women generally. The disparity between extremely young white and “non-white” teenagers, however, is arrestingly greater than this cumulative average: in 1985, the abortion rate for women of color under age 15 was 5.4 times that for white women in the same age group, while the birthrate for women of color in this group was 6.5 times as high. Henshaw & Van Vort, supra at 86. To appreciate the magnitude of this problem, consider that, in 1988, half
Because these disparities in the need for abortion services pre­cede, at least analytically, the imposition of any statutory abortion restriction, it is also essential to assess the impact of funding restrictions on the options that remain available to women of color after such restrictions are imposed. If a woman of color is faced with an unwanted pregnancy in one of the thirty-seven states that have “restrictive” funding statutes,26 she may choose to pursue one of four possible options: (1) she might try to qualify for public funding under the restrictive statute, (2) she might use her own money to pay for a legal abortion, (3) she might use her money to pay for a cheaper, illegal abortion, or (4) she might decide to carry her pregnancy to term.27 Each of these options will be considered in turn.

A. Qualifying for Public Funding

While a Medicaid-eligible woman might find the possibility of qualifying for public funding for an abortion to be the most practical in terms of cost, it is also the least likely option to be available to her. Of the 743,090 abortions reported in any of the states with restrictive funding laws,28 only 0.11% were publicly funded in fiscal year 1987.29 Of the thirty-seven states with restrictive funding laws, thirty are “life only,” meaning that a woman is required to produce a doctor’s certification that her life will be endangered by continuing her pregnancy in order to qualify for funding through Medicaid.30 Foreseeable complications of pregnancy or childbearing, which arise in six of every ten cases,31 may make a woman’s abortion “medically necessary” in that they may threaten her with substantial and even permanent injury. Under the Hyde Amendment and the “life only” restrictions of thirty states and the District of Columbia, however,
such risks to a woman's health are not sufficient to qualify her for a publicly funded abortion. 32

Even in the six restrictive states that additionally provide exceptions for cases of rape or incest, 33 a minuscule number of women who are eligible under these provisions actually obtain publicly funded abortions. 34 Although it is possible that the underemployment of statutory exceptions for rape and incest is attributable to the strictness with which state officials administer these provisions, a more likely explanation is that women themselves may be unaware of the complexities in their state's abortion funding law or else unwilling to admit that their pregnancy is the result of rape or incest. Given that all but one of these statutes require a woman to promptly report whether she has been the victim of rape or incest to state law enforcement agencies, 35 it would not be surprising if many women felt deterred from attempting to qualify for public funding in states with this kind of restriction.

B. Paying for an Abortion Out-of-Pocket

While raising the money for an abortion may be barely feasible in many cases, it is nevertheless an option which many women, particularly those who are at risk for serious (but non-life threatening) health complications, feel compelled to pursue. 36 In 1989, the average cost a woman paid in a clinic or physician's office for a first-trimester abortion was $231. 37 Raising a sum of money this

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33 These states are: Iowa, Minnesota, Pennsylvania, Virginia, Wisconsin, and Wyoming (Colorado, the seventh less restrictive state, only allows funding in cases of physical or psychological life endangerment). Gold & Guardado, supra note 21, at 232. These seven states provided zero funding for abortion services in 1987. Id.


36 Of Medicaid-eligible women seeking to obtain an abortion, 75 to 80% elect and eventually are able to pay for an abortion themselves. Rachel B. Gold, Abortion and Women's Health: A Turning Point for America? 52 (1990)(unpublished manuscript, on file with the Alan Guttmacher Institute).

37 Id. at 51. The cost of a first trimester abortion can vary greatly from state to state and even from facility to facility. The maximum cost for a first trimester abortion in 1986 was
large—more than half the average monthly income of a family on Medicaid—can have severe effects on the life of a Medicaid-eligible woman, forcing her and her family to give up money for food, clothing, utilities, and other basic necessities. One study has found serious consequences of this nature in 58% of the cases where Medicaid-eligible women pay for an abortion out of their own funds.

Medicaid-eligible women are also much more likely to delay obtaining an abortion while they raise the money to pay for the procedure, a course of action that may be both costly and physically dangerous. One poll of Medicaid-eligible women found that these women most frequently delayed an abortion past the tenth week of pregnancy because they needed time to raise the money. The study concluded that, because of this delay, nearly one-quarter of Medicaid-eligible women who otherwise would have obtained an abortion in the first trimester were forced to postpone the procedure into the second trimester. Particularly where access to legal

38 Gold, supra note 36, at 51.
40 Id.; see also James Trussell et al., The Impact of Restricting Medicaid Financing for Abortion, 12 Fam. Plan. Persp. 120, 129–30 (1980).
41 The problem a woman of color may have in raising money for an abortion may trap her in a vicious circle of rising costs. In 1982, only 32% of all abortion providers (37% of all public and private hospitals) reported that they would perform an abortion after the first trimester, while the vast majority of those providers who would perform second and third trimester abortions reported that they charged more money for the procedure. Stanley Henshaw, Jacqueline D. Forrest & Ellen Blaine, Abortion Services in the United States, 1981 and 1982, 16 Fam. Plan. Persp. 119, 125, 126 (1984). See infra note 46.
42 The risks of major complications and death rise markedly after the first trimester, and studies have shown that the risk of death begins to rise 30% for every week past the eighth week of gestation, and that the risk of major complications rises 20% for every week past this point. Henshaw & Wallisch, supra note 39, at 171. This is so because abortion deaths are most often caused by infectious complications (sepsis), which are significantly more likely to result when the fetus is larger and more developed and when the abortion is incomplete. Delay, Limited Access Found Key Factors in Septic Abortion Deaths, 13 Fam. Plan. Persp. 46, 47 (1981); see also David A. Grimes, Second-Trimester Abortions in the United States, 16 Fam. Plan. Persp. 260, 263 (1984).
43 Henshaw & Wallisch, supra note 39, at 170.
44 The “first trimester” is usually defined as the stage of pregnancy prior to the twelfth week; the “second trimester” is the stage of pregnancy between approximately the thirteenth week and the point at which the fetus becomes “viable” (approximately the twenty-fourth to twenty-sixth week). See Grimes, supra note 42, at 260–61.
45 Henshaw & Wallisch, supra note 39, at 170; see also Aida Torres & Jacqueline D. Forrest, Why Do Women Have Abortions?, 20 Fam. Plan. Persp. 169, 175 (1989) (29% of all
abortion is geographically limited, black women, teenagers, and women covered by Medicaid are significantly more likely than others to delay an abortion well into the second trimester.

C. Paying for an Illegal Abortion

Although illegal abortions are often less expensive than those performed by a licensed physician in a clinic or hospital, they are also far less safe for the woman. It is not necessary to recount the horrific stories of “back-alley abortions” performed in the years prior to Roe to recognize that illegal abortion is not now and has never been a viable alternative for low-income women who would terminate their pregnancies. Nonetheless, estimates of the numbers of illegal abortions obtained in the United States between 1975 and 1979—a period following the Supreme Court’s decision in Roe but encompassing the passage of the first Hyde Amendment in 1977—range from 5,000 to 23,000. During this period, deaths due to illegal abortion were fifteen times higher among black women and eleven times higher among Hispanic women than among white women, such that, together, black women and Hispanic women accounted for 82% of illegal abortion deaths in the United States. An estimated one-third of the women who obtained illegal abortions between 1975 and 1979 chose that option because they could not afford a legal abortion or because legal abortion providers were not available in their areas.

women who delayed an abortion past the sixteenth week did so because they lacked the money to pay for an abortion earlier in their pregnancy).

46 In areas with limited access to abortion services, the real cost of an abortion must additionally be computed as including travel costs, meals, lodging, time missed from work, day care, and so forth. In 1987, 31% of all women in the United States lived in counties with no abortion provider at all. Henshaw & Van Vort, supra note 24, at 106.

47 Torres & Forrest, supra note 45, at 174; Late Abortions Linked to Education, Age and Irregular Periods, 13 Fam. Plan. Persp. 86, 86 (1981).


51 Binkin, et al., supra note 50, at 164. In the years prior to Roe, black women and Hispanic women died from illegal abortions at 23 times and nine times the rate of white women, respectively. Id.

52 See id. at 166.

53 Id. at 163.
D. Carrying an Unwanted Pregnancy to Term

The original sponsor of the Hyde Amendment, Representative Henry Hyde (R.-Ill.), had hoped that the federal government's restriction of Medicaid funding for abortion services would serve to compel the poorest women in the United States to give birth rather than terminate their pregnancies. Several independent studies of Medicaid-eligible women in the United States have found that the Hyde Amendment accomplishes this result about one-quarter of the time—effectively denying abortions to 25% of Medicaid-dependent women (perhaps the poorest quartile).

In assessing the impact of funding restrictions on the actual number of women in the United States who are forced into unwanted childbirth, it is illustrative to compare abortion statistics in the years prior to the Supreme Court's decision in *Roe* with those from the present day. Accepted estimates of the yearly number of legal and illegal abortions performed in the United States in the 1960s fall between 1.0 and 1.5 million. Compared with the current number of 1.6 million abortions per year, and adjusted for population, these estimates suggest that the criminalization of abortion did surprisingly little to deter women who sought abortions from obtaining them through whatever—often dangerous and illegal—means were available. Strangely, however, restrictions on the fund-
ing of abortion do appear to have had a measurable impact on the number of births and abortions obtained in funding-restricted states. Based on data from other states with similar legislation, the director of the Michigan Department of Social Services estimated that 20% of Medicaid-dependent women seeking abortions would be forced to give birth under Michigan's new funding restriction.58

These data indicate that, at least with respect to the most economically disadvantaged members of society, the real-world effects of abortion funding restrictions may not be very different from those of outright statutory bans on abortion in the years prior to Roe. The cause of this startling similarity may be traceable to the relative cost and availability of abortion services under each kind of statutory regime. Prior to Roe, there is at least anecdotal evidence that some physicians took it upon themselves to offer cheap, illegal abortions to patients who did not want or could not afford to give birth.59 In the present day, by contrast, relatively “safe” alternatives to legal abortion are almost nonexistent. Thus, if cost currently prohibits a woman from obtaining an abortion at hospitals or clinics (which sometimes offer reduced rates for indigent women), there simply may be no safe or inexpensive alternatives available to her apart from giving birth—an option which, of course, her Medicaid coverage would pay for.

Several recent studies indicate that a woman who is able to obtain an abortion in the first trimester takes about one-seventh the risks of health complications and death that she would by giving birth.60 This objective risk, however, may not be of paramount concern to a pregnant woman who is forced into unwanted child­birth. Far more salient in a woman’s subjective assessment of her situation are likely to be the overall burdens in loss of income, substantially higher incidence of abortions performed for psychiatric reasons among private patients in private and voluntary hospitals than among ward patients and patients in municipal hospitals. Id. In 1959, of 96 therapeutic abortions reported by 11 teaching hospitals in New York City, only one was performed on a black patient, although 27% of obstetric patients served by these hospitals were black. Id. (citing Alan F. Guttmacher, Induced Abortions, 63 N.Y. ST. J. of Med. 2334 (1963)).


59 See Tribe, supra note 31, at 35, 38; Roger Rosenblatt, Welcome to Uncomfortable Times, U.S. News & World Rep., Jul. 17, 1989, at 8. Also, because of the greater demand for illegal abortions in this period, it is possible that information on “less hazardous” methods for self-inducing abortion was more widely available.

60 Researchers Confirm Induced Abortions to Be Safer For Women Than Childbirth: Refute Claims of Critics, 14 Fam. Plan. Persp. 271, 271 (1982) [hereinafter Abortion Safer Than Childbirth].
inability to support her family, loss of mobility, inability to work, and impingements on other aspects of individual autonomy that she expects will accompany the birth of an unwanted child. Unfortunately, the degree to which a woman who is forced to give birth feels these aspects of her life are compromised by unwanted childbirth is not measurable by the kinds of demographic statistics that confine this analysis.\textsuperscript{61} Nevertheless, the subjective hardship of forced childbirth warrants special mention, and a great deal more empathic consideration than it can possibly be given here, as it is doubtless the defining characteristic of this fourth option.

Women who receive some form of public assistance and carry an unwanted pregnancy to term are at much greater risk for becoming homeless or caught in the so-called "welfare trap" than publicly-assisted women who choose and are financially able to abort.\textsuperscript{62} A 1978 national survey of low and marginal-income women served by a government family planning program concluded that 39\% of these women "would become dependent on AFDC [Aid to Families with Dependent Children] if they were to have an unplanned birth."\textsuperscript{63} Although it is true in general that a woman who carries her pregnancy to term takes a greater health risk than a woman who aborts her pregnancy in the first trimester,\textsuperscript{64} lack of prenatal care and greatly reduced access to gynecological services puts women of color at a substantially greater risk when they choose (or are compelled) to give birth.\textsuperscript{65} In sum, a woman of color who is

\textsuperscript{61} The impressions of one woman in such a situation cannot possibly suffice, but perhaps lend some perspective to this final option:

Why does the government want hungry children in the world? . . . [W]e live in this society, where you have to have a place to stay, everyone needs a house. Then they say you have to have your body covered, which means you need clothing. Nobody gives you anything to eat. You have to eat food. . . . I see people eating steak on television, and my children are eating chicken backs and chicken necks.


\textsuperscript{62} Id. at 176.

\textsuperscript{63} \textit{Unplanned Pregnancy is Main Cause of Welfare Reliance, Survey Finds}, 13 \textit{FAM. PLAN. PERSP.} 186 (1981). This finding has been corroborated by other studies, which have found that only 5\% of AFDC mothers ever receive any form of public assistance before they conceive their first child. \textit{Id.} Black teenage mothers who receive AFDC are more likely still to be dependent on AFDC at age 26 than those who do not have a child. Greg J. Duncan & Saul D. Hoffman, \textit{Teenage Welfare Receipt and Subsequent Dependence Among Black Adolescent Mothers}, 22 \textit{FAM. PLAN. PERSP.} 16, 16 (1990); see generally Laurie Schwab Zabin et al., \textit{When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status and Subsequent Pregnancy}, 21 \textit{FAM. PLAN. PERSP.} 248 (1989).

\textsuperscript{64} \textit{Abortion Safer Than Childbirth}, supra note 60, at 271.

\textsuperscript{65} For live births, the maternal mortality rate of nonwhite women is three times that of
faced with an unsafe, unaffordable, or simply unwanted pregnancy in any of the thirty-six states that restrict abortion funding assumes a disproportionately weightier burden no matter which of the available options she chooses.

The racially disparate impact of abortion funding restrictions is compellingly clear and seems at first glance to be well suited to a demand for judicial relief by women of color. Abortion advocates note that the factual data on abortion-funding restrictions reveal an unsubtle correlation between persons who suffer most acutely under these restrictions and socioeconomic groups in the United States that have traditionally been least successful in gaining access to political power.66 In a recent brief before the Supreme Court, one group of amici reasoned that correlations of this type define precisely the situation in which the Equal Protection Clause of the Constitution is most naturally applicable; that governmental actors and others in positions of power should not "too casually trade away for others key liberties that they are careful to reserve for themselves" and for other members of their race and class.67

Under prevailing Supreme Court jurisprudence, however, such functional definitions of constitutional equal protection are simply
not the stuff of majority opinions. Rather, as the balance of this article will explore in detail, the principles currently governing the Court's administration of the Equal Protection Clause have made it virtually impossible for claims arising from the type of real-life racial disparities described in this section to trigger a constitutional response. The Court, which once held that the constitutional guarantee of "equal protection of the laws is a pledge of the protection of equal laws,"\textsuperscript{68} today will permit laws to escape judicial scrutiny that deprive even the most basic interests of constitutionally protected groups, and that subject members of these groups to statutory burdens unparalleled among members of the political majority, so long as they are not "discriminatory" within the Court's perplexing definition of the word.\textsuperscript{69} For this reason, race-based challenges to abortion funding restrictions, like the gender-based and poverty-based challenges that preceded them, will invariably fail. Incapable of responding to real-world conditions of inequality like those described in this section, the Equal Protection Clause in its present formulation has become a mocking abstraction for those who still suffer for the color of their skin and for their history of political and economic disempowerment. In the context of abortion funding, an examination of the method by which this transmogrification of the doctrine has taken place, an analysis of its impact on constitutional jurisprudence, and a proposal for restoring a principled and manageable connection between the doctrine and its substantive underpinnings occupy the remainder of this discussion.

III. Equal Protection in the Abortion Context: Government's Non-Obligation to Provide Abortion Services to Indigent Women

\textit{Harris v. McRae}\textsuperscript{70} was among the first cases in which the Supreme Court considered the equal protection issues raised by restrictions on the public funding of abortion.\textsuperscript{71} In \textit{Harris}, a class action was brought against the Secretary of Health, Education and Welfare to enjoin enforcement of the "Hyde Amendment"—a supplement to the 1980 Medicaid appropriations bill that cut off federal funding under Title XIX for all "abortions except that which a physician certifies to be necessary to preserve the life of

\textsuperscript{68} Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
\textsuperscript{69} This definition will be carefully examined in Part IV.
\textsuperscript{70} 448 U.S. 297 (1980).
the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest..." The plaintiffs were a class of Medicaid recipients, abortion providers, and religious organizations who challenged the federal funding restriction, inter alia, as a violation of the Fifth Amendment's implied guarantee of equal protection.

The crux of the plaintiffs' equal protection claim in Harris was that the unequal funding scheme provided for in the Hyde Amendment—allowing disbursement of federal Medicaid funds for substantially all medically necessary services for the poor (including necessary services associated with childbirth), but cutting off funding for medically necessary abortions—invidiously discriminated against indigent women by foreclosing their constitutionally protected decision to obtain an abortion. In particular, the plaintiffs argued that, by removing the exception for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term," Congress had arbitrarily chosen to penalize the exercise of the abortion right among a narrow and politically powerless class of persons: indigent, Medicaid-dependent women facing serious risks to their health. The U.S. District Court found this last argument compelling, particularly with respect to teenagers at a high risk for complications resulting from unintended pregnancy, and enjoined enforcement of the Hyde Amendment.

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73 Plaintiffs also included four individual Medicaid recipients who had been unable to obtain medically necessary abortions when they were denied funding under the Hyde Amendment. Harris, 448 U.S. at 304.

74 See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (Fourteenth Amendment guarantee of equal protection applicable to federal government through "liberty" component of Fifth Amendment Due Process Clause).

75 Harris, 448 U.S. at 321–22.

76 Id. at 312.


78 Harris, 448 U.S. at 315.

The Supreme Court disagreed. Writing for the Court, Justice Stewart held that the Hyde Amendment neither "impinged" upon any "fundamental right" secured by the Constitution nor discriminated against any judicially recognized "suspect class." Under

80 Harris, 448 U.S. at 312–18. Government action that impinges upon the “fundamental” rights or interests of a particular class of individuals will violate equal protection if such action is not “necessary to promote a compelling governmental interest.” See, e.g., Shapiro v. Thompson, 394 U.S. 618, 638 (1969) ("fundamental right" to travel interstate); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667–70 (1966) ("fundamental right" to equal access to the franchise). This level of judicial review is known as “strict scrutiny,” under which government bears the burden to show, first, that its actions serve a purpose that is not only "legitimate" under the Constitution but also sufficiently “compelling” to justify the government in tampering with the rights of a class of individuals; and second, that it has chosen means that are not only “rationally related” but “necessary” to effect this purpose and “least restrictive” to individual rights of all means available. See, e.g., Shapiro, 394 U.S. at 634; Harper, 383 U.S. at 670.

A lower level of review, usually applicable to government regulation of purely economic matters, is the “minimum rationality” or "rational basis" standard, Williamson v. Lee Optical Co., 348 U.S. 483, 488–91 (1955). Under this standard, the plaintiff has the burden of proving either that the government’s actions do not further a “legitimate governmental purpose” or that, if the government does have a legitimate purpose for its actions, it has chosen means that are not “rationally related” to the attainment of this purpose. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 83 (1911). Although the Court in the last 20 years has adhered less rigidly to this “two-tiered” system of judicial review, it is still often true that the choice between strict scrutiny and minimum rationality is effectively dispositive of a plaintiff’s claim under equal protection of due process. See Gerald Gunther, The Supreme Court, 1971 Term-Foreword: In Search of the Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) (strict scrutiny usually “strict' in theory and fatal in fact’); see also infra note 88.

81 Harris, 448 U.S. at 322–23. If government classifies individuals for unequal treatment according to criteria that are constitutionally “suspect,” the basis for that classification will be subject to strict or “the most rigid scrutiny.” Korematsu v. United States, 323 U.S. 214, 216 (1944). Although the characteristics that will render a particular criterion “suspect” under equal protection are not altogether clear from the Court’s holdings, the Court has always held racial and ethnic classifications to be categorically of this type. See, e.g., McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hernandez v. Texas, 347 U.S. 475, 478–79 (1954); Korematsu, 323 U.S. at 216; Hirabayashi v. United States, 320 U.S. 81, 100 (1945). Even during the period when the Court was reluctant to extend the guarantees of the Fourteenth Amendment to other minority groups, black citizens were held to be the persons “for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color...” Strauder v. West Virginia, 100 U.S. 303, 307 (1879).

In addition, the Court has applied an intermediate standard of judicial review—one not quite so permissive as minimum rationality and not so surely fatal as strict scrutiny—to a few specific types of statutory classifications: those based upon gender, Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971), illegitimacy, Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982), and alienage, Plyler v. Doe, 457 U.S. 202 (1982). When government deliberately classifies individuals according to one of the “quasi-suspect” criteria, and imposes burdens upon the selected group it does not impose generally, the classification will be upheld unless it fails to serve “important governmental objectives” or is not “substantially related to the achievement of those objectives.” Craig, 429 U.S. at 197.
both prongs of traditional equal protection analysis, the Court thus
held that the Amendment withstood the plaintiff’s facial challenge
because it bore a “rational relationship to the legitimate govern­
mental objective of protecting potential life.”82

The Court first addressed the “fundamental rights” component
of the plaintiff’s claim under the rubric of “substantive due pro­
cess,”83 finding that the Hyde Amendment did not burden or re­
strict the right recognized in Roe v. Wade84 merely because it denied
certain women access to abortion.85 Although Roe had established
the right to choose an abortion as an aspect of a woman’s “fundamental”
right to privacy, the Court reasoned that the government
did not “impinge” upon this right merely by failing to make medi­
cally necessary abortions economically obtainable.86 Thus, for pur­
poses of both its due process and equal protection analysis,87 the
Court held that the “fundamental right” to choose an abortion was
not compromised by restrictions that left “an indigent woman with
the same range of choice . . . as she would have had if Congress
had chosen to subsidize no health care costs at all.”88

82 Harris, 448 U.S. at 325.
83 “Fundamental rights” analysis under the Equal Protection Clause is somewhat confusing
for its similarity, in methodology if not in scope, with that used to discern “fundamental
rights” under the rubric of “substantive due process.” Although 20 years have passed since
the observation was first made, it still seems fair to assume that, at a minimum, “every interest
found to be fundamental and therefore protected by the due process clause will also be
fundamental under the Equal Protection Clause. . . .” Developments in the Law—Equal Protection,
82 Harv. L. Rev. 1065, 1130 (1969). Thus, for example, to the extent that a woman’s right
to an abortion is encompassed by the “fundamental” right of privacy under the Due Process
Clause, it would appear to be logically no less protected by the guarantee of equal protection.
The doctrine of “fundamental rights” under the Equal Protection Clause, however, is far less
certain. In the absence of a “suspect classification,” the Court has recognized protected
interests under equal protection that range from the right to vote in state elections, see, e.g.,
Harper, 385 U.S. at 670, and the right to equal ballot access, see, e.g., Williams v. Rhodes, 393
U.S. 23, 33–34 (1968), to the right to a first appeal on a criminal conviction, see Douglas v.
California, 372 U.S. 353, 355 (1963), and the right to procreate, see Skinner v. Oklahoma,
316 U.S. 535 (1942). How far these cases go in defining a sphere of equal protection that is
beyond the protection of due process, and whether there is an emergent principle for
determining which sorts of rights will be protected independently by equal protection, is
beyond the scope of this article.

84 410 U.S. 113 (1973).
85 Harris, 448 U.S. at 316–18.
86 Id. at 316. But cf. Doe v. Bolton, 410 U.S. 179, 201 (1973) (appellants’ argument that
statutory restrictions on abortion access “have produced invidious discriminations” need not
be addressed by the Court, because the provisions complained of have already been found
invalid under due process).
87 Doe, 410 U.S. at 322.
88 Id. at 317.
Under the second prong of its equal protection inquiry, the Court found that the Hyde Amendment did not single out any group for special disadvantage according to criteria that were constitutionally "suspect."89 In making this determination, the Court drew on a series of cases in which it had previously held that the Equal Protection Clause does not generally prohibit classifications based on wealth.90 Most recently, in *Maher v. Roe,*91 the Court had upheld against a similar challenge by a class of indigent women a Connecticut welfare regulation barring the use of public funds for "nontherapeutic" (that is, elective) abortions.92 In *Harris,* although the plaintiffs argued that the Hyde Amendment's denial of funding even for "medically necessary" abortions promised far more severe consequences for indigent women,93 the Court found no reason to deviate from this recent precedent:

Here, as in *Maher,* the principal impact of the Hyde Amendment falls on the indigent. But that fact does not itself render the funding restriction constitutionally invalid, for this Court has held repeatedly that poverty, standing alone, is not a suspect classification. . . . That . . . the present case involves the refusal to fund medically necessary abortions, has no bearing on the factors that render a classification "suspect". . . .94

Reasoning that the Hyde Amendment thus worked no form of unconstitutional discrimination under either the "suspect classification" or "fundamental rights" component of equal protection law, the Court concluded that the Amendment passed constitutional muster by bearing merely a "rational relationship" to the legitimate governmental objective recognized in *Roe* of "protecting potential life."95

89 Id. at 323.
92 Id. at 466–67.
94 Id. at 323.
95 Id. at 325. Note that this description of the government's purpose in passing the Hyde Amendment—and the characterization of that purpose as "legitimate"—is not a mere formality in *Harris,* as it is in many cases where the "minimum rationality" test is used. By
Nine years after *Harris*, in *Webster v. Reproductive Health Services*, the Court made clear that its decisions in the abortion-funding context applied equally to all forms of public support for abortion that a government might choose to withdraw. In *Webster*, although the Court acknowledged that comprehensive restrictions on the use of public facilities and public employees for abortion services would, in all likelihood, put the cost of abortion out of reach for many indigent women, again it did not find that these restrictions encroached upon the right to an abortion recognized in *Roe*. Rather, the Court reasoned from its earlier holdings in the Medicaid-funding context that such restrictions by a state government “[left] a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.” Thus, in *Webster*, the Court strongly reaffirmed its position that, even where restrictions on public funding admittedly impede access to abortion services, and thus foreclose the right to choose an abortion for some women, such restrictions are a rational method for government to express “a value judgment favoring childbirth over abortion.”

concluding categorically that the government’s restriction of public funding for abortion neither impinged the abortion right nor discriminated against any judicially-recognized “suspect class,” the Court’s prior analysis had suggested that Congress might have legislated this restriction for any reason whatsoever. Presumably, however, had Congress enacted the Hyde Amendment for the specific purpose of forcing Medicaid-dependent women into unwanted childbirth, thereby undermining *Roe*, or out of a specific desire to deny the constitutional rights of indigent women, the restriction would have failed under any standard of judicial review. *But see supra* notes 54–55 and accompanying text.


97 *Id.* at 509–10. *Webster* involved a due process challenge to a Missouri statute that made it unlawful, *inter alia*, “for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother;” *Id.* at 507 (citing Mo. Rev. Stat. § 188.215 (1986)) and “for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother.” *Id.* (citing Mo. Rev. Stat. § 188.210 (1986)). The plaintiffs argued that these provisions of the Missouri statute went well beyond the passive expression of governmental policy that the Court had held permissible in *Harris* and the other abortion funding cases. *Id.* at 503, 509.

Particularly as the statute defined “public facility” as “any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof,” *id.* at 540 n.1 (Blackmun, J., dissenting) (citing Mo. Rev. Stat. § 188.200 (1986)), the plaintiffs argued that courts might literally interpret the statute to bar even private physicians in private hospitals from performing abortions in some instances—for example, where a private hospital were “located on ground leased from a political subdivision of the state.” *Id.*

98 *Id.* at 509; *id.* at 523 (O’Connor, J., concurring).

99 *Id.* at 509; *id.* at 523–24 (O’Connor, J., concurring).

100 *Id.* at 509.

101 *Id.* at 509–10 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).
From the perspective of abortion funding, the 1990 case *Rust v. Sullivan*\(^{102}\) represented a similar foreseeable expansion of the principles articulated in *Harris* and *Webster*. In *Harris*, the Court had held that the right recognized in *Roe* did not forbid a legislature from withholding public funds to pay for abortion services—even medically necessary abortion services.\(^{103}\) In *Webster*, the Court had held that the right did not forbid a legislature from withholding public funds from facilities that continued to provide abortion services, even if the patients in these facilities paid for abortions themselves.\(^{104}\) By simply extending this definition of the abortion right fashioned in these cases, the Court in *Rust* held that a woman's right to obtain an abortion did not forbid a legislature, through its agents in the executive branch, from withholding public funds from family planning facilities that “provide counseling concerning the use of abortion . . . provide referral for abortion . . . or encourage, promote, or advocate abortion as a method of family planning.”\(^{105}\)

The Court's holdings in *Harris*, *Webster*, *Rust*, and the other abortion funding cases raise a number of recurring and difficult questions with respect to the Court's definition of the abortion right. In *Roe v. Wade*,\(^{106}\) the Supreme Court held that a woman's right to


\(^{103}\) See *supra* notes 87–95 and accompanying text.

\(^{104}\) See *supra* notes 96–101 and accompanying text.

\(^{105}\) 111 S. Ct. at 1765 (quoting 42 C.F.R. §§ 59.8(a)(1) & 59.10(a) (1989)). Writing for the Court, Chief Justice Rehnquist drew the connection to the Court's earlier holdings in the abortion-funding area explicitly:

> Just as Congress' refusal to fund abortions in *McRae* left "an indigent woman with at least the same range of choice . . . as she would have had if Congress had chosen to subsidize no health care costs at all," and "Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals," Congress' refusal to fund abortion counseling and advocacy leaves a woman with the same choices as if the government had chosen not to fund family planning services at all.

*Id.* at 1777 (citations omitted).

Of course, plaintiff's challenge in *Rust* also involved a significant first amendment challenge to the federal "gag rule" on family planning facilities—a challenge which focused in particular on the need (and the traditional recognition of the need) for candid and open discussion between a doctor and a patient. 111 S. Ct. at 1771–76. Although an extensive discussion of this challenge is simply not possible here, it is instructive to note in passing that the Court addressed these freedom of speech concerns in a manner almost identical to its treatment of the right to an abortion in the cases discussed in this section. Indeed, the Court quoted extensively from its decisions in the abortion funding context in discarding the plaintiff's first amendment challenge in *Rust*, noting that a "refusal to fund a protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."

*Id.* at 1772.

\(^{106}\) 410 U.S. 113 (1973).
an abortion is "fundamental," encompassed by the broad "penumbral" right of privacy;[^107] and in each of the abortion funding cases the Court has purported to adhere to this precedent—carefully noting that its current holding leaves the right recognized in Roe "undisturbed."[^108] But the Court has also acknowledged in each of these subsequent cases that statutory restrictions on the public funding of abortion "may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions."[^109] Indeed, the Court has in some cases gone so far as to acknowledge, albeit obliquely, that funding restrictions are usually enacted *for the very reason* that they will put abortion out of reach for some women without the necessity of enacting direct restrictions on abortion access that would, presumptively, violate the Court's holding in Roe.[^110] As such, it is difficult, at least at a purely functional or intuitive level, to discern what manner of "fundamental right" the Court ultimately conceives the right to choose an abortion to be.

Doctrinally, the funding cases provide an answer: a government does not "impinge" upon the abortion right merely by failing to ensure the universal availability of abortions. But positing a threshold "impingement requirement,"[^111] and grafting this requirement


[^108]: Maher v. Roe, 432 U.S. 464, 476 (1977) (today's decision "signals no retreat from Roe"); Harris v. McRae, 448 U.S. 297, 315 (1980) (quoting "no retreat" language approvingly); Webster v. Reproductive Health Servs., 492 U.S. 490, 521 (1989) (statute "affords us no occasion to revisit the holding of Roe...and we leave it undisturbed"); see also Webster, 492 U.S. at 526 (O'Connor, J., concurring) ("there will be time enough to reexamine Roe. And to do so carefully.").

[^109]: Maher, 432 U.S. at 474; see also Webster, 492 U.S. at 509 (quoting Maher, 432 U.S. at 474); Harris, 448 U.S. at 315 (quoting Maher, 432 U.S. at 474); Poelker v. Doe, 432 U.S. 519, 521 (1977).

[^110]: See Harris, 448 U.S. at 325. By "obliquely," I mean the Court has occasionally demonstrated its awareness that restrictions on abortion funding translate into fewer abortions and more births just like direct, impermissible, restrictions on abortion access. The Court noted that "Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life." Id. See also Beal v. Doe, 432 U.S. 438, 446 (1977) (state has an interest in "encouraging normal childbirth"); Maher v. Roe, 432 U.S. 464, 478 n.11 (1977) ("In addition to the direct interest in protecting the fetus, a State may have legitimate demographic concerns about its rate of population growth").

[^111]: Susan F. Appleton, Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis, 81 COLUM. L. REV. 721, passim (1981). Professor Appleton argues that, in the years following the 1977 abortion-funding cases, lower courts consistently misinterpreted the Court's position on
onto the abortion right, only begs the more functional, realistic question of whether abortion can be understood as a "right" at all—much less a "fundamental right"—if government may deliberately and selectively deny access to abortion to a narrow, politically inconsequential, segment of society. More than merely ignoring this obvious functional question, the Court's distinction between government action that "makes . . . it impossible" to exercise a right and action that "impinges" upon that right seems designed purposely to excuse the Court from dealing with the abortion right in any principled, coherent, or substantive way. Yet, even if the impulse to avoid this difficult and impassioned discussion through impenetrable legalisms is in some sense understandable, surely any effort to deal with the abortion right realistically—even one that were manifestly unacceptable to some segment of society—would be preferable to a jurisprudence in which the nature and substance of the right are left entirely to speculation. That these questions are posed by women who, in the abortion funding context, face real and immediate hardship at the hands of their government, only makes the necessity for judicial candor in the area of abortion more pressing.

funding restrictions; thinking that these holdings, like Roe, turned on a judicial balancing of the state's legitimate interest in protecting fetal life and a woman's interest in obtaining an abortion. Id. at 740–46. The error in these lower court opinions, Appleton observes, is that they failed to identify the language of "entitlement" and "positive/negative" rights analysis that ran throughout Harris and the 1977 cases. Id. at 734–35 & nn. 98, 99. Focusing on this aspect of the funding cases, it is clear that the Court was not at all concerned with what interest the government had in restricting abortion funding (it may even have sought, in inexplicably, to increase the number of "abnormal births"), but rather with the limited character of the abortion right itself, which the Court concluded government could not "impinge"—whatever its purpose—by merely failing to ensure the accessibility of abortion. Id. at 734–740. Appleton correctly predicted that this reformulation of the Court's "fundamental rights" analysis would have a profound impact on all substantive "rights" protected under the rubric of substantive due process. Id. at 753–58. Specifically, Appleton foresaw the Court's new direction as utterly inconsistent with the aspirations of Professor Frank Michelman's "welfare-rights thesis." Id. at 753–57. Compare Frank Michelman, Welfare Rights in a Constitutional Democracy, 1979 Wash. U.L.Q. 659, 664–85 (the Fourteenth Amendment guarantees "basic welfare interests" to the extent necessary to ensure universal participation in democratic system) with DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (1989) (the Due Process Clause is a limitation on the state's power to act, not "a guarantee of certain minimal levels of safety and security").

112 Maher, 432 U.S. at 474.
113 Cf. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2878 (1992) ("Consciously or not, the joint opinion's verbal shell game [in formulating the new 'undue burden' standard] will conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation") (Scalia, J., concurring in the judgment in part and dissenting in part).
The failure of indigency-based challenges to restrictions on abortion funding does not necessarily foreclose the possibility of a successful equal protection challenge based on race. The right to an abortion by itself, however, is no more likely to trigger strict scrutiny under the "fundamental rights" component of equal protection than it was in the early abortion-funding cases. The "fundamental" nature of the abortion right cannot, presumptively, depend on the group to whom funding restrictions deny abortions. It follows, therefore, that any chance of success such claims have in challenging funding restrictions must depend solely on whether race is a more adequate legal basis than indigency for obtaining strict scrutiny under the "suspect classification" component of equal protection. An exploration of the law governing race-based challenges of this general type will be taken up in the next section.

IV. THE CURRENT DOCTRINE OF EQUAL PROTECTION: "SUSPECT CLASSIFICATION" AND THE ANTDISCRIMINATION PRINCIPLE

Doe v. Babcock is not the first case in which abortion advocates have raised the disparate racial impact of abortion funding statutes as the basis for an equal protection challenge. In Doe, however, as in every other case where racially disparate impact has been argued, courts ruling on the constitutionality of funding restrictions have unfailingly chosen to ground their opinions elsewhere, usually in the law of substantive due process. In Webster, one group of amici argued the cause of racially disparate impact quite forcefully, drawing on many of the same types of medical and demographic studies that were used to frame this discussion in Part II. It was therefore somewhat surprising—even granting that the parties themselves did not raise the issue—that the Webster Court devoted not so much as a footnote to addressing the impact of Missouri's public support restrictions on women of color. This failure to acknowledge the racially disparate impact of abortion funding restrictions is particularly curious in light of the Webster Court's specific focus on the related claims of wealth discrimination by indigent women.

The remainder of this discussion will be devoted to an explication and subsequent analysis of the Court's expected reasoning.

115 See Civil Rights Brief, supra note 15, passim.
should it ever directly address the “suspect classification” issue in a race-based challenge to an abortion funding statute. This section will argue that such a challenge will ultimately fail under current equal protection jurisprudence, and that this expected failure may be fairly attributed to mediating principles in the Court's administration of the Equal Protection Clause that are themselves misformulated and unjust.

A. De Facto Discrimination117 Under Current Equal Protection Law

Since 1979, the Supreme Court has consistently held that evidence of a facially neutral governmental act that has a disparate negative impact on members of a “suspect class” will not by itself subject that act to strict scrutiny, except to the extent that this or other “objective” evidence justifies an inference of “discriminatory

117 The terms de facto and de jure discrimination are sometimes used to describe the phenomena I generally refer to herein as “disparate impact” and “discriminatory intent,” respectively. De jure discrimination usually involves “facial” (that is, codified or overt) classifications by government according to some constitutionally “suspect” criterion, such as race. It also extends, however, to classifications that are neutral on their face, but either intended to harm members of a “suspect class,” see Hunter v. Underwood, 471 U.S. 222, 223, 229 (1985) (state constitutional provision disenfranchising persons for crimes of “moral turpitude” established for the purpose of attaining “white supremacy”); Rogers v. Lodge, 458 U.S. 613, 622 (1982) (facially-neutral voting scheme “maintained” for a racially discriminatory purpose); White v. Register, 412 U.S. 755, 765 (1973) (voting district gerrymandering scheme “used invidiously to cancel out or minimize voting strength” of black residents), or administered by the government in a way that renders them functionally equivalent to overt “suspect” classifications, see, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886). Historical examples of de jure discrimination are laws authorizing the President to designate “zones” for the internment of Japanese-Americans during World War II, see generally Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943), and laws by which states enforced the racial segregation of their school systems, see Brown v. Board of Educ. of Topeka I, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954). If a particular government action discriminates de jure against members of a “suspect class,” the burden of proof under strict scrutiny shifts to the government to show that such discrimination is not “invidious,”—that is, that it is both “necessary to further a compelling government interest” and the least restrictive of all means available to attain this interest. See Korematsu, 323 U.S. at 216.

De facto discrimination includes, definitionally, all forms of government action that have a disadvantaging impact or effect on members of a “suspect class” but that do not involve de jure discrimination. Examples of de facto discrimination are provided throughout this section. It is definable simply as any government action not discriminatory on its face, in its administration, or in its purpose, but that nevertheless subjects members of an identifiable group to special disadvantage. The degree to which de facto discrimination against a “suspect class” will trigger strict scrutiny under the Equal Protection Clause is the question explored by this section.
purpose” on the part of the government. In *Washington v. Davis* the Court upheld the District of Columbia Police Department’s use of a written personnel test in screening applicants to the department’s officer training program. Plaintiffs were black applicants who challenged the screening test on equal protection grounds, alleging that the department’s use of the test unfairly discriminated against black applicants in that these applicants tended to fail the test at four times the rate of whites. Moreover, as the District of Columbia had never had the test “validated” for its relatedness to the job of police officer, plaintiffs argued that the presumed correlation between an applicant’s score and the ability to perform on the job was inherently unreliable.

The Court held that the evidence of disparate racial impact put forth by plaintiffs in *Davis* did not make out a *prima facie* case of racial discrimination under the Equal Protection Clause. Citing what it determined to be a “basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose,” the Court held that evidence of the screening test’s disparate impact on black and white applicants fell short of the showing the Constitution required. As the plaintiffs in *Davis* had produced no evidence tending to show that the test was designed to fail black applicants at a rate higher than whites, they had failed to make out a *prima facie* case of invidious racial discrimination.

The Court did not commit itself unreservedly to the “basic principle” of equal protection law it announced in *Davis*, however. Rather, it held that “disproportionate impact” should not be “irrel-

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119 *Id.* at 229 (1976).
120 *Id.* at 232, 245–46.
121 *Id.* at 236–37.
122 *Id.*
123 *Id.*
124 Writing for the majority, Justice White noted: *[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.* *Id.* at 245 (quoting U.S. Const. amend. XIV, cl. 4).
125 *Id.* at 241 (emphasis added).
evant” to the ultimate question of discriminatory purpose,\textsuperscript{125} and that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another.”\textsuperscript{126} It thus appeared after \textit{Davis} that members of a “suspect class” who could make a sufficiently strong showing of \textit{de facto} discrimination might still, in some cases, gain the benefit of an inference of “purposeful discrimination”—one that would place the burden upon the government to disprove the existence of racial animus. If the deprivation to these plaintiffs were found to be severe enough, or categorical enough, the \textit{Davis} Court seemed to indicate it would demand a “compelling governmental interest” to justify the government’s \textit{prima facie} invidious discrimination.

The possibility of the Court’s ever inferring a discriminatory purpose from proof of disparate racial impact was sharply curtailed, however, in several later decisions purporting to apply the “basic principle” announced in \textit{Davis}. In \textit{Personnel Administrator of Massachusetts v. Feeney},\textsuperscript{127} the Court upheld a Massachusetts statute that established an absolute “veteran’s preference” in the state’s hiring and promotion of civil servants.\textsuperscript{128} Plaintiff Feeney—a woman and nonveteran—challenged the statute as a violation of equal protection, arguing that the practice of placing all military veterans at the top of the list of candidates for available state jobs had the effect of favoring male applicants almost exclusively over female applicants.\textsuperscript{129} Feeney further argued that the discriminatory impact of the Massachusetts statute required the Court to infer an invidiously discriminatory purpose on the part of the legislature, as such impact was an inevitable result of the legislature’s decision to implement an absolute veteran’s preference.\textsuperscript{130} The Court saw no such require-

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 242.
\item \textsuperscript{126} \textit{Id.} at 241–42 (emphasis added).
\item \textsuperscript{127} 442 U.S. 256 (1979).
\item \textsuperscript{128} \textit{Id.} at 259.
\item \textsuperscript{129} \textit{Id.} at 270–71. Over 98\% of the veterans in Massachusetts were male. \textit{Id.} Like the black police applicants in \textit{Davis}, who sought to have the screening test invalidated under even the “rational basis” standard by arguing that the test had never been validated for its relatedness to the job of police officer, Feeney also attempted to challenge the rationality of the veterans’ preference itself. Because veterans were to be put at the top of all hiring lists regardless of their scores on pertinent civil service exams, Feeney argued that the veterans’ preference did not rationally serve any legitimate objective in hiring civil servants. \textit{See id.} As in \textit{Davis}, this aspect of Feeney’s challenge was dismissed by the Court.
\item \textsuperscript{130} \textit{Id.} at 278.
\end{itemize}
ment, however, and it responded to Feeney's challenge by further refining its definition of a "discriminatory purpose":

"Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," and not merely "in spite of," its adverse effects upon an identifiable group.131

Because Feeney presented no evidence tending to show that the legislature acted with the specific purpose of disadvantaging female civil servants, the Court found she had failed to make out a prima facie case of invidious gender-based discrimination.

While the Feeney Court expressly held that it would not impute discriminatory intent to a government entity where that entity's actions were merely certain to produce a discriminatory result, the Court reiterated in subsequent cases its willingness to infer an invidiously discriminatory purpose from "circumstantial," "direct," and "objective" evidence.132 In fact, however, the Court has only delivered on this promise in the relatively "limited contexts" of jury venire selection, district gerrymandering, and, at least historically, de facto school segregation.133 With respect to the selective depriva-

131 Id. (citations omitted). The Court apparently distanced itself from its earlier holding in Palmer v. Thompson, 403 U.S. 217 (1971) with this language. In Palmer, the Court held that a city council's decision to close its racially segregated swimming pools in response to a court order to integrate was not discriminatory, even if the decision was made "in part because of" its racial impact; because operation of the public pools was a discretionary act, the city was free to withdraw at the expense of "black and white [citizens] alike." Id. at 224-25. Further, the Court argued that invidious discrimination should be determined by the "actual effect" of a statute on minority groups, since "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." Id. at 224. The Court in Washington v. Davis noted that "[t]o the extent that Palmer suggests . . . that legislative purpose [as opposed to legislative intent] is irrelevant . . . our prior cases are to the contrary." 426 U.S. 229, 244 n.11 (1976). But cf. Memphis v. Greene, 451 U.S. 100, 115-16, 119, 128-29 (1981) (city council's closure of white street abutting black neighborhood places only "routine burden" on black residents; some evidence suggesting that closure decision was racially motivated does not, therefore, mandate a finding of discriminatory purpose).


133 McCleskey v. Kemp, 481 U.S. 279, 293 (1987). Even in the area of voter-district gerrymandering, Chief Justice Rehnquist has observed that it has only been the "rare case" in which the Court has been willing to infer a discriminatory purpose from mere statistical disparities. Id. at 293 n.12. When the Court has made such an inference, the Chief Justice notes that it has usually found the statistical evidence to warrant a conclusion of discriminatory purpose that is "irresistible, tantamount for all practical purposes to a mathematical demonstration." Id. (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)). See Mobile v.
tion of other rights, it is consistent with the Court's holdings to conclude that statistical evidence of racially disparate impact will not give rise to strict scrutiny under equal protection unless such evidence substantially proves that specific government actors acted with "discriminatory intent." Indeed, outside of the limited contexts it has marked for special protection, the Court may be unwilling to invalidate a discriminatory measure on the part of government even where a plaintiff's evidence of discriminatory animus is conclusive. Although such evidence would clearly establish that the government has acted "because of" and not merely "in spite of" a measure's discriminatory effects, and would thus be sufficient to establish a \textit{prima facie} case, the government may show that it acted "because of" many other factors as well, and that any one of these


The concept of legislative "intent" is not ordinarily interchangeable with that of legislative "purpose." A government's "purpose" in passing a particular law is arguably clear from the text of the law itself in the legal context in which it was designed to operate. Thus, a law erecting impenetrable walls around a black neighborhood would plainly have a discriminatory "purpose" even if the government genuinely intended the walls as a monument to the Biblical battle of Jericho. While virtually every member of the Court has at one time accepted the notion that unconstitutional discrimination requires a racially discriminatory "purpose," some Justices, particularly Justices Stevens and White, have strongly urged that this requirement should not properly turn on the question of legislative "intent," which, they argue, involves the Court in futile scrutiny of "the subjective thought processes" of individual legislators. \textit{See} Rogers v. Lodge, 458 U.S. 613, 618 (1982) (opinion by Justice White); \textit{id.} at 637 (Stevens, J., dissenting); \textit{id.} at 630 (Powell, J., dissenting); Mobile v. Bolden, 446 U.S. 55 (1980) (opinion by Justice Stevens). Nevertheless, a majority of the Court continues to use the terms "purpose" and "intent" interchangeably. \textit{See}, \textit{e.g.}, \textit{Keyes v. School Dist.}, 413 U.S. 189, 208 (1973) ("the differentiating factor between \textit{de jure} and so-called \textit{de facto} segregation . . . is \textit{purpose} or \textit{intent} to segregate").

\textsuperscript{135} \textit{Arlington Heights}, 429 U.S. at 270 n.21.

Proof that the decision by the [government] was motivated in part by a racially discriminatory purpose would not necessarily require[] invalidation of the challenged decision. Such proof would, however, shift[] to the [government] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.

\textit{Id.} (emphasis added). Note that the Court's test in \textit{Arlington Heights} effectively collapses the standard for a \textit{prima facie} showing of invidious discrimination with "minimum rationality" review of the government's purpose in creating a situation of \textit{de facto} discrimination. \textit{Cf. Tribe}, \textit{supra} note 31, at 96–99.
nondiscriminatory motives—or all of them—would have yielded the same result. In such a case, the government's actions will withstand an equal protection challenge under current doctrine.

Thus, in view of its overwhelming reluctance to recognize violations of equal protection in the absence of de jure discrimination (other than in the limited contexts mentioned above), perhaps the Court's failure to assess or even to comment upon the racially disparate impact of the Missouri statute in Webster was not such a surprising omission after all. While it would have been disingenuous of the Court not to acknowledge the de jure wealth-based classifications in the Missouri statute, nothing in the statistical racial disparity or in the text of the statute required, under the Davis line of cases, that the restriction's impact on women of color be given similar consideration. Indeed, a majority of the modern Court may view even the possibility of a successful challenge based upon de facto racial discrimination to be substantially foreclosed in most areas by its prior holdings. Absent some direct showing of racial animus on the part of the Missouri legislature in Webster, the facial neutrality of the funding restriction in that case made its real-world impact on women of color irrelevant to the Court's equal protection inquiry.

B. The Antidiscrimination Principle

Constitutional law commentators have labeled the rule in Davis and its progeny—that equal protection only forbids intentional governmental discrimination against members of a judicially recognized "suspect class"—the "antidiscrimination principle." At its base, the antidiscrimination principle is animated by two propositions concerning the nature of equal protection under the Constitution—one practical and one normative. The practical proposition is that the Constitution's guarantee of "equal protection of the laws" is a meaningful guarantee—that is, a guarantee that is supposed to mean something, even if the words themselves provide little instruction

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136 Arlington Heights, 429 U.S. at 270.
137 See, e.g., Hunter v. Underwood, 471 U.S. 222 (1985) (state constitutional provision disenfranchising persons convicted of "moral turpitude" unconstitutional despite facial neutrality; legislators in 1901 were self-proclaimed "white supremacists" and provision unchanged since that time).
as to what that something ought to be. This proposition, in turn, has two corollaries: 1) that the judiciary ought to enforce the guar­antee of equal protection, whatever its meaning, and 2) that there ought to be limits on the judiciary’s ability to enforce the guarantee that are consonant with the role of the judiciary in a democratic system. Thus, from a practical standpoint, the antidiscrimination principle serves three goals: it supplies a coherent meaning to the ambiguous constitutional language, it suggests a principled course for judicial language, and it imposes principled limits on the legitimacy of that action.139

The normative proposition underlying the antidiscrimination principle is what ultimately gives the ambiguous constitutional language its meaning; it is that the constitution envisions a society in which certain group characteristics—race, gender, and ethnicity to name a few—are irrelevant to government’s distribution of burdens and benefits, and that this goal is attainable by the abrogation of discriminatory acts perpetrated by discriminatory governmental actors.140 The antidiscrimination principle thus reflects a judgment that the constitutional language, “no state shall deny to any person within its jurisdiction the equal protection of the laws,”141 best resembles a prohibition against all (and limited to all) acts of purposeful discrimination by a government against specific judicially-identified groups within that government’s jurisdiction. It also assumes, incidentally, that all forms of constitutionally prohibited discrimination are manifested, on a case-by-case basis, in a discriminatory act perpetrated by a discriminatory actor.142 Note that there is nothing magical or preordained about this interpretation; it is merely one possible compromise between the language of the Equal Protection Clause, what is known about the history and vision of the Fourteenth Amendment, and the practical imperatives discussed above. A plausible reading of the Fourteenth Amendment that leaned more heavily toward ease of administration, or one that mandated a more vigorous program of judicial action, might have been equally possible.143

139 See Tribe, supra note 17, § 16-21, at 1514.
140 See Freeman, supra note 138, at 1052–57.
141 U.S. Const. amend. XIV, § 1.
142 See Freeman, supra note 138, at 1052–57.
143 For example, Professor Alan Freeman suggests that the Equal Protection Clause might plausibly have been interpreted to mandate a form of judicial review that ensured only the procedural integrity of governmental decisionmaking (a “means-oriented” approach), id. at 1058, or, on the other hand, one that called for more sweeping judicial enforcement of some “substantive” level of baseline equality. Id. at 1058–64.
Professor Alan Freeman has called this normative proposition animating the antidiscrimination principle the “perpetrator perspective,”\(^{144}\) as it reflects a vision of reality in which it is sufficient to the promise of equal protection for a court to stand vigilantly against the “blameworthy perpetrators” of discriminatory acts. As a paradigm for addressing \textit{de jure} and other intentional forms of discrimination, the antidiscrimination principle thus provides a clear mandate for courts to invalidate official action that is “blameworthy” in its “infliction of injury” on protected groups.\(^{145}\) As a standard for shielding these groups from exclusively \textit{de facto} forms of discrimination, however, the antidiscrimination principle functions only as a limit on the legitimate exercise of judicial power. Because there is neither a “perpetrator” in cases of \textit{de facto} discrimination nor, indeed, anyone who may be deemed “blameworthy” for the adverse treatment of the impacted group, the principle detects and counsels no violation of the guarantee of equal protection.

1. The Perpetrator Perspective: Its Practical Limitations

The perpetrator perspective of the antidiscrimination principle may be criticized for artificially restricting a court’s focus to the government actors \textit{in each case} who have undertaken or maintained an ostensibly neutral practice.\(^{146}\) In \textit{Feeney},\(^{147}\) the Court upheld an absolute veteran’s preference for civil service positions on the grounds that the statute before the Court exhibited no evidence of purposeful gender-based discrimination. An earlier version of the same Massachusetts statute, however, had provided a specific exemption to the veteran’s preference for civil service jobs thought to “especially call[] for women.”\(^{148}\) Such evidence that an earlier Massachusetts legislature had, in fact, intended the veteran’s preference to concentrate women in low-paying clerical positions\(^{149}\) might have led the Court to conclude that the entire statutory scheme was designed in part “because of” and not merely “in spite of” its impact on female civil servants. Instead, the Court noted that all overtly

\(^{144}\) \textit{Id.} at 1052.


\(^{147}\) 442 U.S. 256 (1979).

\(^{148}\) \textit{Id.} at 266 n.14 (\textit{citing} 1919 \textit{MASS. ACTS} c. 150, § 2).

\(^{149}\) \textit{Id.} at 285 (Marshall, J., dissenting) (\textit{citing} \textit{Anthony} v. \textit{Massachusetts}, 415 F. Supp. 485, 488 (1976)).
sexist language had since been taken out of the statutory provisions, and that the current legislature avowedly maintained the veteran’s preference for a legitimate and nondiscriminatory purpose—to give aid to veterans. That the veteran’s preference continued to operate in much the same way as it had before the offending language was removed—to the overwhelming detriment of female civil servants—did not in the Court’s opinion make it “purposely discriminatory” within the meaning of the Equal Protection Clause. Thus, the holding in *Feeney* is consistent with the idea of a perpetrator perspective and also suggests one of the practical limitations of such a perspective: if all government officials before a court are “blameless” in their maintenance of an historically discriminatory practice, there is, strictly, no “perpetrator” to whom a court may attribute a violation of the antidiscrimination principle.

The perpetrator perspective may also fail to capture “purposeful” discrimination by government actors whose decisions are beyond the Court’s capacity to review. In *McCleskey v. Kemp*, a black man who had been sentenced to death for shooting a white police officer brought an equal protection challenge against the Georgia capital punishment statute, claiming that the statute had been administered by prosecutors and petit juries in a racially discriminatory manner. McCleskey’s challenge was based upon a thorough statistical study of death penalty cases in Georgia, which found that black defendants convicted of killing white victims were 4.3 times more likely to receive a death sentence in Georgia than white defendants convicted of killing black victims, and that Georgia prosecutors sought the death penalty in 70% of cases involving black defendants and white victims but only 15% of the cases involving black defendants and black victims. Retrospectively, the study concluded that, in cases with aggravating and mitigating factors similar to McCleskey’s, Georgia juries would not have sentenced to

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153 *Id.* See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (facially-neutral law may be discriminatory in its administration).

154 The data generated by the Baldus study of the Georgia capital punishment system were based on a 230-variable statistical analysis of over 2,000 murder cases tried in Georgia in the 1970s. *McCleskey*, 481 U.S. at 286–87.

155 *Id.* at 321 (Brennan, J., dissenting).

156 *Id.* at 286–87.
death 20 of every 34 defendants so sentenced for killing a white person if their victim had been black.\textsuperscript{157}

Three government actors were implicated by the discriminatory impact of the Georgia capital punishment system, any one of whom might have possessed a racially discriminatory intent that would have required the invalidation of the Georgia statute: state prosecutors, petit juries, or the legislature. With respect to Georgia’s prosecutors, the Court found that the numerous “policy considerations,” traditionally within the prosecutor’s authority to evaluate in prosecuting a criminal defendant suggested “the impropriety of [courts] requiring prosecutors to defend their decisions to seek death penalties. . . .”\textsuperscript{158} Because the Court therefore lacked the authority (or, perhaps, the capacity) to review a prosecutor’s complex decisionmaking process, it held that it could not seek to discover any racial animus in the decision to seek the death penalty.

Similarly, the Court found that “innumerable factors” necessarily entered into the deliberations of petit juries for which no statistical analysis could hope to account,\textsuperscript{159} and, moreover, that “controlling considerations of . . . public policy” required a court not to call upon each unique jury “to testify to the motives and influences that led to [its] verdict.”\textsuperscript{160} Because jury decisions are, like prosecutorial decisions, generally beyond a court’s power to review, the Court held that it also could not seek to uncover a racially discriminatory motive in the decision to impose the death penalty.

Last, the Court considered the Georgia legislature that had adopted the capital sentencing law. Drawing on its earlier decisions in \textit{Arlington Heights}\textsuperscript{161} and \textit{Feeney},\textsuperscript{162} the Court observed that the statistical evidence in McCleskey’s case fell far short of proving that the Georgia legislature had adopted or maintained the sentencing law “because of” and not merely “in spite of” its discriminatory effects.\textsuperscript{163} Furthermore, as there were clearly “legitimate reasons” for the legislature to have adopted the system of capital punishment it did—even if there were also illegitimate reasons\textsuperscript{164}—the Court

\textsuperscript{157} Id. at 321 (Brennan, J., dissenting).
\textsuperscript{158} Id. at 296.
\textsuperscript{159} Id.
\textsuperscript{160} Id. (quoting McDonald v. Pless, 238 U.S. 264, 267 (1915); Chicago B. & Q.R. Co. v. Babcock, 204 U.S. 585 (1907)).
\textsuperscript{162} Personnel Adm’r v. Feeney, 442 U.S. 256 (1979).
\textsuperscript{163} Id. at 298.
\textsuperscript{164} See Arlington Heights, 429 U.S. at 270 n.21.
held that it could not "infer a discriminatory purpose on the part of the State of Georgia" based solely on McCleskey's evidence of disparate racial impact.\footnote{Feeney, 442 U.S. at 299.} In a footnote, the Court commented that McCleskey had "introduced no evidence to support [his] claim" that the Georgia legislature had acted with a racially discriminatory purpose—a seeming (and perhaps telling) misstatement of the Court's own position regarding the evidentiary relevance of \textit{de facto} discrimination to the issue of purposeful discrimination.\footnote{Id. at 299 n.21.}

Thus, focusing only on the practical application of the antidiscrimination principle to cases arising under equal protection, the perpetrator perspective might be fairly criticized for failing to recognize and to invalidate the full range of "purposeful discrimination" the antidiscrimination principle ostensibly forbids. In particular, the perpetrator perspective falls short in cases where it is acknowledged that purposeful discrimination is at work (because no other nonracist or nonsexist explanation is possible), but where no "perpetrator" can be identified—either because the blameworthy party is not before the court (the \textit{Feeney} case), or because the court is unable to examine the actions of the parties that are before it to determine if they are blameworthy (the \textit{McCleskey} case). In such cases, the antidiscrimination principle is violated by its own practical limitations, as certain types of discriminatory results that plainly could not be effected without purposeful governmental discrimination escape the operation of the perpetrator perspective.

2. The Perpetrator Perspective: Its Methodological Limitations

The Supreme Court in \textit{Davis} and its progeny held that the guarantee of equal protection is only violated by "purposeful" governmental discrimination directed against members of a "suspect class." Under the perpetrator perspective, however, there is cause to question whether all forms of "purposeful" discrimination are equally "blameworthy," and therefore whether all are forbidden under the Court's definition of a "discriminatory purpose." Consider once more the Court's holdings in \textit{Feeney} and \textit{Arlington Heights}. In each of these cases, the Court explicitly rejected a reading of "purposely discriminatory" that defined a government's "purpose" as including the foreseeable and inevitable results of its acts. That is, the Court in each of these cases required not merely a discrimi-
natory "purpose"—in the broad, arguably ordinary sense of the word—nor even a discriminatory "intent"—as this word has also been used in the law to encompass the foreseeable results of one's acts—but something like a "specific intent" to discriminate against a particular group in a particular way. To the extent the term "specific intent" has a settled meaning in the law, it is a concept more familiar to the criminal context. See generally Phillip E. Johnson, Criminal Law 13-17 (4th ed. 1990); Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes 229-31 (5th ed. 1989); Joel P. Bishop, Bishop's New Criminal Law § 342, 202-03 (1892).

By definition, the perpetrator perspective asserts that all unconstitutionally invidious discrimination on the part of the government involves discriminatory effects that are, at least to some degree, both consciously anticipated and desired by identifiable officials within the government. To put this requirement somewhat differently, the perpetrator perspective assumes that no judicially cognizable violation of the antidiscrimination principle can occur in the absence of "blameworthy," subjectively hostile conduct by the government. If an official's action has a discriminatory impact that is inadvertent, or merely coincidental, then the official is presumptively "blameless" of any discriminatory intent and therefore not in violation of the antidiscrimination principle.

As Justice Marshall and numerous others have observed, while blatant and even violent examples of inter-group hostility are not rare in the United States, most governmental discrimination, at least, no longer takes place, either in its expression or its application, at such an overt and detectable level. Rather, the type of unjust discrimination with which equal protection is generally concerned—state-sponsored discrimination—seems far more likely to emerge today from a range of subtle, even innocent, motives than from the kind of "blameworthy" racial animus the intentionality requirement

167 To the extent the term "specific intent" has a settled meaning in the law, it is a concept more familiar to the criminal context. See generally Phillip E. Johnson, Criminal Law 13-17 (4th ed. 1990); Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes 229-31 (5th ed. 1989); Joel P. Bishop, Bishop's New Criminal Law § 342, 202-03 (1892).

168 Freeman, supra note 138, passim.

169 Id.

170 Id. at 1054-55.


of the perpetrator perspective categorically requires. From a methodological standpoint, therefore, the degree to which the perpetrator perspective should mark the outer bounds of equal protection law is called into question by the perspective’s inability to capture the true range of illegitimate (for example, race or gender) motives that may underlie facially-neutral forms of official discrimination. Limited by the perpetrator perspective, the antidiscrimination principle is incapable of distinguishing disparate treatment originating in this range of illegitimate motives from that truly undertaken “in spite of” its discriminatory effects.

3. The Antidiscrimination Principle: Its Constitutional Inadequacy

The practical and methodological failings of the perpetrator perspective, and thus of the antidiscrimination principle itself, are indicative of an even greater crisis in the principle’s constitutional underpinnings. By exclusively focusing on “intentional” forms of discrimination, I have argued that the perpetrator perspective frequently fails to capture the range of non-merit-based treatment that disadvantaged groups may receive at the hands of the government. Yet, if it is granted that the Equal Protection Clause and other antidiscrimination provisions in the Constitution aspire to a vision of society in which the indicia of race, ethnicity and nationality are no longer relevant to the government’s allocation of burdens and benefits, how is the antidiscrimination principle justified in failing to address government action that even results in disparate burdens according to these indicia? The answer the antidiscrimination principle itself gives, by definition, is that the constitution’s vision of equal protection is fully attainable through the remediation of only “intentional” forms of discrimination.  

173 Conversely, Professor Freeman notes, the antidiscrimination principle necessarily asserts that all forms of discriminatory treatment that are not the product of intentional discrimination must be fully consistent with the Constitution’s vision of a “color-blind,” or other “indicia-blind” society.  

174 See supra notes 140–42, 168–70 and accompanying text.  

175 Freeman, supra note 138, at 1066, 1070–71, 1073–76. The antidiscrimination principle is obviously not a jurisdictional limitation. Courts have not recused themselves from considering evidence of de facto discrimination, but rather, as the Davis cases show, have continued to invite evidence of disparate impact on protected groups as a part of the larger inquiry into discriminatory purpose. See supra notes 126–32 and accompanying text. Moreover, in certain limited contexts, the Supreme Court has continued to recognize evidence of disparate impact as potentially dispositive of the question whether strict scrutiny should
Freeman thus perceives in the antidiscrimination principle a "refined abstraction" regarding the nature of contemporary society.\(^{175}\) If the goal of antidiscrimination provisions in the Constitution is to attain a "future society" in which all disparities in the treatment of designated groups are fully attributable to "accidental, impartial, or neutral phenomena utterly disassociated from any [discriminatory] practice,"\(^{176}\) then any principle of equal protection law "that legitimizes as nondiscriminatory substantial disproportionate burdens borne by one [such group] is effectively claiming that its distributional rules are already the ones that would exist in future society."\(^{177}\) That is, the antidiscrimination principle does not serve merely to abdicate judicial authority over the question whether specific instances of \textit{de facto} discrimination are inconsistent with the vision of an "indicia-blind society."\(^{178}\) Rather, the principle can only be justified as incorporating the \textit{whole} of the promise of equal protection if it actively "legitimizes" \textit{de facto} forms of governmental discrimination as consistent with the ideals of meritocracy and group equality.

At the base, then, of its practical and methodological failings, the antidiscrimination principle reflects a view of society that is essentially abstract and, in its abstraction, inconsistent with the constitutional promise of equal protection. If the "future society" of group irrelevance has arrived, then courts truly need do no more apply. \textit{See supra} note 133 and accompanying text. Thus, it seems, the function of the antidiscrimination principle in ordinary cases \textit{de facto} discrimination has not been merely to render these claims nonjusticiable, but to require courts actively to pass on the question whether the disparate impact complained of is or is not the product of governmental discrimination. Freeman argues that by ruling disparate statutory burdens on protected groups "nondiscriminatory" \textit{despite} their discriminatory impact, the antidiscrimination principle does not restrain judicial authority so much as it merely redirects this authority toward the constitutional "legitimization" of unintentional governmental discrimination. Freeman, \textit{supra} note 138, \textit{passim}.

As Professor Tribe suggests, the Court is not bound to place its imprimatur upon measures that merely lack discriminatory intent or that, in any event, the Court feels it lacks the authority to remedy sufficiently. Tribe, \textit{supra} note 17, § 16-20, at 1512. Rather, by acknowledging that a form of discrimination is being effected by a particular measure, but that the Court is unable or unwilling in certain circumstances to provide an appropriate remedy, Tribe argues that the Court could more responsibly exercise whatever degree of deference it chooses without incidentally—and often conclusively—announcing to all agencies of government that a particular practice gives no offense to constitutional notions of equality. \textit{Id.}

\(^{175}\) Freeman, \textit{supra} note 138, at 1066.
\(^{176}\) \textit{Id.} at 1075.
\(^{177}\) \textit{Id.} (emphasis added).
\(^{178}\) \textit{See supra} note 174 and accompanying text.
than to guard against intentional deviations from this happy norm. If, however, such a society is still far from realization, and individuals continue to be locked out of institutions of political and economic power based in whole or in part upon their membership in an historically oppressed group, then the unattained constitutional vision of a “future society” requires courts to be more attentive to the range of unmeritorious treatment such groups actually receive. By tailoring equal protection law to the abstract possibility of a “future society,” the Supreme Court has instead fashioned a doctrine unresponsive both to the realities of invidious discrimination and to the unrealized goal of meritocracy.

The antidiscrimination principle’s function as a “legitimizing” doctrine is, however, far more insidious than this objection indicates. By actively classifying all unintentional forms of discrimination as “nondiscriminatory,” the perpetrator perspective further invites the conclusion that all such de facto discriminatory effects must fairly be attributable to “accidental” or “neutral phenomena” in the real world. That is, the antidiscrimination principle necessarily implies that persons or groups who suffer special burdens under “nondiscriminatory” practices have themselves created the conditions under which they are disadvantaged. For the antidiscrimination principle to comport with the animating equal protection ideal of meritocracy, such unsubtle “victim blame” is absolutely required by the Davis line of cases: black applicants to a police officer training program must be less qualified than the white applicants who are admitted, black criminal defendants who are sentenced to death must commit more vicious and heinous murders than the white defendants who are spared, women stuck in low-paying clerical jobs must be more particularly suited to them than the men who advance, and Medicaid-dependent women of color who are unable to obtain abortions must be less industrious or less deserving than the women who can afford them.

If equal protection law is to be lifted out of this harsh and unproductive abstraction, courts must restore their foundational concept of “discrimination” of its descriptive content in the real world human context. The Constitution itself establishes a framework for democracy and capitalism that is virtually defined by its realism in the relationships of citizens to each other—both the strengths and the self-interested shortcomings that invariably char-

179 Freeman, supra note 144, at 1075.
acterize these relationships. For equal protection to serve as a practical corrective in the real world of human interaction, it is essential that the Court similarly reestablish the doctrine in the evolving relationships of power and domination that realistically threaten the constitutional vision.

The antidiscrimination principle is a step in that direction, but it is drastically incomplete. By focusing on the perpetrator of a discriminatory act, the antidiscrimination principle artificially limits itself to only one-half of the discriminatory relationship in which the ideal of meritocracy is subverted. Clearly, every act of discrimination must have a perpetrator—though many may be long dead, judicially inaccessible, or "blameless" in their apparent motivations. Equally true, however, is that every act of discrimination must have a victim: a person or group who serves in an immediate sense as a repository of discriminatory intent even when no "blameworthy perpetrator" is apparent. Without encompassing both parties to a discriminatory act, "discrimination" itself has become a jurisprudential concept in which only the victims are to blame for their "unintended" subjugation. Only by redefining "discrimination" to realistically encompass both attendees to a discriminatory act can equal protection law plausibly be wrested from this doctrinal artificiality and redirected toward relationships of discrimination that practically threaten the constitutional vision. The remainder of this analysis will explore a neglected principle of equal protection law that might restore to the doctrine this critically substantive content.

V. THE JUDICIAL FUNCTION UNDER THE ANTISUBJUGATION PRINCIPLE

In Washington v. Davis, the Supreme Court purported to identify a "basic principle" of constitutional equal protection, that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." As this basic principle has been interpreted and applied in cases following Davis, however, it neglects what was once a prominent theme in the Court's administration of the Equal Protection Clause and other antidiscrimination provisions of the Constitution. In cases decided under this forgotten doctrine, the Court was occasionally justified in going beyond the search for a "blameworthy perpetra-
tor" to strike down measures that in themselves perpetuated the subjugation of a protected group. The resuscitation of this theme—labelled the "antisubjugation principle" by Professor Laurence Tribe—is part of my proposal for retrieving equal protection law from the artificial confines of the antidiscrimination principle.

A. The Transition from Plessy to Brown I

Nearly forty years ago, in Brown v. Board of Education I, the Supreme Court held that a state's maintenance of racially-segregated public schools violated the Fourteenth Amendment's guarantee of "equal protection of the laws," thus signalling the beginning of the end for lawful racial segregation in the United States. For forty years before Brown I, the Court had clung to the doctrine of "separate but equal" it had contrived in Plessy v. Ferguson. Under that doctrine, states were permitted to force black children and white children into separate schools, so long as the schools provided for black children were, very roughly, "equal" in quality to those designated for whites. Brown I put an end to this practice in 1954, and paved the way in future cases for the piecemeal dismantling of the United States system of racial apartheid.

Although Brown I was, of course, a case involving quite deliberate, de jure racial segregation, the Court had held for forty years under Plessy that government-sponsored segregation was not by

183 See Tribe supra note 17, § 16-21. Other commentators have developed analogus approaches under a variety of different names. See Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 147-70 (1976) ("group-disadvantaging principle"); Freeman, supra note 138, passim ("substantive equal protection" incorporating "victim perspective"); Kenneth L. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 1 (1977) ("equal citizenship"). Although I use the term "antisubjugation principle" throughout this analysis, my concept of the principle—its scope and methodology—is not identical to Professor Tribe's. In this article, I have attempted to formalize the judicial inquiry Tribe suggests by fleshing out many of the considerations he has raised and incorporating them into what I hope is a workable and coherent proposal for judicial administration of the Equal Protection Clause. Except where I have specifically cited Tribe, any presuppositions or characteristics attributed to the antisubjugation principle, and any errors in the analysis or application of the principle, are my own.
185 U.S. Const. amend. XIV, § 1, cl. 4.
186 163 U.S. 537 (1896).
187 See id. at 540, 547, 551.
itself a form of invidious racial "discrimination": so long as legally segregated programs or facilities gave "equal" treatment to members of "nonwhite" races, the mere purposeful classification of individuals by race was irrelevant to the doctrine of equal protection under *Plessy*. Chief Justice Warren's unanimous opinion in *Brown* thus made no mention of the motives or purposes underlying Kansas' school segregation plan, but rather focused entirely on the "effect of segregation itself on [the] public education" of black children. Observing in this regard that "[s]egregation . . . has a tendency to [retard] the educational and mental development of negro children," the Court ultimately concluded that it could no longer rationally maintain the doctrine of "separate but equal" in the area of public education.

Apart from the Court's consideration of the actual effects of segregation on black schoolchildren, there is no visible legal basis in the *Brown* opinion for the Court's abandonment of the regime of *de jure* segregation it had sanctioned in *Plessy*. First, no factual evidence exists that the legislatures in *Plessy* and *Brown* had appreciably different motives for establishing their respective systems of racial segregation—nor, as I have said, did the Court in *Brown* concern itself with such differences. Second, the shift in doctrine between *Plessy* and *Brown* cannot be explained by reference to the rights deprived to persons of color under each type of statutory regime. Nothing in the *Brown* opinion suggests that the right to a quality education was found to be of constitutionally greater significance than the right to travel by one's chosen railway carriage. Indeed, the Court in subsequent cases has consistently held that *Brown* did not establish a "fundamental right" to education—and certainly not a right to an education of any particular quality. Rather, the crucial shift in the Court's reasoning between *Plessy* and *Brown* seems only to have been its willingness in the latter case to include the discriminatory *effects* of segregation on "nonwhite" schoolchildren among its other doctrinally established indicia of unconstitutional discrimination.

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188 See id. at 543–44.
189 See id. at 548.
191 See id. at 494, 495.
In *Plessy*, the Court accused the black plaintiffs of having "put [a] construction upon" the practice of segregation that characterized it as "stamp[ing] the colored race with a badge of inferiority."194 Reasoning that nothing in the language of the statute suggested that its purpose was to oppress or demean black citizens,195 the *Plessy* Court found that, to the contrary, a law segregating railroad carriages was a "reasonable" exercise of the state's power, "enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."196 The Court thus held that segregation laws did not "necessarily imply the inferiority of either race to the other."197 "The underlying fallacy of the plaintiffs' argument," the Court concluded, lay in its "assumption" that racial segregation, without the further intent to demean or oppress, was a *purposeful* form of discrimination against them.198

By contrast, although the language of the statute at issue in *Brown I* was at least as facially inoffensive as that in *Plessy*,199 the Court itself was willing to adopt the perspective of the plaintiffs in order to balance the state's presumptively "legitimate" interest in maintaining segregated schools with the *actual* impact of segregation on the quality of education available to black children.200 By allowing itself to view segregated public education in the broad, historically realistic context of racial oppression, the Court was disposed to note an apparent contradiction between the reality of segregated learning and the abstract legal possibility of "separate but equal" education.201 Only by grounding antidiscrimination law in the reality of racial inequality—in discrimination as black children themselves experienced it—was the Court finally able in *Brown I* to raise the inherent inequality of segregated education to a constitutional level of significance. Viewing the forty-year-old doctrine of *de jure* segregation in this way, the Court naturally concluded that its holding

194 *Plessy*, 163 U.S. at 551.
195 *Id.*
196 *Id.* at 550 (emphasis added). "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this Court." *Id.* at 545.
197 *Id.* at 551.
198 *Id.*
201 *Id.* at 495.
in *Plessy* should yield in the context of public education to the constitutional ideals of "equality of opportunity" and meritocracy.\(^{202}\)

*Brown I*, however, cannot accurately be understood to hold that discriminatory impact alone is sufficient to render a challenged statute unconstitutional, even in the limited context of public education. In later cases, the Court held that states having undertaken and completed good faith measures to integrate their systems of education could not subsequently be found in violation of *Brown I* if "white flight" or other demographic shifts resulted in the *de facto* re-segregation of their schools.\(^{203}\) Assuming these later cases are, as the Court maintains, consistent with the holding in *Brown I*, the *Brown I* Court itself presumptively would not have found the mere fact of a segregated public school system constitutionally intolerable if this segregation had been caused by purely neutral (that is, unintended or accidental) phenomena. Had such been the case, the Court would have been obliged to reach the same conclusion even if unintentional school segregation had created disparities in the *quality* of education identical to those the Court identified in *Brown I*.\(^{204}\)

Assuming, however, that the state legislatures in *Brown I* and *Plessy* shared a substantially similar objective—to create specific racially segregated environments—it is also fairly clear that the mere *intent* of the legislature in *Brown I* was, standing alone, insufficient to justify the Court's departure from its holding in *Plessy*. As I have already noted, the Court in *Plessy*—and for forty years after *Plessy*\(^{205}\)—had specifically held *de jure* segregation not to be a form of invidious racial "discrimination" prohibited by the Constitution, as the mere intent to segregate was thought not to be an intent to "anoy" or "oppress" any "particular class."\(^{206}\) As *Brown I* explicitly left this earlier holding undisturbed except in the narrow context

\(^{202}\) See *id.* at 493.


of school segregation, the Court presumably must have identified in school segregation some form of discriminatory intent in school segregation that went beyond the mere intent to segregate in Plessy.

Arguably, the Court in Brown I not only recognized the Kansas legislature’s clear intent to racially segregate its schools, but further inferred an intent on the part of the state to educate its black students in a manner inferior to white students. Such an intent would have made the Kansas school system not merely a “nondiscriminatory” separation of the races, but a transparently deliberate mechanism for “interfering with the political equality of the negro,” a discriminatory purpose prohibited even under the original holding in Plessy. Although a state’s provision of substandard education to black children would seem not to violate the Constitution were it the result of purely neutral phenomena, the Court in Brown I may have quite naturally concluded that the Kansas legislature intended the foreseeable consequences of maintaining racially segregated schools on the quality of education provided to black children. Certainly, it would have been no great leap for the Court to have concluded that the legislature was at least indifferent to the impact of its actions on black children. But where a government’s indifference to the deprivation of a particular interest so closely mirrors a tradition of intentionally depriving that interest for the purpose of subjugating a disadvantaged group, the Court may have recognized the legitimacy of treating the government’s indifference to the foreseeable consequences of its actions as, in every respect, an intent to see those consequences effected.

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207 See Brown I, 347 U.S. at 495. The factual finding that segregated public education had a negative impact on black children that went beyond the mere separation of the races was, in fact, the only area in which the Brown I Court explicitly rejected the holding in Plessy. Id. at 494–95. Once the Court had concluded, based on “modern authority” in the field of psychology, id. at 494 n.11, that “separate educational facilities [were] inherently unequal,” no further deviation from Plessy was necessary to find the Kansas school system invalid on equal protection grounds. Id. at 495.

208 See id. at 494.

209 Plessy, 163 U.S. at 545. Brown I drew the connection between equal educational opportunity and the democratic ideal of equal political participation explicitly: “Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship.” 347 U.S. at 493.


211 See supra notes 203–04 and accompanying text.
B. The Antisubjugation Principle: Balancing the "Victim" and "Perpetrator" Perspectives

The transition from Plessy to Brown I illustrates two important aspects of what Professor Tribe has labelled the "antisubjugation principle."²¹² First, unlike a court functioning today under the antidiscrimination principle, the Court in Brown I was able to engineer a principled departure from "separate but equal" by considering both the specific objectives of the Kansas legislature in classifying schoolchildren by race and the real-world impact of this classification on black schoolchildren forced to attend segregated schools.²¹³ Second, after concluding that segregated public schools had an adverse impact on the education of black schoolchildren, the Court in Brown I was able to raise this disparity to a level of constitutional significance by realistically viewing Kansas' provision of substandard education to blacks as tantamount to a purposeful "interference" with the political equality of the negro."²¹⁴ Each of these aspects of the Court's opinion in Brown I shed light on the neglected, animating presumptions of the antisubjugation principle.

The antisubjugation principle focuses on the persons actually disadvantaged by, as well as the perpetrator of, an allegedly discriminatory governmental act. This methodological focus on the subjects of disparate treatment by government has been characterized, perhaps unfortunately, as the "victim perspective" by Professor Alan Freeman.²¹⁵ On a jurisprudential level, the "victim perspective" of

²¹² Tribe, supra note 17, § 16-21.
²¹³ Brown I, 347 U.S. at 492 n.9, 493-94.
²¹⁴ Plessy, 163 U.S. at 545. See Brown I, 347 U.S. at 494-95.
²¹⁵ Freeman, supra note 138, at 1053 n.16. To some extent, each component of the term, "victim perspective," invites misunderstanding as to what the term is supposed to describe. I have retained it here, however, for two reasons. First, "victim perspective" is the term Professor Freeman has chosen, and I can detect no significant deviation in my understanding and use of his concept that would justify giving it another name. Second, even if I were disposed to distance myself in some way from Freeman's formulation, I doubt whether I could coin a more descriptive term that would not pay a hefty price in laconicism ("disadvantaged group perspective" only solves half the problem, and is already three times as long).

"Victim" is a value-laden term, perhaps more so than "perpetrator," and unfortunately connotes a condition of helplessness, a moral posture of innocence, and, ironically, a "blame-worthy perpetrator." None of these connotations is intended here. In using the word "victim," I mean only to describe persons who are specifically adversely affected by an allegedly discriminatory governmental action, not to rule in advance on whether that adverse impact is, in fact, discriminatory.

There is also an important distinction to be made here between the word "perspective," and the often-synonymous word "perception." It is not likely that a court would derive any benefit from considering or balancing the victim's perception of a governmental action, because such a standard would likely be as subjective and malleable as the antidiscrimination principle.
the antisubjugation principle requires a court to consider one broad component of *de facto* discrimination that it is predisposed to neglect under the antidiscrimination principle: the effects of an ostensibly neutral government action on an historically subjugated group, not only the statistical impact of such action, but whether it exacerbates or perpetuates *pre-existing* stigma that are historically associated with a pattern of hostility or indifference toward the subjugation of that group.216

The “victim perspective” is not in the nature of a “test” of the validity of government action, however, but rather a range of additional criteria that might be used to broaden the existing equal protection inquiry beyond the motivation of a particular government actor in a particular case. The normative presumption of the antisubjugation principle is, in this respect, that courts should not permit government to effect through inadvertence, coincidence, or covert animus that which it could not accomplish openly and “intentionally.”217 The “victim perspective” merely asserts that the real-world impact of a measure claimed to violate equal protection is a legitimate starting place for this inquiry.

The antisubjugation principle, however, would not abandon intent as a crucial element of discrimination. Insofar as intent to do harm to members of a “suspect class” may realistically take the form of ignorance, indifference, or subconscious hostility toward the needs of a disempowered group,218 the antisubjugation principle would appropriately take a more sophisticated view of “discriminatory intent” than the Court’s holdings currently allow. Furthermore, insofar as intent to discriminate may only be visible over the historical lifetime of a particular governmental practice,219 the antisubjugation principle would require the Court to find certain discriminatory practices unconstitutional *in themselves*, even where be-

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216 See Tribe, supra note 17, at 1520.
218 See supra notes 170–72 and accompanying text.
219 See supra notes 146–66 and accompanying text.
ign justifications have replaced or merely masked the government's originally invidious motives. While the antisubjugation principle thus takes a somewhat broader and more realistic view of "intent" than the Court's holdings after Davis, the idea of "purposeful discrimination" would still be an essential element of a claim of unconstitutional discrimination under the Equal Protection Clause.

Of course, were the antisubjugation principle to require that "purposeful discrimination" be proven by direct evidence of a particular government actor's invidious state of mind—which may be the only way to know for certain whether subconscious or barely-conscious factors underlie a particular practice—nothing would distinguish it from the status quo under Davis and its progeny. Rather, the antisubjugation principle offers a methodology, a jurisprudential paradigm of sorts, for the drawing of a conclusive inference of purposeful discrimination based solely on objective and circumstantial evidence in certain cases of de facto discrimination. As applied, the jurisprudential paradigm of the antisubjugation principle would involve a two-part test, each step of which is designed to limit the inference of a discriminatory purpose to those cases in which the constitutional vision of equal protection—of a society based on individual achievement and merit—is realistically placed in jeopardy.

The first step of a court's inquiry under the antisubjugation principle is to confront the question courts dispose of only incidentally under the antidiscrimination principle—namely, whether the disparity in treatment raised by members of a "suspect class" is more likely attributable to accidental or neutral phenomena in the real world than to some manifestation of the specific historical oppression of that class. For example, if a court concluded, based on the evidence before it, that Catholic parents in the United States were more likely than other parents to have more than four children during their lifetimes, and that Catholic families were therefore likely to suffer more acutely under a new federal tax law repealing

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220. By a "conclusive inference," I do not mean to imply that the constitutionality of any measure might turn on merely whether it imposes a disparate burden on a particular group. Rather, such an inference would be "conclusive" only in that the antisubjugation principle, when triggered, would demand strict scrutiny of a government's prima facie invidious classification. If a government offered affirmative evidence that it acted for some other, nondiscriminatory reason in imposing the disparate burdens complained of, such evidence would go toward the government's showing of a "compelling governmental interest" justifying its mistreatment of a specific protected group.

221. See supra note 179 and accompanying text. See also Freeman, supra note 138, at 1075.
the deduction for dependent children,\textsuperscript{222} the court would be obliged to determine under the antisubjugation principle whether the long history of anti-Catholic bias in the United States or some accidental, neutral phenomenon was a more likely explanation for the law's disparate impact on Catholics. Looking at history, at the nature and impact of anti-Catholic bias on Catholic families, and at the range of factors that might lead Catholic parents to have more children than other parents in the United States, the court might well conclude that neutral phenomena, such as the informed decisions of some Catholic parents to have more than four children, more adequately explained the law's disparate impact than the historical subjugation of Catholics as a class.\textsuperscript{223}

In a case such as \textit{Washington v. Davis},\textsuperscript{224} however, where black applicants to a police officer training program tended to fail the program's entrance exam at four times the rate of whites,\textsuperscript{225} a court's calculus under the antisubjugation principle might be very different. The court would consider the history of black oppression in the United States, the nature and impact of that oppression on black persons, and the range of factors that might lead black applicants to a police officer training program to score lower on an entrance exam than their white counterparts. If the court were then to conclude that some indeterminate aspect of black subjugation in the United States more adequately explained the performance of these black applicants than their inherent or chosen baseness, stupidity, laziness, or mere inability to perform in the job of police officer, the court would immediately progress to the second level of inquiry under the antisubjugation principle.

As part of its inquiry under the "victim perspective," a court is next obliged to consider the \textit{nature of the interest} effectively limited by the government's action, and the extent to which that interest is itself connected with a "tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group."\textsuperscript{226} As focusing on the victim of a discrimin-

\footnotesize{\textsuperscript{222} The hypothetical is wholly fictitious.}
\footnotesize{\textsuperscript{223} This is not to say that such a law would withstand other types of constitutional challenges; perhaps it would not. Under both the antisubjugation principle and the antidiscrimination principle, however, a court would not, in all likelihood, find the suggested tax law to discriminate unconstitutionally against Catholic families.}
\footnotesize{\textsuperscript{224} 426 U.S. 229 (1976).}
\footnotesize{\textsuperscript{225} Id. at 236-37.}
\footnotesize{\textsuperscript{226} \textit{Tribe}, supra note 17, § 16-21, at 1520. In this way, the antisubjugation principle might be expected to bring a substantive component to equal protection law that would, as Tribe suggests, strengthen the existing similarities between the "fundamental rights" doctrine}
natory act necessarily entails an inquiry into the extent and nature of the interests deprived by a governmental practice, note that, at this second level, the antisubjugation principle implicitly asserts that certain types of interests, when they are deprived or partially deprived to certain protected groups, more naturally give rise to an inference of discriminatory intent than others. The basis for such an assumption cannot go unexamined. After all, one of the strongest arguments in favor of the antidiscrimination principle is that it provides a bright-line rule for distinguishing incidental disparities in the administration of neutral rules—which may exist even in a future, harmonious society—from invidious governmental discrimination. 227 Without a standard for distinguishing which types of interests, and which types of protected groups, strengthen the inference of discriminatory purpose under the antisubjugation principle, this second level of inquiry seems to invite unprincipled judicial activism in the name of equal protection. 228

Professor Laurence Tribe has suggested such a differentiating principle. Tribe argues that there are certain constitutional interests, a subclass of interests he refers to as "relational rights," 229 that under the Equal Protection Clause and the more familiar doctrine of substantive due process. Id. § 16-21, at 1517 n.26. These two substantive doctrines would not be identical, however; the Equal Protection Clause would presumptively continue to protect certain interests that are uniquely within its sphere of historical concern. Rather, a doctrine of equal protection administered through the antisubjugation principle would tend independently to protect only those interests that govern the inherent power relationships between individuals and groups in a democratic system. Id. § 16-21, at 1520; see infra notes 229–31 and accompanying text.

227 See supra notes 142–45 and accompanying text.

228 If indeed, as Justice Holmes sneered in Buck v. Bell, 274 U.S. 200 (1927), appeals to equal protection are "the usual last resort of constitutional arguments," id. at 208, there is even greater reason to be concerned about the legitimate scope of judicial action under the antisubjugation principle.

229 Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330, 331–33 (1985). In his analysis, Tribe draws a distinction between "relational" rights and "individual" rights. Individual rights are those which citizens can exercise on their own, and which they are free to waive, by contract or otherwise, if they should decide that greater benefit would result from this waiver. See id. at 334. Individual rights are also those that are "negative" in character—they give rise to an "individual veto" over any governmental action that would limit them unjustifiably. Id. at 333. Most constitutional rights, Tribe argues, are of this "individual-alienable-negative" type. Id. at 332. The Constitution guarantees an individual's right to speak freely or to "bear arms," for example, but these rights are also freely alienable by the individual, in the marketplace or elsewhere, if she should choose not to exercise them. Correlatively, government is under no obligation to assist the individual in the exercise of these rights. See id. at 334. Although the government may not impinge upon the individual's right to free speech
by their nature are designed as specific constitutional responses to known forms of discrimination against certain historically disadvantaged groups. Relational rights of this type—such as the Thirteenth Amendment’s prohibition of slavery—have been recognized or created at various points in history to remedy specifically those forms of discrimination that tend to undermine the equality of political and economic opportunity guaranteed to all groups in a democracy. Where the immutable characteristics of a certain

or to bear arms, neither is it required to guarantee the individual a forum, a megaphone, or a gun if the market does not otherwise provide one.

Unlike individual rights, relational rights are not waivable by the individual because it is not the individual whom these rights are primarily designed to protect. Id. at 333. Democratic society, rather, is the chief beneficiary of relational rights, as these rights ensure the threshold levels of equality and community that such a society requires. Id. at 333–34. Equal access, for example, is a relational right governing the relationship between the government and the governed in a democracy—it is thus a right that neither the government nor the governed may alienate by law or by contract. Id. at 334. See Reynolds v. Sims, 377 U.S. 535, 568 (1964) (right to vote “an essential part of the concept of a government of laws and not men”) (quoted in Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966)). Similarly, rights establishing the minimum access a defendant must have to the criminal justice system are relational rights. As the Court held in Griffin v. Illinois, 351 U.S. 12 (1956), “equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court. . . .” Id. at 17 (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).

Tribe argues that all relational rights that the individual needs assistance to exercise necessarily give rise to an affirmative duty on the part of government to remove these rights from regulation by the marketplace—that is, to ensure their availability to all persons on more or less equal terms. Tribe, supra, at 335. He gives the Thirteenth Amendment’s prohibition of slavery as an example, noting that the government could not honor that command by saying that “the slave who needs affirmative help to purchase his manumission, or to destroy the physical chains by which he is still bound, must simply buy his freedom, and the equipment needed to secure it . . . .” Id. at 335. In Tribe’s analysis, relational rights for which either the government or the market are prerequisite necessarily must be “positive” rights. But cf. Maher v. Roe, 432 U.S. 464, 469 n.5, 471 n.6, 474 n.8 (1977) (government only has obligation to ensure availability of rights over which government holds a “monopoly”). “Negative” rights that the market regulates might therefore be understood, roughly, as “commodities.” A citizen’s right to own a gun, for example, or to acquire more than the minimally-guaranteed level of education, are essentially rights to behave in the consumer market in certain ways—to buy a gun or to pay for a particular college degree. The “right” itself is not jeopardized by this market regulation; rather, it retains its character as an unexercised “right to buy,” “lease,” or “own.” By contrast, relational rights, were they to be alienable by the market or by an act of government, would be stripped entirely of their character as “rights.” That is, it would be senseless to speak of a general “right” not to be enslaved if one had to purchase one’s manumission, or of a “right” to vote if it were understood that only monied individuals could cast ballots. Relational rights, when they are reduced to commodities, do not therefore become “negative” rights. Rather, they become, for lack of a better word, “non-rights.”

See Tribe, supra note 17, at 1517–18.

See Tribe, supra note 229, at 333 n.14. The purpose of these rights, from the per-
group have triggered arbitrary barriers to that group's access to the 
institutions of the political and economic marketplace, constitutional 
ideals of meritocracy and equality of opportunity have required the 
establishment of specific relational rights to guard against the pos­
sibility of state-sanctioned and state-sponsored oppression. Having 
as their goal the preservation of the democratic and capitalist sys­
tem, these relational rights preserve the legitimacy of a society 
whose distributional rules purport to be based solely on the effort 
and skill of its individual members.

Relational rights analysis suggests that there are certain types 
of cases in which it is particularly appropriate to impute a discrim­
inatory purpose to a governmental actor who too casually dismisses 
the discriminatory effects of his otherwise legitimate official actions. 
If the Constitution suggests a causal link between the very existence 
of certain rights and official discrimination against certain histori­
cally disadvantaged groups, then courts should seemingly take the 
selective deprivation of such rights to the groups they specifically 
protect as sufficient evidence of discriminatory purpose. Particularly 
where this type of deprivation results from mere indifference on 
the part of government toward the needs of a disadvantaged group, 
the existence of a specific antidiscrimination right in the Constitu­
tion would seem to belie any meaningful distinction between this 
type of motivation and more "intentional" subjugation of the af­
fected group.

spective of a democratic system, is to enable the groups they specifically target to overcome 
whatever historically "given" characteristics have impeded their access to the political and 
economic marketplace. Normatively, relational rights of this type seek to mediate the power 
relationships in a democracy that, because of their tendency to disadvantage arbitrarily 
particular groups, work against the ideals of an open political system and a free market 
enshrined in the Constitution.

Without attempting to guarantee "equality of condition" among citizens, all relational 
rights serve to establish the minimally requisite "equality of opportunity" or "equality of 
access" that democratic marketplaces presuppose. Id. at 335-40; cf. Michelman, supra note 
111, passim; Frank Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor 
Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969). As noted in the text, the Civil 
War Amendments, which abolished de jure institutions of slavery, removed the most onerous 
impediment that history had placed on the access of blacks to political and economic equality. 
Prior to the framing of the Constitution, other limitations based on "immutable" group 
characteristics had prompted the creation of similar relational rights. Article I, Section 9 
guaranteed that persons of "common" ancestry would no longer be subrogated to nobles in 
their access to institutions of government and commerce. U.S. CONST. art. I, § 9, cl. 8. Article 
VI, U.S. CONST. art. VI, cl. 2, and the Establishment Clause, U.S. CONST. amend. 1, ensured 
that persons of all historically stigmatized faiths would have equal access to political power.

232 Tribe, supra note 229, at 333.
Of course, whether or not a court should draw an inference of discriminatory purpose from a showing of only de facto discrimination cannot turn on whether a “relational” right is at stake, as this category simply does not exist outside Professor Tribe’s analytical framework. Rather, relational rights analysis merely suggests that there are substantive areas where a court’s sensitivity to more subtle forms of official discrimination would be particularly called for under the antisubjugation principle. To recall the specific judicial inquiry mandated by the “victim perspective,” an inference of discriminatory purpose would become increasingly more likely under the antisubjugation principle as the de facto deprivation visited on an historically disempowered group comes closer to affecting substantive interests that are themselves associated with the protection of that group from a “tradition of hostility,” “blindness,” or “indifference” by government.\textsuperscript{233} Crucial to a court’s application of the antisubjugation principle are, therefore: a realistic understanding of the power relationships involved in a particular instance of discriminatory impact;\textsuperscript{234} an understanding of the history of governmental treatment that has led to the subordination of a “suspect class”;\textsuperscript{235} a realistic appraisal of the effects a particular measure has on the interests of a “suspect class”; and, of course, a thorough factual understanding of the government’s purpose in wit­tingly or unwittingly subjecting members of a “suspect class” to particular disadvantages.\textsuperscript{236} Grounding its notion of “discrimination” in the workings of actual power relationships in a democracy, the antisub­jugation principle thus marks out a realistic middle course between the Davis line of cases’ narrow focus on only the perpetrator of a discriminatory act and a more substantive, equality-of-condition-based definition of constitutional equal protection.

The antisubjugation principle, as a blueprint for constrained and principled judicial activism, asserts that an inference of purposeful discrimination drawn from the deprivations actually and foreseeably caused by a government’s action is justified only where such deprivations recall a tradition of purposeful discrimination that has brought about the subordination of the affected group through similar means. Thus, in Feeney,\textsuperscript{237} where the Massachusetts

\textsuperscript{233} See supra note 214 and accompanying text.

\textsuperscript{234} See Freeman, supra note 138, at 1066; Tribe, supra note 17, at 1518; Tribe, supra note 229, at 338.

\textsuperscript{235} See Tribe, supra note 17, at 1520.


\textsuperscript{237} 442 U.S. 256 (1979).
veteran's preference statute had the effect of limiting opportunities for women in civil service employment, except in low-paying clerical jobs,238 the antisubjugation principle would have required the Court to weigh heavily the evidence that such disparate treatment exactly mirrors the tradition of gender-based employment discrimination that has for years resulted in the purposeful confinement of women to the secretarial pool. Had the Court placed the veteran's preference statute in this broader, more historically realistic background, it would likely have found that the Massachusetts statute was itself a discriminatory measure that could be justified only by the most convincing of state interests. Because equal access to jobs carrying power and prestige is an interest that responds particularly to the ways in which women traditionally have been subjugated in the political and economic marketplace, the selective deprivation of the interest to women—whether specifically motivated by a desire to oppress women or not—most naturally justifies a judicial inference of discriminatory intent.

C. The Antisubjugation Principle in the Abortion Funding Context

Regardless of the Supreme Court's characterization of the abortion right itself in the abortion funding cases—variously described in these cases as an "entitlement,"239 a "liberty interest,"240 and a right that may be "denied" without being "impinged"241—under the antisubjugation principle the Court could not have continued to ignore the real-world impact of abortion-funding restrictions upon reaching the "suspect classification" strand of its inquiry. Under the "victim perspective," the first question a court must ask in a case of de facto discrimination is, "what is the actual effect of the government's action in this matter on the interests of this suspect class?" As a threshold matter, therefore, the Court would be obliged to consider fully the known impact of abortion funding restrictions on women of color.242 As Part II of this article suggests, one of the most striking features of these restrictions is their predictable denial of abortion to women of color who cannot otherwise afford them.243

238 Id. at 285 (Marshall, J., dissenting) (citing Anthony v. Massachusetts, 415 F. Supp. 485, 488 (1976)).
239 Harris v. MacRae, 448 U.S. 297, 316 (1980).
242 See supra notes 19–66 and accompanying text.
243 See supra notes 54–58 and accompanying text.
In the first part of its analysis under the antisubjugation principle, a court would determine whether the disparate racial impact of abortion funding restrictions is fairly attributable to the history of government-sanctioned and otherwise official subjugation of women of color, or whether accidental and neutral phenomena provide a more adequate explanation.\textsuperscript{244} At first blush, the question is a close one, as black women in particular have a much higher abortion rate than white women, and the cause of this disparity in the need for abortion services is not entirely understood.\textsuperscript{245} That black women are also disproportionately represented among women who cannot afford to pay for abortion services, however, is not nearly so elusive. Black women and other women of color are vastly overrepresented among indigent persons and persons dependent upon government services.\textsuperscript{246} Almost any federal measure that specifically classifies according to indigency will therefore have a predictable, disparate impact on black women and other women of color—even if women of color are not, as they are in the abortion context, otherwise overrepresented among the regulated class.

Taking the impact of abortion funding restrictions as a whole, the disparate treatment of women of color under such restrictions cannot be explained without reference to the marked concentration of women of color among the poor and extreme poor in the United States. The more pertinent question under the antisubjugation principle, however, is whether the root cause of this disparity is more

\textsuperscript{244} See supra notes 209–13 and accompanying text.

\textsuperscript{245} As noted in Part II, the disparity in both the abortion rates and birthrates of black women and white women is directly attributable to the higher pregnancy rates of black women. See Henshaw & Van Vort, supra note 24, at 102. To the extent that the abortion rates of a group of women, taken independently of the birthrate, is a predictable function of that group’s pregnancy rate, it is fair at least to suggest that the disproportionately high demand of black women for abortion services may stem in part from the lower rate of contraceptive use among black women. See William D. Mosher & James W. McNally, Contraceptive Use at First Premarital Intercourse, 23 Fam. Plan. Persp. 108, 110–11 (1991). If this is the case, the lack of information many black women receive concerning contraceptive services, and the reduced availability of these services to women of lower incomes, are at the core of the racial disproportionality in abortion rates. Elise F. Jones & Jacqueline Darroch Forrest, Contraceptive Failure Rates Based on the 1988 NSFG, 24 Fam. Plan. Persp. 12, 7 (30.8% of black women and 22.4% of white women with family incomes less than $23,211 experience contraceptive failure among U.S. women generally within the first year of use; contraceptive failure among U.S. women generally is 13.8% within first year of use); Gold & Daley, supra note 19, at 208 (“In constant 1980 dollars, total U.S. expenditures for contraceptive services fell by 34% between 1980 and 1990, despite an increase from 1982 through 1988 in the number of women at risk of an unintended pregnancy”). Such factors cannot plausibly be attributed to the inherent characteristics of, or conscious choices by, women of color.

\textsuperscript{246} See supra notes 22–23 and accompanying text.
likely than not a manifestation of the specific historical oppression of women of color. After hundreds of years of discrimination in employment, wages, education, housing, health care, and political access, a court would not have to be insensitive so much as it would have to be utterly disconnected from historical reality to attribute the disproportionate poverty of women of color to accidental or neutral phenomena in the real world.

The second part of an inquiry under the antisubjugation principle would require a court to consider the power relationships involved in restricting funding for abortion, the history of governmental treatment that has led to the subordination of women of color as a "suspect class," the effects of funding restrictions on the interests of women of color, and the government’s purpose in wittingly or unwittingly subjecting women of color to particular disadvantage by restricting public funding.247 Each of these considerations, and all of them taken together, lead a court in determining whether the disparate racial impact of abortion funding restrictions appropriately justifies an inference of discriminatory intent on the part of government. For its similarity to a court’s present inquiry under the antidiscrimination principle, the last of these considerations will be taken first.

It is, of course, quite deliberate that the Hyde Amendment and other restrictions on abortion funding deprive abortions only to indigent women. During the congressional debates on the Hyde Amendment, Representative Henry Hyde acknowledged that a more natural way for Congress to serve the goal of protecting fetal life would be simply to ban abortion altogether.248 Representative Hyde argued, however, that as such a measure would clearly be invalid under Roe v. Wade,249 the best Congress could do would be to deny the right to obtain an abortion only to poor women.250 If Congress wanted to force as many women as possible to surrender their right to an abortion and to carry their unwanted pregnancies to term, Hyde and his fellow legislators would simply have to accept the fact that the deprivations wrought by unwanted pregnancies would be visited only on indigent women.251

247 See supra notes 234–36 and accompanying text.
249 410 U.S. 113 (1973).
251 Id.
Thus, barring a level of detachment unbefitting a legislative body, the disparate impact of abortion-funding restrictions on women of color was both foreseeable and foreseen by Congress and by other legislatures that have passed such restrictions. Faced with the choice to force only some unwanted childbirths or none at all, Congress committed itself to a course of action that it knew would affect only women in the lowest socioeconomic strata. Although this level of intent would clearly not be sufficient under the antidiscrimination principle to qualify as "purposeful discrimination" against women of color, the "victim perspective" of the antisubjugation principle would require a court to take a much closer look at the actual nature of the deprivation acceded to by Congress and the relatedness of this deprivation to a tradition of intentional subjugation.

With respect to the interest deprived, a court might note that a woman's interest in unrestricted access to abortion is similar, in many respects, to the interest of a black individual in the abolition of slavery or of a Catholic person in the United States in the constitutional prohibition against established religion. Characteristics like these that are, for all intents and purposes, "immutable"—a person's religion, her color, or her ability to give birth—bear no relationship to the ability of citizens to perform meritoriously in the political and economic marketplace. That much, hopefully, is known. Yet, because these same characteristics have been transformed over history into barriers against the individual self-advancement of persons who possess them, any interest that is directly allied with their protection—that is, with the "protection" of their irrelevance in the political and economic marketplace—is in many respects tantamount to a basic personal interest in the constitutional promise of equal political and economic opportunity.

From the "victim perspective," then, the interest of a particular group of women in unrestricted access to abortion, whether that interest is characterized as a "fundamental right," a "relational right," or merely a "liberty interest," becomes stronger as the systemic ideal of meritocracy becomes more and more remote. It is in such a situation, where an interest that is allied with the full participation of a particular group is at its strongest and the constitutional

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252 See supra notes 131–35 and accompanying text.
253 See supra notes 229–31 and accompanying text. See also Tribe, supra note 229, at 337.
254 See supra notes 229–31 and accompanying text.
ideal of meritocracy correspondingly at its nadir, that the antisubjugation principle most naturally warrants an inference of purposeful discrimination.255

There is an immediate and obvious connection between a woman of color’s interest in a publicly-funded abortion and her interest in overcoming the legacy of government-sanctioned racial discrimination that has resulted in her political and economic disempowerment. As several of the studies in Part II indicate, black women who receive some form of public assistance are much less likely ever to break out of the “welfare trap” when they experience a mistimed pregnancy that results in an unwanted birth.256 In the absence of public funding, twenty to twenty-five percent of women who would avoid this result by obtaining an abortion are forced into unwanted childbirth.257 For the others, raising the money to pay for an abortion will result in delay, increased health risks, and greater costs—another kind of “trap” that public funding restrictions inevitably create. The need for women of color to have control over whether they will give birth to children they have not planned, cannot afford, should not carry for medical reasons, or simply do not want, thus touches an interest in the promise of meritocracy that is unparalleled among women for whom this promise has been more satisfactorily fulfilled. To the extent that women of color have been placed in this position by the historical willingness of government to sanction and even mandate their oppression, any present effort by government to prevent women of color from breaking out of the “traps” set by their history of subjugation might naturally be viewed merely as an extension of this cruel history. In such cases, the antisubjugation principle requires an inference of intentional discrimination that can be overcome only by the most compelling of governmental interests.

255 See supra notes 237–38 and accompanying text.
257 Aida Torres et al., Public Benefits and Costs of Government Funding for Abortion, 18 Fam. Plan. Persp. 111, 117 (1986); Henshaw & Wallisch, supra note 39, at 171; Trussell et al., supra note 40, at 129; see also Gold, supra note 36, at 51 (range of 20% to 25% of women unable to pay for an abortion therefore carry unwanted pregnancies to term).
258 See supra notes 36–47 and accompanying text.
VI. Conclusions

The current doctrine of equal protection will not support a claim of racially disparate impact against restrictions on the public funding of abortion. With respect to the “fundamental rights” component of equal protection, the Supreme Court has evolved a doctrine that dismisses the denial of abortion through funding restrictions as no form of “impingement” on the underlying “right” to an abortion. Moreover, the Court has indicated in its recent decisions that it may be poised to abandon the abortion right altogether, a development which, while it would plainly be of no consequence in the area of abortion funding, would have profound effects on the lives of women throughout the United States.

With respect to the “suspect classification” component of equal protection, the Court has made it abundantly clear that statistical disparities in the impact of a facially-neutral law will ordinarily carry little weight without direct evidence of discriminatory intent. In the abortion funding context, claims of de facto racial discrimination will therefore fail. It makes very little difference that the deprivations wrought by funding restrictions can be among the most severe to befall a human being; cases like McClesky illustrate that the Court will demand discriminatory intent even where the very life of a citizen is at stake.

The antisubjugation principle offers an alternative to the Court’s current doctrine that would restore to equal protection an appropriate substantive content in the real world of human interaction. Drawing on a strong (if recently neglected) theme in equal protection law that uses the constitutional ideals of meritocracy and equality of opportunity as guideposts for judicial activism, the antisubjugation principle provides a perspective from which neither the realities of “unintentional” discrimination nor the limits of legitimate judicial action are ignored. Applying these principles in the context of abortion funding, the profoundly disparate impact of funding restrictions on the lives of women of color, coupled with the government-sanctioned tradition of discrimination that has created and perpetuated this disparity, warrant and require an inference of intentional governmental discrimination. That such an analysis is not likely to be forthcoming from the present Court does not diminish its value to a political system that, while ignoring the substantial burdens it has historically placed on the lives of women of color, purports to base itself on the constitutional ideals of equality of opportunity and meritocracy.