

Effects of Intent: Do We Know How Legal Standards Work

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THE EFFECTS OF INTENT: DO WE KNOW HOW LEGAL STANDARDS WORK?

Theodore Eisenberg & Sheri Lynn Johnson†

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No one knows how the intent standard works in racial discrimination cases, though many have speculated. To test the speculation, this study examines how the intent standard actually operates. Its findings cast doubt on whether we really know how any legal standard functions.

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INTRODUCTION AND BACKGROUND

Since 1976, when the Supreme Court decided *Washington v. Davis*,¹ fourteenth amendment equal protection claims have required proof of intentional discrimination. Such proof establishes a racial classification and racial classifications receive strict scrutiny by courts. Because strict scrutiny is fatal in fact, if not in theory,² the intent requirement is the crucial hurdle that victims of discrimination must clear to obtain relief.

The Court in *Davis* disparaged the importance of demonstrated, racially disproportionate effects, prompting a flurry of criticism³ that continues. This criticism assumes that an intent standard will rarely be satisfied and that, while it governs, many racial wrongs will remain unproven and therefore unrighted. Except in particular subfields (such as school desegregation⁴), subsequent Supreme Court decisions support this assumption,⁵ thereby fueling the anti-intent fires. To explore the assumption that most plaintiffs would be unable to prove discriminatory intent, this Article examines all the federal district and appellate court opinions published in the twelve years following *Davis*.⁶ The results are divisible into two major areas: (1) the volume and success of intent claims, and (2) the factors that influence the outcome of intent cases.

With respect to volume and success, our findings suggest that, despite social scientific evidence of substantial racial discrimination, victims file surprisingly few intent claims, not more than a few per federal district per year. The intent cases succeed at trial slightly less often than non-civil rights cases, but not less often than other civil rights cases. Intent cases rarely result in damages awards. The story on appeal is complicated. Very few intent cases succeed on appeal, fewer than one per circuit per year, but this is attributable to the small number of cases appealed and not to unusually low success rates. Lower court rulings for both plaintiffs and defendants in intent cases are more difficult to overturn than are rulings in both

¹ 426 U.S. 229 (1976).

² Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

³ See *infra* text accompanying notes 64-67.

⁴ See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, *reh'g denied*, 444 U.S. 887 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, *reh'g denied*, 444 U.S. 887 (1979).

⁵ See *McCleskey v. Kemp*, 481 U.S. 279, *reh'g denied*, 482 U.S. 920 (1987); *City of Memphis v. Greene*, 451 U.S. 100, *reh'g denied*, 452 U.S. 955 (1981) (thirteenth amendment case); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (fifteenth amendment case); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

⁶ We also studied intent claims in state and district courts. See *infra* text accompanying notes 99 & 128.

non-civil rights cases and in other civil rights cases. Despite their stability, intent cases provoke more dissents and concurrences than other appellate cases.

The expert judgment that plaintiffs would have a low success rate in intent cases is not verifiable by observing all published opinions. Intent claimants' success rate is not markedly different from that of other civil rights claimants. The more striking finding is the low volume of intent litigation. The Supreme Court's standard takes its toll not through an unusually high loss rate for those plaintiffs reaching trial or appeal, but by deterring victims from even filing claims.

The second area of inquiry, assessing which factors increase the likelihood of plaintiff success, yields surprising results with implications that transcend the specific area of intentional race discrimination cases. Several factors by which knowledgeable observers would expect to explain the pattern of opinion results turn out to be unimportant. Comparing results at the district and appellate court levels leads to an even more startling result: different factors lead to sustaining intent claims at the two opinion levels. Thus, the student of district court opinions observes an intent standard that differs in operation from the standard that would be seen by the peruser of appellate court opinions.

The results here suggest the possible benefits of reevaluating, using statistical techniques, the accepted wisdom about how legal doctrines function. Our largely untried technique⁷ of reading nearly all of the cases in an area and subjecting them to multivariate analysis, provides insights and raises issues beyond the grasp of traditional scholarly legal analysis, which typically relies on small samples of cases chosen for their pedagogic or other interest. The law professor or practitioner who reads three or four cases and identifies the crucial factor or factors in a legal area may be working from too small a sample; those relying on insights into a "leading" case may find their conclusions unsupported by the mass of legal decisions.⁸ Even in an area as intensely analyzed as racial discrimi-

⁷ Examples of similar approaches are Paul Burstein & Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 LAW & SOC'Y REV. 355 (1986); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990); and Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

⁸ The findings also add to the growing body of empirical literature focusing on the selection effect at various stages of the legal system. E.g., Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). These studies show that cases litigated to conclusion in district court are not a random cross-section of filed cases.

nation, multivariate analysis offers insights into decision patterns unavailable through traditional legal analytical techniques.

A. Doctrinal History of the Intent Standard

The fourteenth amendment's history clearly shows that the primary purpose of the equal protection clause was to prohibit at least some forms of official racial discrimination.⁹ How discrimination should be defined is not so clear. Until relatively recently, neither the Supreme Court nor its commentators had settled on a single comprehensive definition.

In *Strauder v. West Virginia*,¹⁰ decided in 1879, the Supreme Court invalidated a law that explicitly excluded blacks from juries. One explanation the Court offered for its holding stressed the need for impartiality, thus foreshadowing the intent standard: "[T]he law in the States shall be the same for the black as for the white."¹¹ Other language in the opinion, however, sounded impact themes: The statute was suspect because it was "a stimulant to that race prejudice which is an impediment to . . . equal justice";¹² because it implied "inferiority in civil society";¹³ because it was "practically a brand upon [blacks]";¹⁴ and because it was a step "towards reducing [blacks] to the condition of a subject race."¹⁵

Shortly after *Strauder*, the Court invalidated a facially neutral ordinance in *Yick Wo v. Hopkins*.¹⁶ The ordinance, which regulated the operation of laundries in wooden buildings, had been administered in a blatantly unequal fashion: permits to operate laundries were granted to all but one white applicant but to none of the approximately 200 Chinese applicants; moreover, at least 150 Chinese owners, but none of eighty comparable white owners, had been arrested for not complying with the ordinance.¹⁷ *Yick Wo* established that the discrimination prohibited by the equal protection clause extended beyond explicit racial classifications. But because the extreme disparate impact of the ordinance could only have resulted from an intent to discriminate, *Yick Wo* did not clarify whether impact or intent was crucial.

⁹ Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). The scope of the fourteenth amendment's intended prohibition remains the subject of debate. See William E. Nelson, *Fourteenth Amendment*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 757, 760 (Leonard Levy, Kenneth Karst & Dennis Mahoney eds. 1986).

¹⁰ 100 U.S. 303 (1879).

¹¹ *Id.* at 307.

¹² *Id.* at 308.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 118 U.S. 356 (1886).

¹⁷ *Id.* at 359.

Ten years later, in the notorious decision of *Plessy v. Ferguson*,¹⁸ the Court upheld a system of explicit, state-enforced segregation and cavalierly dismissed the importance of disparate effects. The segregation in *Plessy* was purportedly different from the discrimination in *Strauder* and *Yick Wo*, for the Louisiana statute at issue did not simply deny a benefit to one racial group.¹⁹ Although the statute classified persons by race, it could be said to be impartial, treating both races the same; its mandate of "equal but separate" accommodations for the races on trains reciprocally excluded whites and blacks from the other race's "equal" privileges.²⁰ To counter such a construction of equality requires arguments about the psychological and social effects of segregation. The Court in *Plessy* rejected such arguments on the ground that if "the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."²¹

The Supreme Court upheld "separate but equal" Jim Crow laws for nearly sixty years, striking down segregated facilities only when they were *tangibly* unequal, for only in cases of tangible inequality was the state deemed accountable for the different effects segregation had upon whites and blacks.²² Then in *Brown v. Board of Education*²³ the Court backtracked, holding that the equal protection clause forbids *de jure* segregation in the public schools, whether or not the segregated schools were superficially equal. Despite *Brown's* heavy reliance on the special role of education and the destructive consequences of segregation for black children, the Court quickly extended *Brown* to other contexts.²⁴ At the least, *Brown* reversed *Plessy*, and established that all explicit state-enforced racial classifications are subject to strict scrutiny.

How much further *Brown* extended the definition of discrimination was unclear for another two decades. The *Brown* opinion emphasized that racial segregation of black children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."²⁵ Such language suggested that stigmatizing, subordinating *effects* con-

¹⁸ 163 U.S. 537 (1896).

¹⁹ *Id.* at 556-57 (Harlan, J., dissenting).

²⁰ *Id.*

²¹ *Id.* at 551.

²² *E.g.*, Sweatt v. Painter, 339 U.S. 629, *reh'g denied*, 340 U.S. 846 (1950).

²³ 347 U.S. 483 (1954).

²⁴ *E.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, *reh'g denied*, 358 U.S. 913 (1958); Gayle v. Browder, 352 U.S. 903, *reh'g denied*, 352 U.S. 950 (1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

²⁵ *Brown*, 347 U.S. at 494.

stitute discrimination, and other post-*Brown* decisions contained similar evocations of caste and class effects.²⁶ Moreover, the Court's subsequent school desegregation holdings were easily susceptible to an effects interpretation. Its repeated rulings that school districts that had been segregated by law did not comply with the fourteenth amendment merely by enacting race-neutral measures, could be read to imply that actual integration was constitutionally required. Justice Powell, in a concurring opinion, even urged that governments had an obligation to provide integrated schools, whether or not de jure segregation had ever existed.²⁷

Two 1971 cases seemed to confirm an effects approach to discrimination. In *Griggs v. Duke Power Co.*,²⁸ the Court interpreted the Title VII statutory prohibition against employment discrimination based upon race to outlaw any hiring practice that disqualified a disproportionate number of blacks, unless that practice was justified by "business necessity."²⁹ The *Griggs* rule expressly included facially neutral practices, and even those adopted with neutral intent.³⁰ Because nothing in the legislative history or general language of the statute appeared to distinguish the kind of discrimination covered by the statute from the kind of discrimination covered by the Constitution, several courts of appeals extended the *Griggs* approach to equal protection claims.³¹ Attempting to translate the business necessity rule for public sector use, those courts concluded that the government could take measures that have harsh impacts on blacks only when it can provide a strong justification for those measures.

That same year the Court decided *Palmer v. Thompson*,³² which upheld the municipal decision to close the Jackson, Mississippi swimming pools rather than desegregate them. The Court reasoned that the record showed "no state action affecting blacks differently from whites"³³ and said that racial "motivation" alone does not render state action suspect.³⁴ The Court's explanation of prior cases that alluded to discriminatory motive was that "the focus . . . was on the actual effect of the enactments, not upon the motiv[e]

²⁶ See, e.g., *White v. Regester*, 412 U.S. 755 (1973) (invalidating a state's use of mult-member election districts on the ground that the system operated to exclude minorities from participation in the political process); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (noting that miscegenation laws were designed to maintain white supremacy).

²⁷ *Keyes v. School Dist. No. 1*, 413 U.S. 189, 224, *reh'g denied*, 414 U.S. 883 (1973).

²⁸ 401 U.S. 424 (1971).

²⁹ *Id.* at 431.

³⁰ *Id.* at 432.

³¹ See cases cited in *Washington v. Davis*, 426 U.S. 229, 244-45 & n.12 (1976).

³² 403 U.S. 217 (1971).

³³ *Id.* at 225.

³⁴ *Id.* at 224.

which led the [s]tates to behave as they did.”³⁵ Effect was at its zenith.

The zenith was brief. In 1976, the Supreme Court ruled in *Washington v. Davis*³⁶ that a showing of discriminatory intent was a prerequisite to finding a violation of the equal protection clause. The opinion distinguished the statutory and constitutional standards and questioned several appellate court decisions that had extended *Griggs* to equal protection claims.³⁷ It also disavowed any reading of *Palmer* that would forbid inquiry into motive, and hinted that an explanation for the result in *Palmer* might lie in the fact that *both* discriminatory intent and disproportionate impact would have to be demonstrated to show a violation of the equal protection clause.³⁸

The plaintiffs in *Davis* had challenged a testing program for the Washington, D.C. police force on the ground that it failed many more blacks than whites. Because they had made no allegations except disparate impact, their case was over when the Supreme Court held that discriminatory intent is necessary for a finding of unconstitutional discrimination.³⁹ Questions concerning the application of the intent requirement could be postponed.

The Court turned to the subjects of proper inquiry in the determination of racially discriminatory intent in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁴⁰ “[W]ithout purporting to be exhaustive,” Justice Powell’s majority opinion briefly addressed seven factors.⁴¹ The first factor, “an important starting point,”⁴² would often be the action’s impact:

Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* [where a state used a grotesque, twenty-eight-sided figure to exclude all black citizens from a city] or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.⁴³

A footnote to this passage acknowledged that several jury selection cases fell into the “clear pattern” category despite the absence of

³⁵ *Id.* at 225.

³⁶ 426 U.S. 229 (1976).

³⁷ *Id.* at 244-45 & n.12.

³⁸ *Id.* at 243.

³⁹ *Id.* at 246.

⁴⁰ 429 U.S. 252 (1977).

⁴¹ *Id.* at 266.

⁴² *Id.*

⁴³ *Id.* (citations omitted).

extreme statistical patterns, ascribing this exception to "the nature of the jury selection task."⁴⁴ After this discussion of "clear pattern" evidence and lesser showings of disparate impact, the Court listed as further factors the historical background of the decision, the specific sequence of events leading up to the challenged decision, departures from the normal procedural sequence, substantive departures, and the legislative or administrative history of the decision.⁴⁵ Neither perpetuation of past discrimination, as suggested by the school desegregation decisions, nor the foreseeability of disparate effects, as proposed by some commentators, were included in the list.

Subsequent decisions have reaffirmed *Davis* and *Arlington Heights*.⁴⁶ Outside of the traditionally plaintiff-favored areas of schools⁴⁷ and jury selection,⁴⁸ plaintiffs have established a racially discriminatory motive in very few of the contested intent cases decided by the Supreme Court since *Davis*. The two noteworthy victories outside these areas both related to voting.⁴⁹

Since *Davis*, the intent standard has come to cast an even larger

⁴⁴ *Id.* at n.13.

⁴⁵ *Id.* at 267-68.

⁴⁶ *E.g.*, *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

⁴⁷ *See* *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) (initiative which prohibited school boards from requiring any student to attend a school other than the school geographically nearest or next-nearest his place of residence, but which contained exceptions permitting school boards to assign students away from their neighborhood schools for virtually all purposes required by their educational policies except racial desegregation, violated equal protection clause); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (record supported lower courts' findings that school board's conduct was animated by a segregative purpose), *reh'g denied*, 444 U.S. 887 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (school board's failure to fulfill its affirmative duty to eradicate effects of dual school system and tendency of its conduct to perpetuate or increase segregation rendered the current systemwide segregation properly traceable to purposefully dual system of the 1950s and to subsequent acts of intentional discrimination), *reh'g denied*, 444 U.S. 887 (1979).

⁴⁸ *See* *Batson v. Kentucky*, 476 U.S. 79 (1986) (To establish prima facie case of purposeful discrimination in selection of the petit jury, the defendant must show that he is a member of a cognizable racial group, that the prosecutor has exercised peremptory challenges to remove from the venire members of defendant's race, and that relevant circumstances raise an inference that the prosecutor used his challenges to exclude the veniremen from the petit jury on account of their race.); *Castaneda v. Partida*, 430 U.S. 482 (1977) (prima facie case of racial discrimination established by a showing that, while the population of the county was 79.1% Mexican-American, over an 11-year period only 39% of the persons summoned for grand jury service were Mexican-American).

⁴⁹ *See* *Hunter v. Underwood*, 471 U.S. 222 (1985) (provision in Alabama Constitution disenfranchising persons convicted of crimes involving moral turpitude, even though neutral on its face, was originally motivated by desire to discriminate against blacks); *Rogers v. Lodge*, 458 U.S. 613 (record sustained district court's findings that at-large electoral system in Burke County, Georgia was being maintained for invidious purpose of diluting voting strength of black population), *reh'g denied*, 459 U.S. 889 (1982). *But see* *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (finding no discriminatory purpose behind the city's at-large method of selecting its commissioners).

shadow over race discrimination law. Although the Court still adheres to the disparate impact standard in Title VII cases,⁵⁰ it has extended the intent requirement of fourteenth amendment equal protection cases to fifteenth amendment voting rights⁵¹ claims, thirteenth amendment "badge or incident of slavery"⁵² claims, antidiscrimination legislation in the areas of contract⁵³ and, to a more limited extent, federally assisted programs.⁵⁴ Moreover, because of the Court's holding that a remedial race-conscious measure by a state governmental body is permissible only upon a finding of past discrimination by that governmental unit,⁵⁵ the intent standard is now relevant in most fourteenth amendment affirmative action cases.

Many cases decided under the *Davis* intent standard are disturbing,⁵⁶ but perhaps the most troubling to date is *McCleskey v. Kemp*.⁵⁷ Warren McCleskey was sentenced to death for murder in Georgia and challenged his death sentence as racially discriminatory. The most important evidence he proffered to demonstrate that Georgia's capital sentencing system is administered in a racially discriminatory manner was the Baldus study.⁵⁸ Baldus examined over 2000 murder cases that occurred in Georgia during the 1970s. The raw data showed large disparities in the imposition of the death penalty, disparities based upon the victim's race. To rule out the

⁵⁰ The Supreme Court modified the *Griggs* rule in several respects that are disadvantageous to plaintiffs. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

⁵¹ *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

⁵² *City of Memphis v. Greene*, 451 U.S. 100, *reh'g denied*, 452 U.S. 955 (1981).

⁵³ *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

⁵⁴ In *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), four Justices expressed the view that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7, which prohibits racial discrimination in federally assisted programs, requires proof of intent. Justice White disagreed with this interpretation but did agree, in a crucial vote, that a private plaintiff should recover only injunctive, noncompensatory relief for disparate impact claims. Justices Stevens, Brennan, and Blackmun supported an impact standard under Title VI on the grounds that agency regulations adopted it.

⁵⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *But see* *Metro Broadcasting Inc. v. FCC*, 110 S. Ct. 2997 (1990) (benign race-conscious measures may be mandated by Congress without a finding of past discrimination.).

⁵⁶ *See* *City of Memphis v. Greene*, 451 U.S. 100, *reh'g denied*, 452 U.S. 955 (1981) (rejecting a § 1982 attack on Memphis decision to close a road that had the effect of keeping blacks from passing through a white neighborhood). Disturbing effects of *Davis* are not limited to race cases; *Davis* also governs constitutional sex discrimination claims. *See* *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (finding no discriminatory purpose behind Massachusetts civil service preference for veterans despite strong gender effects and a history of gender discrimination in the state civil service); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (no intentional sex discrimination in excluding pregnancy from coverage of otherwise comprehensive disability insurance plan).

⁵⁷ 481 U.S. 279, *reh'g denied*, 482 U.S. 920 (1987).

⁵⁸ *See* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, *EQUAL JUSTICE AND THE DEATH PENALTY* (1990) [hereinafter *BALDUS STUDY*].

possibility of spurious correlations, Baldus subjected his data to exhaustive analysis, considering 230 variables that might have been hypothesized to explain the disparities on nonracial grounds.⁵⁹ Controlling for nonracial variables, Baldus estimated that defendants charged with killing white victims were more than four times as likely to be sentenced to death than defendants charged with killing black victims.⁶⁰ Black defendants accused of killing white victims were the most likely to be condemned. McCleskey also offered evidence to show Georgia's extraordinary legacy of a race-conscious criminal justice system.⁶¹

After reciting this evidence and accepting the validity of the Baldus study, Justice Powell's majority opinion noted that statistical disparities ordinarily must be "stark" to be accepted as the sole proof of discriminatory intent.⁶² The Court then refused to broaden the category of cases in which less extreme impact is deemed sufficient proof of intent. Justice Powell reaffirmed the necessity of showing discriminatory purpose, explaining that a showing of awareness of racially disparate consequences was inadequate; only a showing that the legislature acted "because of" an anticipated racial effect would suffice.⁶³ Because McCleskey had not made such a showing, the Court rejected his equal protection claim.

B. Commentary on the Intent Standard

Early commentary on the role of discriminatory purpose in equal protection cases argued that legislative motive was a proper subject of inquiry.⁶⁴ This focus was partly the result of the Supreme Court's refusal to examine motive in *Palmer v. Thompson*⁶⁵ and partly the result of larger questions concerning the role of motive in constitutional law.⁶⁶ But after the Court decided *Davis*, commentators quickly shifted gears; intent was certainly relevant, but that did not mean that the intent standard constituted a comprehensive approach to all discrimination.

Dissatisfaction with the discriminatory purpose standard has two distinct facets. One is the difficulty of proving discriminatory

⁵⁹ *Id.* at 42-45 (discussing research design, sample, and data).

⁶⁰ *Id.* at 154.

⁶¹ 481 U.S. at 329-32 (Brennan, J., dissenting).

⁶² *Id.* at 293.

⁶³ *Id.* at 298-99.

⁶⁴ Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

⁶⁵ 403 U.S. 217 (1971).

⁶⁶ See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

purpose.⁶⁷ Even if the discriminatory purpose standard reflects a correct view of what constitutes discrimination—decisions made “because of” race—it may be a poor vehicle for identifying instances of such decisions.⁶⁸ Several commentators have argued that sophisticated discriminators will conceal their purposes.⁶⁹ Drawing on developing social science data concerning the prevalence and manifestations of unconscious racism,⁷⁰ recent writers have contended that race-based decisionmaking is common, and have pointed out the impossibility of adducing evidence that a decision was made “because of” race when the decisionmaker himself is unaware that race influenced his choice.⁷¹

A second facet of the anti-*Davis* commentary argues that intentional, “because of” race discrimination provides a too limited vision of the goal of equality embodied in the fourteenth amendment. Most broadly, Alan Freeman has argued that intent tests wrongly adopt a perpetrator’s perspective on discrimination; from the victim’s perspective, effects are of greater importance.⁷² Others have asserted that avoidance of particular effects, such as subordination,

⁶⁷ See, e.g., Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 114-16 (1977); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 548-49 (1977); Robert G. Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. REV. 961, 1001; Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

⁶⁸ Cf. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956 (1989) (arguing that the discriminatory intent standard “leads either to incoherence or to an inquiry that is no less amorphous, and potentially as threatening to existing institutions, as the rival conceptions of discrimination that *Washington v. Davis* rejected.”).

⁶⁹ Eisenberg, *supra* note 67, at 47-48; Perry, *supra* note 67, at 551; Schwemm, *supra* note 67, at 1031.

⁷⁰ A burgeoning literature (spanning Freudians, cognitive psychologists, and sociologists) documents the rise of the aversive racist, a person whose ambivalent racial attitudes lead her to deny her own prejudice and express it indirectly, covertly, and often unconsciously. Although terminology varies with the discipline—as does the explanation of the origin of unconscious racism—all subfields document the existence and prevalence of the same phenomenon. See Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027-29 (1988) (reviewing the literature).

⁷¹ See KENNETH L. KARST, *BELONGING TO AMERICA* 156 (1989); Johnson, *supra* note 70; Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1650 (1985) [hereinafter Johnson, *Black Innocence*]; Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1419 (1988); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Gayle Binion, “Intent” and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 442; Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-8 (1976); Karst, *supra* note 67, at 1165; Strauss, *supra* note 68, at 960.

⁷² Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

stigma, second-class citizenship, or encouragement of prejudice, are encompassed in the constitutional ideal, and that those effects should therefore be included in the definition of discrimination.⁷³ Still others have argued that, while a pure impact standard might be unmanageable, if limited, racially disproportionate impact should be included in the definition of discrimination. Candidates for the limiting principle include foreseeability of disparate impact,⁷⁴ proximate causation of disparate impact,⁷⁵ and disparate impact that results from perpetuation of past discrimination.⁷⁶ Alternatively, some critics have contended that disparate racial effects should give rise to heightened scrutiny in all cases, but that the state's defensive burden should be lower than in purposeful discrimination cases.⁷⁷

C. The Data

Most criticism of *Washington v. Davis* argues or assumes that the intent standard will be difficult to satisfy. There have been no attempts to systematically study cases decided under the intent standard. To fill that gap, we decided initially to examine all district court opinions. Data about the absolute number and rate of plaintiffs' victories is obviously relevant to the intent standard's operation. Having made arguments critical of *Davis* ourselves,⁷⁸ we expected to find few successes. More specifically, we expected to find the absolute number of winning racial discrimination plaintiffs to be low, but were less clear about what rates of success to predict. Uninformed intuition would predict low success rates as well. But selection effect theory suggested that success rates at trial might not vary greatly from other classes of claims,⁷⁹ and that the unfavorable substantive law would instead be reflected in fewer filings.

Later we expanded our inquiry to courts of appeals cases, in part because we were concerned about whether district court judgments were frequently reversed; the possibility of frequent reversals could cast doubt upon any conclusions we might draw about plaintiff success. In assessing the stability of results on appeal, we were primarily concerned with affirmances and reversals, but we also examined rates of concurrences, dissents, and per curiam opinions.⁸⁰

⁷³ See Strauss, *supra* note 68, at 941-46 (reviewing these conceptions of discrimination and citing their proponents.).

⁷⁴ See, e.g., Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 129 (1983) (authored by Pamela S. Karlan).

⁷⁵ See Eisenberg, *supra* note 67.

⁷⁶ See Brest, *supra* note 71, at 31-36; Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154-55 (1976).

⁷⁷ See Perry, *supra* note 67, at 559-60, 563; cf. Gunther, *supra* note 2, at 20-24.

⁷⁸ Eisenberg, *supra* note 67; Johnson, *supra* note 70.

⁷⁹ See Priest & Klein, *supra* note 8; *infra* text accompanying notes 125-30.

⁸⁰ Our decision to consider courts of appeals decisions was also motivated by the

The cases analyzed stem from a search for all federal appellate and district court published opinions from June 7, 1976 to February 6, 1988, a period of 140 months, that cite either of the two leading intent cases—*Washington v. Davis* or *Arlington Heights*. WESTLAW searches located every opinion citing either case and we eliminated from the study cases that lacked a constitutional race-based intent claim.⁸¹ Remaining cases were read and coded for many factors, including basic identification data such as district and circuit, subject matter, bases for relief alleged by plaintiffs, bases for granting or denying relief relied on by the courts, procedural posture, the existence of dissenting opinions, relief granted, and other items. This yielded 140 appellate opinions and 176 district court opinions.

II

VOLUME, SUCCESS, AND OTHER CHARACTERISTICS OF INTENT CASES

The data can address concerns about the difficulty of satisfying the intent standard in at least two ways: by the success rate of those cases filed and by the total volume of filings.⁸² The volume of intent claim activity suggests that plaintiffs infrequently invoke the Constitution to attack racial discrimination. Intent claims succeed at rates lower than other classes of litigation, though not at shockingly lower rates.

A. Criteria for Assessing Volume and Success Rates

Our data, like almost all case data used in legal analysis, consist

desire to expand the sample size, but the completed study now suggests that combining district and appellate court data is unlikely to be helpful in this way.

⁸¹ The searches used were:

WASHINGTON +S DAVIS & (INTENT! PURPOSE!) & DISCRIMIN! & DATE(AFTER 6/7/76), and
ARLINGTON +S HEIGHTS & (INTENT! PURPOSE!) & DISCRIM! % WASHINGTON +S DAVIS & DATE(AFTER 6/7/76).

The searches were conducted on February 6 and 7, 1988. Some cases decided just before the search date were not yet available as full opinions. These were added to the sample later. For possible differences in the availability of unpublished opinions among WESTLAW, LEXIS, and the Administrative Office of the United States Courts, see Memorandum from Peter W. Martin to Donna Stienstra, Stewart Schwab, Ted Eisenberg, and Other Interested Folks (Mar. 6, 1987) (on file at *Cornell Law Review*) (discussing results of LEXIS searches for unpublished decisions by circuit).

⁸² For discussions of definitions of success, see Theodore Eisenberg & Stewart J. Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 676-77 (1987) [hereinafter Eisenberg & Schwab, *Reality*]; Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989) [hereinafter Eisenberg & Schwab, *What Shapes Perceptions?*]; Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 726-28 (1988) [hereinafter Schwab & Eisenberg, *Explaining*].

of published opinions, not all case filings. Published opinions may not be a representative sample of all race-based intent cases filed, and in some respects, pointed out below, they surely are not. The ideal methodology for studying plaintiff successes in intent claims presumably would be representative of all trial court level activity. Even such a study should be supplemented by an investigation of pre-filing primary behavior. But for many issues throughout the legal system, published opinions are all we have.⁸³

Fortunately, studies of similar cases are available that contain both filing and opinion data bearing on volume and success. These studies, together with case filing information published by the Administrative Office of the United States Courts,⁸⁴ allow us to draw reasonable inferences about filing levels and the total number of successful cases from the published opinion intent data. Before proceeding, it is helpful to clarify the terminology we employ in referring to results from previous studies.

Three classes of overlapping cases should be distinguished: (1) race-based intent cases, consisting of constitutional claims against governments and officials, (2) "civil rights" cases, a category of cases in the classification scheme maintained by the Administrative Office,⁸⁵ and (3) "constitutional tort" cases, cases brought under 42 U.S.C. § 1983. These categories are not mutually exclusive and we do not seek to classify claims in a single category. Indeed, a single claim (such as a racially motivated decision to terminate a government program) can fit into all three categories. But since each category contains cases that do not fit in the other two categories, the constitutional tort and civil rights groups are not perfect proxies for intent claims. They are the closest subject matter areas about which substantial data are available. Although many of our results do not depend on studies of civil rights and constitutional tort cases, these studies enrich our findings. We note the differences in these categories, thereby enabling the reader to judge whether the inferences we draw from studies of "civil rights" and "constitutional tort" cases are reasonable.

Intent cases can arise in any setting, from school desegregation

⁸³ For example, when Congress debated recent civil rights legislation, studies of appellate opinions dominated the empirical picture being drawn. 3 Hearings on H.R. 4000, *The Civil Rights Act of 1990*, House Comm. on Education and Labor, 101st Cong., 2d Sess., 240, 279, 454 (1990) [hereinafter *Hearings*].

⁸⁴ For discussion of the Administrative Office data, see Eisenberg & Schwab, *Reality*, *supra* note 82, at 653.

⁸⁵ See ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIAL POLICIES AND PROCEDURES transmittal 64, vol. XI (Mar. 1, 1985) [hereinafter A.O. GUIDE]. Our terminology in this article differs from the Administrative Office's. The Administrative Office refers to the category we are labeling "civil rights" as "other civil rights." *Id.* at 11-88 (Exhibit J).

to prison conditions, from actions against the police to claims involving the criminal justice system. They transcend most traditional doctrinal legal boundaries. They may be (as in the program termination example above) but need not be what we are calling "civil rights" and "constitutional tort" cases. For example, a criminal defendant's assertion of an intentionally racially biased jury is an intent claim, but is neither a civil rights claim (in the sense used by the Administrative Office) nor a constitutional tort claim.

The Administrative Office's categorization of "civil rights" cases is important because data about success in each Administrative Office category are available. As the most general civil rights category maintained by the Administrative Office, it includes cases filed under many federal civil rights statutes.⁸⁶ Since section 1983 (constitutional tort) actions dominate this category,⁸⁷ the civil rights category may be best defined by what it excludes. The term "civil rights," as used below to refer to Administrative Office data, does not include most cases raising claims of discrimination in employment, accommodations, or voting, even though common usage of the term might include such claims.⁸⁸ The Administrative Office has a separate category for each of these areas. Many civil rights cases are intent cases, but many are not.

"Constitutional tort" cases include actions brought under section 1983 against state and local authorities alleging constitutional violations and similar actions brought against federal officials.⁸⁹ Constitutional tort cases substantially overlap with "civil rights" cases. The constitutional tort category is important because prior studies establish levels of volume and success for constitutional tort cases. The results from constitutional tort cases⁹⁰ are directly relevant to race-based intent claims, most of which are brought as constitutional tort actions under section 1983.⁹¹ The two subclasses of

⁸⁶ What we are calling the Administrative Office's "civil rights" category includes, in addition to nonprisoner cases filed under § 1983, nonprisoner cases filed under 42 U.S.C. §§ 1981, 1985, 1988, 2000a and 2000d; fifth amendment claims; claims under the Economic Opportunities Act (42 U.S.C. § 2701 (1988)); and other unclassified civil rights cases.

⁸⁷ The best evidence suggests that about 70% of these "civil rights" cases are § 1983 cases. Eisenberg & Schwab, *Reality*, *supra* note 82, at 665, 670.

⁸⁸ See A.O. GUIDE, *supra* note 85, at 11-45 (Exhibit B).

⁸⁹ Federal actions are based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Section 1983 actions may not be brought against federal officials, but the scope of the *Bivens*-based action is about the same as the § 1983 action.

⁹⁰ Constitutional tort cases are actions brought against state and federal officials asserting violations of federal law.

⁹¹ Eisenberg & Schwab, *What Shapes Perceptions?*, *supra* note 82, at 525. Table III shows that about 20% of constitutional tort claims in three large districts for one year were discrimination claims (employment and other), and that about 16% of published

constitutional tort cases that include express discrimination claims show district court and appellate court success rates that are close to the overall constitutional tort success rates.⁹²

B. Volume

The intent standard's demands might discourage plaintiffs from bringing intent-based claims. If the intent standard makes cases more difficult to win, or is perceived to by plaintiffs, the standard would shift the distribution of cases filed, resulting in fewer filings than under a less stringent standard. There is already evidence that discrimination victims are less likely than other victims to bring their grievances to anyone's attention or to bring them to court.⁹³ A legal standard that discourages victims already reluctant to sue is of special concern.

1. *The Number of Intent Cases*

One cannot directly observe the national total of intent claims filings, but it is possible to estimate the number of such filings from data gathered in this study and in other sources. By using percentages from studies in which both the number of published opinions and the number of filings are known, we may estimate the number of intent filings from the known number of intent opinions. Two such estimates yield a consistent result of relatively few filings.

An estimate based on an actual comparison of district court filings and opinions is available. Siegelman and Donohue studied a closely related area of law, employment discrimination, in which one might expect a comparable number of opinions per filing.⁹⁴ (Indeed, about one-third of district court intent opinions involve employment claims.) They found that about 20 percent of employment discrimination cases filed lead to district court published opinions.⁹⁵ Applying the 20 percent rate to the 176 district court opinions we found yields an estimate of 880 district court filings for the period

constitutional tort opinions in three circuits over a five-year period were discrimination claims. *Id.*

⁹² *Id.* at 525, Table 3 (combining the employment and other discrimination categories).

⁹³ KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* 25-30 (1988); Charles R. Epp, *Connecting Litigation Levels and Legal Mobilization: Explaining Interstate Variation in Employment Civil Rights Litigation*, 24 *LAW & SOC'Y REV.* 145, 160 (1990); David Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72, 87 (1983).

⁹⁴ Peter Siegelman & John J. Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 *LAW & SOC'Y REV.* 1133 (1990). Their study covers a long time period, 1972 to 1986, but is limited to cases in the Northern District of Illinois. *Id.* at 1138.

⁹⁵ *Id.* at 1141.

covered. Dividing by twelve years suggests that about 70 intent claims, less than one per district, were filed each year. A second estimate is based on data from a constitutional tort study containing both opinion data and filing data. It suggests about two filings per federal district per year.⁹⁶ By either estimate, the number of district court filings stating a claim of intentional racial discrimination is low.⁹⁷

⁹⁶ Contrasting the appellate court data with data from the constitutional tort study provides another estimate of district court filings. Extrapolating back to district court level filings from the appellate activity requires one to make some assumptions about the representativeness of the constitutional tort data. District court constitutional tort filing data from the earlier study are limited to one year of filings in three districts, but the nonprisoner filing rate in these three districts seems to be reasonably representative of the national experience for that year. Schwab & Eisenberg, *Explaining, supra* note 82, at 721 n.8. We must assume it is also representative of a longer time period. Further, we must assume that the filing/appellate opinion ratio is similar for constitutional tort cases and for race-based intent claims; the justification for this assumption is that, as noted above, race-based intent claims are closely related to constitutional tort claims. Using these two assumptions one can estimate the percentage of the district court docket consisting of race-based intent claims, keeping in mind that this should be treated as a rough order-of-magnitude estimate.

Nonprisoner constitutional tort claims comprised about 4.3% of federal filings. Eisenberg & Schwab, *What Shapes Perceptions?, supra* note 82, at 514 (Figure 1), 522 n.59. If the ratio between filings and appellate opinions is the same for constitutional tort litigation and race-based intent litigation, then 2% of the 4.3%, or about .086% of district court filings are intent claims. Given that district court filings totaled about 2,411,000 for the period of the study, *see infra* note 97, .00086 times this number, or 2073, intent claims would have been filed. This yields an annual total of 173 intent claims, about two per year per district.

⁹⁷ One estimate of the volume of race-based intent claims comes from projecting onto total district court filings the proportion of published district court opinions that involve race-based intent claims. WESTLAW shows about 95,000 district court opinions from 1976 to 1988. (The precise number is 97,277 if one includes all WESTLAW opinions and 94,476 if one excludes opinions that WESTLAW reports as not published.) The 176 district court intent opinions during the same period thus comprise about .19% of district court opinions. If they comprise the same percentage of filings, there would have been 382 intent filings per year for the 12 years of this study, about four per federal district per year and less than one per federal district judge per year.

The filing estimates are as follows: From July 1, 1977 to February 28, 1988, district court filings totaled about 2,411,000. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF DIRECTOR. We have reduced 1988 filings by one-third to reflect the end of this study not coinciding with the end of the Administrative Office's fiscal year. If race-based intent claims comprise .19% of total filings, there would have been 4581 intent filings or about 382 per year. For 1982, a year in the middle of this study, there were 511 authorized federal district court judgeships. 1982 ANNUAL REPORT at 476 (Table X-1).

This estimate from the fraction of published opinions probably substantially overestimates the total number of intent filings. Federal court dockets contain surprisingly high percentages of default judgments, government payment program filings, and social security cases. Marc Galanter, *The Life and Times of the Big Six, Or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921. These routine collection cases and minor administrative law actions are very unlikely to lead to published opinions. Large groups of filings that do not lead to opinions inflate the number of estimated intent filings, because the .19% figure should be multiplied by some number substantially smaller than the total number of filings. In addition, one suspects that intent cases are more

Intent cases are also a small fraction of the appellate docket. A WESTLAW search provides another estimate of the level of appellate activity. WESTLAW shows about 149,000 appellate opinions from 1976 to 1988.⁹⁸ Using this figure for the total, the 140 intent opinions comprise about .1 percent of published appellate opinions. Even if we somehow missed many intent opinions, or should adjust the crude WESTLAW figures, intent opinions would not comprise more than the higher .2 percent estimate.

Thus, using estimates of the number of race-based claims filed or the proportion of the district and appellate court dockets occupied by these claims, constitutional race-based intent litigation is relatively rare. Adding state court intent opinions would not materially affect these results; for all states, we found a total of only fifty-three such opinions for the twelve years of this study.⁹⁹

2. *Interpreting the Number of Filings*

Assessing whether the level of filings or number of trial successes is "low" requires comparing the number of filings with the number of discriminatory acts engaged in by governmental bodies and their agents. This in turn requires a definition of discrimination. If one's definition is broad enough to include governmental actions that exacerbate or perpetuate existing inequalities, then there is no doubt that a great deal of discrimination exists and no doubt that the intent standard will not capture most of it, since it is not designed to do so.

If the Supreme Court's definition of action taken "because of" rather than merely "in spite of" race is used, the amount of governmental discrimination is harder to assess. Nevertheless, there is reason to believe that the amount is far from insignificant. Contemporary data on racial attitudes document the persistence of prejudice.¹⁰⁰ Social preference studies reveal a relatively stable pattern of aversion towards blacks.¹⁰¹ Many negative stereotypes per-

likely than other cases to lead to opinions. The Siegelman and Donohue data, *supra* note 94, support this suspicion because a 20% opinion rate applied to all filings would yield over 500,000 opinions for the years studied, not the 95,000 observed on WESTLAW.

⁹⁸ WESTLAW shows 149,382 total opinions, of which 149,304 were published.

⁹⁹ Twenty-eight of these opinions involved challenges to criminal convictions, with the bulk of these (19) being challenges to jury selection procedures. Of course, many more such challenges are made than appear in published opinions. Such intent claims, possible in a huge number of criminal prosecutions, should be accounted for separately.

¹⁰⁰ See HOWARD SCHUMAN, CHARLOTTE STEEH, & LAWRENCE BOBO, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1985); David German, *Black and White in America*, Newsweek, Mar. 7, 1988, at 23; *Poll Finds Whites Use Stereotypes: Racial Groups Characterized in Mostly Negative Terms*, N.Y. Times, Jan. 10, 1991, at B10, col 3.

¹⁰¹ Johnson, *Black Innocence*, *supra* note 71, at 1647 n.172-73 and accompanying text (reviewing the literature).

sist, although they are somewhat less extreme and widespread than in the 1950s and 1960s.¹⁰² Encouragement that might be drawn from the decrease in negative stereotypes must be tempered with caution: a study designed to test whether the declining social acceptability of racial prejudice has tainted the responses in the newer polls concluded that there has indeed been some fading in negative attitudes, but also some faking on the part of those polled.¹⁰³ Negative feelings also persist, although the predominant cast of those feelings has changed in the last twenty years.¹⁰⁴ Dominative racists, those who express bigoted beliefs and hostility openly and frequently through physical force, are now rare; aversive racists, prejudiced persons who do not want to associate with blacks but rarely will say so, are more common.¹⁰⁵

Documentation of persistent widespread prejudice does not by itself demonstrate the existence of widespread discrimination. Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly.¹⁰⁶ Thus, the social and legal sanctions against prejudice reduce the frequency with which prejudice will be expressed in discriminatory behavior. However, those sanctions also decrease the proportion of discriminatory behavior that will be clearly identifiable as discriminatory. Moreover, as we come to a greater understanding of unconscious racism, it seems increasingly likely that measures of prejudiced attitudes will, at least in some settings, *underestimate* the number of potential discriminators; there may be many persons who report (and even believe they have) benign attitudes who nevertheless will act harmfully toward minorities because of race.¹⁰⁷

In addition to the attitudinal data, which strongly suggest the likelihood of substantial amounts of racial discrimination in the soci-

¹⁰² *Id.* at 1647 n.174-76 and accompanying text (reviewing the literature).

¹⁰³ Harold Sigall & Richard Page, *Current Stereotypes: A Little Fading, A Little Faking*, 18 J. PERSONALITY & SOC. PSYCHOLOGY 247 (1971).

¹⁰⁴ There have been related changes in the nature of discrimination litigation. As more workers benefited from Title VII's ban on discrimination, more opportunities arose for on the job discrimination. In recent years, challenges to hiring practices have been eclipsed by challenges to termination decisions. See *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1257 n.3 (6th Cir. 1990) ("Over 43% of all Title VII cases involve discharge, a far greater percentage than that attributed to any other issue.") (citing EEOC data); John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015-19 (1991). Some evidence suggests that discrimination levels, however substantial, have declined. *Id.* at 1001-03. For a discussion of the question whether job discrimination victims have increased their propensity to sue, see *id.* at 1003-04.

¹⁰⁵ Johnson, *Black Innocence*, *supra* note 71, at 1649 (reviewing the literature).

¹⁰⁶ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 56-57 (1954).

¹⁰⁷ See Lawrence, *supra* note 71.

ety at large, there is some direct evidence of discrimination itself, although such evidence is much more difficult to collect. First, the Baldus study of 2000 murder cases, although rejected by the Supreme Court in *McCleskey*, constitutes powerful evidence of pervasive racial discrimination.¹⁰⁸ After controlling for 230 other variables, Baldus found that defendants charged with killing white victims were more than four times as likely to be condemned to death than were defendants charged with killing black victims. Baldus's study is powerful for two reasons: first, the discrimination uncovered involved public, rather than private decisionmakers; and second, the discriminatory effect was so strong that it most likely shows that white decisionmakers devalued the importance of black lives and black interests—a devaluation that would seem likely to affect many other political decisions, including allocation of governmental services. Even if, as the Supreme Court held, Baldus's study did not establish discrimination in *McCleskey's* case, it establishes a pattern of race-based decisionmaking across many cases.¹⁰⁹

A second source of evidence about discrimination comes from experiments designed to investigate racially discriminatory behavior. In a variety of field studies that simulate real life situations, researchers report discrimination,¹¹⁰ as do social scientists engaged in controlled laboratory studies on the influence of race upon white subjects' guilt attributions.¹¹¹ A third piece of evidence is the rise in

¹⁰⁸ BALDUS STUDY, *supra* note 58.

¹⁰⁹ Gross and Mauro's study of death penalty cases finds similar racial discrimination. SAMUEL R. GROSS & ROBERT MAURO, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 53 (1989).

¹¹⁰ See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiation*, 104 HARV. L. REV. 817 (1991); William E. Schmidt, *White Men Get Better Deals on Cars, Study Finds*, N.Y. Times, Dec. 13, 1990, at A26, col. 4 (reporting Ayres study); Donald G. Dutton & Robert A. Lake, *Threat of Own Prejudice and Reverse Discrimination in Interracial Situations*, 28 J. PERSONALITY & SOC. PSYCHOLOGY 94 (1973) (whites who had been told that their responses to a questionnaire had shown them to be racially prejudiced gave more money to black panhandlers than to white panhandlers, but whites who had been told that their response showed them to be egalitarian gave less money to black panhandlers than to white panhandlers); Samuel L. Gaertner, John F. Dovidio & Gary Johnson, *Race of Victim, Nonresponsive Bystanders and Helping Behavior*, 117 J. SOC. PSYCHOLOGY 69 (1982) (white subjects in the presence of passive bystanders helped black emergency victims less quickly than white emergency victims); Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAVIORAL SCI. 275 (1983) (students who believed they were determining the punishment of a fellow student discriminated against other-race students); Sukdeb Mukherjee, Sashi Shukla, Joanne Woodle, Arnold Rosen & Silvia Olarte, *Misdiagnosis of Schizophrenia in Bipolar Patients: A Multiethnic Comparison*, 140 AM. J. PSYCHIATRY 1571 (1983) (black and Hispanic mental patients more likely to be diagnosed as schizophrenic even when other variables are controlled for); William Yee, *Comment on Schulman's Article*, 81 AM. J. SOC. 629 (1975) (discussing finding that white subjects delivered more painful shocks to failing black confederate than to failing white confederate).

¹¹¹ Johnson, *Black Innocence*, *supra* note 71, at 1625-40 (reviewing the literature).

racially motivated violence and campus harassment of minorities.¹¹² These well-publicized events suggest that even old-fashioned discrimination has hardly been eradicated. The campus discrimination is particularly illuminating because college students, younger and better educated than the general population, are less likely than the general population to engage in racial discrimination.¹¹³

Assessing the meaning of the level of intent claim activity requires accounting not only for the level of discrimination, but also for alternative methods of bringing discrimination claims. If race-based intent claims find other outlets, there is less cause for concern about the intent standard's effects. Much of the subject matter of constitutional race litigation overlaps with federal statutes. Governmental discrimination in employment, housing, and voting violates not only the fourteenth amendment but federal statutory commands as well.¹¹⁴ In counting the number of intent cases, we include cases in which there is a statutory claim as well as a constitutional claim. Thus, a case seeking statutory redress of discrimination is not in our study only if no constitutional intent claim was made. In employment, the area with by far the most cases of the three,¹¹⁵ there are substantial advantages to including an intent claim along with any claim of disparate impact;¹¹⁶ these cases would be counted in our study. Cases that allege only disparate impact, which would not show up in our study, are a small fraction of employment litigation.¹¹⁷ For the many areas of life not covered by statutes, intent claims against the government can be brought only as constitutional claims. Thus, we are "counting" most of the legal means of redress for intentional, official racial discrimination.

We conclude that the level of underlying "because of" discrimination is substantial even if not quantifiable. If there is significant governmental race discrimination in the society, constitutional litigation is not directly redressing much of it.

¹¹² Steve France, *Hate Goes to College*, A.B.A. J., July 1990, at 44; Isabel Wilkerson, *Racial Harassment Altering Blacks' Choices on Colleges*, N.Y. Times, May 9, 1990, at 1, col. 5.

¹¹³ JAMES M. JONES, PREJUDICE AND RACISM 74, 78 (1972).

¹¹⁴ 42 U.S.C. §§ 2000e-2000e-17 (1988) (employment); 42 U.S.C. §§ 3601-3606 (1988) (housing); 42 U.S.C. § 1973-1973aa-6 (1988) (voting).

¹¹⁵ See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF DIRECTOR (any year since the mid-1970s).

¹¹⁶ Title VII, the major federal employment discrimination statute, requires state and federal presuit administrative steps, prohibits punitive or full compensatory damages, and disallows jury trials. See Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602 n.38 (1988).

¹¹⁷ An American Bar Foundation sample of employment discrimination cases found that, in 1985-1987, pure disparate impact cases comprised only 1.84% of employment discrimination cases. Donohue & Siegelman, *supra* note 104, at 998 n.57. A seemingly broader category, encompassing all nonanimus-based discrimination, comprised only 10% of employment discrimination cases. *Id.* at 1019.

C. Success Rates

Predicting a low success rate from a burdensome legal standard is risky, as is inferring the burdensomeness of the standard from success rates. A straightforward prediction is that if the intent standard is difficult to satisfy, intent plaintiffs would lose much more often than they would win. But success rates may vary depending on the point in the process that one examines. By the time cases reach trial, parties' settlement behavior will temper the effect of a higher legal standard.¹¹⁸ Civil rights cases filed under federal statutes that do not require a showing of intent are more likely to settle than civil rights cases requiring a showing of intent.¹¹⁹ This lesser rate of settlements may not be observable in published opinions, however, either at the district court or appellate levels. In the same study showing that impact-based civil rights claims settle more often, no significant difference was observed in the success rate *at trial* between intent-based and impact-based claims.¹²⁰ If the intent standard leads to less success for plaintiffs, it may show up only in settlement rates.

1. *Success in the District Courts*

In the district court opinions, plaintiffs prevailed in forty-seven of 118 (40 percent) cases with an outcome clearly identifiable as success or failure. For purposes of comparison with other classes of cases, it is difficult to know what to make of the 40 percent figure. The district court opinions are not a representative cross-section of district court level activity. Settlement, the modal outcome for most litigation, is vastly underrepresented in opinions.¹²¹

It is more useful to isolate a subset of the opinion cases, those resolved at trial, and compare intent claimants' success rates with trial success rates from other studies. A rough calculation suggests that the opinions represent a substantial fraction of all tried intent claims. Assuming 140 intent filings per year¹²² and a 15 percent rate of trial,¹²³ there would be 21 tried cases per year, or 252 for the twelve years of the study. The opinion data contain 100 tried cases,

¹¹⁸ See Priest & Klein, *supra* note 8.

¹¹⁹ Stewart Schwab & Theodore Eisenberg, *The Influence of Judicial Background on Settling and Winning Cases & A Study of the Disputing Pyramid* (1990) (unpublished paper) (on file at *Cornell Law Review*).

¹²⁰ *Id.*

¹²¹ Siegelman & Donohue, *supra* note 94, at 1155 (Table 7).

¹²² This is twice the number of the estimate based on the Siegelman & Donohue data, the only study to directly compare district court filings and district court opinions. See *supra* notes 94-95 and accompanying text.

¹²³ Schwab & Eisenberg, *Explaining*, *supra* note 82, at 733 (Table IV), 784 (Table B2).

or about 40 percent of all of the estimated number of trials.¹²⁴ By any reasonable estimate, the opinions comprise a substantial fraction, though admittedly not a random sample, of all tried intent cases.

What trial success rate do the opinions show? One hundred of 176 district court opinions indicate disposition of the intent claim at trial. Eighty-nine yielded clear rulings on intent claims, with plaintiffs prevailing in 40 percent of the cases (36 cases). (Coincidentally, this is the same success rate as in the larger pool of all opinion cases, those both tried and not tried.)

This 40 percent success rate can be compared to success rates in other studies of trials. In the most comprehensive study of district court trials, the plaintiff won in about 46 percent of the cases.¹²⁵ It is unlikely that published intent opinions underestimate trial success in the district courts; if published opinions are biased in any direction, it is probably toward overestimating plaintiff success, because plaintiff success means a finding of governmental misconduct. Our district court data thus suggest that intent cases fare slightly worse at trial than do other causes of action. This is consistent with an earlier finding that civil rights plaintiffs do worse at trial than do other plaintiffs.¹²⁶ It seems unlikely that greater than normal success in settlements somehow makes up for low trial success rates,¹²⁷ so our direct district court data point toward modestly lower rates of success in filed cases.¹²⁸

The picture differs when intent trial success rates are compared with trial success rates in other studies of constitutional tort and civil rights cases. A study of all nonprisoner constitutional court cases filed in one year in three districts showed a plaintiff trial success rate of 27 percent.¹²⁹ Administrative Office data show civil rights plaintiffs succeed in 33 percent of trials.¹³⁰ Thus, even if in-

¹²⁴ Siegelman & Donohue found published opinions to reflect an even higher percentage of all trials. Siegelman & Donohue, *supra* note 94, at 1155.

¹²⁵ Theodore Eisenberg, *The Relationship between Success Rates before Trial and at Trial*, 154 J. ROYAL STATISTICAL SOC'Y, Series A, Part 1, 111 (1991). This 46% figure results from taking a weighted mean of all the case categories of the Administrative Office of the United States Courts.

¹²⁶ Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1579-80 (1989); Schwab & Eisenberg, *Explaining*, *supra* note 82.

¹²⁷ The trial success rate in all civil rights cases is slightly lower than the success rate in published district court intent opinions. But this may not reflect a difference in overall success at trial, if, as we hypothesize, plaintiff success at trial is overestimated by published opinions. Fertile comparison to other civil rights cases would require data on other published civil rights district court opinions, which we have not gathered.

¹²⁸ In state court opinions, plaintiffs prevailed in only three of 32 cases with clear outcomes.

¹²⁹ Schwab & Eisenberg, *Explaining*, *supra* note 82, at 729 n.37.

¹³⁰ Eisenberg, *supra* note 8, at 357; Eisenberg, *supra* note 125, at 115 app. A.

tent claims fare somewhat worse at trial than non-civil rights cases, they do not fare noticeably worse at trial than cases in closely related areas; if anything, intent cases fare slightly better. In any case, one cannot support concerns about the intent standard's influence on case outcomes based on observable plaintiff success rates.

The filing estimates computed above allow a crude estimate of the number of successful intent claims. We estimate one to two intent filings per year per district.¹³¹ Using the success rate of plaintiffs in constitutional tort litigation,¹³² we estimate less than one successful intent claim per year per district, including cases that settle.

2. *Success on Appeal*

The appellate data can be measured in two ways: one can examine either reversal rates or absolute success on appeal. The first measure takes into account who won in the district court. The second measure simply examines who wins on appeal, regardless of who the appellant was.

Reversal Rates. Data from a study on constitutional tort cases provide appellate success rates with which to compare intent-based race claims. Figure 1 summarizes the results and limits the sample to cases in which there is a single clear appellant and a clear victor with respect to the intent claim on appeal.

The Figure shows that nonprisoner constitutional tort litigants succeeded in 38 percent of the 395 published opinion cases they appealed. Their opponents succeeded in 48 percent of the 89 cases they appealed.¹³³ Constitutional tort cases are more volatile on appeal than the randomly selected control group of non-civil rights cases; plaintiffs appealing in this group prevailed in 35 percent of the 411 cases while defendants prevailed in 33 percent of the 222 cases they appealed.

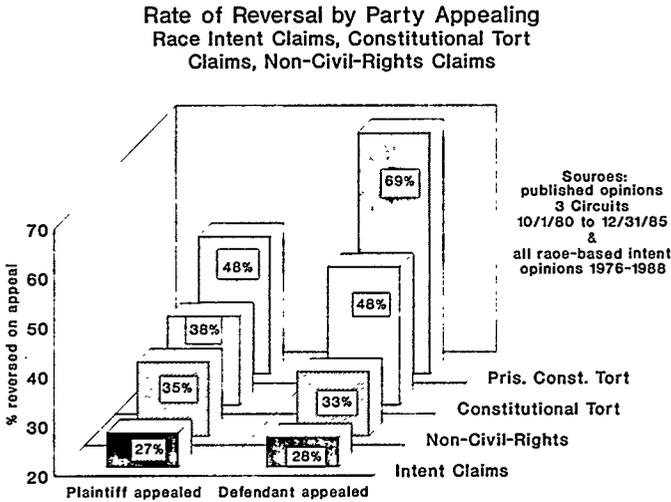
For both plaintiffs and defendants, intent-based race claims are more difficult to overturn than either constitutional tort cases or non-civil rights cases. Race-based plaintiff-appellants succeed in 27 percent of the 66 published opinion cases they appeal while their opponents succeed in 26 percent of the 27 cases they appeal. Whoever appeals the ruling below can expect to lose about three-quarters of the time on appeal. The plaintiff-as-appellant reversal

¹³¹ See *supra* text accompanying notes 95-96.

¹³² In constitutional tort litigation, plaintiffs succeeded by settlement or court judgment in less than half of the filed cases. Eisenberg & Schwab, *Reality*, *supra* note 82, at 674, 683-84; Schwab & Eisenberg, *Explaining*, *supra* note 82, at 733. This estimate probably overstates plaintiff success because it counts as successful every case that settled.

¹³³ Eisenberg & Schwab, *What Shapes Perceptions?*, *supra* note 82, at 518.

FIGURE 1



rate on appeal in intent cases is significantly different from the rate for constitutional tort cases at the .10 level. (The defendant-as-appellant reversal rate on appeal in intent cases is significantly different from the rate for constitutional tort cases at the .05 level. The reversal rate for plaintiffs and defendants combined also differs at the .05 level.) The intent/non-civil rights differences all point in the same direction but are not significant at the .10 level, with the combined plaintiff/defendant reversal rate in intent cases differing from that in non-civil rights cases at the .17 level. We conclude that intent claims, even more than other areas of law, show a strong affirmed effect. The relative failure of both plaintiffs and defendants to obtain reversal on appeal suggests that, as appellate rules require, appellate courts are reluctant to overturn lower court findings based on such factually intensive issues as intent.¹³⁴

In one respect the intent results are not as symmetrical as they

¹³⁴ On this issue we expect that the decisionmaking process filtering published opinions overstates the reversal rate.

The general criterion for publication is that the case be noteworthy rather than routine or obvious, and thus will contribute to the development of the law. Certainly, cases where district court judges are found "wrong" would often fit this criterion. One would expect, then, that most reversals would be published, as well as non-routine affirmances. This filtering effect of the criterion for publication would tend to increase the number of reversals found in published opinions over the actual number of reversals from all appeals. But this filter, without more, would be uniform across all classes of litigation and between plaintiffs and defendants.

Eisenberg & Schwab, *What Shapes Perceptions?*, *supra* note 82, at 535. For data on federal appellate court reversal rates in unpublished decisions, see Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 311 (1990). See also Burton M. Atkins, *Communication of Appellate Decisions: A Multivariate Model for Understanding the Selection of Cases for Publication*, 24 LAW &

first appear. Although plaintiff and defendant appellants have about the same success rate on appeal, there is an important difference in their volume of appeals. Of the 93 cases with clear appellate outcomes, 66 (71 percent) were appeals by plaintiffs. Defendants in intent cases, as in other classes of cases, appealed much less often than plaintiffs. The reluctance of appellate courts to reverse lower court findings thus preserves any advantage that defendants enjoyed at the trial court level.¹³⁵

Absolute Success Level. A second way to measure intent claimants' success rates on appeal is to ignore who appeals and simply ask how often intent claimants prevail. Thirty-eight of the race-based claims, or about three per year for the entire country, were clear victories for plaintiffs. (This count slightly understates the raw number of appellate victories, because our victory analysis includes only cases with unambiguous outcomes.) By this measure, the success rate of intent claims is not very different from the rate of success in constitutional tort litigation generally.

3. *The Complexity of Intent Cases on Appeal*

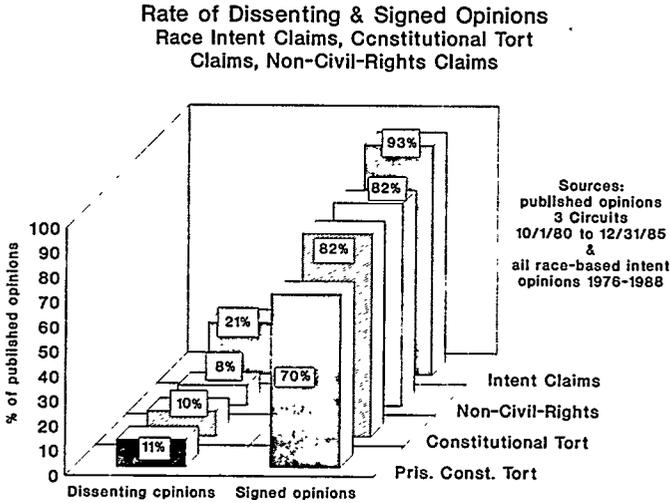
Although intent cases are more stable on appeal (in the sense that they are reversed less frequently than other cases), they are more controversial. Intent cases generate more dissents and fewer per curiam (unsigned) opinions than do comparable classes of claims. Figure 2 shows the relative frequency of dissenting and signed opinions in four classes of published appellate opinions: (1) intent claims, (2) nonprisoner constitutional tort claims, (3) prisoner constitutional tort claims, and (4) non-civil rights cases.

The distinctiveness of intent opinions emerges whether one compares intent appellate opinions to nonprisoner constitutional tort appellate opinions or to non-civil rights cases. Of the 140 intent opinions in the sample, 30 (21.4 percent) generated dissents. In comparison, the three-circuit study shows dissents in only 10.3 percent (62 of 604) of nonprisoner constitutional tort opinions and 8.3 percent (63 of 760) of non-civil rights opinions. The unsigned per curiam opinions, which may signal a case's relative simplicity, occur less frequently in intent cases. The percentage of per curiam opinions is calculated by subtracting from 100 the percentage of

Soc'y Rev. 1171, 1191 (1991) (positive correlation between publication of opinion and reversal in English Court of Appeal).

¹³⁵ The district court opinions show intent claims prevailing in 42 of 106 cases (39.6%), a success rate lower than that of non-civil rights litigation, but not far from that in civil rights litigation generally. Schwab & Eisenberg, *Explaining, supra* note 82, at 728. The 39.6% figure includes tried cases and cases that did not reach trial. Plaintiffs lose more often than defendants at the trial level and appellate courts do little to change this result.

FIGURE 2



signed opinions shown in Figure 2. Per curiam opinions disposed of only 10 of 140 (7.1 percent) intent cases. In the three-circuit study, per curiam opinions disposed of 18.2 percent (110 of 604) of non-prisoner constitutional tort cases and 17.5 percent (133 of 760) of non-civil rights appeals. All of the differences between intent and other classes of cases are significant at or beyond the .05 level.¹³⁶

The combination of stable decisions (decisions unlikely to be reversed) with unusually high rates of dissent seems odd. If factually based intent determinations are improbable candidates for reversal, appellate judges should agree more often in such cases than in other classes of cases. Is it that judges dissent more in cases in which race claims prevail (or fail)? Moreover, there is little difference in the rate of dissent when cases are grouped by whether the intent claim failed or succeeded on appeal. Perhaps judges are more likely to dissent in all intent cases (both those that succeed and those that fail), knowing that they will be outvoted. Or perhaps a few of them (on both sides) are adamant about their views and disregard settled law. Whether we can predict who will dissent, or what kinds of cases will provoke the most dissent, requires further inquiry.

4. Remedies

Any assessment of plaintiff success would be incomplete without information about what plaintiffs win, when they win. As Table

¹³⁶ Of 140 appellate intent decisions, 20 (14.3%) contained concurrences. In the three-circuit study, concurrences appeared in 8.9% (54 of 604) of nonprisoner constitutional tort decisions and 4.9% (37 of 760) of non-civil rights decisions.

It shows, nonmonetary remedies dominate relief in race intent cases. Only seven of the district court opinions and six of the appellate opinions refer to compensatory damage awards. Fewer than ten percent of the opinions discuss attorney fees. None of the district opinions and only two of the appellate opinions refer to punitive damages awards. And of the two punitive damages awards mentioned on appeal, one was overturned in an opinion in our sample¹³⁷ and one was overturned in a later opinion.¹³⁸

TABLE I
Remedies in Intent Cases

	Courts of Appeals	District Courts
<i>Relief Awarded</i>		
Compensatory Damages	6	7
Punitive Damages	2	0
Attorney Fees	8	14
Nonmonetary Relief	42	63
	N = 140	N = 176

These remedial results confirm the longstanding belief that injunctions are the weapon of choice in civil rights cases. In some cases, those against state defendants, the eleventh amendment precludes retroactive damages.¹³⁹ But many cases involve purely local defendants or individual state officials; damages are available against both. The results suggest that fears of massive and frequent damages awards in civil rights cases probably are unwarranted.¹⁴⁰ They also suggest that fear of damages awards is unlikely to serve much of a deterrent function.

III EXPLAINING THE OUTCOME OF RACE-BASED INTENT CLAIMS

Volume, success rates, complexity, and remedies are important features of intent-based litigation. More sophisticated analysis allows deeper probing of intent case outcomes and of beliefs about the intent standard's operation. In particular, such analysis illuminates whether the intent standard functions in the way its architects

¹³⁷ *Lenard v. Argento*, 699 F.2d 874 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983).

¹³⁸ *Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist.*, 670 F.2d 1 (1st Cir.), *cert. denied*, 457 U.S. 1120 (1982).

¹³⁹ *See, e.g., Edelman v. Jordan*, 415 U.S. 651, *reh'g denied*, 415 U.S. 1000 (1974).

¹⁴⁰ *Hearings, supra* note 83, at 229-36 (statement of Theodore Eisenberg).

would have anticipated, or whether it works more as its critics charged it would. At a practical level, correlations between identifiable case characteristics and success should be useful to litigants assessing their cases.

This section first discusses the characteristics our analysis uses to explore the intent standard. It then presents the results of models in which the outcome of an intent case is a function of various factors describing each case.

A. Predictors of Plaintiff Success

Intent cases have several characteristics for which one ought to account. For example, a case's subject area (employment or voting) should be accounted for at the same time one considers whether the case was certified as a class action; if all class actions happen to be employment cases, the influence of class action status per se would be distorted without also accounting for the cases' subject matter. Statistical analysis of intent case outcomes requires testing the importance of one factor, holding other factors constant. The need to account simultaneously for several case characteristics prompts our use of multivariate regression-like analysis.

Legal Theories Relied On. *Arlington Heights* described the kinds of proof plaintiffs can and should offer to establish discriminatory intent. We subdivided the *Arlington Heights* criterion of "legislative and administrative history" into "statements by members of the decisionmaking body, minutes of its meetings, or reports" and "statements by public, witnesses, press, etc."; listed the six other *Arlington Heights* methods of proof; and added "bare allegation of discrimination; no material facts pled"; "foreseeability of effects" (because of its role in the intent standard controversy), and "perpetuation of past discrimination" (because of its historical role in school desegregation cases). Since these bases are not mutually exclusive, we used a variable (coded 0 or 1) to account for the presence of each factor. The kinds of proof follow, with variable names in parentheses:

1. Clear pattern or event, unexplainable on grounds other than race ("clear pattern");
2. disparate impact short of a clear pattern ("disparate impact");
3. statements by members of the decisionmaking body, minutes of its meetings, or reports ("member's statement");
4. statements by public, witnesses, press, etc. ("public statements");
5. foreseeability of effects ("foreseeability");
6. bare allegation of discrimination; no material facts pled ("bare allegation");

7. specific sequence of events leading up to challenged decision, or departures from normal procedural sequence ("procedure");
8. prior act of discrimination by alleged discriminator, or the historical background of challenged decision (especially a series of official actions taken for invidious purposes) ("past acts");
9. substantive departures from rules usually followed by decisionmaker ("substantive departure"); and
10. perpetuation of past discrimination ("perpetuate discrimination").

We hypothesized that "clear pattern" would be the best of these predictors in the plaintiff-positive direction, and that "bare allegation," the residual category, would be strongly predictive of plaintiff loss.

The Parties' Status. It is common to hypothesize that the status of the plaintiff or defendant affects the outcome of cases. Corporate plaintiffs and defendants may on average embody greater concentration of wealth and power than individual plaintiffs.¹⁴¹ Government plaintiffs and defendants have litigation track records superior to those of private parties.¹⁴² This superiority may vary depending on the level of government involved. Public interest litigation groups, such as the ACLU, have greater experience than individuals and therefore may be expected to have greater success in litigation.¹⁴³ Several variables in our study take these plaintiff-defendant characteristics into account.

The variable "non-government plaintiff" was coded 1 when the plaintiff or plaintiffs did not include a governmental entity and 0 when a governmental entity was a party plaintiff. Based on past studies of the success of the government-as-litigant, we expected government plaintiffs to fare better than purely private plaintiffs. Since the vast majority of defendants in race-based intent cases are governments, we did not similarly code the defendants. We did, however, distinguish between particular types of government involved as defendant. The variable "local defendant only" was coded 1 when the only government defendant was at the local level and was coded 0 otherwise. This distinguishes suits against cities and counties from suits against states, regional authorities, and the

¹⁴¹ Stanton Wheeler, Bliss Cartwright, Robert A. Kagan & Lawrence M. Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 *LAW & SOC'Y REV.* 403 (1987).

¹⁴² Burstein & Monaghan, *supra* note 7, at 375-76; Eisenberg, *supra* note 126, at 1598-1601 (employment discrimination cases); Schwab & Eisenberg, *Explaining*, *supra* note 82, at 774-75 (civil rights cases).

¹⁴³ Schwab & Eisenberg, *Explaining*, *supra* note 82, at 767.

federal government.¹⁴⁴

Many believe that public interest groups, such as the NAACP have special skills or experience in bringing discrimination claims and that their participation might therefore increase the likelihood of success. Alternatively, one might view such groups as having a special agenda in bringing cases and therefore caring *less* about winning or losing than other plaintiffs. To take into account the presence of a public interest group in a case, the variable "public interest group" was coded 1 when the opinion revealed the presence of a public interest group as party, counsel, or amicus, and was coded 0 otherwise.

Some scholars comment on the difficulty of having to label the defendant an intentional discriminator in race-based intent cases.¹⁴⁵

Perhaps any judicial finding of racial discrimination—even a finding based on racially disparate effects that are insufficiently justified by the state—will carry some implication of blame for government officials. But an inquiry centered on motive guarantees that antagonisms will be intensified, for it forces the litigants into name-calling on one side and self-righteousness on the other.¹⁴⁶

Reluctance to name an intentional discriminator should be more of a problem when the defendant is still in office than when the defendant no longer serves. The variable "in office" was 1 when the public defendant was in office at the time the case was filed, and 0 otherwise.

Case Characteristics. Various case characteristics might also affect outcomes. We hypothesized that the subject matter of the case might be important: Supreme Court doctrine seems more relaxed about proof of intent in voting rights cases than in other race-based intent cases.¹⁴⁷ Perhaps claims in school cases, the area in which the federal courts made their reputations as modern champions of civil rights, are treated better than other discrimination claims. Class action status might be thought to predict success, if one suspects that class actions are more vigorously litigated than other actions. The

¹⁴⁴ We coded several other status variables that proved uninteresting. These included variables accounting for whether the plaintiff was a corporation, whether the defendant was purely public, whether the defendants included a state government or state officials, and whether the defendants included the federal government or federal officials. The governmental level variables are not mutually exclusive; combinations of defendant characteristics were permitted.

¹⁴⁵ See K. KARST, *supra* note 71, at 154; Karst, *supra* note 67; Theodore Eisenberg, *Washington v. Davis*, in 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 2035-36 (Leonard Levy, Kenneth Karst & Dennis Mahoney eds. 1986).

¹⁴⁶ K. KARST, *supra* note 71, at 154.

¹⁴⁷ See cases cited *supra* note 49.

existence of a class, furthermore, might be evidence of a widespread violation. Several variables account for these case characteristics. The variables "voting case," "employment case," and "school case" identify the subject matter of the case, and were coded 1 where appropriate. The variable "certified class action" was coded 1 if the case involved a certified class action and 0 otherwise.¹⁴⁸

In most appellate court cases, another case variable is likely to be important in predicting outcome. Either because of standard-of-review rules regarding deference to lower courts or because of the difficulty inherent in overturning any prior decision,¹⁴⁹ the party who appeals is at a disadvantage. Accordingly, the variable "defendant appealed" takes into account who has won below in the model consisting of appellate opinions.

Judicial Characteristics. At the district court level, the individual judge hearing a case influences the outcome. So few intent cases are decided, however, that no individual judge will publish an opinion in more than a handful of intent cases.¹⁵⁰ Instead of using the identity of the district judge, which could not lead to significant results, we used variables designed to capture shared characteristics in the judges' backgrounds. Appellate level studies sometimes find Democratic judges to be more liberal in their decisionmaking than Republican judges.¹⁵¹ Some district court research also finds

¹⁴⁸ We also coded for whether plaintiff had counsel. This variable is not included in the analysis because plaintiffs had counsel in nearly all cases (as might be expected in a data base of published opinions) and the presence of counsel was an insignificant influence on success.

¹⁴⁹ See Burton Atkins, *Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States*, 24 LAW & SOC'Y REV. 71 (1990); Eisenberg & Schwab, *What Shapes Perceptions?*, *supra* note 82; Wheeler, Cartwright, Kagan & Friedman, *supra* note 141.

¹⁵⁰ No district court judge wrote an opinion in more than two or three of the cases in our study.

¹⁵¹ ROBERT A. CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 7 (1983); GLENDON A. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959); Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 280 (1988) ("[b]eing a Democrat is associated with casting votes in favor of equal protection claims"); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496 (1975) [hereinafter Goldman 1975]; Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-64*, 60 AM. POL. SCI. REV. 370-85 (1966); Joel B. Grossman, *Social Backgrounds and Judicial Decision-making*, 79 HARV. L. REV. 1551 (1966); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961); Stuart S. Nagel, *Unequal Party Representation on the State Supreme Courts*, 45 JUDICATURE 62 (1961); John R. Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194 (1962); Donald R. Songer, *The Policy Consequences of Senate Involvement in the Selection of Judges in the United States Courts of Appeals*, 35 W. POL. Q. 107-19 (1982); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981); Sidney S. Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. POL. 352 (1962).

greater Democratic liberality and suggests that the most important background correlate of case outcomes is the appointing President.¹⁵² Presumably, greater liberality would lead to greater support for intent claims. Other studies explore the effect of a judge's prior experience as a prosecutor or elected office holder, or a judge's years on the bench. To account, albeit imperfectly, for judicial backgrounds, we coded variables for the judge's party, race, and sex; the appointing President and his party; whether the judge had been a prosecutor; whether the judge had prior judicial experience; whether the judge held elected office; and the judge's age and experience.¹⁵³ We controlled for the judge's background only for district court cases, where the judge's influence would be felt most directly and would not be filtered by a record compiled in a trial court or action of a multimember appellate panel.

Other Factors. Other influences might bear on the outcome of race-based intent claims. History suggests that the region of the country or the circuit court appealed to might influence case outcomes; accordingly, we tried several variables reflecting geography, but none proved interesting. The time elapsed since *Washington v. Davis* might be relevant. Cases decided shortly after *Davis* might not have fully absorbed the legal standard;¹⁵⁴ appellate and lower courts might have been reluctant to rely on the newly articulated and more difficult standard to snatch apparent victory from plaintiffs who had been litigating for years. Cases filed after the *Davis* decision might not have evinced the same reaction, and, over time, the doctrine may or may not have become more deeply entrenched. We account for the passage of time after *Davis* with the variable "years since Davis."

B. Frequency of Case Characteristics

Table 2 provides the frequency of occurrence for each of the legal theories, as well as for the other case characteristics in the model.

The frequencies provide several insights into the intent standard. First, the most common method of proof at both the district

¹⁵² R. CARP & C. ROWLAND, *supra* note 151, at 34-36, 51-83, 150-52 (Nixon appointees more conservative than Kennedy appointees; Kennedy appointees more conservative than Johnson appointees); C.K. Rowland, Robert A. Carp & Donald Songer, The Effect of Presidential Appointment, Group Identification and Fact-Law Ambiguity on Lower Federal Judges' Policy Judgments: The Case of the Reagan and Carter Appointees 2 (unpublished paper presented at the American Political Science Association Meeting 1985) (on file at *Cornell Law Review*).

¹⁵³ A summary of prior findings about the influence of judicial background may be found in Schwab & Eisenberg, *supra* note 119.

¹⁵⁴ See George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193 (1987).

TABLE 2
Frequency of Case Characteristics: Intent Claims

<i>Variable</i>	Appellate Opinions		Dist. Ct. Opins.	
	%	N	%	N
defendant appealed	27	38	NA	NA
plaintiff appealed	68	95	NA	NA
both appealed	5	7	NA	NA
Methods of Proof				
clear pattern	15	21	29	51
disparate impact	49	68	39	69
member's statement	8	11	14	25
public statements	4	6	6	10
foreseeability	9	13	25	44
bare allegation	6	8	5	9
procedure	19	27	19	34
past acts	27	38	24	43
substantive departure	4	6	11	20
perpetuate discrimination	6	9	24	43
certified class action	24	33	33	58
non-government plaintiff	86	120	91	161
public interest group	29	41	28	50
in office	22	31	51	89
voting case	4	6	10	16
school case	27	38	23	40
employment case	22	31	35	62
local defendant only	57	80	57	100
	Mean		Mean	
years since Davis	6.68		5.35	
Total		N = 140		N = 176

court and appellate levels is a showing of disparate impact. Plaintiffs relied on this method in 49 percent of appellate intent cases leading to published opinions and in 39 percent of district court opinions. The decision to appeal served as an important filter with respect to several methods of proof. Plaintiffs relied on a "clear pattern" or on "foreseeability" in, respectively, 29 percent and 25 percent of district court opinions. On appeal, these numbers dropped to 15 percent and 9 percent. Reliance on perpetuation of past discriminatory effects ("perpetuate discrimination") showed a similar drop from district to appellate courts.

Second, three categories dominate the subject matter of intent claims—voting, school, and employment cases. Together they make up 68 percent of district court cases; school and employment cases constitute almost half the appeals. Public interest groups frequently are present in intent cases, showing up in 29 percent of appellate opinions and in 28 percent of district court opinions.

Our model tested the likelihood of a race-based intent claim prevailing as a function of the parties' status, the case characteris-

tics, the nature of the proof offered, and the external factors. Table 3 presents the results. For each equation, the dependent variable was coded 1 if plaintiff's race-based intent claim prevailed and 0 if it failed. We employed regression-like analysis to determine the effect of each factor (independent variable), holding constant other factors about the case.¹⁵⁵

Table 3 contains the results for three different equations. The first two equations, labeled "Prevail in District Court" and "Prevail in Court of Appeals," include most of the variables of likely interest in assessing the intent standard, though even these equations have been screened to exclude potentially interesting variables that proved to be of little influence.¹⁵⁶ Within each equation's results the first column shows a variable's "odds multiplier," a standard way of expressing the size of a variable's influence for the regression technique used.¹⁵⁷

The "odds multiplier" is the amount by which the plaintiff's odds of winning the "average" case should be multiplied if the variable is present, holding all other variables constant.¹⁵⁸ To assess the magnitude of a variable's effect, multiply the odds of winning without the variable's presence by the variable's odds multiplier. An odds multiplier greater than 1.0 indicates that the variable's presence, holding other factors constant, increases the chances of win-

¹⁵⁵ Since, for present purposes, intent cases either succeed or fail, the dependent variable in this model is dichotomous (0 or 1), and we rely on logistic regression analysis in lieu of ordinary least-squares regression. See generally BALDUS STUDY, *supra* note 58, at 383; MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 448 (1990); DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION (1989). This part of the analysis excludes cases that lack a clear prevailing party.

For these data the results obtained using ordinary least-squares regression do not differ substantially from the logistic regression results. Models using the same variables are both highly significant, and the important variables have similar magnitude and significance in both models.

¹⁵⁶ See *supra* notes 144 & 148.

¹⁵⁷ The Appendix contains the actual logistic regression coefficients. In multivariate logistic regression, each estimated coefficient provides an estimate of the corresponding variable's effect on the logarithm of the dependent variable's odds, adjusting for all other variables included in the model. The odds multiplier is obtained by taking the antilog of the regression coefficient. D. HOSMER & S. LEMESHOW, *supra* note 155, at 58. On the merits of using the odds multiplier, see BALDUS STUDY, *supra* note 58, at 383-84. The interpretation of the variable "years since Davis" differs because, unlike all other variables, it is continuous. Its odds multiplier traces the effect of a unit increase (one year) in the variable.

¹⁵⁸ The odds of winning should be distinguished from the probability of winning, even though the terms "odds" and "probability" are often used interchangeably in informal conversation. For example, "clear pattern" has an odds multiplier of 6.7. Assume that the odds of winning a case (based on all other factors about the case) are 1:1, corresponding to a 50% probability of winning. The odds multiplier of 6.7 means that the presence of "clear pattern" changes the odds of winning from 1:1 to 6.7:1, corresponding to an 87% probability of winning.

TABLE 3
 Logistic Regression Results
 Dependent Variable = Intent-Claim-Prevailed

<i>Variable</i>	Prevail in District Court		Prevail in Court of Appeals		Most Parsimonious Model: District Court	
	<i>Odds Multiplier</i>	<i>Signif.</i>	<i>Odds Multiplier</i>	<i>Signif.</i>	<i>Odds Multiplier</i>	<i>Signif.</i>
clear pattern	6.7	.006	3.6	.162	4.2	.005
member's statement	24.2	.003	.4	.406	7.8	.008
foreseeability	3.7	.058	4.4	.227	2.9	.056
perpetuate discrimination	2.8	.109	.6	.686	2.7	.078
disparate impact	1.9	.375	1.5	.577		
public statements	1.2	.899	.1	.198		
procedure	.8	.788	.2	.075		
past acts	.7	.560	2.1	.404		
substantive departure	.3	.155	.6	.785		
bare allegation	.0005	.702	.2	.225		
public interest group	.8	.644	.5	.306		
non-government plaintiff	.2	.066	.9	.954	.2	.055
certified class action	9.0	.001	.5	.389	6.2	.001
in office	1.1	.837	5.9	.051		
employment case	2.3	.347	.2	.115		
voting case	2.1	.471	.3	.472		
school case	2.3	.359	.8	.825		
local defendant only	2.1	.253	6.1	.018		
years since Davis	1.0	.599	.8	.103		
defendant appealed	NA	NA	15.7	.001	NA	NA

ning; an odds multiplier of less than 1.0 indicates that the variable's presence, holding other factors constant, reduces the chances of winning. An odds multiplier of 1.0 indicates that the variable's presence does not change the odds of winning. Within each equation's results, the second column shows the probability that the observed result would occur by chance. Thus "clear pattern" not only has a sizeable odds multiplier, but there is less than one chance in a hundred that one would observe this result by chance.¹⁵⁹

The third equation with a pair of columns in Table 3, labeled "Most Parsimonious Model: District Court," presents the district court result for a more parsimonious set of variables that excludes

¹⁵⁹ A word is in order about how the presence of a method of proof could have an odds multiplier of less than one. For example, in the "Prevail in District Court" equation, the variable "substantive departure" has an odds multiplier of .25 or .3 rounded to the nearest tenth. Thus, holding other factors constant, if plaintiff's odds of winning were 1:1 without "substantive departure" present, they are .3:1 with it present. How can the presence of an additional method of proof correspond to a decrease in the chances of winning? The small odds multiplier indicates that plaintiffs tend to prevail when "substantive departure" is alleged only if other methods of proof are also relied on. At the margin, it is not a helpful method of proof.

variables of little or no statistical significance. By all measures of goodness-of-fit, each of the models fits the data well.¹⁶⁰

C. The District Court Results

The Full Base Model. The district court results confirm some beliefs about intent-based litigation and call other beliefs into question. The single most substantial factor pushing towards plaintiff success is proof resting on an official's statement ("member's statement"). Putting aside methods of proof, certification of a class action most enhances plaintiffs' odds of winning. The fact of certification is a signal of success and the large stakes in such cases make them especially worth pursuing.

With respect to the status of plaintiffs and defendants, the small, near-significant odds multiplier for "non-government plaintiff" confirms that the government is an especially formidable plaintiff. "Local defendant only," the variable reflecting whether only local governments or officials are defendants, has an effect in the expected direction, but that effect is insignificant.

Several kinds of proof of intent significantly increase the chance that a plaintiff will prevail. Relative to other methods of proof, statements by members of the decisionmaking body ("member's statement") and the presence of a clear pattern unexplainable on any grounds other than race ("clear pattern") are the two most frequent and most significant indicators of plaintiff success. The next most predictive factors are foreseeable effects ("foreseeability") and perpetuation of past discrimination ("perpetuate discrimination"). Not surprisingly, cases deemed to have barely alleged discrimination ("bare allegation") were highly likely to lose, though there were too few of these to be statistically significant.¹⁶¹

The data offer further support for those concerned that intent is difficult to prove. The impediments to subtle showings of intent are seen by excluding cases lacking either a statement by a member of the decisionmaking body or the presence of a clear pattern. Excluding such cases, plaintiffs prevailed in 17 of 77 (22.1 percent) district court opinions. In cases with either very clear patterns of discrimination or a member's statement, plaintiffs prevailed in 31 of 53 cases (58.5 percent). In other words, plaintiffs obtained about one favorable district court opinion per year for the entire country in cases without either clear patterns or a member's statement. Intent claimants need "smoking gnn" evidence of discrimination to

¹⁶⁰ See Appendix. For a discussion of testing goodness-of-fit in logistic regression, see D. HOSMER & S. LEMESHOW, *supra* note 155, at 135-71.

¹⁶¹ "Bare allegation" can be removed from the equation with little change in the other variables.

prevail. Subtler methods of proof, though approved in *Arlington Heights*, rarely carry the day.

Two surprising results are the small size and insignificance of public interest group participation and the greater-than-one odds multiplier of "in office." One explanation of the small size is that, by the time a case reaches the late stages of district court procedure,¹⁶² the presence of public interest groups and the current status of the alleged wrongdoers is irrelevant; the importance of public interest group participation is felt primarily in settlement negotiations or at earlier stages. The methods of proof that the court is likely to accept are difficult for the parties to agree on and they cannot be factored into settlement decisions. They therefore remain significant at the later stages of litigation. Below we offer an alternative explanation of the "in office" results; not only does that variable persist in having a surprising odds multiplier at the appellate level, but also becomes significant at about the .05 level.¹⁶³

More Parsimonious Model. As suggested by the many insignificant variables in the first equation ("Prevail in District Court") in Table 3, many of the variables in the full model contribute little to the descriptive power or goodness-of-fit of the model. The third column shows a more parsimonious model which fits the data as well as the larger model. The more parsimonious model uses only the four leading methods of proof ("clear pattern," "member's statement," "foreseeability," and "perpetuate discrimination"), together with two status variables (plaintiff's position, or "non-government plain-

¹⁶² The modal method of termination in district court opinions is at trial.

¹⁶³ One possible concern about the district court results is that, in their opinions, district judges might only mention plaintiff's reliance on the particular method of proof on which the court intends to rely in sustaining plaintiff's allegation of intentional discrimination. If courts systematically fail to mention failed methods of proof relied on by plaintiffs, then the opinions provide little evidence about when a method has been unsuccessful. In fact, courts frequently do mention the use of a method of proof, whether or not they rely on it to sustain a claim. The following Table shows the number of times a method of proof is mentioned as a basis of the plaintiff's claim, together with the number of times the courts relied on that method in sustaining the claim.

Methods of Proof
Frequencies of Allegation and Acceptance
(limited to cases with clear outcome on intent claim)

<i>Variable</i>	<i>Alleged</i>	<i>Sustained</i>
clear pattern	41	30
disparate impact	47	14
past acts	44	31
procedure	34	15
substantive departure	16	12
member's statement	16	10
public statements	9	6
perpetuate discrimination	38	26
foreseeability	40	28

tiff," and "certified class action").¹⁶⁴

From a doctrinal perspective, the roles of the "foreseeability" and "perpetuate discrimination" factors are puzzling, both in the full model and in the more parsimonious model. Neither foreseeability of disparate effects nor perpetuation of past discrimination are included in the *Arlington Heights* list of factors probative of discriminatory intent, a list that is authoritative for, and binding on, the lower courts.¹⁶⁵ Yet both variables are almost as good predictors as the two kinds of "smoking gun" evidence included in the *Arlington Heights* list (clear pattern unexplainable on any grounds other than race and statements by the members of the decisionmaking body); the four variables can even be treated as interchangeable with little loss of predictive power. Moreover, the remaining *Arlington Heights* factors (including disparate impact short of a clear pattern, on which plaintiffs relied in over one-third of the cases) contribute virtually nothing to predicting the outcome of intent claims. For reasons unclear at this point,¹⁶⁶ district court judges appear to be responding to intent cases in ways the Supreme Court has not prescribed, and of which it would not approve. Perhaps the lower courts are silently rebelling against the intent standard's constraints.

Model with Judicial Characteristics. It is possible that judicial characteristics, rather than the case characteristics studied so far, more completely explain the outcome of district court intent cases. To explore this possibility, we combined the variables in the most parsimonious district court model from Table 3 with a set of variables designed to account for judges' background characteristics. Table 4 presents the results for two equations. The first pair of columns includes only those judicial characteristics with a sizeable effect and

¹⁶⁴ Even this model could be further reduced by treating the four leading methods of proof interchangeably and constructing a variable, ranging from 0 to 4, measuring the number of the four methods alleged in a case. This approach, of course, would require the assumption that each of the four intervals from 0 to 4 are of equal "length." For alternative treatments of ordered categorical variables, see GARY KING, *UNIFYING POLITICAL METHODOLOGY: THE LIKELIHOOD THEORY OF STATISTICAL INFERENCE* 115-17 (1989). This model, too, provides most of the descriptive power of the model using the four variables of the leading methods of proof.

¹⁶⁵ Although *Arlington Heights* said that the list was not exhaustive, the Supreme Court has repeatedly quoted and referred to that list without expansion. See, e.g., *Wayte v. United States*, 470 U.S. 598 (1985) (rejecting foreseeability); *City of Mobile v. Bolden*, 446 U.S. 55, 72-74 (1980); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (rejecting perpetuation of discrimination and foreseeability); *Castaneda v. Partida*, 430 U.S. 482 (1977). The Court again expressly disavowed foreseeability in *McCleskey v. Kemp*, 481 U.S. 279, *reh'g denied*, 482 U.S. 920 (1987).

¹⁶⁶ Here are some speculations: Perhaps the lower court judges are still responding to older cases; perhaps they are responding to the intent standard commentary (what a gratifying thought!); or perhaps the facts do not match the categories very well, and fact-finders are doing the best they can within the general contours of intent doctrine.

TABLE 4

Logistic Regression Results, Including Judicial Characteristics
 Dependent Variable = Intent-Claim-Prevailed

<i>Variable</i>	<i>Most Parsimonious Model</i>		<i>Model Including All Judicial Characteristics</i>	
	<i>Odds Multiplier</i>	<i>Signif.</i>	<i>Odds Multiplier</i>	<i>Signif.</i>
Case Characteristics				
clear pattern	7.6	.001	4.7	.019
member's statement	10.1	.012	7.2	.056
foreseeability	3.7	.037	3.6	.064
perpetuate discrimination	3.1	.090	4.3	.062
non-government plaintiff	.2	.081	.1	.055
certified class action	9.3	.001	14.1	.001
Judge Characteristics				
black or female judge	4.9	.181	5.2	.177
prior prosecutorial experience	4.9	.013	3.9	.081
prior judicial experience	5.5	.012	8.7	.009
judge's age in years	1.1	.038	1.1	.112
prior elected office			2.3	.350
Republican judge			2.1	.563
Eisenhower appointee			.8	.979
Kennedy appointee			7.7	.806
Johnson appointee			14.5	.747
Nixon appointee			2.3	.920
Ford appointee			4.0	.869
Carter appointee			3.1	.892
Reagan appointee			.003	.814

significance at or near the .10 level. The second pair of columns shows a model that includes more judicial characteristics.

The results suggest that some judicial background characteristics can help explain case outcomes. Although the party and appointing President variables are not near any reasonable threshold of statistical significance, other variables are. Controlling for the case characteristics, black or female judges,¹⁶⁷ judges with prior prosecutorial experience, judges with prior judicial experience in state court, and older judges¹⁶⁸ all treat intent cases more favorably than judges lacking these background features. These results match

¹⁶⁷ We combined black judges and female judges into a single category because neither group standing alone heard enough cases to expect interesting results. Since common wisdom is that both black judges and female judges are more "liberal" than white male judges, they can be grouped together without destroying their individual effects.

¹⁶⁸ The variable "judge's age in years" is a continuous variable, not a 0 or 1 variable like those in Table 4. Its interpretation differs slightly from that of the other variables. Since the judge's age is coded in years, Table 4 reports the effect on case outcomes of a change of one year in the judge's age. A one-year difference has an odds multiplier of only 1.1, but a 10-year age difference (perhaps the threshold before one would expect age to make a difference) would have an odds multiplier of 2.6.

those of other studies of judicial influence.¹⁶⁹

The essential point for present purposes is not how interesting or uninteresting the judicial characteristics results are. Rather, it is that, regardless of which set of judicial characteristic variables are used, the case characteristic variables retain their essential features. All of the most interesting case characteristic variables (those in Table 4) retain the direction of their effect (for or against plaintiffs), remain sizeable, and remain statistically significant at approximately the same level in this model as in the model that did not include judicial characteristics. To the extent one can control for judicial influence on case outcomes, our central findings remain intact.

D. The Appellate Court Results

As Figure 1 suggests, the appellate data in Table 3 strongly confirm the affirmed effect.¹⁷⁰ By far, the single best predictor of who will win on appeal is who won below.

The rest of the data substantially support the notion that the cross-section of cases appealed is not a random sample of the cases decided by opinion below. Several variables that were significant at the district court level lose significance or change sign on appeal. Not only is "member's statement," the variable most highly correlated with plaintiff success in the district courts, insignificant on appeal, but its odds multiplier drops below 1.0 in the appellate equation. One can infer that strong cases with decisionmaker statements at the district court level may not be appealed. Other notable variables change effect as well. Though not highly significant, "certified class action," a factor strongly correlated with district court success for plaintiffs, has an odds multiplier substantially less than 1.0 in the appellate equation. The public interest group variable becomes even more prodefendant (odds multiplier less than 1.0) in the appellate data. "Procedure" (an unusual procedural sequence or series of events leading to the challenged decision) undergoes a similar shift and becomes statistically interesting. "Past acts" by the alleged discriminator shifts from antiplaintiff (odds multiplier less than 1.0) in the district courts to highly proplaintiff at the appellate level. "Perpetuate discrimination" changes from a large, proplaintiff, marginally significant variable, to a substantial antiplaintiff, but statistically insignificant, variable on appeal. The coefficients of the

¹⁶⁹ Goldman 1975, *supra* note 151, at 501, 503 (age most important background variable for civil liberties issues); Tate, *supra* note 151. Other studies find voting records less clearly correlated with age and prior experience. J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* (1981).

¹⁷⁰ The appellate analysis excludes cases that lack a clear prevailing party on appeal, as well as cases in which both parties appeal.

three major case categories, employment, voting, and schools, all change from proplaintiff in the district court data to prodefendant on appeal.¹⁷¹

Not every variable undergoes a transformation. "Clear pattern" remains large and positive in both equations, though much less significant in the appellate equation. The "non-government plaintiff" variable remains favorable to defendants in both equations, though it is of no significance in the appellate equation. The surprising direction of "in office" at the district court level reappears on appeal and becomes significant at the .051 level. Cases limited to local government defendants fare even better on appeal than at the district court level, and the variable is significant at the .018 level. The appellate data also show that increasing passage of time ("years since Davis") renders it more difficult for plaintiff to prevail.

Not only do important variables shift in terms of who they favor, but one cannot reject the hypothesis that *no* method of proof is a significant factor in explaining success on appeal. Although we would not have predicted this, one plausible explanation is available. By the time of trial, the principal uncertainty about the outcome of a case is how the fact-finder will assess the proof. When the fact-finder does resolve the evidence of intent in favor of one party, the appellate court has less leeway to overturn that finding than it would to overturn a legal ruling. The reduced scope of appellate review is largely independent of the method of proof presented at trial. This explanation is consistent with the earlier evidence about the relative stability of intent cases on appeal. Just as intent appeals, because they are so tied to fact-finding, are more stable than other appeals, so the method of proof, as the most fact-sensitive aspect of an intent case, resists appellate second-guessing.

A second, related explanation pertains to the parties' decision whether to appeal or to settle after trial without appealing. If the principal uncertainty in the case is the fact-finder's reaction to the

¹⁷¹ One concern about the appellate results is that introducing the new variable "defendant appealed" masks or changes the observed effect of the other variables in the equation. For example, it may be that, not taking into account who is appealing, "member's statement" is in fact a proplaintiff variable in the appellate equation. Cases with "member's statement" simply tend to be appealed by defendants, who lost below. The "defendant appealed" variable might absorb this proplaintiff information, leaving little for the appellate "member's statement" variable to show. Similar considerations might apply to other variables.

To test this hypothesis, one can run the appellate equation without "defendant appealed" as an independent variable. There are marginal shifts in the significance of the other variables, but no noteworthy sign changes. The one striking effect of this deletion is to make the overall model less significant and a less accurate predictor of case outcomes. For example, the successful prediction rate falls from about 82% to about 73%.

proof, that uncertainty is removed as soon as the trial ends. After trial, the parties have seen how a presumably objective fact-finder reacts to their arguments. They should be better able to agree on the outcome of an appeal. To the extent they agree, they can save the costs of appeal by adopting the predicted outcome, usually affirmation, as a basis for settlement negotiations.¹⁷²

Focusing on the filtering effect of the decision to appeal may offer insights into two variables that are significant on appeal, but less interesting at the district court level: "in office" and "local defendant only." On appeal, both variables highly correlate with a successful intent claim. What could explain, contrary to expectation, that having the alleged wrongdoer in office at the time of filing would increase the chance of success? It may be that this factor pushes officials to appeal decisions that stand relatively little chance of being reversed. To accommodate existing political relationships, it may be necessary for government litigators to appeal on grounds less meritorious than they would otherwise require. The goal of the appeal may be as much to send a supportive signal to the challenged official as to win the case. The same reasoning might explain the greater-than-one odds multiplier of "in office" in the district court equation. The decision to press ahead with litigation is skewed by the political necessity of satisfying those in office.¹⁷³

Like "in office," "local defendant only" is a prodefendant factor at the district court level. "Local defendant" is even more prodefendant, and significantly so, at the appellate level. It may be that, compared to other government defendants, local officials feel greater pressure to resist claims and to pursue appeals, even when objective assessment of the cases suggests that they will lose.

IV CONCLUSION

Plaintiffs infrequently file intent claims. Each year at the district court level, not more than one intent claim per district succeeds. Activity is even scarcer at the appellate level, and fewer than one published appellate opinion per year, per circuit, rules favorably for an intent claimant. Perhaps surprisingly, intent claimants' success rates do not differ substantially from the success rates of other civil

¹⁷² Similar reasoning might support a prediction of 50% success rates on civil appeals, adjusted for possible asymmetric stakes of the parties, because the parties do not appeal a random cross-section of completed cases. Priest & Klein, *supra* note 8, at 28-29. Presumably, they mainly appeal cases in which the outcome is not a foregone conclusion. Yet, as this study confirms, there is a persistent tendency for appellants to succeed well below 50% of the time. See Eisenberg & Schwab, *What Shapes Perceptions?*, *supra* note 82; Wheeler, Cartwright, Kagan & Friedman, *supra* note 141.

¹⁷³ One would therefore expect "in office" to be a negative predictor of settlement.

rights litigants. Intent cases are not as susceptible to reversal on appeal as other cases, a result that holds for both intent claimants and their opponents; but this finding may be explained by the intensely factual nature of intent claims.

In assessing which factors influence the outcome of race-based intent claims, the study's most striking findings emerge: the variables that predict success in intent claim cases are not those one would anticipate. With little loss of predictive power, two factors not mentioned by the Supreme Court can be interchanged with the two kinds of "smoking gun" evidence included in the authoritative list of methods of proof found in *Arlington Heights*. Furthermore, there are sharp differences in the performance of the variables between the district court and appellate levels.

Two factors limit how far one can go in attributing volume and success results to the intent standard. Ideally, one would like a stable course of pre-*Washington v. Davis* case law, with ascertainable volumes and success rates to contrast with our post-*Davis* findings. These data would then be combined with accurate measurements over time of the level of discrimination in society. But both the pre-*Davis* data and the quantitative measurement of discrimination are unlikely ever to be satisfactory.

Pre-*Davis* race-based equal protection law was in a state of confusion. After announcing in several opinions that disparate effects could establish violations of the equal protection clause, the Court discarded effects and demanded a showing of illicit motive.¹⁷⁴ Until *Davis* clarified the standard in equal protection cases, plaintiffs were likely to plead and prove a mixture of intent and impact-based theories. Sorting out the change attributable to *Davis*'s new standard seems impossible without more stable pre-*Davis* doctrine.¹⁷⁵ And even if more satisfactory doctrinal data were available, there would be little confidence in any method of measuring the level of societal discrimination, and, therefore, little confidence about the calculated volume of race-based filings one could expect to see if a standard less stringent than the intent standard were in place. The available social science data suggest inherent problems in measuring the level of discrimination in society.

The claims for this aspect of the study must therefore be more modest. First, if one believes there are troubling levels of official discrimination in America, the volume of race-based intent litigation provides no basis for confidence that litigation is successfully ad-

¹⁷⁴ See Eisenberg, *supra* note 67.

¹⁷⁵ But even after reading all pre-*Davis* cases one would be hard pressed to establish a useful baseline for comparative purposes. It would also be difficult to ascertain whether one had collected all or nearly all of the pre-*Davis* cases.

addressing the problem. Although we acknowledge that published opinions, both district and appellate, may not be representative of all underlying case filings, this does not mean that one must abandon hope of obtaining useful insights about an area of law from them.¹⁷⁶ Although many of our quantitative statements are estimates, they represent substantially more informed estimates than could be made without knowledge of the opinions. Second, whatever *amount* of discrimination is being redressed through litigation, the selection of *which* discrimination to redress does not seem to be proceeding according to the Supreme Court's guidelines.

More ambitious claims may be warranted for the methodology developed here. In one important respect we need make no apology for the sample of cases studied. They are representative—indeed, for most scholars they are the full population—of the cases shaping perceptions of the legal system. Published opinions are all most of us ever work from. Our findings with respect to both levels of opinions, and to the differences between district and appellate opinions, suggest the benefits of analyzing a substantial fraction of all the opinions in a legal area. Such analysis may generate a rethinking of any legal area to which it is applied.

¹⁷⁶ Similarly, one can derive useful knowledge about trial success rates from knowledge of motion success rates and vice versa. Eisenberg, *supra* note 125.

APPENDIX

Goodness-of-Fit Data

(1)
Table 3
Prevail in District Court

	Chi-Square	df	Signif.
-2 Log Likelihood	93.485	98	.610
Model Chi-Square	65.182	19	.000
Goodness of Fit	95.934	98	.540

Observed	Predicted		% Corr.
	FAILED	PREVAILED	
FAILED	59	12	83.10%
PREVAILED	13	34	72.34%
Overall			78.81%

(4)
Table 4
Most Parsimonious Model

	Chi-Square	df	Signif.
-2 Log Likelihood	87.128	105	.897
Model Chi-Square	69.484	10	.000
Goodness of Fit	92.382	105	.806

Observed	Predicted		% Correct
	FAILED	PREVAILED	
FAILED	58	11	84.06%
PREVAILED	11	36	76.60%
Overall			81.03%

(2)
Table 3
Prevail in Court of Appeals

	Chi-Square	df	Signif.
-2 Log Likelihood	79.004	72	.267
Model Chi-Square	46.796	20	.001
Goodness of Fit	83.017	72	.176

Observed	Predicted		% Correct
	FAILED	PREVAILED	
FAILED	47	8	85.45%
PREVAILED	12	26	68.42%
Overall			78.49%

(5)
Table 4
Model Including All Judicial Characteristics

	Chi-Square	df	Signif.
-2 Log Likelihood	70.518	82	.813
Model Chi-Square	66.937	19	.000
Goodness of Fit	70.410	82	.816

Observed	Predicted		% Correct
	FAILED	PREVAILED	
FAILED	50	11	81.97%
PREVAILED	10	31	75.61%
Overall			79.41%

(3)
Table 3
Most Parsimonious District Court

	Chi-Square	df	Signif.
-2 Log Likelihood	103.306	111	.686
Model Chi-Square	55.361	6	.000
Goodness of Fit	109.115	111	.533

Observed	Predicted		% Correct
	FAILED	PREVAILED	
FAILED	58	13	81.69%
PREVAILED	12	35	74.47%
Overall			78.81%