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A FRAMEWORK FOR THE NEXT CIVIL RIGHTS ACT: WHAT TORT CONCEPTS REVEAL ABOUT GOALS, RESULTS, AND STANDARDS

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INTRODUCTION

Over the past two decades, civil rights advocates have lamented the conservative trends in the Supreme Court, and the White House and Congress's disregard of civil rights.[1] In advocates' eyes, civil rights have slowly eroded in the courts, and racial inequity has steadily mounted in reality.[2] No small effort, singular legislation, or

1. *See, e.g.*, John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to the "The Law School Five,"* 46 HOW. L.J. 175, 178 n.17 (2003) (lamenting the current Court's efforts to overturn the progress of the Warren Court); Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1029 (2002) (noting that the Court is actually more conservative than Congress); CITIZENS' COMM'N ON CIVIL RIGHTS & CTR. FOR AM. PROGRESS, THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION (William L. Taylor et al. eds., 2007), http://www.cccr.org/downloads/civil_rights1.pdf. In addition, presidents have appointed conservative members to the federal judiciary, the Senate has confirmed them, and Congress has passed no legislation contrary to their conservative opinions. *See generally* Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH. L. REV. 849 (2005).

2. *See, e.g.*, John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375 (2003); ERICA FRANKENBERG, CHUNGMEI LEE & GARY

even a progressive president will dramatically reverse this reality. The regular harassment of African American drivers will not end simply with the enactment of racial profiling legislation. Equal educational opportunities will not occur simply because plaintiffs obtain a cause of action to challenge racial inequities. Environmentally polluted minority neighborhoods will not become clean because the Environmental Protection Agency has the authority to intervene, nor will neighborhoods become desegregated because Congress makes more housing vouchers available to low-income families.

In recent years, advocates have struggled to retain old victories and slow, rather than stop, the exacerbation of these inequities. However, the time may be coming when advocates can again "make dents" in these problems. For the first time since 1991, the possibility of new significant civil rights legislation is real. Democrats gained control of Congress last year,[3] and they may be joined by a Democratic president in 2009.[4] Each of the top Democratic presidential candidates has recognized, at least rhetorically, the need for substantive change in the racial status quo, and indicated that he or she will be more protective of civil rights than recent administrations.[5] For instance, responding to a question about racial problems at a Howard University debate, Barack Obama, Hillary Clinton, and John Edwards directly acknowledged that issues of race are serious, and demand their attention and work.[6] At varying times, they each have promised to take action to address the issues.[7]

ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (2003), http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf (analyzing the increase in school segregation as a result of Supreme Court decisions).

3. John M. Broder, *Democrats Take Senate*, N.Y. TIMES, Nov. 11, 2006, at A1.

4. Carl P. Leubsdorf, *President Hillary? Gore May Be Democrats' More Bankable Candidate—If He'll Run*, DALLAS MORNING NEWS, May 25, 2006, at 21A (noting that polls of the electorate favor Democratic presidential candidates by a substantial margin); Frank Newport et al., *Where the Election Stands: June 2007, A Gallup Poll Review*, GALLOP POLL NEWS SERV., June 27, 2007, http://www.gallup.com/poll/27985/Where-Election-Stands-June-2007.aspx (finding that most indicators favor democratic candidates).

5. *See* Senator Hillary Rodham Clinton, 2008 Presidential Candidate, Remarks at the 2007 Democratic Primary Debate at Howard University (June 28, 2007), http://ontheissues.org/2008/Hillary_Clinton_Civil_Rights.htm; Senator John Edwards, 2008 Presidential Candidate, Remarks at the 2007 Democratic Primary Debate at Howard University (June 28, 2007), http://ontheissues.org/2008/John_Edwards_Civil_Rights.htm; Senator Barack Obama, 2008 Presidential Candidate, Remarks at the 2007 Democratic Primary Debate at Howard University (June 28, 2007), http://ontheissues.org/2008/Barack_Obama_Civil_Rights.htm.

6. Hillary Clinton's response to the question was "that race and racism are defining challenges . . . [b]ut there is so much left to be done. And for anyone to assert

Many believe the time for action is well overdue. The last time Congress passed any significant civil rights legislation was in the Civil Rights Act of 1991.[8] The 1991 Act was designed to overturn the Supreme Court's narrow interpretation of actionable employment discrimination claims, including its rejection of a disparate impact theory.[9] Moreover, the 1991 Act was not an unusual effort at the time. A few years prior to the 1991 Act, Congress, in response to Supreme Court decisions, passed the Civil Rights Restoration Act of 1987 to expand private causes of action for gender, race, age, and

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that race is not a problem in America is to deny the reality in front of our very eyes." Clinton, *supra* note 5. John Edwards was even more aggressive in his response, stating that "discrimination has had an impact that still is alive [and] well in America, and it goes through every single part of American life." Edwards, *supra* note 5. Responding to the question last, Obama voiced his approval of the other candidates' appraisals, echoing that, although significant progress has been made in regard to race, more work is to be done because "we live in a society that remains separated in terms of life opportunities for African-Americans, for Latinos, and the rest of the nation." Obama, *supra* note 5.

7. Clinton proclaimed that "when it comes to racial justice right now[,] I'm willing to work hard to be a strong advocate for Civil Rights and human rights here at home and around the world." Senator Hillary Rodham Clinton, 2008 Presidential Candidate, Remarks at Senate Debate in Manhattan (Oct. 8, 2000), http://ontheissues .org/2008/Hillary_Clinton_Civil_Rights.htm. John Edwards premised the theme of his campaign on the existence of a divided America, or what he calls "two Americas," one for the haves and one for the have-nots, which he vowed to attack. Senator John Edwards, 2004 Vice-Presidential Candidate, Remarks at the Democratic Primary Debate in Albuquerque, N.M. (Sept. 4, 2003), http://ontheissues.org/2008/John _Edwards_Education.htm (speaking of the two educational systems in America). For him, this issue "is not an African-American issue, not a Latino issue, not an Asian-American issue. This is an American issue," which we all have a responsibility to solve. Senator John Edwards, 2004 Vice-Presidential Candidate, Acceptance Speech to the Democratic National Convention (July 28, 2004), http://ontheissues.org/2004/John _Edwards_Civil_Rights.htm. Moreover, he explicitly sees law as helping solve these problems and proposes using it "to break down some of these economic and racial barriers." Senator John Edwards, 2008 Presidential Candidate, Remarks at the Take Back America 2007 Conference (June 19, 2007), http://ontheissues.org/2008/John _Edwards_Welfare_+_Poverty.htm. (advocating the use of federal programs to help desegregate neighborhoods and create opportunities for the inner city poor to move elsewhere). Barack Obama likewise argues that addressing the problems of race and inequality is not only good for minorities, but "good for America as a whole." Obama, *supra* note 5. His assertion that "there's got to be political will in the White House to make [racial equity] happen" indicates that he, as well, would be committed to such ends. *Id.*

8. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.).

9. Congress explicitly indicated that its purpose for the Act was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* at 1071. *See generally* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000) (discussing the 1991 amendments and other changes in employment discrimination).

disability discrimination in federally funded programs.[10] Similarly, Congress had amended the Voting Rights Act in 1982 to overturn the Court's rejection of voting rights claims based on disparate impact or discriminatory effects in *City of Mobile v. Bolden*.[11]

In the years following the 1991 Act, the Supreme Court issued a series of decisions that again narrowed the scope of civil rights claims. Congress has yet to respond. The Court's decisions have, for instance, limited the ability of plaintiffs to seek attorney's fees from defendants,[12] placing the viability of many civil rights cases in jeopardy.[13] In employment cases, the Court has permitted employers to force employees to contract away their civil rights protections.[14] Victims of reoccurring toxic and environmental hazards in minority neighborhoods, individuals who are denied drivers' licenses because they do not speak or read English fluently, and children who suffer from gross racial disparities in school discipline, funding, and quality all have seen their right to challenge these circumstances in federal court largely eliminated.[15] The Court's decisions have also had

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10. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). In *Grove City College v. Bell*, 465 U.S. 555 (1984), the Court had held that a plaintiff only had a cause of action if the specific program in which he faced discrimination had received federal funds. *See id.* at 573-74. Thus, if the school only received federal funds for its special education program, and no other program, the school would have been free to discriminate against students in other programs. *Id.* The Civil Rights Act of 1987 overturned this holding. *See, e.g.*, Leake v. Long Island Jewish Med. Ctr., 695 F. Supp. 1414, 1415-16 (E.D.N.Y. 1988).

11. 446 U.S. 55, 70 (1980). *See* Voting Rights Act of 1965, Pub. L. No. 91-285, § 2, 84 Stat. 314 (codified as amended at 42 U.S.C. § 1973 (1982)); *see also* Thornburg v. Gingles, 478 U.S. 30 (1986) (discussing and applying the amendment).

12. *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 604-05 (2001).

13. Limitations on claims for attorney's fees goes to the heart of all civil rights cases, as they allow plaintiffs to pursue cases that plaintiffs otherwise could not afford. *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561, 576 (1986); O. Whitman Smith, *Erosion of Civil Rights Enforcement: Judicial Constriction of the Civil Rights and Disability Law Bar*, 28 VT. B.J. & L. DIG. 41 (2002). Moreover, the threat of paying those fees provides plaintiffs with what may be their only leverage during negotiation. *See* Evans v. Jeff D., 475 U.S. 717, 731-35 (1986).

14. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119-22 (2001).

15. Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (eliminating an individual's right under Title VI of the Civil Rights Act of 1964 to challenge disparate impact in federally funded programs); *see also* Sam Spital, *Restoring* Brown's *Promise of Equality After* Alexander v. Sandoval*: Why We Can't Wait*, 19 HARV. BLACKLETTER L.J. 93, 111 (2003) (discussing post-*Sandoval* litigation and the barrier for plaintiffs seeking to use federal law to redress racial discrimination); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1520-21 (2005) (noting the "setbacks" *Sandoval* created); Melanie K. Gross, Note, *Invisible Shackles:* Alexander v. Sandoval *and the Compromise to the Medical Civil Rights Movement*, 47 HOW. L.J. 943, 981-86 (2004) (discussing how *Sandoval* undermines medical civil rights strategies); Carlos A. Ball, *The Curious Intersection of*

negative effects on the rights of women, individuals with disabilities, older workers, and citizens in general.[16]

In 2004, a coalition endorsed legislation to reverse these decisions and to again give citizens the power to address these and other inequities in court.[17] The legislation, titled the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004 (Fairness Act), addresses negative decisions in areas including race, gender, age, disability, employment, and various other civil rights categories.[18] Over one hundred United States Representatives and twenty-five Senators sponsored the Fairness Act, as well as over sixty national nonprofit and advocacy organizations.[19] On January 24, 2008, Senator Edward Kennedy

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Nuisance and Takings Law, 86 B.U. L. REV. 819, 871-72 (2006) (finding that *Sandoval* took "the air out of the environmental justice movement's litigation sails").

16. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (declining to hold that each paycheck received in a gender discrimination case under Title VII and the Equal Pay Act, subsequent to an alleged discriminatory pay decision, was a discrete discriminatory act triggering the time limit for filing a claim with the Equal Employment Opportunity Commission, and affirming summary judgment in favor of the defendant); Smith v. City of Jackson, 544 U.S. 228 (2005) (finding that expansions in the Civil Rights Act of 1991 that reached claims of disparate impact apply more narrowly to claims under the Age Discrimination in Employment Act, or age discrimination claims generally, than to other Title VII claims); Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) (holding that an award of punitive damages under Title VII and the Civil Rights Act of 1991 could not be upheld under the theory of vicarious liability and that the plaintiff must show malice or reckless indifference on the part of the employer); Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (holding that the provision of the Civil Rights Act of 1994 allowing punitive and compensatory damages under Title VII did not apply to cases pending at the time of the Act's passage); Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) (declining to retroactively apply provisions of the Civil Rights Act of 1991, which extended the coverage of claims under § 1981 to discriminatory contract terminations).

17. Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. (2004), http://www.thomas.gov/cgi-bin/bdquery/z?d108:HR03809:@@@D&summ2=m&. In general, the bill would "restore, reaffirm, and reconcile legal rights and remedies under [the varying] civil rights statutes." 150 CONG. REC. H514 (daily ed. Feb. 11, 2004). Specifically, it would amend the Civil Rights Act of 1964, the Education Amendments of 1972, and the Age Discrimination Act of 1975 to permit plaintiffs to establish discrimination based on disparate impact. *Id.* In addition, the bill would amend the Uniformed Services Employment and Reemployment Rights Act of 1994, the Age Discrimination in Employment Act of 1967, and the Fair Labor Standards Act of 1938 to provide that a state's receipt or use of federal financial assistance for a state program or activity shall constitute a waiver of sovereign immunity to a suit under such Acts by a program employee. *Id.* Finally, it would authorize civil actions in federal court for discrimination based on disability by amending the Air Carrier Access Act of 1986. *Id.*

18. *Id.*

19. *See* CIVILRIGHTS.ORG, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, ORGANIZATIONS ENDORSING FAIRNESS: THE CIVIL RIGHTS ACT OF 2004, http://www.civilrights.org/campaigns/civil_rights_act/org_support.html (listing the

reintroduced this legislation as the Civil Rights Act of 2008.[20] Senators Barack Obama and Hillary Clinton joined in co-sponsoring this legislation.[21]

The most important aspect of the Civil Rights Act of 2008, or any other new civil rights legislation, will be the question of whether to amend or change the Supreme Court's intentional discrimination standard. The Court applies the intentional discrimination standard to almost all antidiscrimination statutes, but it has proven most problematic in race and gender discrimination cases. In contrast to other intent, mens rea, and liability standards, the intentional discrimination standard places a high burden of proof on plaintiffs, which can rarely be met without admissions or smoking-gun evidence. For this and several other reasons, the intentional discrimination standard has been the subject of intense critique for several years.[22]

The purpose of this Article, however, is not to take sides in a legislative debate or the interpretation of past statutes, nor to propose specific legislative changes. Rather, the purpose of this Article is to frame the legislative approach to assessing the appropriate intent or liability standard in civil rights legislation and to emphasize the factors that should and should not be relevant in deliberations. In particular, the goal is to prevent the discussion from devolving into the subjective polemics that normally accompany issues of liability in race discrimination cases. Notions of what conduct is immoral, prejudiced, biased, or faulty too often dominate the question of what activities should be prohibited in order to help promote racial equity.[23] Consequently, the actual pursuit of progress in racial equity becomes only an afterthought. Moreover, the Supreme Court's requirement of "invidious discriminatory

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supporting organizations); H.R. 3809, 108th Cong. (2004); Civil Rights Act of 2004, S. 2088, 108th Cong. (2004).

20. Civil Rights Act of 2008, S. 2554, 110th Cong. (2008).

21. *Id.*

22. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1437-39, 1512 (2d ed. 1988); Barbara Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 963-66 (1993); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 291-94 (1997).

23. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 925-30 (1993) (concluding that proof of fault was at the core of the Rehnquist Court's view of discrimination); *id.* at 970-71 (critiquing the notion that moral wrongfulness is relevant to discrimination); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 773-75 (2006) (arguing for the relevance of blame in discrimination cases).

purpose"—or acting "because of," not simply "in spite of,"[24] the harms that befall minorities—has perpetuated the notion that antidiscrimination law only prohibits activity that is immoral or reprehensible, rather than simply contrary to the goals of antidiscrimination law. The Court has rejected a disparate impact standard because the Court does not deem the activity that the disparate impact standard prohibits to be discriminatory and, thus, immoral or reprehensible.[25] These holdings have fostered an extensive and charged debate over the intent and impact standards.[26]

The debate persists, in part, because both sides assume that an identifiable, normative notion of fault exists in discrimination and should be implemented through a standard. Both sides have differing views of what it means to discriminate, and believe that their views have moral or normative authority. The premise of this Article is that antidiscrimination law should reflect policy objectives, not moralistic or normative notions of fault. If antidiscrimination law is policy driven, the debate becomes less about pointing fingers at particular activities and people as being discriminatory, and more a discussion about how to create a society that functions for the benefit of everyone. Likewise, in federally funded programs, the goal becomes one of promoting racial equity rather than conceding to the perpetuation of inequity. This Article is directed at those individuals and legislators who have not chosen sides in the charged debate over disparate impact and discriminatory intent, and provides a broad, neutral framework with which to approach new civil rights legislation.

The best way to do this is to turn our discussion to the less emotional and politically charged lessons found in tort law, and leave the specific issues of discrimination behind. Such a turn is appropriate, as antidiscrimination law is but a species of tort.[27] In tort, one finds that no sacrosanct or inherent form of fault justifies imposing or alleviating liability. The mens rea, intent, or substituted standards vary widely across torts.[28] Neither context nor circumstances can explain this variance. Instead, the variance itself demonstrates the nonexistence of an inherent concept of fault in tort.

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24. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272-74 (1979) (requiring a "discriminatory purpose" and requiring the defendant to act because of gender); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (requiring "invidious discriminatory purpose [as] motivating factor").

25. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001); *Arlington Heights*, 429 U.S. at 565.

26. For a discussion of that debate and the longstanding battle for a disparate impact standard, see Selmi, *supra* note 23, at 702-08 (2006).

27. Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

28. *See infra* notes 89-117.

Particular liability standards or mental states are chosen for certain torts and in certain contexts, not because they reflect fault, but because they produce desired results.[29]

Tort law does not delude itself, as does antidiscrimination law, with the notion that it is punishing "wrongdoers" or morally unacceptable "faulty" conduct. Tort law is largely policy driven, determining the ends that the law should produce and then shaping standards of legal liability to achieve them.[30] Thus, nothing is particularly significant or indicates inherent culpability in a standard based, for instance, on foreseeability, substantial certainty, or deliberate indifference, other than the fact that such standards regulate society in a manner that will produce desirable outcomes. This is not to suggest that people who accidentally kill and those who intentionally kill are morally indistinguishable from one another; a difference certainly exists and criminal law takes that difference into account. However, a tort system need not if, for instance, its only purpose is to compensate family members for their loss of support. In that case, the defendant's motives are irrelevant.[31] Likewise, if the goal of antidiscrimination law is to reduce racial inequity, segregation, or barriers, a defendant's motives are irrelevant.

As this analogy suggests, understanding how and why tort liability standards are sculpted is instructive in analyzing antidiscrimination standards. A comparison between the two is invaluable for legislators who seek to adopt any new meaningful, effective, and appropriately conceptualized civil rights legislation. The initial inclination of many, however, would be to consult and rely heavily on Supreme Court antidiscrimination precedent. Unfortunately, they are unlikely to find adequate explanation or structure there. Supreme Court precedent lacks any transparency as to why the Court adopted the intentional discrimination standard and later expanded its applicability.[32] The Court simply proceeded as though the intent standard is inherently appropriate and necessarily identifies all of the actions that are contrary to equal protection and antidiscrimination. Moreover, outside of some general favoritism

29. *See infra* notes 148-76 and accompanying text.

30. *See infra* notes 145-53.

31. DAN B. DOBBS, THE LAW OF TORTS 17 (2000) ("[I]f compensation is an unqualified goal in itself, defendants would be liable whenever they caused harm, even if they were not at fault.").

32. For a more lengthy discussion of this lack of explanation, see Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 569-72 (2006).

toward "colorblindness,"[33] the Court has spoken nothing of goals or the treatment that equal protection and antidiscrimination guarantee. Yet, tort principles demonstrate that, without attention to the goals or intended results of equal protection and antidiscrimination, nothing justifies the intent standard or renders it more appropriate than other standards.

Though the Court has failed to articulate goals, this does not mean that they do not exist. Insofar as the intentional discrimination standard appears designed to produce a consistent set of results, the Court's goals are implicit. A tort approach emphasizes that, regardless of what the Court's goals are, Congress's goals must control, at least, in regard to its statutes. Thus, a tort approach prompts us to assess whether the Court's implicit goals are consistent with the goals the democratic process has deemed appropriate. Moreover, a tort-based approach demands an identification of the actual results of the intent standard, or any other standard, and whether those results further our goals. Insofar as antidiscrimination law's aim, like torts, is to produce efficient and socially productive results, the intent standard falls short.

Part I of this Article begins by explaining why tort law concepts are relevant to constitutional and antidiscrimination law. Part II explores the concept of fault in historical and current torts, demonstrating that fault is not a normative concept and has no inherent meaning other than that one has transgressed some standard that a legislature or court has adopted. Part III reveals that tort standards are adopted to further societal goals, not to identify or punish wrongful conduct. Part IV applies these concepts to antidiscrimination law and, in particular, the intentional discrimination standard, to demonstrate that the intent standard is designed to pursue values and interests adopted by the Court, rather than those explicit or implicit in civil rights legislation. Part V stresses that we can only determine the appropriate standard by having a serious democratic conversation focusing on the values and interests we wish to achieve through antidiscrimination law. The Article concludes with an evaluation of the potential standards that can be applied to achieve congressional ends.

I. THE CONNECTION BETWEEN TORT AND CONSTITUTIONAL LAW

Some might query why tort law serves as an appropriate comparison for or critique of antidiscrimination law, and the intentional discrimination standard in particular. First, the Supreme

33. For an explanation of the Court's colorblind jurisprudence, see Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 139-56 (1998).

Court has not provided a rationale for the intent standard. Thus, we have no framework from which to construct new standards. Tort law's clear framework provides a means by which to bridge this gap. Second, although the Court has recently strayed from tort law in its antidiscrimination jurisprudence, tort and constitutional violations are inherently intertwined. Deprivations of equal protection, due process, property, and other rights secured by the Constitution are "constitutional torts." As the Supreme Court indicated in *Imbler v. Pachtman*,[34] deprivations of constitutional and federal law under 42 U.S.C § 1983 are but a "species of tort liability."[35] Similarly, Dan Dobbs flatly states, "civil rights violations are torts."[36] Moreover, civil rights causes of action regularly overlap with trespassory torts.[37]

For example, some common law tort assaults and batteries also constitute deprivations of life and liberty under the Due Process Clause.[38] In the same way, an intentional infliction of emotional distress might accompany the denial of equal protection. Some nontrespassory torts also have civil rights analogs. Police misconduct was traditionally litigated under the common law action for malicious prosecution, but is now more commonly litigated under the Fourth Amendment law of search and seizure.[39] Finally, state courts must align common law torts such as defamation with the First Amendment to ensure free speech rights are not infringed through tort claims.[40]

The overlap alone, however, does not fully elucidate the connection between common law torts and constitutional torts. Common law torts serve as a theoretical foundation for developing liability standards in constitutional torts. As the Court wrote in *Carey v. Piphus*:

> [O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.[41]

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34. 424 U.S. 409 (1976).

35. *Id.* at 417; *see also* Heck v. Humphrey, 512 U.S. 477, 483 (1994); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986).

36. DOBBS, *supra* note 31, at 81.

37. *Id.* at 81-94.

38. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

39. *See generally* Malley v. Briggs, 475 U.S. 335 (1986).

40. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

41. 435 U.S. 247, 257-58 (1978).

The Court has consistently reiterated this sentiment, writing that constitutional rights are "governed by federal rules conforming in general to common-law tort principles."[42]

The Court has also spoken directly to the connection between intent standards in torts and civil rights. In *Monroe v. Pape*,[43] the Court reasoned that proof of intent and liability in constitutional torts "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[44] Due process and Eighth Amendment claims have, as a result, implemented standards that closely resemble or refine common law theories of negligence, intent, and recklessness.[45] As a historical matter, the same has been true of equal protection and antidiscrimination standards.

Lower courts continued to apply the intent doctrine in a manner that was consistent with objective common law intent, rather than subjective motive-based intent, even after the Supreme Court in *Washington v. Davis*[46] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[47] held that equal protection claims of race discrimination would be governed by a new motive-based intent doctrine. Lower courts inferred intent "based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing [racial inequality]."[48] Objective common law principles were so ingrained in lower courts' assessment of liability in equal protection cases that it was not until the Supreme Court reversed additional lower court decisions that the lower courts fully abandoned their objective criteria and adopted the Court's subjective criteria for

42. Wallace v. Kato, 127 S. Ct. 1091, 1095 (2007) (citing Heck v. Humphrey, 512 U.S. 477, 483 (1994)); *see also Carey*, 435 U.S. at 257-58.

43. 365 U.S. 167 (1961).

44. *Id.* at 187.

45. *See, e.g.*, Nishiyama v. Dickson County, 814 F.2d 277, 282 (6th Cir. 1987) (discussing the definition of gross negligence as required to sustain a due process claim in terms of intent, reasonableness, and forseeability); *see also* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1165-66 (1994) (discussing the judicial use of common law principles to guide interpretation of due process); Holly Boyer, Note, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317, 320 (2003) (discussing the Supreme Court's use of common law standards to rule on an Eighth Amendment claim).

46. 426 U.S. 229 (1976).

47. 429 U.S. 252 (1977).

48. Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975).

proving intent.[49] The Court, unfortunately, failed to explain why it made this drastic change. The intentional discrimination doctrine became the controlling standard simply because the Supreme Court "said so." Thus, a gap in understanding the Court's antidiscrimination jurisprudence was created.

Tort law can help fill this gap. Tort law is the foundation for much of antidiscrimination law. By looking to this basic foundation, we can perhaps gain some insight into the Court's implicit rationale and create a more balanced analysis of the intent doctrine and its alternatives.

II. THE DEVELOPMENT AND ADOPTION OF LIABILITY STANDARDS IN TORT LAW

Although the term "fault" is used extensively in tort law, it lacks any clear definition because it is not supported by a normative principle of liability. To the extent that tort labels a defendant as being at "fault," it does not mean that the defendant is morally culpable, has engaged in "wrongful" conduct, or has transgressed natural law. "Fault" merely indicates that the defendant has crossed some line that the law has determined he should not. Moreover, that line can be drawn for any number of reasons that have nothing to do with the defendant "wronging" someone. As this section demonstrates, the further one explores tort standards, the clearer it becomes that liability standards are reflections of what society deems, at any given time, to be necessary for social progress, efficiency, retribution, compensation, or other pressing concerns. The standards do not simply punish or identify "wrong" or normatively faulty conduct.

A. The Rise and Relevance of Fault in Tort History

Tracing the historical origins of tort will not necessarily reveal a normative theory of fault that justifies liability. From tort's inception, courts have been reluctant to rely on any concept of fault as an ultimate measure of liability. In fact, many argue that until the formal rise of negligence during the late nineteenth and early twentieth centuries, fault was entirely irrelevant.[50] Initially, the notion that an individual had a general legal duty to prevent harm toward others was nonexistent.[51] When the concept of negligence

49. *See* Black, *supra* note 32, at 539-40 (discussing the difficulty lower courts had in evaluating evidence in discrimination cases after the Supreme Court's decision in *Sandoval*).

50. DOBBS, *supra* note 31, at 266.

51. Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation,* 15 GA. L. REV. 925, 944 (1981).

eventually developed, it was against a backdrop of no-liability, rather than strict liability or liability without fault.[52] Strict liability and no-fault tort theories were avenues for reparation,[53] but reparation itself was not extensively available. Most individuals who were injured simply had no claim in tort. Thus, strict liability and no-fault were effectively deviations from the general rule of no-liability and, in any event, were oblivious to a normative fault concept.

The notion that a defendant owed a duty to others and could be at "fault" arose slowly.[54] Initially, common carriers were the only defendants upon whom courts imposed a general duty, and that duty was primarily a response to public demands.[55] Other than that duty, the most one could expect from others was "fair play" or the avoidance of acting in bad faith.[56] Thus, most conduct that courts would today label faulty was permissible. Even once courts recognized a general duty of care in negligence, they were often unwilling to impose liability based on the breach of this duty. Instead, courts carved out circumstances where they reasoned no duty existed and, hence, refused to impose liability despite the existence of otherwise negligent conduct. Moreover, courts readily accepted defenses, such as assumption of risk, as a means of indirectly limiting defendants' duty and holding them blameless for their conduct.[57] When such defenses were unavailable, courts sometimes manipulated the significance of particular facts and, in the process, narrowed the scope of a defendant's duty.[58] Likewise, courts would recognize a duty, but simply limit the types of harm one must guard against.[59] The basis was not a lack of fault, but simply a

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52. *Id.* at 959.

53. A debate between some exists as to whether strict liability and trespass are appropriately recognized as no-fault schemes, but, in any event, this Article's reference above the line to strict liability and no-fault still refer to the same class of cases regardless of how some might characterize them. *See generally* Franz Werro, *Tort Law at the Beginning of the New Millennium: A Tribute to John G. Fleming's Legacy*, 49 AM. J. COMP. L. 147, 155-56 (2001).

54. Rabin, *supra* note 51, at 945-46.

55. *Id.* at 944.

56. *Id.* The "fellow servant" rule operated in the same respect, exempting employers from vicarious liability when an employee harmed a fellow employee rather than a third party. *See, e.g.*, Graczak v. City of St. Louis, 202 S.W.2d 775, 780 (Mo. 1947). Thus, although negligent conduct—for which the employer was otherwise responsible—injured an employee, no remedy would exist. *Id.*

57. Rabin, *supra* note 51, at 943.

58. Rabin's prime example of this is *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (1928), where the court's articulation of the facts was crafted to undermine the recognition of a duty to warn. Rabin, *supra* note 51, at 957. By undermining the duty, the court established "no duty" to warn. *Id.*

59. *See, e.g.*, Coughlin v. Tailhook Ass'n, 818 F. Supp. 1366, 1368-69 (D. Nev. 1993) (refusing to recognize a cause of action for negligent infliction of emotional distress

refusal to include certain damages as compensable harms.[60] Finally, courts disregarded a defendant's "fault," or rendered it irrelevant, by arguing that contract or property law controlled rather than tort law.[61] Most notably, courts for decades used the contract concept of privity to negate manufacturers' liability when their products injured consumers.[62]

B. The Nonexistence of Fault as a Normative or Consistent Concept in Current Tort Liability Standards

Fault is no more of a concrete or normative concept today, nor any more determinative of liability, than it was historically. Admittedly, today's torts are divided into formal categories with specific mens rea, knowledge, or intent requirements, which some might interpret as focusing on or identifying forms of fault that justify liability. For instance, when the law finds that someone had the legal intent to cause harm or that a person's negligence led to harm, one might infer that this mens rea is indicative of normative "fault" that justifies liability. But as the following demonstrates, the mens rea or intent standards that tort uses to impose liability are

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independent from traditional negligence); *see also* Therese Lee Carabillo, Comment, *Tort Law–*Payton *Revisited: The Beginning of the End of the Physical Harm Requirement–*Sullivan v. Boston Gas Co., 414 Mass. 129, 605 N.E.2d 805 (1993), 27 SUFFOLK U. L. REV. 997, 999 (1993).

60. Rabin, *supra* note 51, at 949, 951-52 (finding that emotional distress cases were not dismissed based on theory that due care had been exercised, and arguing that commentators overlook these cases in examining fault). The courts' original rationale was based on a fear of false claims (opening a floodgate of claims), the difficulty of measuring damages, lack of precedent, and that the harm was indirect. *See, e.g.*, Recent Developments, *California Rejects Tort Action for Fear for Another,* 15 STAN. L. REV. 740, 741-43 (1963) (discussing a California decision in which a claim for emotional distress was dismissed citing judicial administrative difficulties).

61. *See, e.g.*, Rawls v. Ziegler, 107 So. 2d 601, 605 (Fla. 1958) (finding that there is no liability of independent contractor to person not in privity with him for injuries resulting from defect in a product rebuilt or repaired by contractor); Palmer v. Miller, 43 N.E.2d 973, 975 (Ill. 1942) ("[T]o impute the negligence of one person to another, such persons must stand in a relation of privity . . . ."); Vistein v. Keeney, 593 N.E.2d 52, 61 (Ohio Ct. App. 1990) ("As a general rule, if a plaintiff brings an action sounding in tort and bases his claim upon a theory of duty owed by a defendant as a result of contractual relations, he must be a party or privy to the contract in order to prevail."); *see also* Rabin, *supra* note 51, at 945-46 (discussing tort law's slow emergence from contract and property law).

62. *See, e.g.*, Newton v. Brook, 32 So. 722, 723-24 (Ala. 1902) (finding no remedy in tort law where the defendant failed to perform the terms of a contract); Louisville & Nashville R.R. Co. v. Spinks, 30 S.E. 968, 970-71 (Ga. 1898) (finding no remedy in tort law where a plaintiff was injured as a result of a breached contractual duty); Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Ex.). *But see* Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (finally disregarding the privity concept and imposing liability)

inconsistent. A simple review of the mens rea and liability standards among the various torts shows that no core concept exists to justify liability, and, hence, no normative concept of fault either.

In intentional torts, individuals are liable for volitional acts that cause direct interference with other persons or their property. A defendant need not intend to harm a plaintiff, but merely to touch, move, or disturb the plaintiff's person or property.[63] In fact, acting with a mere substantial certainty that one's actions will contact another's person or property is sufficient intent.[64] Thus, the defendant need only act volitionally, not with purpose to harm or offend another.[65] Moreover, the defendant's subjective intent is the stated focus of inquiry, but this subjective intent is ascertained from objective evidence.[66] Consequently, regardless of his actual subjective intent, a person who shoves another will be deemed to have intended to commit battery.[67]

Negligence, by contrast, focuses solely upon one's outward conduct, disregarding subjective intent.[68] Conduct is negligent when it creates an unreasonable risk of harm to others.[69] However, one is liable only for those harms that are foreseeable.[70] With the narrow exceptions of children[71] and individuals suffering from a physical incapacity[72] or having superior knowledge,[73] foreseeability is an

63. RESTATEMENT (SECOND) OF TORTS § 13(a)-(b) (1965) (stating that the mere intent to cause the imminent apprehension of harmful or offensive contact when such contact results will lead to liability for battery).

64. *Id.* § 8A cmt. b; Garratt v. Dailey, 279 P.2d 1091, 1093-94 (Wash. 1955).

65. DOBBS, *supra* note 31, at 48.

66. *Id.* at 49.

67. *Id.*

68. *Id.* at 275.

69. RESTATEMENT (SECOND) OF TORTS § 282 (1965).

70. *See* DOBBS, *supra* note 31, at 334; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. d (Proposed Final Draft No. 1, 2005); *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 94-95 (1881) (writing that liability does not attach to "an injury arising from inevitable accident, or . . . from an act that ordinary human care and foresight are unable to guard against") (quoting Chief Justice Nelson of New York).

71. *See, e.g.*, Robinson v. Lindsay, 598 P.2d 392, 393 (Wash. 1979) (negligence of children is based on the child's "age, intelligence, maturity, training and experience . . . ."). Only when engaging in abnormally dangerous or inherently adult activities are children held to a higher standard. *Id.*

72. *See, e.g.*, Shepherd v. Gardner Wholesale, Inc., 256 So. 2d 877, 882 (Ala. 1972) (stating that a person with a permanent visual impairment is required to act with the ordinary care of a "person with a like infirmity," and not that of a person with no such impairment).

73. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 12 (Proposed Final Draft No. 1, 2005).

entirely objective standard based on the reasonably prudent person.[74] Thus, a defendant may or may not have subjectively realized his action created an unreasonable risk, but a finding of negligence will still follow if a reasonably prudent person would have.[75]

The standards for defective products, engaging in abnormally dangerous activities, and vicarious liability impose strict liability with what is generally referred to as a lower level of "fault."[76] For instance, a defendant is liable for harms resulting from abnormally dangerous activities even if he exercised the utmost care.[77] The rationale is that the defendant chooses to engage in an activity he knows is extremely hazardous and from which the danger cannot be eliminated.[78] He also engages in this activity for his own economic benefit.[79] Thus, if the harm materializes, he is its cause, and he knows he will be liable.

Similarly, with defective products, a manufacturer may not be careless or intend to injure consumers; however, the manufacturer puts products into the marketplace to make a profit, knowing that that some products may be defective and injure consumers. When these products harm consumers, liability should fall on the manufacturer rather than the consumer, particularly when it is either beyond the consumer's control to prevent the harm or it was a harm that the manufacturer could have prevented.[80] In short, the manufacturer is at "fault" because it put a defective product on the market.[81]

Vicarious liability is far less complex. Employers are liable simply because their employees, working to further their employers' interests, cause injury to others.[82] However, similar to the other categories of strict liability, employers knowingly place their employees in positions where they can harm others, and the employers reap an economic benefit from doing so. This justifies imposing the burden of liability on employers.[83]

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74. *See* RESTATEMENT (SECOND) OF TORTS § 289 (1965).

75. DOBBS, *supra* note 31, at 275.

76. *See* RESTATEMENT (SECOND) OF TORTS § 519 (1977).

77. *Id.* § 519(1).

78. *Id.* § 520.

79. *See id.* § 520 cmt. d.

80. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998).

81. *Id.*

82. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

83. *See* Ira S. Bushey & Sons v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (justifying vicarious liability under the theory that the harms caused by the employee where "characteristic" of the employer's business). For a full discussion of the rationales for imposing vicarious liability, see Gary T. Schwartz, *The Hidden and*

Some might argue that strict liability cannot be included within the realm of claims based on "fault" because liability attaches in strict liability regardless of intent, negligence, or some other culpability concept.[84] Such an argument, however, ignores the fact that strict-liability defendants have engaged in action knowing that harm is a possibility. The argument also assumes that negligent, intentional, and other similar torts are based on fault. As demonstrated in part above and in depth below, none of these torts are based on a normative or inherent notion of fault. Moreover, even were some concept of fault at work in negligence, the distinction between strict liability claims and negligence or intent is minimal in many respects. First, the move to strict liability in products liability was, in part, precipitated by a recognition that negligence is the cause of many products-related harms, but proving negligence in this context is difficult even when negligence exists.[85] Thus, the move to strict liability is a choice to assume that the manufacturer is negligent, and avoid requiring painstaking proof of negligence or potentially allowing the erroneous rejection of claims with merit.

Second, although negligence is not explicitly required to sustain a products liability claim, a calculus similar to that involved in assessing negligence has gradually been incorporated into products liability. For instance, determining whether a product suffers from a design defect involves a balancing test that is roughly parallel to Judge Learned Hand's famous risk-utility formula for negligence.[86] With negligence, the analysis is whether the burden is less than the probability of harm resulting, multiplied by the gravity of the harm. Similarly, design defect claims weigh the likelihood that the product's design will cause injury, the gravity of that injury, and the mechanical and economic feasibility of improving the design. Little apparent difference exists between the two tests other than their adaptation to differing contexts; both balance the likelihood and severity of harm against the cost of avoiding it. In addition, products liability for manufacturing, design, and warning defects is anchored

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Fundamental Issue of Employer Vicarious Liability, 69 S. CAL. L. REV. 1739, 1747-64 (1996).

84. *See, e.g.*, Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 620-21 (1992).

85. *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring); Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 432 (Minn. 1971) ("[I]n many cases proof of a defect may simply be a substitute word for negligence."); *see also* Gary T. Schwartz, *Understanding Products Liability*, 67 CAL. L. REV. 435, 460-61 (1979) (indicating that strict liability for products may be a "shortcut" to negligence that dispenses with long detailed trials over the issue of fault).

86. DOBBS, *supra* note 31, at 340. For further explanation of Learned Hand's balancing test, see United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

by the same fundamental concept found in negligence: the foreseeable and unreasonable risk of harm.[87]

Although not as closely parallel to negligence as products liability, the analysis for abnormally dangerous activities also reflects negligence concepts. The analysis focuses on the risk that the activity poses and whether the activity's value to the community outweighs the danger posed.[88] Thus, much like Learned Hand's test, liability only follows if the burden caused by depriving the community of the activity is outweighed by the danger that it creates.[89] Vicarious liability stands alone in not incorporating a risk-utility balancing similar to negligence. However, this balancing is unnecessary because the predicate for imposing liability is that the employee has engaged in negligent or otherwise tortious conduct. In short, all of the above forms of "strict liability" are, on some level, grounded in weighing the costs, benefits, and unreasonableness of harm that closely resembles negligence. Thus, strict liability causes

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87. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

88. RESTATEMENT (SECOND) OF TORTS § 520 (1977). The *Restatement (Third) of Torts* doesn't explicitly include the value to the community weighed against the danger, but it retains the sentiment by focusing on the significance of the risk and whether the activity common to the community. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20 (Proposed Final Draft No. 1, 2005). Moreover, it directly poses the traditional question in negligence of foreseeability of harm. *Id.* Regardless, many courts continue to follow the *Restatement (Second)* on abnormally dangerous products. *See, e.g.*, Perez v. S. Pac. Transp. Co., 883 P.2d 424, 425 (Ariz. Ct. App. 1994); Splendorio v. Bilray Demolition Co., 682 A.2d 461, 466 (R.I. 1996); Peneschi v. Nat'l Steel Corp., 295 S.E.2d 1, 1 (W. Va. 1982).

89. Nuisance claims, which are sometimes treated along with other strict liability and abnormally dangerous activities, likewise begin with the issue of the harm or, more precisely, with whether the interference with another's property is unreasonable. However, in determining whether it is unreasonable, courts look at the appropriateness of the location and the social utility of the activity. *See, e.g.*, Martins v. Interstate Power, Co., 652 N.W.2d 657, 660 (Iowa 2002) (stating that the location and the purpose are considered when determining whether a particular use constitutes a nuisance); RESTATEMENT (SECOND) OF TORTS § 827 (1979). Even though some activity may interfere with neighbors' use and enjoyment of their land, an activity with significant social value may nonetheless be exempt from a claim of nuisance. *Id.* § 828 cmt. e. Public utilities such as water treatment and electrical and nuclear plants may be the best example of how the utility of an activity can outweigh its harm. *See, e.g.*, San Diego Gas & Elec. Co. v. Superior Court, 920 P.2d 669, 696-97 (Cal. 1996) (finding that the alleged harm would have to outweigh the social utility of the activity complained of in order to grant relief against the defendant electric utility company); Westchester Assoc., Inc. v. Boston Edison Co., 712 N.E.2d 1145, 1149 (Mass. App. Ct. 1999) (finding that electromagnetic fields generated by an electric utility's operation of power lines did not constitute a nuisance when they interfered with computer monitors in an adjacent building); Borough of Collegeville v. Philadelphia Suburban Water Co., 105 A.2d 722, 731 (Pa. 1954) (affirming a lower court's decision not to enjoin the erection of a dam in part because "[t]he impounding of water for public use is a necessity").

of action are not conceptually divergent from the other fault-based torts; they simply fall at a different point on the spectrum of liability.

A few additional discrete and less prevalent torts also exist. These remaining torts generally require a higher mental state, such as specific motive, recklessness, or wantonness.[90] For instance, malicious prosecution, defamation, injurious falsehoods, and interference with economic value require a showing of motive.[91] To sustain a claim for malicious prosecution, a plaintiff must show that the defendant initiated legal proceedings against him, not merely by mistake, negligence, or litigiousness, but because of ill motive or illegitimate purpose.[92] Likewise, uttering or writing inaccurate or false statements will not render a defendant liable for defamation or injurious falsehoods so long as the subject matter of the statements relates to issues of public concern, deals with public figures, or relates to business.[93] Instead, a plaintiff must show the defendant acted with malice or reckless disregard for the truth.

The justification for a higher mens rea in these cases is not based on a concept of fault, but rather is primarily a factor of cost-utility balancing, which must account for the inherent social utility and value of the challenged activity. When individuals speak about public matters or figures, they exercise their First Amendment rights, which counterbalance a plaintiff's right to vindication.[94] As one of the most valued constitutional rights, the legal standard for defamatory or speech-based torts simply imbeds this weight into the prima facie case by requiring the plaintiff to demonstrate a more egregious and unjustified harm. Similarly, claims of injurious falsehoods occur in the competitive marketplace, and the higher

90. *See, e.g.*, DOBBS, *supra* note 31, at 52 n.5 (discussing examples of statutes or cases requiring higher levels of intent or carelessness).

91. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring proof of "actual malice" or reckless disregard for the truth in a defamation claim); RESTATEMENT (SECOND) OF TORTS § 653 (1977) (stating that improper purpose is an element of a malicious prosecution case); *id.* § 767 (1979) (suggesting that good or socially desirable motives would excuse interference with economic interests or contract).

92. *See* RESTATEMENT (SECOND) OF TORTS § 653 (1977).

93. *N.Y. Times Co.*, 376 U.S. at 281-82 (stating the limits of liability when an individual comments on issues of public concern); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (establishing the limits of liability when an individual comments on public officials and figures); RESTATEMENT (SECOND) OF TORTS § 623A (1977) (requiring not only that a statement be false and cause injury to a plaintiff, but that the defendant also know that it was false or act with reckless disregard for the truth).

94. *N.Y. Times Co.*, 376 U.S. at 269.

standard these plaintiffs must overcome reflects the high value our system places on economic competition.[95]

The breadth and variance within the above spectrum of torts demonstrates that no inherent, consistent, or agreed upon form of fault exists to necessarily justify forcing one individual to compensate another. "Fault" is simply a choice about where to situate liability, and, hence, a legal construct rather than a normative concept. As Oliver Wendell Holmes concluded, a "common ground at the bottom of all liability in tort" is "very hard to find"[96] because "[t]he law did not begin with a theory"[97] and did not develop a coherent one later. Instead, the common law of torts reflects tendencies,[98] and even the tendencies can diverge at times.[99] In short, the law does not create prohibitions based on an inherent form of fault. "What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise."[100]

Today, however, conceptualizing fault and liability as mere reflections of our choices may seem counterintuitive because of the regular reliance on "fault" and "no-fault" as categories of torts. A collective review of the various fault standards—ranging from malice, intent, recklessness, and negligence to strict liability—demonstrates that no normative foundation, single mental state, or fault concept connects and justifies liability across torts. Insofar as all of them involve some level of mens rea or knowing acts, one might argue that this is a normative basis for inferring fault. However, reducing the level of knowledge to the point where it is common to all torts would render the commonality so basic as to be meaningless; it would only be the knowledge that one is engaging in a particular activity. Thus, no *conscious* level of wrongdoing extends across tort.

For instance, conscious wrongdoing might exist in many intentional and malice-based torts, but conscious wrongdoing does not exist in negligence. Except in those rare instances where negligence is gross, justifies punitive damages, or poses a very grave risk, the typical negligent defendant does not engage in conscious wrongdoing. The defendant acts consciously, but lacks a purpose to cause harm or to create a risk of harm. Similarly, in strict liability cases, although a defendant may choose to engage in an activity that can cause serious harm, no conscious wrongdoing exists. In fact, the

95. *See, e.g.*, DOBBS, *supra* note 31, at 1277; Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc., 604 P.2d 1090 (Alaska 1979).

96. HOLMES, *supra* note 70, at 77.

97. *Id.*

98. *Id.* at 78.

99. *Id.* (discussing how the tendency to impose liability for voluntary choices is tempered by the separation consideration of foreseeability).

100. *Id.* at 110.

likelihood of harm may seem low to the defendant, and the defendant may take all possible precautions to prevent it. Nonetheless, the law will impose strict liability on the defendant if the harm occurs.[101]

In short, the more one scrutinizes and attempts to categorize torts, the more fault, or any other culpability concept used as a basis for liability, dissolves. As Kenneth Simons concludes in his expansive evaluation of mental states, the various mental states and differing liability standards are not constructed on any concept of fault or legal hierarchy;[102] rather, they are constructed to further policy and social objectives. Thus, liability standards do not make judgments regarding fault.

C. *Negligence's Disregard for "Fault" in Imposing and Alleviating Liability*

1. Objective Standards

A normative concept of fault is nonexistent even in torts' major category of negligence. Negligence law regularly casts the relevance of "fault" or "culpability" aside. Negligence's basic inquiry into whether conduct creates a foreseeable risk of harm implies a concern with fault. However, the evaluation of foreseeability from an objective and theoretical reasonableness standard ignores individual predilections,[103] allowing liability to extend beyond the actual subjective negligence of individuals. Negligence requires everyone to conform to a single standard of care, which generally takes no account of the internal temperaments, intellect, education, or physical abilities of individuals. Consequently, a generally weaker man, although acting with the utmost care, can be liable for his inability to conform his conduct to that of an average physically fit man.[104]

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101. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20 (Proposed Final Draft No. 1, 2005) (stating that strict liability applies to those engaging in abnormally dangerous activities "even when reasonable care is exercised by all actors"); RESTATEMENT (SECOND) OF TORTS § 519 (1977) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.").

102. *See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463, 464 (1992).

103. *See* Rabin, *supra* note 51, at 930.

104. Those with physical disabilities, such as the blind, are not expected to see the same things that a person with normal vision would. *See, e.g.*, Shepherd v. Gardner Wholesale, Inc., 256 So. 2d 877 (Ala. 1972). However, they would be required to take extra precaution in certain instances because of their knowledge of that disability. Likewise, someone who has superior knowledge of a danger is expected to act with the

Holding the physically weaker man liable is justified because the effects of his acts are no less harmful than those of other men. Moreover, an objective standard is the only one legally manageable, but the justification cannot be that the impaired man acted with fault or is "blameworthy." Similarly, negligence is not based on emotions, motives, or other subjective criteria that might reflect fault or culpability.[105] This type of evidence is simply irrelevant to negligence. Although some men certainly act carelessly and are blameworthy, the conclusion that one is inherently or subjectively at "fault" or "careless" does not follow from the legal finding of negligence. The law only assesses whether one has crossed a preestablished line as to what is acceptable conduct.[106] In this respect, negligence is shockingly similar to strict liability. The disregard for personal subjectivity in negligence reveals that, similar to strict liability, it is not based on a normative concept of fault or culpability.

In addition, the courts' ad hoc application of and divergence from the general negligence standard undermines any alignment between negligence and normative fault. For instance, for certain classes of individuals, such as minors and physically disabled individuals, courts look beyond outward conduct to subjective capacities, and effectively apply a lower standard of care than the objective one.[107] Yet, in contrast, courts refuse to afford any leniency to mentally ill individuals who lack knowledge and foresight regarding risks, or to consider their capacity when evaluating their conduct.[108] In fact, courts would hold them liable even though it may be impossible for mentally ill individuals to elevate their conduct to that of the objective reasonable person. The conflicting treatment of these groups reveals that negligence standards cannot be reconciled with a normative concept of fault. Recognizing the inconsistencies, some courts admit that the disparate treatment is driven by policy rather than fault considerations.[109]

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care that a reasonably prudent person would if he or she possessed such superior knowledge.

105. *See* HOLMES, *supra* note 70, at 110.

106. *See id.*

107. *See, e.g.*, *Shepherd*, 256 So. 2d at 882; *see also* Wilson v. Sibert, 535 P.2d 1034 (Alaska 1975) (taking special account of emergency circumstances in evaluating reasonable conduct).

108. *See* Patrick Kelley, *Infancy, Insanity, and Infirmity in the Law of Torts*, 48 AM. J. JURIS. 179, 180 (2003) ("[T]he law of negligence stead-fastly refuses to take into account the limitations of the mentally ill: the standard for judging whether the mentally ill actor's conduct was negligent is the conduct of the reasonably prudent sane person, and that standard is applied even when the actor was suddenly stricken by an unforeseeable mental illness.").

109. *See, e.g.*, Creasy v. Rusk, 730 N.E.2d 659, 664 (Ind. 2000).

By imposing a higher standard on mentally incompetent individuals, courts hope to encourage family members and social networks to take responsibility for the individuals.[110] This encouragement serves an important purpose, since individuals with diminished mental capacities may be more likely to unintentionally cause harm to others.[111] These rationales, however, are irrelevant to any concept of fault. They simply reveal that courts tend to exercise and withhold leniency based on social utility and harm, rather than fault. This concern with social utility and harm might also explain those instances where courts diverge from their general willingness to afford children a relaxed standard of care. When minors engage in adult activities or operate dangerous instrumentalities, courts hold them to an adult standard—not because the minors are suddenly at fault under these circumstances, but because their activities create significant risks to others.[112]

2. Prima Facie Case of Negligence

The disregard for "fault" becomes even clearer when one closely examines the prima facie elements of negligence. To establish a claim of negligence, a plaintiff must not only demonstrate that a defendant engaged in negligent conduct that led to injury, but he must also establish duty, damages, actual cause, and proximate cause. These additional requirements "rob" the "fault principle . . . of any sensible meaning, because key elements in a negligence case having nothing to do with breach of due care—particularly, the duty question—frequently are determinative of major categories of injury claims."[113] For instance, an excavation company might dig craters on a worksite and be aware that deep pools of water formed in them, but when a person later comes onto the site, falls into the crater, and drowns while the company owner watches, the law would excuse the owner for carelessly leaving the craters open or neglecting to warn of them unless the victim can establish a duty owed to him.[114]

As an element of negligence, proximate cause similarly limits liability. The basis for the limitation, however, is a policy consideration, not the absence of fault.[115] A person can breach a duty of care and actually cause harm to someone, but tort law will only hold the defendant is only liable if his conduct was the proximate

110. *See id.*

111. *See id.*

112. Moreover, an adult has most likely enabled the minor in this activity and must monitor that activity closely.

113. Rabin, *supra* note 51, at 932.

114. *See, e.g.*, Yania v. Bigan, 155 A.2d 343 (1959).

115. *See* Rabin, *supra* note 51, at 957-58.

cause of the injury. Proximate cause relies on the narrowing concept of foreseeability to achieve this end. A defendant is not liable for his careless conduct if harming the particular plaintiff was "unforeseeable." A defendant, however, could engage in the same careless conduct and be subject to unlimited damages if the initial harm to the plaintiff was foreseeable.[116] More particularly, the law would hold a man who negligently bumps his car into another liable for minor physical injuries resulting from the bump because jolting someone in the car is foreseeable. But relying on a proximate cause analysis, the defendant would not be liable for the death of a man standing next to a parked car who died as a result of the defendant negligently crashing into the trunk of the car and igniting a gas can inside of it because this harm was unforeseeable.

As Dobbs writes, proximate cause is among those rules that "seek to impose limits on liability for conduct that would otherwise be considered negligent."[117] The harsh reality is that "the line against liability must be drawn somewhere and . . . proximate cause rules reflect the effort courts make to draw that line."[118] The courts draw that line based on social objectives and utility. Thus, proximate cause is inherently a policy question of what the scope of a person's liability "should be," not whether the person was at fault.[119] In short, the basic standards in tort law's major category of negligence demonstrate that individual fault, even if it could be fairly said to exist, is not determinative of liability. Courts are willing to disregard a defendant's fault and alleviate liability in some instances and, in others, to impose liability notwithstanding the lack of subjective culpability or "fault."

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116. For instance, a simple car accident could lead to liability for the accident itself, lost wages of a corporate executive, and loss of consortium, among other things.

117. DOBBS, *supra* note 31, at 443 n.2.

118. *Id.* at 445. Dobbs points out that proximate cause can be conceived of as more than merely a practical limitation. *Id.* at 446. Judgments about proximate cause are also an attempt to "limit liability to the reasons for imposing liability in the first place" and, hence, are a mere corollary to negligence rules. *Id.* However, that rationalization can quickly become circular when one probes the notion that proximate cause is simply an indirect mechanism for establishing no duty where a duty would otherwise exist. *See* Rabin, *supra* note 51, at 957; *see also id.* at 936-49 (discussing various indirect measures by which to establish no duty). Consequently, proximate cause can shape what one's duty is or is not.

119. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("[Proximate cause means] that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

3. Exceptions to the Duty of Reasonable Care

Finally, even when all the above elements of negligence are met, courts are still willing to disregard the negligent or "faulty" conduct of certain classes of defendants. The most prominent example of this exception to negligence (and some intentional tort rules) is governmental immunity.[120] Courts and commentators attempt to rationalize the exception by articulating government immunity as merely a formalization of the traditional rule that a government or monarchy has no legal duty toward citizens and, hence, no duty that it can breach or discharge negligently.[121] However, that the rule is founded on tradition does not distinguish its continuation from any other exception, particularly in light of a purported all-encompassing standard of care that negligence is intended to embody. The elimination of liability for negligent conduct, whatever the reason, is nothing less than an exemption and a divergence from the duty to exercise reasonable care.

The application of general negligence rules to any number of government actions makes this clear. For instance, consider a police department that tells a homeowner to lock himself in the basement during a robbery because it is dispatching officers immediately, but never actually does. The department is no less negligent when that owner is killed than is the landlord who tells a renter the same, but does not bother to call the police at all. Yet, governmental immunity would exclude liability against the police department, while liability is imposed on the landlord.[122] Although more curtailed now, the law has also recognized similar immunities for the negligent activities of charitable organizations.[123] Thus, the availability of immunities to eliminate liability for negligent conduct again demonstrates that

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120. In fact, the distinction between governmental immunity and privilege is largely one of semantics today. A privilege formerly meant that, based on the circumstances, the activity was nontortious, whereas the immunity allowed that the conduct was tortious, but the immunity simply defeated liability. *See, e.g.*, DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 82-100 (5th ed. 2005) (analyzing defenses to intentional torts as privileges that justify the defendants' particular conduct); RICHARD A. EPSTEIN, TORTS 637 (1999) (using the terms "privilege" and "immunity" interchangeably); *see also id.* at 611 (contrasting between defenses or privileges based on a defendant's conduct and immunities that simply excuse a defendant for his tortuous conduct).

121. Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1349-50 (2002) (discussing Comm'rs of State Ins. Fund v. United States, 72 F. Supp. 549, 551 (S.D.N.Y. 1947), which indicated that the plaintiff's case did not lack evidence of negligence, but was doomed by the fact that the defendant was the United States itself, and because of the policy of sovereign immunity).

122. *See, e.g.*, De Long v. County of Erie, 457 N.E.2d 717 (N.Y. 1983).

123. *See* 42 U.S.C. § 14503 (2006).

fault is neither determinative of liability, nor a normative concept in tort.

Traditionally, the courts also carved out an expansive divergence from negligence for careless landowners. From the outset of negligence, courts crafted legalisms to hold landowners blameless for their negligence. In particular, courts categorized entrants upon an owner's land as invitees, licensees, or trespassers.[124] Owners owed invitees a duty of reasonable care, but an owner needed only to avoid intentional, wanton, and willful conduct toward licensees—possibly the most common category—and trespassers.[125] Thus, although an application of negligence standards might indicate that an owner was at fault in injuring a licensee, courts excused the owner from liability.[126] In effect, the right and privilege of landowners to use their property as they saw fit superseded the duty of reasonable care,[127] again demonstrating that neither fault, intent, negligence, nor any other standard is a normative measure of whether to impose liability. Rather, as with immunities and other divergences discussed above, the leniency toward landowners demonstrates that considerations other than fault account for why the law does or does not impose liability in various contexts.

Once one understands that negligence is not a reflection of fault, it becomes difficult to determine where liability should begin or end. As Robert Rabin's scholarship on the fault principle reveals, even the most esteemed tort commentators have struggled to establish why civil liability should be limited only to negligent acts.[128] For example, Rabin finds that Holmes essentially conceded the irrelevance of fault, as Holmes's justification for the limitation of liability to negligence was simply that the limitation was necessary to encourage and protect freedom of action, and minimize the law's intrusion.[129] This reasoning is questionable. When economic incentives are accounted for, liability based on negligence and strict liability are the same in terms of their capacity to change or infringe on freedom of action.[130]

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124. *See, e.g.*, Gladon v. Greater Cleveland Reg'l Transit Auth., 662 N.E.2d 287, 291 (Ohio 1996). As to trespassers and licensees, the owner's only duty is to refrain from willful, wanton, or reckless conduct that is likely to injure. *Id.* at 293. The owner has no duty to anticipate or prevent the presence of licencees or trespassers, or dangers to them. *Id.* Only as to invitees is there any duty of reasonable care. *Id.*

125. *Id.* at 293.

126. Moreover, this was the case even though the landowner was in a better position than the licensee to protect against the harm that the licensee suffered. *See* Rabin *supra* note 51, at 934-35 (discussing Rowland v. Christian, 443 P.2d 561 (Cal. 1968)).

127. Rabin, *supra* note 51, at 935-36.

128. *Id.* at 928-33.

129. *Id.* at 929-30.

130. *See id.*

With both, the defendant will only alter his conduct to avoid harm when the cost of doing so is marginally less than compensating victims for the harm.[131] Realizing the odd similarity between the purportedly distinct concepts of negligence and strict liability, Guido Calabresi and Jon Hirschoff, in effect, push the irrelevance of fault one step further.[132] They argue that the question in tort is not whether imposing strict liability is appropriate; "[t]he issue is just where strict liability should stop."[133]

The answer is that liability simply starts and stops, not where fault dictates, but where society dictates. Holmes justifies using objective, yet arbitrary, standards as a basis for liability as being "necessary to the general welfare."[134] More generally, tort liability begins and ends based upon our social objectives, not the false notion that some inherent fault or responsibility exists.[135] Thus, throughout the history of torts, "fault," negligence, and intent have all been ignored, adopted, limited, or excepted when necessary to further some other goal.[136] Negligence, intent, or any other concept of "fault" one might employ are but means to some other end, rather than independently significant principles to which we must adhere. The only remaining issue is to ascertain what ends these means are intended to serve.

III. TORT LIABILITY STANDARDS AS MEANS TO ACHIEVE SOCIETAL GOALS

Our societal values, goals, and purposes explain our choices in regard to liability standards. Of course, no single value or goal explains the adoption of all standards because our values and goals are not static. They have varied across time and context, inevitably producing as many bases of liability as there are different values, purposes, or notions of justice.[137] The consistent and constant pursuit of a social value or goal does, however, explain why our courts or legislatures ultimately adopt a particular standard.[138] Thus, the applicable liability standard in a particular context is a reflection of

131. *Id.* at 931.

132. *See* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

133. *Id.* at 1056.

134. HOLMES, *supra* note 70, at 108.

135. *See* Rabin, *supra* note 51, at 928-33.

136. *See id.*

137. *See* ROBERT L. RABIN, PERSPECTIVES ON TORT LAW 255 (4th ed. 1995).

138. *See* Simons, *supra* note 102, at 522 (concluding, in an analysis of mens rea and fault concepts across all areas of the law, that "the normative purposes of legal rules generally provide the most compelling explanation for the law's choice of particular mental state categories . . . .").

the goal or value that society seeks, rather than some inherent notion of fault or blameworthiness. Moreover, a full understanding of the reasons for choosing a particular fault or liability standard can only come from exploring the social values, purposes, and concepts of fairness or justice that motivate the choice.[139] In short, tort liability standards are an attempt to order society as we see fit or as times necessitate.[140]

In shaping tort standards, we have an expectation of achieving a given goal, and a particular mens rea, fault, or liability standard has worth only insofar as it achieves that goal.[141] Hence, the correct approach to evaluating a particular standard is not whether it is a "good" standard or reflects the blame, fault, or culpability of a defendant, but whether it produces results consistent with the desired social end. When a particular standard does not produce those desired results, the standard is simply modified or an exception is created.

This lesson has been at play throughout the history of torts. The general rules of negligence and intent, for instance, were originally constructed on social norms. Battery is measured from what a reasonable person would find offensive, which is a reflection of social norms.[142] Likewise, in its earliest forms, negligence was determined largely by social customs.[143] The breach of customs, which evolve through a process of accommodating social acceptability and efficiency, was a basis for deeming conduct negligent.[144] However, no rule of intent or negligence perfectly serves social ends and, thus, the rules have exceptions and defenses. Like the general rule itself, the courts have consistently recognized exceptions when necessary to permit socially valuable or acceptable behavior.[145]

The evolution of products liability also demonstrates the creation and subsequent modification of liability rules to serve social goals. Once injury prevention became a primary goal of tort liability for consumer products, and negligence standards proved insufficient to ensure that end,[146] the liability standard moved away from an

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139. RABIN, *supra* note 137, at 255.

140. *See supra* Part II. As a leading commentator has noted, what is often missing from torts courses is an analysis and discussion of the "historical, moral, and economic values that liability rules." RABIN, *supra* note 137, at xii.

141. *See* Simons, *supra* note 102, at 466.

142. *See* RESTATEMENT (SECOND) OF TORTS §§ 18-19 (1965).

143. *See id.* §§ 282-83.

144. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 39 (1972).

145. *See* Simons, *supra* note 102, at 493-94.

146. *See* Derrick Williams, *Secondhand Jurisprudence in Need of Legislative Repair: The Application of Strict Liability to Commercial Sellers of Used Goods*, 9 TEX. WESLEYAN L. REV. 255, 280 (2003).

inquiry of negligent conduct to one that focused primarily on harms.[147] By attaching liability based on harm, the law would encourage manufacturers to create safer products and, hence, further the goal of injury prevention.[148] Yet, the focus on harm eventually imposed too high a burden on business because it failed to account for the actual cost, and the potential impossibility or impracticability, of altering products.[149] Had the sole goal been injury *compensation*, the harm-focused rule would have remained appropriate, as the rule would have achieved no more or less than the goal. The harm-focused standard, however, imposed liability beyond what was necessary to further injury *prevention* because it compensated victims regardless of the safety alternatives that were available to manufacturers and retailers.

As a result, products liability reverted to a less aggressive standard that blended negligence concepts with the previous harm-focused standard. As discussed earlier, design defect analysis still begins with an assessment of the harm suffered by consumers, but the standards also include a cost-benefit analysis that only imposes liability when it makes technological and economic sense to do so.[150] Similarly, the failure to include a warning on a product initially rendered a product defective if a warning could have reduced or avoided a foreseeable harm.[151] This standard created the wide potential for liability. Thus, to avoid liability, manufacturers began offering extensive warnings of any and all possible dangers

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> Forcing injured consumers to sue under the negligence theory would inevitably lead to less product liability suits in this area . . . The duty of reasonable care does not deter used goods dealers from selling defective products, and even if it did, used goods dealers can relatively easily prove that they satisfied the duty . . . .

Id.

147. *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Traynor, J., concurring) (stating that the costs of injury from defective consumer products should be borne by manufacturers irrespective of negligent conduct).

148. Williams, *supra* note 146, at 280 (discussing how strict liability for harm better protects consumers from injury from defective secondhand commercial products).

149. *Id.* at 257 ("[A]pplying strict liability to commercial sellers of used products, while facilitating compensation to injured victims, poses substantial problems for commercial sellers who are unable to pay large damage awards and implement procedures to prevent product-related injuries in the future.").

150. *See, e.g.*, DOBBS, *supra* note 31, at 997-99 (explaining what a plaintiff must prove to establish a design defect); Honda of Am. Mfg. Inc. v. Norman, 104 S.W.3d 600 (Tex. App. 2003).

151. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998); *see also* Payne v. Soft Sheen Prods., Inc., 486 A.2d 712, 725-26 (D.C. 1985) ("Under both a negligence and a strict liability theory, the manufacturer has an obligation to anticipate reasonably foreseeable risks of harm arising in the course of proper use, and to warn of those risks.") (citations omitted).

associated with a given product, regardless of the likelihood or severity of injury.[152] These extensive warnings rendered many important warnings useless because the product or warning pamphlets became so cluttered that consumers no longer bothered to read them in their entirety or were unable to identify the comparative significance of warnings.[153] Consequently, the standards for warning defects were narrowed to reduce manufacturers' incentives for cluttering their products with warnings and to increase their incentive for communicating effective warnings.[154] Again, the desired result was to increase injury prevention. In short, the courts adopted, amended, and applied products liability rules, not based on an inherent notion of fault or culpability, but based on what rules produced results consistent with societal goals.

One of the most dominant goals of tort law has been to foster social utility.[155] Fostering social utility entails producing results or systems that are the most beneficial for the most people. As Dobbs states, "it bases tort law on social policy or a good-for-all-of-us view."[156] This is in contrast to a legal system that seeks to produce justice for the individual, regardless of whether it produces efficient results overall.[157] To produce "good" results for society as a whole, social utility theories eschew rules that merely address the interests of individuals.

The means of achieving social utility, of course, vary. Creating a set of rules that effectively spreads the cost-burden of injuries across industries and communities rather than individuals, to make compensating all victims affordable, is one way of achieving social utility.[158] Using the law to deter certain conduct, encourage other

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152. *See* Mark R. Lehto & James M. Miller, *The Effectiveness of Warning Labels, in* PRODUCT LIABILITY 1989: WARNINGS, INSTRUCTIONS, AND RECALLS 169 (PLI Litig. & Admin. Practice, Course Handbook Series No. 379, 1989).

153. Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards,* 11 YALE J. ON REG. 293, 381-91 (1994) (discussing the possibility that the proliferation of warnings in general may weaken the impact of truly necessary warnings).

154. Schwartz, *supra* note 84, at 687-91.

155. *See, e.g.*, Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims,* 36 ARIZ. ST. L.J. 805, 878 (2004) (noting social utility as one of two dominant purposes of tort); Richard Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law,* 10 J. LEG. STUDIES 187 (1981) (positing social utility as a dominant purpose of tort law).

156. DOBBS, *supra* note 31, at 12.

157. *Id.*

158. Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs,* 78 HARV. L. REV. 713, 714 (1965).

> "[C]ompensation" as an aim means only that it is deemed more desirable for persons other than the injured to pay the costs of the injury. This is because if many pay the cost of an accident rather than one . . . the social dislocation

conduct, and consequently prevent future injuries is another way of achieving social utility. In either instance, the law's purpose would not be to identify "fault," but to increase safety and compensate harm. If the law only punishes "fault," some injuries that could have been prevented will continue to occur because the defendant has no incentive to alter his conduct.[159] Moreover, individuals will be left to shoulder the entire burden of the harm.

By balancing the burdens and benefits, many tort analyses imbed the pursuit of social utility and goals into the very fabric of their liability standards. The weighing of costs and burdens associated with negligence and products liability standards are inherently a method through which the law balances a diverse and competing set of social, economic, and political goals.[160] A decision in any given case prefers one interest over another or requires one to mitigate its effects on the other. However, social utility and values are also a factor in torts that do not explicitly balance burdens and benefits.

For instance, on a less obvious level, the liability of land owners has varied with numerous attempts to balance the interests of land rights and the harm to third parties. Historically, court decisions reflected the notion that furthering land interests was a foremost social value by determining that a land owner's interest trumped a court's compliance with the negligence standard.[161] In addition, the exceptions to a land owner's duties could vary depending on geographic location. Geographic variations are consistent with a balancing of interests theory because land was suited, or ill-suited, for particular uses depending on geographic locations, which caused land's value and utility to vary.[162] Thus, a land owner's duty in

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> costs of the accident may be reduced; this is the basis of the theory of loss spreading. . . . For when those who are "more able to pay" pay, we believe that fewer secondary undesirable effects will occur.

Id.

159. Interestingly, implicit in these foregoing concepts of utility is also an even deeper value-based decision about whom should benefit from the law and how much. As Calabresi and Hirschoff point out in their analysis of the development of strict liability, societal preferences over how to distribute wealth among groups are "crucial to the choice of liability rules." Calabresi & Hirschoff, *supra* note 132, at 1080. For instance, modern products liability and worker's compensation law is a decision regarding the relative powerlessness of average consumers and workers, and an effort to shift the power of the law to their advantage.

160. *See* Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Tort*, 31 LA. L. REV 1, 27 (1970).

161. *See supra* notes 124-27.

162. For example, Missouri has enacted laws requiring that all fields where animals are kept be fenced and has defined what constitutes a "fence" under the statue. MO. REV. STAT. §§ 272.010, 272.020 (2007). Similar laws have been in place since 1808 to protect landowners from damage caused by trespassing cattle and other grazing

regard to fencing in his animals in rural states would differ from more urbanized or industrial states.

The modern willingness to impose a higher duty of care on land owners reflects a change in the concept of social utility from one grounded in land interests to one premised, among other things, on the need to reduce avoidable injuries.[163] In the end, a concept of social utility, whatever it may be, always has the final say in dictating liability standards. The varying factor is what specific social utility concept we wish to pursue in a given context, which is always a reflection of our judgment of how best to order society.

In fact, the entire evolution of tort law is but one long example of liability shifting to promote social values or needs, however one chooses to define them. The current spectrum of tort liability and the variance of liability across time are explained by tort's efforts to respond to social needs. Almost every major expansion or contraction of tort law reinforces this notion.

Tort, as an independent body of law, grew out of property and contract law because they were unable to effectively address the increasing complexities and injuries in society.[164] Likewise, the earliest form of tort was disinterested in identifying and correcting what one might call fault; rather, its purpose was to ward off vigilantism, feuds, and revenge for harms one might suffer.[165] Thus, tort liability was evoked to serve a social end.[166]

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animals. Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change*, 63 MO. L. REV. 537, 540 (1998). Similarly, Iowa maintains a fence law requiring that "[t]he respective owners of adjoining tracts of land shall upon written request of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year." IOWA CODE § 359A.1A (2007); *see also* David S. Steward, Note, *Iowa Agricultural Fence Law: Good Fences Make Good Neighbors*, 43 DRAKE L. REV. 709 (1995) (discussing the theories behind Iowa fence laws). However, some states, seeing value in the free grazing of animals, require land owners to fence animals *out* if they do not want animals on their land. COLO. REV. STAT. § 35-46-101 (2007); DOBBS, *supra* note 31, at 943.

163. *See, e.g.*, William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980*, 47 BUFF. L. REV. 117, 194-202 (1999).

164. *See generally* Rabin, *supra* note 51, at 945; DOBBS, *supra* note 31, at 5-8 (discussing the relationship of torts to contract and property).

165. HOLMES, *supra* note 70, at 34.

166. Holmes did argue that strict liability without fault offended his sense of justice. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1733 (1981). Others likewise added that strict liability was immoral. *Id.* at 1734. Such critiques suggest that, at least for some, morality is intertwined with tort liability. Yet, Holmes admittedly found it difficult to establish any norm at work behind tort liability, much less a moral principle. HOLMES, *supra* note 70, at 77-80. Instead, it seems more accurate to recognize that some of our social goals, such as fairness, reparation for harm, or reasonableness, intersect with morality and, hence, might appear as moral or normative fault principles. However,

This trend resurfaced over and over again. Tort expanded beyond trespass and strict liability to include "trespass on the case" because the initial causes of action were too simplistic to address the varying ways in which people injure one another.[167] Tort also created arbitrary expansions of liability to impose absolute duties on "common carriers" and those engaging in occupations termed "public occupations."[168] Because society and its members placed significant trust in these entities and industries, the law had to ensure society would be protected against the injuries they caused.

The next major expansion occurred in the form of negligence, significantly increasing the spectrum of compensable harms while at the same time requiring some limitation so as not to overly burden infant industry.[169] This limitation was achieved by recognizing various defenses, such as assumption of the risk, no duty, contributory negligence, and the fellow servant rule.[170] However, tort was forced to expand again when society began consuming more

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this intersection does not establish that any moral principle exists. Thus, the argument that some forms of liability offend morals may be a more accurate critique than that the liability offends reasonableness or fairness, for instance. *See, e.g.*, George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539-40 (1972) (arguing that reciprocity and reasonableness correlate with the moral foundation of law).

167. Malone, *supra* note 160, at 19-22; *see also* DOBBS, *supra* note 31, at 259-62.

168. *See, e.g.*, Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1145-48 (1990) (discussing the common law origins of, and policy justifications for, imposing strict liability on common carriers); Rabin, *supra* note 51, at 944 (discussing the absolute duty of innkeepers and carriers, who provided services to the public, to insure against injury to persons and goods).

169. *See generally* DOBBS, *supra* note 31, at 263-68; Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403 (2000) (suggesting that as a response to increased social concerns for fairness and cost-spreading, the twentieth century saw an increase in the protections and remedies available to negligence victims); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 519 (2003) (suggesting that twentieth-century changes in tort law were due to political and social influences stemming from a growth in the industrial economy, emphasizing physical injury and deemphasizing traditional torts like trespass).

170. *See, e.g.*, Thomas v. German Gen. Benevolence Soc'y, 141 P. 1186 (Ca. 1914) (applying the fellow servant rule to bar recovery); Sears, Roebuck & Co. v. Geiger, 167 So. 658 (Fla. 1936) (discussing the origins of contributory negligence as a bar to all recovery); Yania v. Bigan, 155 A.2d 343 (Pa. 1959) (rejecting liability because defendant owed no duty to plaintiff); Bolen v. Strange, 6 S.E.2d 466 (S.C. 1939) (relying on assumption of the risk to bar recovery). The courts also simply refused to recognize certain claims for emotional harm, even when the defendant had acted negligently or intentionally. *See, e.g.*, Mitchell v. Rochester Ry. Co., 45 N.E. 354 (N.Y. 1896). Remnants of such limitations continue to persist today. *See, e.g.*, City of Mobile v. Taylor, 938 So. 2d 407 (Ala. Civ. App. 2005); Grube v. Union Pacific R.R. Co., 886 P.2d 845 (Kan. 1994); Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764 (Minn. 2005); Jun Chi Guan v. Tuscan Dairy Farms, 24 A.D.3d 725 (N.Y. App. Div. 2005); Smalley v. Friedman, Damiano & Smith Co., 873 N.E.2d 331 (Ohio Ct. App. 2007).

manufactured goods and the danger of those goods increased to significant levels. In regard to consumer products, tort dispensed with the need to prove negligence, replacing it with more plaintiff-friendly standards.[171] During recent decades, courts and legislatures also curtailed defendants' ability to use contributory negligence and the above-discussed defenses as means by which to defeat liability.[172]

All of these changes revolved around social forces and needs amidst unique historical contexts. As society changed, so did its needs, dangers, cultural customs, and goals. Tort law simply followed these changes, attempting to create standards that reflected the varying concepts of social value and utility. Ranging from maintaining basic civility, protecting private property, and encouraging economic expansion to compensating victims and spreading costs, the goals of tort law reflect the constant attempt to use tort liability to achieve a historically contingent notion of social utility, progress, or efficiency.

IV. CONSTITUTIONAL AND ANTIDISCRIMINATION LIABILITY STANDARDS

The Supreme Court's intentional discrimination standard is, by many accounts, the most significant barrier to achieving racial equity through legal advocacy.[173] If Congress revisits the issues of discrimination and equality anytime soon, the debate will likely revolve around whether to replace or amend the intent doctrine with a more plaintiff-friendly liability standard.[174] The lessons provided by tort law should frame this discussion and help remove it from debates over wrongfulness, bias, or "fault."[175] Before applying the tort framework to antidiscrimination, however, it is helpful to understand how the Court has approached liability standards for other constitutional torts.

This context will provide further insight into the development of the intent standard in the areas of equal protection and antidiscrimination. In turn, this will provide a more solid basis upon which to evaluate the standard. With due process, for instance, the

171. *See generally* Richard L. Cupp, Jr., *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 889-95 (2002).

172. *See* DOBBS, *supra* note 31, at 504 ("By the 1980s, only four states—Alabama, Maryland, North Carolina, and Virginia—had failed to adopt comparative negligence rules. The overwhelming majority of American states thus now follow the general system adopted in other common law and in the major civil law countries.").

173. *See, e.g.*, Flagg, *supra* note 22; Freeman, *supra* note 22; Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 323 (1987).

174. *See supra* note 17 and accompanying text (discussing the proposed Civil Rights Act of 2004 and its inclusion of disparate impact as the proper proof of discrimination).

175. *See* discussion *supra* Part III.

Court is rather explicit about the goals and results that its jurisprudence should produce.[176] In contrast, the Court is far from explicit in the areas of equal protection and antidiscrimination. Nonetheless, careful analysis can reveal some implicit goals.[177] One can then filter those goals through a tort framework to assess whether the intent standard is, in fact, an appropriate liability standard for antidiscrimination statutes.

A. The Context and Evolution of the Intentional Discrimination Standard

The mens rea, fault, and liability standards for violations of constitutional and civil rights vary, although across a smaller spectrum than in torts. Few, if any, constitutional torts impose liability under a plaintiff-friendly standard resembling that of strict liability.[178] Moreover, some require "higher" mens rea requirements, like those found at the opposite end of the torts spectrum.[179] To demonstrate a denial of equal protection based on race, for instance, a plaintiff must prove that the defendant acted with a specifically motivated intent,[180] which, in terms of hierarchy, rests on a level similar to the tort standards of reckless and wanton conduct or motive.[181] Other constitutional claims operate on a median-level standard similar to the negligence standard of torts. For instance, the Court has held that, under certain circumstances, establishing a denial of due process would only require a form of negligent conduct.[182] When the Court revisited the standard in later cases, it elevated it slightly to deliberate indifference.[183]

The Court's tendency in constitutional torts has been to adopt stricter standards and limit liability. For instance, a police department may be negligent in causing harm to a prisoner, but a

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176. *See* discussion *infra* Part IV.A.

177. *See* discussion *infra* Part IV.B.

178. *But see, e.g.*, Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 211 n.125 (2005).

179. *See generally* Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZ. L. REV. 749 (2006).

180. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp, 429 U.S. 252, 265-66 (1977) (requiring "invidious discriminatory purpose [as] a motivating factor").

181. *See* Simons, *supra* note 102, at 467.

182. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (holding that negligent conduct, such as the loss of a prisoner's hobby kit, could serve as the basis for a procedural due process claim). *But see* Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (holding that negligent conduct is not sufficient to serve as a basis for a procedural or substantive due process claim).

183. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (recognizing the application of deliberate indifference in due process).

denial of due process does not occur unless the department is deliberately indifferent to the harm.[184] The Court has rationalized limiting liability in this way as being necessary to preserve deference and respect toward municipalities and to avoid imposing affirmative duties on them.[185] Similarly, the Court's adoption of an intent standard in discrimination elevated the mens rea standard above the previous natural and foreseeable consequences standard and, consequently, severely limited the potential liability of government.[186]

In regard to most constitutional and statutory civil rights, the Court has been transparent in articulating goals and analyzing how a standard does or does not achieve these goals. For instance, the Court reasoned that the original intent of the Due Process Clause, a major category of constitutional tort law, was only to prevent those instances where one is "deprived" of due process, which entails an affirmative deprivation of rights or abuse of power.[187] The Court has also explained why a negligence standard is not appropriately calibrated to those goals and how a different standard would be.[188] Recognizing a claim for a mere negligent deprivation would impose liability for unintended harms and losses, pose the risk of trivializing the Constitution, and make the Constitution a font of state law rather than a shield against serious state-imposed injuries.[189] Likewise, lower standards could permit government liability even when the connection between the state and the injured person is limited, and potentially stretch beyond preventing governmental deprivations of due process.[190] In this respect, the Court's analysis is squarely focused on the results and whether they further the goals of due process, which reflects a torts rather than fault-based approach to setting standards. Unfortunately, the Court's precedent has not offered this level of transparency in regard to the intentional discrimination standard.

The Court first implemented the intentional race discrimination standard in equal protection cases and later summarily applied the same standard to statutory claims of discrimination under Title VI of

184. *See, e.g.*, Waddell v. Hendry County Sheriff's Office, 329 F.3d 1300, 1306 & n.5, 1309 (11th Cir. 2003) ("In this non-custodial setting, a substantive due process violation would, at the very least, require a showing of deliberate indifference to an extremely great risk of serious injury to someone in Plaintiffs' position.").

185. *See, e.g., Daniels*, 474 U.S. at 332; Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694-95 (1978).

186. Simons, *supra* note 102, at 524.

187. *Daniels*, 474 U.S. at 330-31.

188. *Id.*

189. *Id.* at 328-32.

190. *Id.* at 332-33.

the Civil Rights Act of 1964—the major vehicle used by plaintiffs to challenge acts of public or publicly funded entities.[191] The Court's decisions do not explain the goals of equal protection or Title VI, or why the intent standard is appropriate. Yet, the Court has been particularly concerned with the results that the intent and other standards would produce. This suggests that, although not articulated, the Court did have a particular goal, value, or interest that it sought to pursue. In this respect, it adheres to a general torts framework in adopting standards. Nevertheless, the Court has incorrectly placed notions of fault or wrongfulness at odds with this torts framework, and ultimately produced results that may even be in conflict with its own goals. Moreover, insofar as the Court is pursuing its own agenda or goals in antidiscrimination law, it has usurped the judgment of Congress and the populace. Therefore, the time has come for the president, Congress, and country to act to correct the contradictions that have plagued the Court.

1. *Keyes v. School District No. 1*

The Court's initial adoption of the intent standard in *Keyes v. School District No. 1*[192] was conclusory at best. The Court was not explicit in its adoption of the intent doctrine as a general constitutional standard, but the Court's later opinions cite to *Keyes* as a foundation for the intent standard.

Keyes was a school desegregation case in which the Court announced, for the first time and without explanation, that "plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."[193] The state must possess a "purpose or intent to segregate," rather than simply engage in intentional action that results in segregation.[194] These sparse statements were the full extent of the Court's explanation of the standard. The Court did not provide a rationale, but flatly asserted that this distinction had been an implicit deciding factor in *Swann v. Charlotte-Mecklenberg Board of Education*.[195] Thus, the standard simply is.

The Court's failure to address results and goals in adopting the standard is problematic because of its unquestionably massive implications. Justice Powell, recognized the import of the standard and critiqued its adoption at length.[196] He argued that only by

191. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
192. 413 U.S. 189 (1973).
193. *Id.* at 198.
194. *Id.* at 208.
195. *Id.*
196. *Id.* at 217-53 (Powell, J., concurring in part and dissenting in part).

misreading precedent could the majority extrapolate the notion that the Fourteenth Amendment did not reach de facto segregation.[197] By his account, the Court's previous decisions had imposed an affirmative duty on all schools to remedy segregation, including that "which in large part did *not* result from historic, state-imposed *de jure* segregation,"[198] because "if one goes back far enough, it is probable that all racial segregation, wherever occurring and whether or not confined to the schools, has at some time been supported or maintained by government action."[199] Moreover, as "creatures of the State, . . . whether the [school] segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle."[200]

Justice Powell also critiqued the intent standard's capacity to produce results that were commensurate with the constitutional right at stake.[201] In his eyes, the plaintiffs had "the right not to be compelled by state action to attend a segregated school system."[202] This necessarily includes the opportunity to receive an equal educational opportunity in an integrated school system.[203] The Court's standard placed no significance on achieving this result and, instead, proceeded with the implicit notion that fault inherently exists in de jure segregation and does not exist in de facto segregation. When viewed from the perspective of results, however, this distinction is irrelevant because both forms of segregation are countenanced by state action and have the same effect on children regardless of motive.[204] The majority opinion, nonetheless, permited schools to subject children to the effects of de facto segregation, while the Court would ameliorate those effects when they result from de jure segregation. In this respect, Powell perceived the majority's intent standard as devaluing the interests of black children: "[I]f our national concern is for those who attend [segregated] schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta."[205]

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197. *Id.* at 222.

198. *Id.*

199. *Id.* at 228 n.12.

200. *Id.* at 227.

201. *Id.* at 225-26.

202. *Id.* at 225.

203. *Id.* at 225-26.

204. *Id.* at 234 n.16.

205. *Id.* at 219; *see also* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 265 (1979) (providing a more lengthy explanation for Powell's personal objections to the distinction and the earlier, more caustic versions of his opinion).

Finally, even assuming the Court's distinction was theoretically justified, Powell queried whether it could achieve the results for which it was purportedly designed. In his view, even when a segregative purpose is present, "courts cannot fairly resolve" the practical difficulty of substantiating subjective discrimination.[206] Instead, courts will engage in "murky, subjective judgments,"[207] leaving "inadequate assurance that minority children will not be short-changed in the decisions of those entrusted with the nondiscriminatory operation of our public schools."[208]

In short, Justice Powell argued that the standard simply does not work effectively and cannot produce results consistent with equal protection. He suggested that the primary questions to be examined by the Court should be what results the standard produces and how they affect the constitutional interests at stake. When balancing the interests at stake, he found that an appropriate equal protection standard would assess whether a state's actions had an integrative effect.[209] Such a standard would look to whether the state had contributed to the maintenance of segregation and, thus, met the state action requirement, rather than whether segregation was its purpose. Yet, the majority ignored the effect, focusing only on the subjective intent.

2. *Washington v. Davis*

Relying on *Keyes*, the Court in *Washington v. Davis*[210] adopted the intent doctrine as the standard for assessing all violations of equal protection based on race.[211] In *Davis*, the Court failed to explain why the intent doctrine is the appropriate standard, but did provide some analysis of the standard's requirements. Again, it proceeded with the conclusory notion that the standard simply "is" because it purportedly always "has" been. The Court stated that "[t]he central purpose of the Equal Protection Clause is the prevention of official conduct discriminating on the basis of race."[212]

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206. *Keyes*, 413 U.S. at 225.

207. *Id.* at 227.

208. *Id.*

209. *Id.*

210. 426 U.S. 229 (1976).

211. *Davis* involved the Fifth Amendment guarantee of equal protection by the federal government. *See id.* However, the Court naturally applied the intent doctrine one year later in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), a Fourteenth Amendment case.

212. *Davis*, 426 U.S. at 239. The Court also reasoned that the Due Process Clause of the Fifth Amendment has the same purpose. *Id.*

It narrowed the meaning of discrimination further to include only invidious, purposeful, or intentional discrimination.[213]

The Fourteenth Amendment, however, does not contain the word "discrimination." The amendment's language is broader, guaranteeing that no state shall deny an individual equal protection under the law.[214] No further narrowing concepts or explanations are included.[215] Therefore, to justify narrowing equal protection to a prohibition solely on discrimination, and invidious discrimination in particular, the Court focused its analysis exclusively on precedent involving invidious discrimination.[216] With the exception of *Keyes*, however, the precedent used by the Court did not predicate its analysis on the existence of invidious discrimination.[217] Thus, *Davis* provides no more of a rationale than any other case.

The Court did note that several court of appeals decisions "impressively demonstrate that there is another side to the issue; but . . . we are in disagreement."[218] Unfortunately, the Court's responsive disagreement lacked depth and attacked a straw man. In particular, the Court wrote that it has "difficulty understanding how a law" neutral on its face, but having a racially disparate impact, "is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws.'"[219] The Court asserted that it cannot comprehend how the law in *Davis* could be discriminatory when the government's stated purpose in enacting the policy was upgrading the abilities of its employees.[220]

This approach by the Court conceptualized an equal protection claim as having two requirements, rather than one. In addition to requiring the plaintiff to demonstrate an unequal opportunity or benefit based on race, the Court required the plaintiff to demonstrate a discriminatory purpose behind the inequity. Other courts and commentators, however, do not find that the Court's invidious discrimination requirement is necessary. Rather, a plaintiff need only show that he was denied an equal opportunity or benefit based on race.[221] They would assert that, similar to the point made earlier

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213. *Id.* at 240

214. U.S. CONST. amend. XIV, § 1.

215. For a more in-depth discussion of the Equal Protection Clause's language, meaning, and relevance to discrimination, see Black, *supra* note 32.

216. *Davis*, 426 U.S. at 239-41.

217. *See* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1565 (2004).

218. *Davis*, 426 U.S. at 245.

219. *Id.*

220. *Id.* at 246.

221. *Id.* at 242-43 (citing Palmer v. Thompson, 403 U.S. 217 (1971); Wright v. Council of Emporia, 407 U.S. 451 (1972)); *see also Davis*, 426 U.S. at 244 n.11.

regarding due process, a denial of equal protection can occur notwithstanding the type of mens rea that accompanies it.[222] Thus, to fairly respond to the opposing argument, the Court would have to relinquish, at least temporarily, its assumption that discriminatory purpose is necessary to sustain an equal protection claim. It does not.

Second, the Court misstated, rather than responded to, the opposing argument. The opposing argument has never been that disparate impact alone should invalidate governmental action. Evidence of disparate impact would merely require the government to articulate a legitimate and necessary reason for employing a criterion that causes disparate impact, particularly when a less discriminatory alternative is available.[223] Only when the impact is so stark that no reason explains it other than race would impact alone invalidate the law, and even the Court's intent cases concede liability on this point.[224] But the Court ignored the more nuanced application of the impact standard in other circumstances and cautioned that the impact standard would summarily invalidate a host of laws.[225] In short, the Court had "difficulty understanding" the standard because it did not bother to address it properly.

Placing the doctrinal issue aside, the Court did provide two primary objections to a disparate impact standard, both of which relate to the results that standard would produce. As discussed throughout this Article, the selection and appropriateness of a given standard are measured by whether the results it would produce are consistent with social goals, not an immutable concept of fault. The Court acted consistently with this principle by focusing on results. First, the Court concluded that a disparate impact standard would result in "a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution."[226] Second, a disparate impact standard "would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes."[227]

Although the Court was appropriately concerned with results, it did not explain how or why such results would be inconsistent with the goals of equal protection. In this respect, the Court's focus on

222. *See supra* notes 188-91 and accompanying text.

223. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

224. *Id.* at 266 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

225. *See Davis*, 426 U.S. at 245.

226. *Id.* at 247.

227. *Id.* at 248.

results was not clearly connected to equal protection goals, which suggests that the preference for these results may be a value choice by the Court, rather than a constitutional imperative. The implicit indication is simply that the government's burden in applying an impact standard to justify its actions and the potential upheaval of the status quo outweighs, in the Court's estimation, the burden that the intent doctrine places on plaintiffs and the potential that discrimination might go unremedied.

3. *McCleskey v. Kemp*

The Court's opinion in *McCleskey v. Kemp*[228] further reflected a results- and value-oriented approach in its choice and application of standards. In *McCleskey*, a multivariable statistical analysis demonstrated that racial bias played a significant role in Georgia's death penalty system.[229] The Court did not question the statistics' validity, but dismissed their relevance because they did not conclusively demonstrate race played a role in McCleskey's particular case.[230] Recognizing that in other contexts similar statistics would shift the burden of proof to the state, the Court nonetheless saw "impropriety [in] requiring prosecutors to defend their decisions to seek death penalties."[231] Thus, the Court concluded that it must ensure that prosecutors retain "wide discretion."[232] Finally, the Court emphasized that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system" and would open the door to challenges of other criminal penalties as well.[233]

McCleskey's assertion, however, was not that disparate impact itself created a claim, but that these particular disparities demonstrate intentional discrimination.[234] Consequently, the Court's rejection of his claim is a further narrowing of the intent standard. Application of the Court's previous iterations of the intent standard would have warranted liability in *McCleskey*. However, recognizing this liability would, in the Court's appraisal, undermine the entire death penalty system and, quite possibly, other aspects of the criminal justice system.[235] Thus, the Court held that evidence of systemic or widespread intentional discrimination is insufficient.[236] A

228. 481 U.S. 279 (1987).
229. *Id.* at 286-87.
230. *Id.* at 292-97.
231. *Id.* at 296.
232. *Id.*
233. *Id.* at 314-15.
234. *Id.* at 291-92.
235. *See id.* at 314-15.
236. *Id.* at 292-94.

plaintiff must also demonstrate that discrimination occurred in his individual case, which cannot be accomplished through the use of statistics.[237] In fact, the Court required individualized evidence that would be unavailable absent admissions by the state.[238] The unfortunate effect of this requirement is to sanction widespread bias in the system.[239] In this respect, the Court's holding appears driven by a rejection of results that challenge the status quo, rather than by an application of the intent standard. Again, attention to results is appropriate, but the Court did not discuss those results in relation to the purpose or goals of equal protection; instead, it simply found them at odds with prosecutorial discretion and the penal system status quo. Consequently, even more clearly than in *Washington v. Davis*,[240] the Court's motivation in adopting the intent standard was the estimation that the burden of a more lenient standard on the status quo outweighs the burden and harm that the narrower intent standard imposes on minorities.

B. A Torts-Based Evaluation of Intent

From a tort liability framework, the most appropriate evaluation of the intent doctrine is whether it produces results that reflect the goals of equal protection and antidiscrimination legislation. As to this issue, the Court's first flaw is suggesting that fault is relevant.[241] The Court's analysis implicitly assumes that conscious racial animus or purpose correlates with a form of normative fault and, thus, justifies liability. Many previous critiques of the Court's racial equal protection jurisprudence miss the significance of this point; they fail to challenge the notion that there is some form of normative fault that equal protection should remedy.[242] Rather than challenging this

237. *Id.* at 293.

238. *Id.* at 324 (Brennan, J., dissenting) (noting that defendants challenging their death sentence must now prove "that impermissible considerations have actually infected sentencing decisions").

239. *See id.* at 320-22.

240. 426 U.S. 229 (1976).

241. Oppenheimer, *supra* note 23, at 925; Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 45 (2006) (concluding that courts have rejected disparate impact standards because "actions taken without a conscious intent to discriminate do not fit the paradigm of a fault-based understanding of 'discrimination'").

242. For instance, scholars make an important point when they demonstrate that most discrimination is a result of subconscious biases, but the thrust of their argument is still premised on a defendant having done something wrong: inappropriately relying on subconscious racial biases. *See generally* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995). *See also* Anita Bernstein, *Treating*

normative approach, critics would simply argue that fault is broader and includes unconscious bias and differential treatment.[243] Consequently, both the Court and its detractors premise liability on a defendant having done something "wrong."[244]

Even those who critique the intent standard for the results it produces do so from a normative or fault perspective, rather than based on the goals of equal protection or antidiscrimination.[245] Too often they fail to connect their critique of the results to an evaluation of the underlying goals the Court is pursuing. Many simply argue the Court's protection of the status quo or failure to eliminate racial segregation produces inequitable results.[246] The intent standard, like any other liability standard, however, is but a tool to achieve an end. The relevant question is whether a standard's results are consistent with the underlying law's goals and purpose. Consequently, the critique of the intent standard and its natural results, needs refocusing. The critique should first be directed at any inconsistency between the Court's assumed purpose of equal protection or antidiscrimination and the real purpose of equal protection and antidiscrimination.[247] However, insofar as the Court's goals of equal protection and antidiscrimination are legitimate, no basis to challenge the intent standard necessarily exists.

1. The Distraction of Fault/Morality in the Intentional Discrimination Standard

The Court, unfortunately, does not acknowledge the primacy of results in setting its equal protection standards. In fact, in many respects, the Court's analysis indicates that it believes some type of inherent fault exists in equal protection and that the intent doctrine

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Sexual Harassment with Respect, 111 HARV. L. REV. 446, 497-501 (1997) (questioning whether discrimination can ever be proved without fault). Such a critique would not necessarily challenge the fault-based approach of the Court. Professor Rutherglen, however, astutely reveals that the arguments over the disparate impact and intentional discrimination standards are ultimately fights over the meaning and goals of equal protection. George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313 (2006).

243. *See, e.g.*, D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 772-78 (1987).

244. *But see* Oppenheimer, *supra* note 23, at 967-72 (concluding we would be better off if we did not look for fault or moral wrongdoing in discrimination cases).

245. *See* Rutherglen, *supra* note 242, at 124-33 (1995).

246. *Id.*

247. Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 414-16 (1998) (noting the considerable scholarship devoted to critiquing the intent doctrine).

identifies it.[248] First, the intent standard applied to equal protection and antidiscrimination, unlike in torts, is not objective. Rather, it is a subjective test focused on the defendant's motives.[249] The search for motive differs from objective intent in that it is fundamentally an inquiry into the appropriateness, morality, or fault of a defendant's decision. Some argue further that if the Court's actual purpose in the intent standard was to limit liability, the Court could have achieved the same result more directly through procedural, proof, or conduct requirements.[250] Its refusal to do so suggests an adoption of a motive-based intent standard, premised on the perception of an inherent moral or fault significance.[251]

Second, the Court's approach to disparate impact standards and the manner of contrasting them with intent further suggests a fault or moral consideration. For instance, in *Griggs v. Duke Power Co.*, the Court accepted disparate impact as a basis for concluding that prohibited discrimination had occurred.[252] *Griggs* specifically identified and imposed liability for a type of discrimination that did not entail malice or purpose.[253] However, in later cases, the Court found that such discrimination—if the Court would even term it discrimination—was not prohibited, and instead required racial motive or purpose.[254] This move away from the *Griggs* standard, as David Oppenheimer writes, was one premised on the notion that the new standards would reflect "fault."[255]

This notion becomes more explicit in cases such as *Watson v. Fort Worth Bank & Trust*.[256] In *Watson*, the Court concluded that it is inappropriate to hold a defendant liable for disparate impact alone because the impact may be unintentional.[257] The Court further asserted that only under those circumstances where disparate impacts are functionally equivalent to intentional discrimination has

248. Simons, *supra* note 102, at 480.

249. *See* Hernandez v. New York, 500 U.S. 352, 359-60 (1991).

250. *See* Simons, *supra* note 102, at 524-25.

251. *See id.*

252. 401 U.S. 424, 433-36 (1971).

253. *Id.*

254. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) ("In such 'disparate treatment' cases . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive.") (citation omitted); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences.") (citation omitted); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977) ("[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.").

255. Oppenheimer, *supra* note 23, at 925.

256. 487 U.S. 977 (1988).

257. *Id.* at 987.

the Court accepted a disparate impact standard as a measure of liability.[258] From this perspective, Title VII's impact standard is merely a means to identify faulty intentional discrimination rather than a prohibition against unjustified barriers for racial minorities, which would not require either fault or improper motive by the defendant. In fact, at least one commentator concludes that although not stated, the Court was even concerned with intent in the *Griggs* case.[259]

This search for "fault" through the intent standard has become more dominant over time. More recently, in *Alexander v. Sandoval*, the Court concluded that a disparate impact standard in Title VI was entirely inapposite from the type of discrimination Congress sought to prohibit.[260] The Court indicated that a disparate impact standard prohibits activities that Title VI's prohibition would otherwise permit.[261] It perceived the intent standard as prohibiting faulty conduct and a disparate impact standard as prohibiting perfectly acceptable conduct.[262] The Court, however, ignored the fact that, regardless of motive, the defendant in *Sandoval* instituted policies that predominantly deprived scores of racial and ethnic minorities the benefit of a driver's license.[263] In the Court's view, such harmful acts are acceptable because the harm is accidental or only incidental to some other purpose.[264]

Such distinctions between intent and impact indicate that the Court is aiming its equal protection and antidiscrimination standards at what it deems morally objectionable conduct. Anything short of that immoral conduct is acceptable and not prohibited. This moral or fault-driven rationale for liability, however, simply lacks justification. The Court fails to connect it to, or demonstrate how it furthers, the goals of equal protection. Moreover, this rationale misses the central wisdom of torts: the absence of moral blameworthiness does not indicate a lack of legal responsibility.[265] Rather, "good" people sometimes do "bad" things and produce results inconsistent with our goals and social utility.[266]

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258. *Id.*

259. Todd B. Adams, *Environmental Justice and the Limits of Disparate Impact Analysis*, 16 T.M. COOLEY L. REV. 417, 418-24 (1999).

260. 532 U.S. 275, 279-86 (2001).

261. *See id.* at 285.

262. *See id.*

263. *See id.*

264. *See id.*

265. Oppenheimer, *supra* note 23, at 971.

266. *Id.*

2. Surmising Implicit Goals from the Practical Results of the Intent Standard

The Court's focus on fault and morality, however, may be a rhetorical rationalization of the intent standard, rather than the actual reason for its adoption. Since *Davis*, the Court has been particularly cognizant of the effects of its antidiscrimination and equal protection holdings. Implicit in the Court's precedent is that the Court is ultimately driven by whether the results correlate with a set of goals, not whether fault exists.

On its face, the intent standard is designed to eliminate racial animus. However, some would not concede that the Court is devoted to this end, because a subjective intent doctrine is so difficult to meet.[267] Nevertheless, the standard, at the very least, drives racial animus and explicit prejudice underground. Beyond this, the intent standard furthers a contentious set of goals that are at odds with limiting racial harms and burdens. Most prominently, the standard protects the status quo of inequality, including inequality in the criminal justice system, racially isolated housing patterns, racially isolated and inadequate schools, and various other structural disparities in society.[268] Moreover, the standard insulates the unimpeded continuation of those inequities by governmental actors from challenge.[269] For the most part, the standard prevents courts and plaintiffs from intruding in, second-guessing, or invalidating

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267. *See* Black, *supra* note 32, at 537-42 (discussing, generally, the difficulty of meeting the requirements of the intent standard and, specifically, the cases that reason the same).

268. *Id.* at 572-74 (discussing Supreme Court cases regarding education that protect and reinforce the status quo); *see also* McCleskey v. Kemp, 481 U.S. 279, 297-98 (1987). In *McCleskey*, the evidence demonstrated that racial bias was systematically a significant factor in the imposition of the death penalty throughout Georgia, *id.* at 287, which would meet the Court's prior interpretation of the intent standard requirement that race be shown to be a motivating factor in a decision. The weight of this evidence, however, would have implicated the entire death penalty scheme in Georgia, as McCleskey's claim of discrimination "challenges decisions at the heart of the State's criminal justice system" and "extends to every actor in the Georgia capital sentencing process." *Id.* at 292. Other states would likewise be susceptible to challenge, as similar statistics "are an inevitable part of our criminal justice system." *Id.* at 312. Rather than challenge the status quo, the Court elevated the intent standard, requiring the defendant to show his particular jury acted discriminatorily, and further stated that it would not make such an inference from statistics alone, regardless of their reliability. *Id.* at 292, 297. The Court demanded such "smoking gun" evidence notwithstanding that the evidence of racial bias in the system was one-sided. *See generally id.* at 308 n.29. In addition, the Court in *Arlington Heights* had indicated that smoking gun evidence is not necessary and that courts must often make inferences of intentional discrimination from circumstantial and statistical evidence. Vill. of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

269. Black, *supra* note 32, at 572-73.

governmental discretion in decision making.[270] In addition, the intent standard reflects a judgment that the government operates more efficiently without the courts' intervention.[271] In short, the intent standard presents a generally insurmountable barrier for plaintiffs[272]—even when discrimination may in fact exist—and, thus, achieves what appears to be the implicit goal of maintaining the status quo and governmental discretion by significantly limiting the scope of potential liability.[273]

Protecting the status quo and governmental discretion, however, does not come without a cost. The interests of racial minorities are inevitably in tension with these goals. School desegregation cases, for instance, presented various situations wherein the amelioration of educational inequality for African American children was pitted against the structure of school systems and white parents' choices and preferences. Chief Justice Burger explicitly pointed out that important "competing values" were at stake in *Swann v. Charlotte-Mecklenburg Board of Education*.[274] Similarly, in *Keyes*, Justice Powell recognized that such balancing was occurring and chided the majority for abandoning its "concern . . . for those who attend [segregated] schools," so as to "perpetuat[e] a legalism rooted in history rather than present reality."[275]

The conflict continued to arise in subsequent cases and effectively became a decisive issue. In *Milliken v. Bradley*,[276] intentionally discriminatory action at the local, state, and federal level caused widespread de jure segregated schools, which nothing short of a comprehensive metropolitan plan could cure.[277] Yet, the Court almost exclusively focused its concern on maintaining "the

270. *See, e.g.*, *McCleskey*, 481 U.S. at 297.

271. *See, e.g.*, *id.* at 311-12; *cf.* Milliken v. Bradley, 418 U.S. 717 (1974) (stressing the need to turn a school district back over to local authorities).

272. *See* Selmi, *supra* note 22, at 293-94; David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 965-68, 990-91 (1989). *See generally* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (detailing empirical findings that show a pattern of failing to infer discrimination).

273. *See* Simons, *supra* note 102, at 524.

274. 402 U.S. 1, 31 (1971).

275. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 219 (1973) (Powell, J., concurring in part and dissenting in part); *see also* WOODWARD & ARMSTRONG, *supra* note 205, at 265 (providing a more lengthy explanation for Powell's personal objections to the distinction and his earlier, more caustic versions of his opinion).

276. 418 U.S. 717, 738-40 (1974).

277. *See id*; Bradley v. Milliken, 484 F.2d 215, 219-21 (6th Cir. 1973); Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971).

structure of public education,"[278] avoiding public opposition to "forced integration,"[279] and protecting what it found to be "innocent" whites in the suburbs.[280] Balancing these interests against those of African American children, the Court disregarded the constitutional violation and harm, and the precedential presumption in favor of remedying the segregation.[281] In fact, the Court shifted the burden onto the victims to show that their remedy was justified by intentional "interdistrict" segregative action,[282] which ultimately allowed the constitutional harm to go unremedied.[283]

Even in Title VII's employment discrimination standards, where the statute explicitly identifies disparate impact as an appropriate standard, the competing interests have motivated the Court to curtail its effect. After initially endorsing a disparate impact standard in *Griggs*,[284] the Court consistently eroded it in cases that followed. *Griggs* required evidence of job relatedness to justify a disparate impact.[285] Just two years later, *McDonnell Douglas Corp. v. Green*[286] weakened the disparate impact standard by allowing an employer to escape liability by merely showing a "legitimate, nondiscriminatory reason" for the disproportionate exclusion of minorities.[287] Later holdings also required plaintiffs to carry the

278. *Milliken*, 418 U.S. at 742-43. The Court also expressed that no tradition in public education was more deeply rooted than the value in local control and avoiding judicial oversight. *Id.* at 741-44. Burger believed that "[i]t was unfair to punish [the suburbs] by involving them in any city-suburb desegregation scheme." *See* WOODWARD & ARMSTRONG, *supra* note 205, at 283. Some members of the Court, however, felt that Burger's early drafts of the opinion shifted the balance too far in favor of the white suburbs. *Id.* at 284-85.

279. WOODWARD & ARMSTRONG, *supra* note 205, at 267.

280. *Id.* at 283.

281. *Milliken*, 418 U.S. at 741-44 (finding the cost of altering the educational structure, consolidation, transportation, and financing to be too high of a burden); *see also* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 213-14 (adopting a presumption against racial imbalances).

282. *Milliken*, 418 U.S. at 738, 744-45. Chief Justice Burger, the author of *Milliken*, "believed it was time for a definitive new direction." WOODWARD & ARMSTRONG, *supra* note 205, at 283.

283. *Milliken*, 418 U.S. at 763 (White, J., dissenting) (writing that "deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State"); *id.* at 768 ("[R]emedies for constitutional violations . . . must stop at the school district line. Apparently, no matter how much less burdensome or more effective and efficient . . . the metropolitan plan might be, the school district line may not be crossed.").

284. 401 U.S. 424, 431-33 (1971).

285. *Id.* at 431.

286. 411 U.S. 792 (1973).

287. *Id.* at 802.

burden of proof in rebutting an employer's articulated reason for its action, and to carry the burden of proving intentional discrimination even after showing that the employer's articulated reason was false.[288]

This weakening of the impact standard was prompted by the inherent tension in employment cases between removing needless discriminatory employment barriers for minorities and imposing a burden on the efficient convenient operation of business.[289] Removing these barriers would require employers to do more than merely implement the easiest or quickest hiring methods, and it would not permit them to ignore the results of their actions. Thus, at the very least, it would impose a self-monitoring and decision-making process that seeks to avoid racial harm. Yet in *Wards Cove Packing Co. v. Atonio*[290] and subsequent cases, the Court's analysis reflects the perception that eliminating disparate impact and imposing less discriminatory alternatives is outweighed by "the cost or other burdens of proposed alternative selection devices."[291] The Court's primary concern was with preserving the discretion of those parties whose actions created the impacts, rather than limiting the impact. Thus, the Court deferred to employers' interests, concluding "[c]ourts are generally less competent than employers to restructure business practices,"[292] and henceforth warned lower courts to "proceed with care" before upsetting an employer's business practices.[293]

In short, although the Court has sporadically suggested that its intent standard is a measure of faulty or immoral conduct, its continual shifting of the intent standard in the above cases with no attention to fault indicates that either those references are misleading or the Court is incorrect in its assessment of the standard. In fact, the Court's acute attention to the practical results throughout these cases indicates that it chose to change the intent

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288. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509-11 (1993); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

289. The interest was originally recognized and justified in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court wrote that "fair in form, but discriminatory in operation" is not acceptable, because the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 431-32. The Court explicitly recognized that the interests of minorities in eliminating disparate impacts and gaining access to employment override the countervailing business interests, stating "Congress directed the thrust of the Act to the *consequences* of employment practices." *Id.* at 432.

290. 490 U.S. 642 (1989).

291. *See id.* at 661 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988)).

292. *Id.* (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)).

293. *Id.*

standard to achieve a particular set of results. In assessing those results, however, the Court does not explain their desirability in terms of the goals of equal protection or antidiscrimination. At most, the Court appears to have its own set of implicit biases and values, which it uses to assess what type of results its standards should produce.

It is worth noting, moreover, that although not approaching the decisions from a tort- or intent-standard perspective, some of the foremost civil rights scholars have focused on the implicit goals behind the Court's shifting standards and results. Their work sheds further light on the relevance of the results and hidden goals in antidiscrimination. Jerome Culp's work reveals that the initial problem with analyzing the Court's intent standard through any framework is the Court's lack of transparency. Culp argues that the Court's lack of transparency is intentional and crucial to what he sees as an attempt by the Court to further its own value-oriented concept of equal protection.[294] He argues that the Court is able to pursue ulterior—yet obfuscated—purposes by articulating its jurisprudence in the language of "colorblindness."[295] The language of "colorblindness" masks its antidiscrimination and equal protection standards as moral standards of fault, when the adoption of standards are actually value choices that are no more morally or normatively justified than any other standard.[296] Thus, the Court's doctrines are simply policy preferences masquerading as morals.[297]

Despite the lack of transparency in the Court's jurisprudence, Derrick Bell finds that the Court's decisions reveal a clear pattern that permits him to ascribe a goal to the Court's equal protection jurisprudence. He argues that its goal is largely to further the interests of whites.[298] Thus, the Court's precedent is not explained by normative principles or fault, but by whether the results of any given test or holding will benefit middle- and upper-class whites.[299] For instance, although *Brown v. Board of Education*[300] is facially motivated by the need to redress harm to blacks, Bell concludes that the end was secondary to the country's need to limit racial apartheid

294. Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162, 177-94 (1994).

295. *Id.* at 173.

296. *See id.* at 194-95.

297. *Id.*

298. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

299. *Id.* at 523.

300. 347 U.S. 483 (1954).

to maintain its international legitimacy.[301] Only when national and white interests converge with those of blacks has the Court expanded its antidiscrimination jurisprudence.[302] He concludes that this goal drives all of the Court's holdings and standards in race cases.[303] Thus, regardless of whether one agrees with the inferences authors such as Culp and Bell make regarding the Court's goals, their work reinforces this section's overall point: antidiscrimination standards are not normative or fault based, but are shaped to produce results consistent with a predetermined goal.

3. Intent As a New or Variable Concept of Equal Protection and Antidiscrimination

Further undermining the notion that the intent standard is a normative assessment of liability and a measure of fault or blameworthiness is the fact that the intent standard is a modern concept of equal protection and antidiscrimination that the Court itself has created, rather than a longstanding equal protection concept. Like tort standards, the standards demonstrating a violation of equal protection or antidiscrimination statutes have existed in a continuum across time based on the goals being pursued at a given instant. The early cases from which the modern Court infers a reliance on "intentional discrimination" made no reference to intent. Until *Brown,* the Court grounded its decisions in an inquiry predominantly revolving around the concept of "equality" rather than discrimination. For instance, in *Plessy v. Ferguson*[304] and its progeny, the Court's analysis was based on whether "equality" existed.[305] The desegregation cases leading up to *Brown* were no different in their analysis. The outcomes may have been different from *Plessy*, but only because the facts demonstrated that the separation in a particular school was not, in fact, equal.[306] Admittedly, *Strauder v. West Virginia*,[307] to which the Court in *Davis* cites, involved racial

301. Bell, *supra* note 298, at 523-26.

302. *Id.* at 523-28.

303. *Id.*

304. 163 U.S. 537 (1896).

305. *Id.* at 542, 551-52; *see also* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 542 (1899) (finding no violation because "[s]o far as the record discloses, both races have the same facilities and privileges of attending them" and that all other matters beyond securing equal rights were social issues).

306. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 641-42 (1950) (finding that segregative practices deprived student of the opportunity to receive an equal, qualitative education); Sweatt v. Painter, 339 U.S. 629, 633 (1950) (holding that educational opportunities were not substantially equal); Gaines v. Canada, 305 U.S. 337, 344, 351 (1938) (holding that the state must furnish a "legal education substantially equal" to whites).

307. 100 U.S. 303, 308-10 (1879).

prejudice and discrimination against blacks in jury service, but the Court found it objectionable because such discrimination prevented blacks from securing the goal of equal protection. The Court articulated the goal throughout as "securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy."[308]

When *Brown* was decided, it continued to rely on the paradigm of equality, noting "[s]eparate educational facilities are inherently unequal"[309] and, where the state provides a public right, that "right . . . must be made available to all on equal terms."[310] A shift obviously occurred in *Brown*, but the shift was precipitated by the Court and society's evolved notions of what amounted to equality and equal treatment.

After *Brown*, equality and discrimination standards became more plaintiff friendly, with the goal being to desegregate society and eliminate barriers for racial minorities. The Court attempted to achieve this by focusing on the results of a defendant's actions rather than mens rea. For instance, school desegregation cases such as *Green* and *Swann* found constitutional violations based entirely on the effects of the schools' actions.[311] The Court demanded immediate action to eliminate disparities between schools and the opportunities therein.[312] Regardless of motive, no excuse was acceptable for not achieving those results. The Court's approach to discrimination and equality outside of the school context, in areas such as employment or housing, was likewise focused on whether the defendants produced

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308. *Id.* at 306.

> No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested,—we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.

Id. at 307 (quoting Slaughter-House Cases, 83 U.S. 36, 71 (1872); *see also Strauder*, 100 U.S. at 307 ("What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States . . . .").

309. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

310. *Id.* at 493.

311. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 23-25 (1971) (indicating that the significant racial imbalance of schools alone may be sufficient to warrant a remedy); Green v. County Sch. Bd., 391 U.S. 430, 437 (1968) (holding that courts must assess the racial imbalance of schools in various categories, including school assignments, faculty and staff assignments, student activities, facilities, and transportation).

312. *Swann*, 402 U.S. at 15; *Green*, 391 U.S. at 437-38.

results that would alter the inequities suffered by racial minorities.[313]

In *Keyes* and *Davis*, those standards began shifting to a mens rea and motivational concern. However, even that shift, which seems so radical and complete today, occurred gradually, as lower courts' interpretation and application of the Court's intent doctrine still varied considerably from where the standard is currently. Lower courts sought to apply the intent doctrine not from a subjective motivational perspective, but from an objective basis that inferred intent based on the "foreseeable consequences of action taken, coupled with inaction in the face of tendered choices."[314] The Court responded by holding that foreseeable consequences were merely relevant evidence to prove intent and that "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation."[315] Yet, at the same time the Court was changing the standard to a subjective one, it still conceded that it could not fault the lower courts' conclusion that, in light of the objective evidence, unconstitutional intent had occurred.[316]

Likewise, the complete shift to the intent standard in antidiscrimination statutes like Title VI took time. For thirty years, the Court allowed plaintiffs to assert claims of disparate impact based on federal regulations enacted pursuant to Title VI, while at the same time concluding that Title VI itself only created a cause of action for intentional discrimination.[317] Only recently did the Court prohibit all Title VI claims based on disparate impact. In sum, the variance in concepts of equality, discrimination, impact, and intent across time demonstrates that no normative concept of fault or

313. *See* Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Lau v. Nichols, 414 U.S. 563 (1974); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

314. Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 51 (2d Cir. 1975); *see also* United States v. Sch. Dist., 521 F.2d 530, 536 (8th Cir. 1975) (overturning a district court that had failed to presume intent based on the "natural, probable and foreseeable consequences" of the defendant's actions); Morgan v. Kerrigan, 509 F.2d 580, 588 (1st Cir. 1974) (stating that a "pattern of selective action and refusal to act can be seen as consistent only when considered against the foreseeable racial impact of such decisions"); Oliver v. Mich. State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974) (holding that a "presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation").

315. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979); *see also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979).

316. *Columbus*, 443 U.S. at 463-64 & n.12 (quoting Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 240 (S.D. Ohio 1977)); *Dayton*, 443 U.S. at 529-30, 535-37, 539-41.

317. *Compare Guardians Ass'n*, 463 U.S. at 586-89, *with* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978).

liability exists in antidiscrimination laws. The standards, as in torts, have been reflections of cultural concepts and goals of equality. Thus, although today's Court might suggest otherwise, the intentional discrimination standard is no more an inherent measure of fault or an equal protection norm than any other standard.

4. The Court's Own Version of a Torts-Based Approach

Although the Court's preoccupation with results suggests that the intent standard is not, in fact, a search for faulty or immoral conduct, it does indicate that the Court follows an approach similar to the torts-based approach discussed earlier.[318] However, a torts-based approach to equal protection standards would also first acknowledge that the intentional discrimination standard is not an end in and of itself, nor an inherent measure of fault, which the Court has not done. Such an acknowledgement would reveal what is currently hidden—that the intent standard is nothing more than an attempt to pursue policy objectives and preferences. Thus, neither the Court, nor future legislation, should preoccupy itself with whether the intent standard reflects fault, morals, racial bias, or some other supposed norm. Instead, the preoccupation should be with whether the standard produces results consistent with our antidiscrimination and racial equity goals.

A torts-based approach and assessment, more so than others, explains the Court's decisions and provides a relatively neutral framework for critiquing them. The framework effectively rejects the notion that a normative evaluation of liability in equal protection is value-free, and reveals that the preoccupation with norms, such as fault, created the confusion and lack of transparency from which we currently suffer. Thus, the torts framework focuses primarily on two questions: (1) what are the goals of the law or system; and (2) does the chosen standard effectively and efficiently achieve those goals? The goals themselves would only be a point of analysis insofar as the goals were contested or unclear. Consequently, given the Court's apparent goals or its notion of the purpose of antidiscrimination, its standard naturally follows. Thus, the standard itself is not the problem or the appropriate focus of critique. Rather, the appropriate critique would be either that: (1) the Court's current goals are actually contrary to constitutional or statutory goals; or (2) the Court miscalculates the practical results of the standard as being consistent with its goals.

Consistent with the above approach, the Court has modified the intent standard primarily where it reasoned that the standard's

318. *See supra* notes 33-48 and accompanying text.

results would be inconsistent with the Court's goals.[319] For instance, the Court created a distinction between inter- and intradistrict school desegregation to preserve the sanctity of private choice, school structures, and suburban school districts.[320] The distinction was not driven by considerations of fault, but rather because the distinction would produce particular results. Similarly, the Court initially presumed discriminatory action was the cause of school desegregation in all instances because its goal and concern was with aggressive desegregation. But when pursuit of that goal posed too great of a burden on schools and the status quo, the Court shifted the burden of proof to plaintiffs to first prove intentional discrimination before any presumption of impermissible segregation would apply to schools.[321] The obvious result was to blunt the likelihood and force of desegregative remedies.

Similar tailoring of results to goals is represented in the Court's retraction of the disparate impact standard and shift toward intent in employment discrimination cases in order to protect business interests through the business necessity defense[322] and, later, the legitimate explanation defense.[323] In fact, the judicial motivations for making changes in employment discrimination standards are strikingly similar to the evolution of tort products liability. Initially, courts applied straightforward tests to determine whether products were unreasonably dangerous or dangerous beyond the expectation of consumers.[324] But when that test failed to reduce the dangerousness

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319. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Milliken v. Bradley, 418 U.S. 717 (1974).

320. Of course, the Court attempts to rely on a notion of fault to symbolically justify its decision. However, as other members of the Court and scholars point out, the state itself was at fault here, and, thus, there was no fault basis by which to exclude the state's agents—the local districts—from the remedy. *See, e.g., Milliken*, 418 U.S. at 763 (White, J., dissenting) ("[D]eliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State."); *id.* at 768 ("[T]he Court fashions out of whole cloth an arbitrary rule that remedies for constitutional violations occurring in a single Michigan school district must stop at the school district line. Apparently, no matter how much less burdensome or more effective and efficient . . . the metropolitan plan might be, the school district line may not be crossed.").

321. *See* Black, *supra* note 32.

322. Oppenheimer, *supra* note 23, at 921.

323. *Id.*

324. *See, e.g.*, Giglio v. Conn. Light & Power Co., 429 A.2d 486, 489 (Conn. 1980); Engberg v. Ford Motor Co., 205 N.W.2d 104, 109 (S.D. 1973); Falk v. Keene Corp., 782 P.2d 974, 980 (Wash. 1989); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

of certain products,[325] courts developed a cost-benefit analysis to extend liability beyond the limits of consumer awareness and expectation.[326] When that proved too aggressive, the courts mitigated the standard by requiring plaintiffs to additionally prove that a reasonable alternative design existed and that it was economically and technologically feasible.[327] These requirements allowed courts to produce results on par with the goal of making products safer rather than simply compensating consumers for whatever harm might befall them. The Supreme Court's employment discrimination jurisprudence mirrors this evolution in significant respects. Initially, the Court used a straightforward test of disparate impact to break down barriers to minorities' entry into the workforce. But the Court later mitigated the disparate impact standard by creating defenses of business necessity and legitimate business purpose, because of the desire to limit the scope of business liability.[328]

V. THE FRAMEWORK AND OPTIONS FOR ADOPTING FUTURE DISCRIMINATION LIABILITY STANDARDS

Demonstrating that a torts approach is appropriate, or that the intent standard is inconsistent with it, is a straightforward task. More difficult is determining what standard might replace it and, most importantly, what ends we wish the new standard to produce. For years, courts and advocates have pitted the intent doctrine against the impact standard, presenting both as monolithic standards. This juxtaposition oversimplifies the paradigm. There are various permutations of both standards and, depending on the permutation, the standards can be minimal or significant burdens on defendants. Moreover, each variation of the standards could be appropriate depending on the ends sought. Thus, the intent standard need not be focused solely on racial animus, motivations, or subjectivity, but instead can be objective or place greater responsibilities on defendants than current standards.[329] However,

325. In particular, the test did not address those products that consumers knew to be dangerous, but whose dangers the customers still had to confront due to work requirements or everyday necessity. *See* Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192 (Mass. 1978).

326. In some cases, a consumer might know of the danger and, thus, the early test would not establish liability. *See, e.g.*, Knitz v. Minster Mach. Co., No. L-84-125, 1987 WL 6486, at *1 (Ohio Ct. App. Feb. 9, 1987).

327. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

328. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431-33 (1971).

329. The intent required in intentional torts or in the natural and foreseeable circumstances test for instance, is easier to apply consistently and accurately. For a further discussion of how the current intentional discrimination standard could incorporate concepts of deliberate indifference, see Black, *supra* note 32, at 537-41.

choosing among standards requires an answer to the fundamental question of what racial policies we wish to pursue. Our country must now return to this question for the first time in decades if it wishes to produce meaningful legislation.

A. Disparate Impact's Variations, Goals, and Results

The disparate impact standard, regardless of its particular permutation, is an arbitrary standard unless appropriately linked to a legislative, policy, or constitutional goal. At various times, disparate impact has been seen by Congress and/or the Court as producing results that are consistent with their goals.[330] The Court, however, without much explanation, no longer sees it as such.[331] Questions, therefore, remain as to the goals furthered by a disparate impact standard and where the standard falls within the spectrum of available liability standards.

A "pure" disparate impact standard—one that determines liability primarily based on the extent of the impact rather than the defendant's ability to articulate a legitimate or nondiscriminatory explanation—is essentially concerned with ameliorating racial harms and burdens.[332] In general, it displaces mens rea or intent entirely and establishes liability irrespective of the blameworthiness of a defendant's conduct.[333] It represents a determination that society should be ordered and operated along a particular line—a racially equitable distribution of burdens, benefits, and opportunities. In these respects, a pure disparate impact standard is akin to some strict liability and workers compensation schemes.

Like strict liability, if a defendant chooses to enact policies that will affect the opportunities, burdens, or benefits of individuals, the defendant would accept responsibility when those decisions produce racially disparate outcomes. Or, in federally funded programs, by accepting the funds, the recipient would be agreeing to make certain types of decisions and produce certain types of results.[334] When the

330. *See, e.g.*, *Griggs*, 401 U.S. at 424 (finding that the existence of a racial imbalance or disparate impact was sufficient to make out a claim in employment discrimination); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e) (implementing a disparate impact standard); Voting Rights Act of 1965, § 2, 42 U.S.C. § 1973 (codified as amended in 1982) (overturning Supreme Court decision and codifying a disparate impact standard).

331. *See* Alexander v. Sandoval, 532 U.S. 275, 279-86 (2001).

332. *See* Selmi, *supra* note 22, at 286-88.

333. The Court has never applied a pure disparate impact standard; the closest it has come was in *Griggs*, 401 U.S. at 424; *see also* Freeman, *supra* note 22 (finding that *Griggs* was the most plaintiff-friendly use of the impact standard the Court has implemented because it viewed the harm from the victim's perspective).

334. *See* Sabri v. United States, 541 U.S. 600, 605 (2004).

recipient's policies and decisions produce results contrary to those desired by federal legislation or regulation, liability would be imposed.[335] As with strict liability for abnormally dangerous products, if a resulting harm occurs—here a racially disparate impact—the defendant is liable. Benevolent motivations, extraordinary precautions, and reasonable care are simply irrelevant, unavailable defenses.

A pure disparate impact standard also reflects the primary focus of workers compensation schemes on compensating and, hopefully, ameliorating harm.[336] Whether a defendant is at "fault" is beside the point.[337] If a worker or, in disparate impact, a racial group suffers harm, the only relevant question is whether the harm occurred in the context of the defendant's workplace, institution, or program. If the goal is to ensure that injuries and racial harms are compensated and avoided in the future, the defendants are in the best position to achieve those ends. In contrast to plaintiffs, defendants can systemically alter their conduct to minimize and avoid harms of a particular nature or harms that affect a particular group. Moreover, they can spread the cost of those harms across various groups and factors and, consequently, efficiently compensate victims for those harms. Given these goals, the only relevant issue is whether the defendants are the cause of the harm—and, hence, could have avoided it—not whether they are at "fault."

A "modified" racial disparate impact standard provides more flexibility than the above "pure" standard. A modified standard permits defendants to continue their course of action so long as they can establish an acceptable explanation for it. The strictness of that explanation depends on the results one wants to produce and the party one wants to favor. The explanation could be as permissive as requiring a legitimate nondiscriminatory explanation, which would allow most impacts to remain in place, assuming either that racial animus can be hidden or is nonexistent. The explanation could also be as strict as requiring the defendant to demonstrate that the particular course of action is a necessity, which would overturn numerous policies, assuming that the defendant could soften the policy objectives through a method that produces less disparate impact.

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335. *See id.* at 605-08.

336. For a discussion of how the Court used the disparate impact standard to primarily address the harms suffered by racial minorities, see Freeman, *supra* note 22, at 1093-99.

337. *See, e.g.*, DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732-33 (3d Cir. 1995) (stating that a "pure disparate impact case" would render irrelevant the reasons why or the factors involved in producing the impact).

As for mens rea, the existence or absence of malice or intent is facially irrelevant to whether liability is imposed in a modified impact standard.[338] With that said, in some respects a modified impact standard is not inconsistent with an intent standard, but simply practical regarding whether and how one can prove it. For instance, where a defendant cannot articulate a legitimate explanation for a disparate impact, intentional or racially motivated discrimination may very well be the explanation for the action.[339] Thus, although the modified impact standard does not require an explicit inference of intent, it may still impose liability in those instances where it is likely that intent exists.[340] Likewise, some argue that in addition to consciously race-motivated action, intentional discrimination includes actions that result from subconscious biases and irrational beliefs.[341] If a defendant cannot articulate a legitimate nondiscriminatory basis for his action, such subconscious bias or irrationality is the best explanation for the action.[342] Thus, a modified impact standard challenges intentional discrimination, but, in the process, prohibits a broader range of policies and actions than the Court's current intent doctrine. The modified impact standard is consistent with the realization that searching for and identifying subjective intent is an inherently unreliable and flawed task, and that an objective test that assumes

338. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1004 (1988).

339. *See* Hernandez v. New York, 500 U.S. 352, 376 (1991) (Stevens, J., dissenting) ("An avowed justification that has a significant disproportionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of discriminatory purpose."); Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981) ("We do not believe, however, that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific.").

340. *See, e.g., Watson*, 487 U.S. at 977.

341. *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1243 (2002); Krieger, *supra* note 242, at 1188; Lawrence, *supra* note 173, at 317, 323; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 532 (2003) (discussing subconscious discrimination in America and stating that "Title VII is concerned with discrimination that is a function of employers' subconscious states of mind").

342. *See, e.g.*, Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1542 (2005) ("[O]nce the most common reasons for employment actions are taken into account (or controlled for through the prima facie case showing), the Court's evidentiary frameworks treat the possibility of even subconscious bias lurking as a threat in decisionmaking processes."); Green, *supra* note 242, at 104, 140 (discussing the prevalence and relevance of bias in employment decisions and how the current dichotomous legal standards fail to account for it).

one intends the natural consequences of one's actions, but still allows one to defend those actions.[343]

A modified impact standard, however, is also consistent with the goal of furthering a different concept of discrimination. Some argue that intent is irrelevant to discrimination and equality.[344] Rather, discrimination occurs when one's actions treat racial groups differently without any justification.[345] A modified intent standard would prohibit such inequality. The lack of a justification for the inequality, rather than any intent, makes it discrimination. Others, such as Oppenheimer, would argue that discrimination can occur through simple negligence.

A modified impact standard prohibits this type of discrimination by assessing whether alternative courses of action are available and balancing the burdens and benefits of pursuing it. In essence, the modified standard has a built-in ability to weigh racial burdens on plaintiffs and costs on the defendant. When a preestablished legitimate interest exists and no less discriminatory alternative can achieve that interest, that interest necessarily outweighs the disparate impact under the standard. The contraposition is likewise true if a legitimate interest is absent or a less discriminatory option is available.

On a conceptual level, a disparate impact standard's closest corollary is current products liability. Disparate impact and products

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343. *See, e.g.*, Black, *supra* note 32, at 567 (stating that the subjective intent is inconsistent with other constitutional torts); DOBBS, *supra* note 31, at 49 ("[T]he trier of fact has no mind reading machine to determine . . . subjective intent. One's subjective intent is necessarily determined from external or objective evidence.").

344. The foremost discussion on this point may be Paul Brest's article. Paul Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976); *see also* TRIBE, *supra* note 22, at 1437-39, 1507 (discussing equal protection's multiplicity and how motivations do not change the harms individuals suffer); Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1143 (2007) ("Sometimes, not only in the metaphysical contexts of evil and suffering, but also in the political contexts of workplaces and neighborhoods, intent matters little. 'What goes on' in the hearts and minds of those who exclude, or who can prevent exclusion but choose not to, is less important than how the benefits and burdens get distributed, how they build on past exclusion, and whether the exclusion is justified.").

345. *See generally* Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of "Equal" Requires a Disproportionate Impact Analysis When Laws Unequally Affect Racial Minorities*, 12 CORNELL J.L. & PUB. POL'Y 85, 118-21, 128-33 (2002) (discussing the varying critiques of the intent standard and the various differing concepts how equal protection should be achieved); Seicshnaydre, *supra* note 344, at 1143 (arguing that unjustified inequality is discrimination even in the absence of bad intent).

liability both were initially much more plaintiff friendly.[346] Both looked primarily at the harm caused by a policy or product.[347] If a product's dangerousness was unreasonable or, in the case of employment, a policy or hiring criteria was not related to a job, liability would be justified regardless of the cost to the producer or the purposes of the employer. However, believing they had gone too far, courts and legislatures reined in these standards over time. As stated previously, products liability required proof of a reasonable alternative design before imposing liability, and disparate impact later allowed defendants to assert a legitimate nondiscriminatory reason for the impact that defendants would have to rebut before imposing liability.[348] Thus, both went from a standard that imposed liability based primarily on harm to a standard that balanced the harm against the competing governmental, business, or social interests.[349]

Products liability law, although continually evolving, still maintains this core standard, but disparate impact as a measure of liability has been entirely removed from equal protection, and either eliminated or seriously limited in racial discrimination statutes.[350] Of course, in its place is the intent doctrine.[351] The question before Congress may soon be whether the intent standard should remain in place, be modified, or be replaced.

As discussed throughout this Article, standards are justified by the ends that they are adopted to produce, not by a normative concept of fault.[352] Unless the goal of statutory antidiscrimination is merely to prevent overt racial discrimination and animus, it is not clear how the intent standard can produce results consistent with other, broader goals of antidiscrimination laws. It simply does not challenge any activities beyond those that are explicitly racially motivated. Consequently, the intent standard lacks the capacity to change other forms of discriminatory or inequitable behavior that

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346. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see also* Merrill v. Navegar, Inc., 28 P.3d 116, 124 (Cal. 2001).

347. *See Griggs*, 401 U.S. at 424; *see also Merrill*, 28 P.3d at 124.

348. *Compare* Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that disproportionate impact alone is not enough to prove racial discrimination), *with* Williams v. Bennett, 921 So. 2d 1269, 1275 (Miss. 2006) (requiring claimant to demonstrate a reasonable alternative design to establish a prima facie design defect claim).

349. In this respect, some have asserted that both products liability and modified disparate impact standards correlate with negligence. *See* Oppenheimer, *supra* note 23, at 969.

350. *See* Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1105-06 (1989).

351. *See id.*

352. *See supra* notes 135-43.

perpetuate the barriers and disadvantages that racial minorities face. However, a modified disparate impact standard, similar to products liability, represents a middle ground between the intent standard's limited ability to alter inequity and the pure impact standard's propensity to remedy vast inequity at the potential expense of other interests.

Tort law has favored this sort of middle-ground approach when the goal has been to produce higher degrees of social utility.[353] Insofar as the intentional discrimination standard is rationalized or facially presented as a normative fault principle or measure of blameworthiness, it simply misplaces its focus. It was precisely the failure of "fault" standards to produce the desired ends and goals that led torts away from them in certain instances, such as products liability.[354] One of the primary goals of tort law in regard to consumer products was to reduce accidents and safety costs.[355] Consumers were ill-equipped to do this themselves, and principles of intent or negligence premised on fault could not consistently ensure that manufacturers did it.[356] Thus, legislatures and courts abandoned "fault" standards in products liability for the current standards, which exist somewhere between negligence and strict liability.[357] As a result, manufacturers have altered their conduct, which has resulted in fewer accidents, higher safety, and reduced costs overall.[358]

If a goal of antidiscrimination were to reduce otherwise avoidable racial inequities or spread the burden of those inequities across society, a modified disparate impact standard would presumably have an effect similar to, and as significant as, products liability. Yet, if reducing or spreading the burden of such racial inequities is a goal, no standard short of a modified impact standard or a standard similar to it is capable of producing results consistent with that goal. The intent doctrine disregards inequitable results.[359]

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353. *See* DOBBS, *supra* note 31, at 12.

354. Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 OHIO ST. L.J. 835, 846-47 (1996).

355. *Id.* at 847; *see also* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24-94 (1970); Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613, 627 (2005) (discussing how Calabresi has viewed tort law as a way to protect public welfare by economic means).

356. *See* Nolan & Ursin, *supra* note 354, at 848.

357. *See id.* at 851.

358. *Id.* at 859.

359. *See, e.g.*, David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2571 (1995) (pointing out that even when there is no intent to discriminate on the basis of race, racial inequity may nonetheless be the result); Comment, Gautreaux v. Public Housing Authority*: Equal*

In fact, its primary effect is to leave past and perpetuated inequities in place.[360] Consequently, it places the burden of eliminating inequity on the individual agency of racial minorities—but individual agency is not apt to produce systemic results.[361] Moreover, insofar as racial minorities in many areas lack the political or economic power to force governments or businesses to willingly avoid racial impacts, they often also lack the power to achieve such results through collective agency.[362] In contrast, a modified impact standard places the onus on those who have the greatest capacity to mitigate racial inequity. However, placing the burden of change on elected officials, whose job it is to serve the people, or on those who use federal funds to operate an institution, is no more undue than the burden tort places on those who are engaged in the business of selling products for profit. Thus, liability under a modified disparate impact standard is appropriate, not because defendants are at "fault" in a normative sense, but because they, more so than others, have the capacity to produce both the harms society wishes to avoid and goals it wishes to achieve.

It is also worth emphasizing that, like products liability, a modified impact standard would only impose a burden on defendants when alternative courses of action are available and pursuing them does not unreasonably interfere with the government, entity, or business's purposes for acting in the first instance. Based on this similarity, the burden of adopting a modified disparate impact standard would be no greater than the tort responsibility we already impose on businesses across the country. And once we determine that

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Protection and Public Housing, 118 U. PA. L. REV. 437, 440 (1970) (discussing Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969), and stating, "[t]he *Gautreaux* court's holding that 'intent' must be proved leaves [foreseeable] inequality in government programs constitutionally unassailable").

360. *See* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 34-35 (2004) (arguing that the intent standard permits the perpetuation of inequality in racial profiling, and further arguing that the inequality is a continuing effect of the stigma of slavery); Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 629 (1992) (concluding the intent standard has led to the "entrenchment of inequality"); Imani Perry, *Post-Intent Racism: A New Framework for an Old Problem*, 19 NAT'L BLACK L.J. 113, 121-22 (2006) ("Instead of claiming that the standards deceptively obscure intentional racism, critical race theorists call into question the objective standards themselves because they replicate racial disadvantage.").

361. *See* Iris Marion Young, Equality of Whom?–Social Groups and Judgments of Injustice 25 (Feb. 1999) (unpublished manuscript, *available at* http://www.pitt.edu/~wpseries/papers/PIA005.pdf).

362. This, however, is not to suggest that collective action cannot produce change; it certainly can. It is only to recognize that there is a political component that may counteract those efforts in certain circumstances, and a legal remedy is often necessary to overcome it. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

a disparate impact, cost-benefit, or some other standard is appropriate, a finding of liability does not imply that fault is a normative notion of intent, malice, motivation, or negligence, but simply that the chosen standard has been transgressed. Liability or fault in this context is the failure to comply with the statutorily or jurisprudentially identified conduct.

B. Looking Outside the Box for Other Options

The intentional discrimination and disparate impact standards have dominated antidiscrimination jurisprudence and thought, but there is no reason to continue to limit the discussion to these two options. As briefly mentioned earlier, courts have previously relied on a natural and foreseeable consequences test to prove violations of equal protection.[363] Oppenheimer has also argued that the Court's employment discrimination standards during the 1980s were akin to negligence.[364] Both of these standards proved workable and effective at the time. The move away from them was not based on a flaw in the standards themselves, but an effort by the Court to pursue other ends.

The available options also span beyond our past experience in race discrimination. Other antidiscrimination paradigms, such as disability, have developed their own liability standards. In disability, plaintiffs must establish "intentional" discrimination, but intent includes actions that lack invidious or inappropriate motivation. Courts have indicated that "intentional discrimination against the disabled does not require personal animosity or ill will. Rather, intentional discrimination may be inferred when a 'policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result.'"[365] In this context, deliberate indifference is tantamount to realizing the harm that an action will create, but nevertheless taking such action. In essence, the courts are looking for the cause of inequality under the law. If inequality is a result of conscious choices, courts often will impose liability.[366] It is also worth noting that if a plaintiff is not

363. *See supra* notes 48, 315-16 and accompanying text; *see also* Black, *supra* note 32, at 565-67.

364. *See generally* Oppenheimer, *supra* note 23.

365. Bartlett v. New York, 156 F.3d 321, 331 (2d Cir. 1998) (quoting Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996)); *see, e.g.*, Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001); Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir.1999).

366. *See, e.g.*, *Bartlett*, 156 F.3d at 331; Bravin v. Mount Sinai Med. Ctr., 58 F. Supp. 2d 269, 277 (S.D.N.Y. 1999).

seeking monetary damages, he need not even show intent, because the focus is on eliminating inequality and barriers.[367]

Of course, entirely new standards or modifications of old ones might also be options. For instance, I have proposed a modified deliberate indifference standard in other articles.[368] In the case of governmental defendants, the standard focuses on whether the government is actively cognizant of its citizens' rights and the harm it might cause them. When the defendant causes racially disparate results or harms, liability would be determined by objective factors: whether the government was, or should have been, aware of the consequences of its actions; whether other less harmful reasonable alternatives were or are available; and whether there is any reason or competing interest that dictates against implementing an available alternative.[369] The final inquiry requires the defendant to justify its choice to perpetrate or continue a racial harm—in spite of available alternatives—with some purpose or interest that outweighs the harm.

This last inquiry, admittedly, could allow judicial values and biases to creep into the analysis. However, this type of balancing is not radically different from many of the implicit choices the Court has regularly made in equal protection and antidiscrimination statutes.[370] The difference under this standard is that the balancing would be transparent. Interestingly, this sort of balancing is also similar to that which occurs in negligence, products liability, and other torts. The important benefit of transparent analysis in those contexts is that it provides for an opportunity to test issues of efficiency and utility with hard evidence, rather than leaving the balancing subject to hidden assumptions and biases. The point here,

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367. Alexander v. Choate, 469 U.S. 287, 302 (1985); *Bartlett*, 156 F.3d at 331; Tyler v. Manhattan, 118 F.3d 1400, 1406 (10th Cir. 1997); M.P. v. Indep. Sch. Dist. No. 721, 200 F. Supp. 2d 1036 (D. Minn. 2002).

368. Black, *supra* note 32, at 575-85.

369. *Id.* at 575.

370. The Court has had significant experience in balancing racial harms and benefits against other interests to which it could turn to for guidance, such as balancing tests in employment discrimination and Title VI cases, or requiring compelling interests to justify affirmative action programs. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (requiring a compelling interest); United States v. Virginia, 518 U.S. 515 (1996) (requiring an important interest); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (weighing the burden of alternatives), *superseded by statute,* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (requiring a business necessity to outweigh disparate impact), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (requiring an educational necessity to outweigh impact). The Court, likewise, balances private interests against governmental costs in due process. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

however, is not to promote a particular standard, but simply to demonstrate that myriad options are available beyond those on which we normally concentrate. Depending on our goals, any one of them could be appropriate.

C. *Aligning Goals with Results*

Determining what standard will work, or whether some particular standard is consistent with a given set of goals, is not difficult. Rather, engaging in an open discussion about the goals of antidiscrimination and what they have been, are, and should be is the difficult task.

As already discussed, equal protection and antidiscrimination standards have changed significantly over time.[371] Until the mid-twentieth century, the goal was to maintain the status quo of white hegemony and dominance of resources and opportunities by sanctioning segregation and inequality in every facet of life.[372] *Brown* signaled the end of that sanction, and by the 1960s and early 1970s, the goal shifted dramatically to affirmatively interrupting the status quo and ameliorating massive inequalities in the public sector.[373] The same goal also prevailed in the private sector, though only to the extent that it was not overly burdensome in the given context, such as housing, employment, or public accommodations.[374] However, the rules and principles that made those changes possible eventually proved to be a greater threat to the status quo than subsequent members of the Court, and much of society, would tolerate.[375] Thus, the Court began to retract that challenge to the status quo, to the point where antidiscrimination law now generally serves to insulate and preserve the status quo from legal attack.[376] In general, equal protection and antidiscrimination statutes currently only prohibit explicit discrimination and animus, though such is no longer the prevalent form of discrimination.[377]

As a constitutional amendment, the goals of equal protection are subject to but a single opinion—that of the Supreme Court.[378] Given the trend of the current Court, a significantly different interpretation

371. *See supra* Part IV.B.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *See supra* notes 359-61 and accompanying text.

377. *See id.*

378. Congressional actions and cultural context can have a significant effect on the Court. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (various amicus briefs submitted to the Court playing huge role); Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 36-48 (2004).

of the appropriate goals of equal protection is unlikely.[379] In contrast, however, the meaning and goals of antidiscrimination statutes do not belong to the Court. They belong to our citizenry and elected representatives. For instance, Congress enacted the Civil Rights Act of 1964 to expand legal protections beyond the boundaries of equal protection and increase the government, courts, and citizens' ability to combat segregation and discrimination.[380] For more than thirty years, the statue was effective in doing so, often through a disparate impact standard. When the Court narrowed the statute in conjunction with narrowing equal protection, Congress responded by enacting the Civil Rights Act of 1991 to correct the Court's missteps, particularly in voting and employment.[381] However, in recent years the Court has again retracted the scope of the statute, raising the question of whether it has done so appropriately and, if not, how these wrongs should be corrected.[382]

A primary point of focus in assessing the Court's contraction of antidiscrimination law is the accuracy or efficacy of its weighing and balancing of the competing interests. Insofar as one assumes that the Court's bias toward the status quo is borne, not from racial or other illegitimate bias, but by a judgment about efficiency or social utility, that judgment is open to a neutral critique. Based on the Court's holdings, its implicit assumption is that favoring the status quo, businesses, and individual choices at the expense of otherwise needless racial impacts produces socially productive and efficient results.[383] In other words, the failure to protect the status quo would

379. *See generally* Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) (finding that Justice Kennedy has taken a new stance on race issues, but that this new position is no more progressive than those of the previous Justices who held swing votes).

380. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2000)).

381. *See supra* notes 9-10 and accompanying text.

382. *See supra* notes 13-20 and accompanying text.

383. Of course, the Court could also be making a judgment based on its assumption that the majority of the public favors the continuation of the status quo, business, or some other interest, rather than the Court itself making a social utility judgment. In effect, the Court could be attempting to maintain its legitimacy. *See, e.g.*, Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."); *see also* Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (requiring that local interests be taken into account in the determination of desegregation cases); Lisa M. Fairfax, *The Silent Resurrection of* Plessy*: The Supreme Court's Acquiescence in the Resegregation of America's Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1, 31-33 (1999) (discussing the Supreme Court's increasing deference to local control in desegregation cases). However, insofar as the public may again speak for itself through Congress and legislation—and the premise of this Article is to provide the framework for doing so—this Article need not address the

create too much upheaval, and any benefits derived from it would not outweigh the upheaval.

The Court's assumption may be incorrect. The assumption, in most respects, broaches mere questions of fact about real costs and benefits. A harder look at the facts suggests that the Court is shortsighted in its approximation of the benefits and burdens. The Court's standards sanction racial harms and impacts, which have effects on individuals, communities, and structures that go far beyond the immediate circumstances in the cases themselves. For instance, whether certain racially disparate hiring criteria are prohibited can be the difference between numerous families obtaining a living wage for generations to come and simply struggling to remain above the poverty line. Whether a community can alter or challenge the site selection for a new school—or the attendance boundaries drawn for it and other schools—can be the difference between an education that allows subsequent generations to gain upward economic mobility and an education that relegates them to inadequate schools, trapping them in the same way it trapped their parents. Where the next public housing units will be developed in any given city, and whether it will serve families or elderly individuals, can be the difference between: (1) the perpetuation of segregation and inequality in the economic, health, educational, and employment sectors; and (2) integration and equality of access to high quality services and opportunities in all of those areas. The Court's recent decisions limiting liability and remedies through the intent standard show no significant appreciation of these factual realities.[384] Some critics of the Court even posit that the Court does not merely overlook the cost or burden on minorities and marginalized groups, but rather devalues the worth of the experiences and opportunities of minorities, rendering their burdens largely irrelevant in a cost-benefit analysis.[385]

Court's possible explanation in that respect. Rather, it can proceed in regard to the remaining available explanation. Moreover, such a concern by the Court seems ironic, since civil rights legislation has always expanded protection beyond that which the Court had recognized, and has been enacted, at least in 1991, to correct the Court's conservatism.

384. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

385. *See, e.g.*, John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1112-20 (2002) (critiquing the Court's treatment of blacks as "unwanted traffic"); Conference, *The Supreme Court, Racial Politics, and the Right to Vote:* Shaw v. Reno *and the Future of the Voting Rights Act*, 44 AM. U. L. REV. 1, 11 (1994); Julian A. Cook, Jr. & Mark S. Kende, *Color-Blindness in the Rehnquist Court: Comparing the Court's Treatment of Discrimination Claims by a Black Death Row Inmate and White Voting Rights Plaintiffs*, 13 T.M. COOLEY L. REV. 815, 850 (1996).

In contrast, the Court is acutely attuned to the costs and burdens that eliminating the above disparities would place on government, businesses, and other entities.[386] The Court, however, appears to misjudge and overvalue the extent of those costs.[387] It focuses on the immediate costs and emphasizes the restructuring that might be required.[388] Of course, it is hard to place much confidence in estimated costs of change if those estimating the costs have any reason to be predisposed against change. Exorbitant claims of costs and burdens were wildly overstated by those who opposed *Brown* and its progeny as a rationalization for their biases in maintaining school segregation and other inequalities.[389]

In addition, even if the Court is correct as to immediate costs, it takes a shortsighted view. The inconvenience or cost to a government, agency, or business to minimize racial impacts and increase opportunity is often a one-time inconvenience, or an inconvenience that, at the very least, diminishes significantly over time.[390] Many structural elements, such as the siting of a housing development or school occur only one time. Of course, employment criteria, hiring decisions, locating school boundaries, or setting admissions criteria may be continually adjusted each year and require reoccurring attention. But those processes generally occur regardless of the consideration of racial impacts and, once that consideration is included initially, it becomes merely one of several other considerations that would have occurred anyway.[391] Admittedly, the short-term costs of any restructuring or additional administrative burdens can be significant, but they are still limited in duration. The Court's failure to account for the burdens over time

386. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509-11 (1993); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute,* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

387. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 37 (2004) (indicating that "[a]lthough the calculation should be straightforward, in practice there is a tendency to overestimate the costs of regulations in advance of their implementation").

388. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 248 (1976) (focusing on the myriad laws that the Court believed would be overturned and restructured by a disparate impact standard); McCleskey v. Kemp, 481 U.S. 279 (1987) (arguing that recognizing McCleskey's claim would lead to the invalidation of a host of criminal laws).

389. *See, e.g.*, Wendy Parker, *The Future of School Desegregation,* 94 NW. U. L. REV. 1157, 1208 (2000) (arguing that opposition to unitary status proceedings based on cost became moot when the United States decided to cover the costs of litigation in *United States v. Georgia*, 702 F. Supp. 1577, 1581 (M.D. Ga. 1989)).

390. *See* ACKERMAN & HEINZERLING, *supra* note 387, at 37-39 (arguing that the costs of environmental regulatory compliance diminishes over time).

391. *See id.*

results in its weighing the short-term costs to the status quo against the short-term benefits to minorities. Regardless of the Court's goals, this failure renders its judgment regarding the comparative costs and benefits suspect. When weighing the long-term benefits to minorities against the short-term costs to the status quo, a judgment that the latter outweighs the former would be difficult to substantiate.

School desegregation is but one powerful example of this. Desegregating our schools required enormous structural changes and economic commitments.[392] A steadfast commitment to desegregation existed for at least two decades.[393] Unfortunately, the commitment fell short of complete desegregation and, in many instances, has resulted in resegregation.[394] Notwithstanding our shortfalls and the enormous burden created by desegregation, the fruits of desegregation have grown exponentially over the years.[395] African American academic achievement skyrocketed in every respect—literacy rates, high school graduation rates, college attendance, college graduation, positions in the academy, and scholarship.[396] Moreover, there is simply no longer a significant cost—if there ever really were—to government or private entities for these continually accruing benefits. Similar arguments could also be made in regard to housing, employment, and voting, to name just a few. In short, the benefits of reducing racial inequality and impacts accrue over long periods of time, whereas the costs of reducing them occur in the short

392. *See, e.g.*, Joe R. Feagin & Bernice McNair Barnett, *Success* and *Failure: How Systemic Racism Trumped the* Brown v. Board of Education *Decision*, 2004 U. ILL. L. REV. 1099, 1102-04.

393. *See, e.g., id.* at 1108-09 (noting that while the Supreme Court made its most meaningful school desegregation decisions in the late 1960s and early 1970s, that commitment had been largely undermined by the 1990s).

394. *See id.* at 1109 (stating that decisions in *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991), and *Freeman v. Pitts*, 503 U.S. 467 (1992) resulted in large-scale resegregation of the involved schools); *see also* GARY ORFIELD & CHUNGMEI LEE, CIV. RTS. PROJECT, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? (2004), *available at* http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf (finding that schools have resegregated over the past two decades and are now as segregated as they were in 1970, when desegregation was first initiated in earnest).

395. *See, e.g.*, Feagin & Barnett, *supra* note 392, at 1109-14.

396. *See, e.g.*, Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 191 (1999) (reviewing GARY ORFIELD, SUSAN E. EATON & THE HARVARD PROJECT ON SCHOOL DESEGREGATION, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996)) ("In 1971, the difference between white and black thirteen-year-olds in average reading scores on the National Assessment of Educational Progress (NAEP) was 39 points (on a scale from 0 to 500), but by 1990 it had decreased to 18 points. Similarly, the gap in math scores between white and black seventeen-year-olds . . . had fallen to 21 points by 1990. . . . [T]est scores in every age group and for each subject tested demonstrated a similar pattern over roughly the same time period. Likewise, the gap between white and black high school and college graduation rates closed dramatically.").

term. Thus, any standard premised on a balancing of burdens and benefits must look far beyond the immediately apparent burden and benefit.

In all fairness, assigning a value to the long-term benefits of reducing racial impacts is an inherently difficult endeavor. Although economists could surely project wealth increases and the value of certain opportunities, and compare them to the administrative and structural costs necessary to produce them, their projections would most likely lack the level of preciseness to permit us to reduce the question to one of simple math.[397] Disagreements among economists, moreover, would certainly arise. However, even if these impracticalities did not exist, the issue of what the real costs and benefits of a particular standard are cannot be reduced solely to an issue of economics. First, if economic analysis indicated the financial and administrative cost is higher than the financial and opportunity benefit to minorities, does it then follow or require concession that the Court's adoption of the intent standard is justified and that the standard strikes the appropriate balance of social values and utility? Likewise, even though the long-term monetary benefits most likely outweigh the administrative costs, is that alone a basis to determine that it is appropriate for the law to be more aggressive in requiring change?[398] In the area of civil rights, the most common answer is that economics, at best, is only part of the equation because much of the value derived and the rights protected are intangible.[399]

The benefits of racial equity, fairness, and integration are priceless.[400] They have an intrinsic value morally, constitutionally,

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397. *See generally* ACKERMAN & HEINZERLING, *supra* note 387, at 39-40.

398. Some would certainly argue that business is best suited to make such judgments and will naturally make changes when necessary to produce more efficient results.

399. *See, e.g.*, Yoram Margalioth & Tomer Blumkin, *Targeting the Majority: Redesigning Racial Profiling*, 24 YALE L. & POL'Y REV. 317, 330-34 (2006) (pointing out that racial profiling cannot be simply evaluated from an efficiency perspective, but must also take into account the invaluable equities at stake in racial stigma and inequity).

400. *See, e.g.*, ACKERMAN & HEINZERLING, *supra* note 387, at 39 (discussing regulation to improve the quality of human life and writing "the benefits are, literally, priceless"); *see also* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV 1785, 1795-96 (2001) (responding to the critique of legal services that the money would be better spent on food, shelter, and the like for the poor, demonstrating that the benefits the legal services bring to the poor far outweighs what the funding could purchase in other goods and services, and characterizing legal services as a "public good"). *See generally* Robert L. Spurrier, Jr., *Federal Constitutional Rights: Priceless or Worthless? Awards of Money Damages Under Section 1983*, 20 TULSA L.J. 1, 17-30 (1984) (demonstrating the difficulty in assessing the damages or value of deprivations of constitutional rights).

culturally, and politically.[401] One simply cannot place a value on the benefits that racial diversity brings to our country, or on the noneconomic benefit of educational attainment or higher quality of life that would result from reducing racial inequity. As the Supreme Court wrote in *Grutter v. Bollinger*,[402] "[N]othing less than the 'nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'"[403] Likewise, one cannot easily measure the cost to those same individuals and communities of a low quality of life that results from racial inequality, or the cost to our nation that results from what some characterize as racial groups living in separate worlds. As civil rights advocates proclaimed, the culture of racial segregation was a "disease" that undermined our basic values and had far-reaching "'psychological, economic, social, and political' consequences."[404] Thus, we must be careful about "monetizing the things we hold most dear [because it] ends up cheapening and belittling them."[405]

However, insofar as individuals, courts, or legislatures balance these "priceless" benefits against costs, they necessarily assign some value to the benefits. That value is largely a factor of idiosyncratic preferences, biases, and a general view of what the world *should* look like. Thus, some may conclude that no administrative or economic burden is too great to see racial equity expand. Others may want to see racial equity expand, but only at a cost that they believe is economically efficient or reasonable. For them, although equity is not exactly quantifiable, it is not an interest that they value the most and, at some point, its cost is outweighed by the burdens it imposes. Others, due to personal bias, vested interest in the status quo, or minimal concern with racial inequity, may believe that almost any burden placed on the government or private sector outweighs the racial impact that individuals and communities suffer. Some would argue that the Court's balancing of interest, in fact, reflects either these biases or, based on the above, simply miscalculates the actual

401. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 553-55 (1974) (holding that damages were properly sought in a suit claiming that disciplinary proceedings at a state prison violated inmates' constitutional right to due process).

402. 539 U.S. 306 (2003).

403. *Id.* at 324 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)).

404. Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 274 (2006) (quoting Malcolm X & James Farmer, *Separation or Integration: A Debate*, DIALOGUE, May 1962, *reprinted in* BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY 400 (1971)). The article further states that "the psychological 'damage that is done to Negroes is obvious [and] the damage that is done to whites in America is equally obvious.'" *Id.*

405. ACKERMAN & HEINZERLING, *supra* note 387, at 40.

benefits and burdens of the intent standard or other alternative standards.[406] In either respect, the Court would be misguided.

In the end, however, the Court's accuracy is irrelevant. The questions now are what value we assign to racial equity, what results we wish to see, and whether we are comfortable with the status quo and the pace of progress. Once we confront these questions, the task of Congress will simply be to approach the new legislation as it would tort legislation and determine what standard will best achieve our ends.

CONCLUSION

The intentional discrimination standard has dominated equal protection since the 1970s and has more recently been expanded into antidiscrimination statutes as well. The Court, however, has allowed the standard to dominate its jurisprudence without providing much, if any, explanation as to how this standard fits within our societal goals and values. Rather, the Court's primary justification focuses on this standard's ability to somehow measure whether a defendant has engaged in faulty or wrongful conduct. The lessons of tort jurisprudence demonstrate that the Court makes the false assumption that such a thing as "faulty" conduct exists, can be accurately identified, or is even relevant. Conduct is labeled "faulty" not because of a normative concept of fault, intent, mens rea, or culpability, but merely because we choose a standard that will produce societal goals. When one transgresses the standard, he is said to be at fault.

The result of the intent standard has further permitted the continuation of racial and other inequities that the Civil Rights Act of 1964 and other legislation were presumably designed to counteract. Notwithstanding its traditional practice of overturning Supreme Court decisions that created such contradictions, Congress has been inactive on this front for over a decade and a half. Much of this inactivity is likely attributable to the public's perception of civil rights and the ascendancy of the Republican Party in Congress and the White House.

The pendulum, however, is now swinging back toward the attitudes and party that instituted much of our civil rights legislation. Thus, the country may soon again deliberate civil rights legislation. This time it must not fall victim to the polemics regarding whether an intent or impact standard is more appropriate. It must

406. *See generally* Staci Rosche, Note, *How Conservative Is the Rehnquist Court? Three Issues, One Answer*, 65 FORDHAM L. REV. 2685, 2689-2704 (1997) (concluding that recent trends indicate a "closing [of] the doors of the Court to the nation's minorities, transforming that institution into an instrument of the status quo").

instead absorb tort law's lessons and determine the goals and values of antidiscrimination law. Although these goals have the potential to become as contentious as the impact versus intent debate, they are transparent, subject to the democratic process, and, as such, provide the prospect for a neutral process. Once the decision is in the appropriate decision makers' hands, crafting a standard becomes a mechanical task rather than a substantive one. As in tort law, the question is simply: what standard can produce the desired results?