

## Recovering Forgotten Struggles Over the Constitutional Meaning of Equality

Author : Helen Norton

Date : October 6, 2016

Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 *Harv. C.R.-C.L. L. Rev.* 1 (2016), available at [SSRN](#)

Legal history can help us overcome the distortions of time and distance that too often obscure our understanding of struggles both past and present. [Katie Eyer's \*Ideological Drift and the Forgotten History of Intent\*](#) exemplifies this kind of legal history. Through painstaking analysis of a century of equal protection decisions by the Supreme Court, she seeks to explain a “perplexing feature of the Court’s early 1970s jurisprudence: the Court’s race liberals’ failure to pursue effects-based approaches to Equal Protection liability at a time when such approaches were gaining credence elsewhere.”

In [Washington v. Davis, 426 U.S. 229 \(1976\)](#), for example, the Court held that the Constitution does not forbid the government’s facially neutral actions that create racial disparities, even if such disparities have the effect of reinforcing traditional racial hierarchies. Rejecting a challenge to the District of Columbia’s examination for police officers that had the effect of disproportionately excluding African-American applicants, the Court held that the equal protection clause addresses only intentionally discriminatory government actions. No member of the Court—including Justices Brennan and Marshall—dissented from this constitutional holding.

This failure can be both puzzling and frustrating to contemporary progressives who believe that the equal protection clause should be read to bar government actions that have the effect of perpetuating traditional patterns of subordination, even when unaccompanied by the government’s intent to cause such harmful effects. They see *Washington v. Davis* and related decisions as impediments to the view that racial disparities are sufficiently suspicious to demand substantial government justification, and that disparities that remain unjustified are morally unsound and instrumentally unwise.

Professor Eyer argues that today’s doctrinal barriers can be understood as a product of progressives’ earlier efforts to overcome a different set of doctrinal obstacles. Beginning in the 19<sup>th</sup> and continuing throughout much of the 20<sup>th</sup> century, the Court refused to invalidate government actions motivated by discriminatory intent, so long as the actions were facially neutral in form. (The only exception involved the rare situation in which a challenger could show that a facially neutral action was not only motivated by the government’s animus, but also that it led to the virtually complete exclusion of protected class members, such that it was indistinguishable in practice from a facially discriminatory classification).

In the aftermath of [Brown v. Board of Education](#), Southern resisters thwarted desegregation efforts by exploiting the Court’s refusal to consider underlying discriminatory intent. Without a muscular intent doctrine, school districts could frustrate *Brown’s* promise by framing their racial hostility in facially neutral terms—for example, through “pupil placement” rules that imposed onerous but ostensibly neutral restrictions on students seeking to transfer from their current (segregated) school assignments. Similarly, in [Palmer v. Thompson, 403 U.S. 217 \(1971\)](#), the Court upheld a city’s facially neutral action in shutting down all public swimming pools, despite the city’s motivation to prevent desegregation.

As Eyer observes, “[T]he ability to invalidate a law based on intent, often taken for granted today, was not a foregone conclusion in the aftermath of *Brown*. . . . Had the Court never embraced an intent-based invalidation standard, our

contemporary constitutional regime would offer a far different, and much bleaker, outlook for racial justice concerns. It is thus important to recall that without intent, we would lack a key bulwark against open evasion of the most basic promises of *Brown*.”

Thus, the Court’s progressives were determined to overcome the doctrinal problem of their day by insisting on the government’s intent to discriminate as the touchstone for an equal protection violation. Not until the 1970s did a majority form around the premise that covertly discriminatory government actions are as offensive to equal protection values as facially segregationist policies. Indeed, as Eyer points out, not until 1985 did the Court invalidate Alabama’s facially neutral constitutional provision disenfranchising those convicted of “moral turpitude,” even though the president of the state constitutional convention had expressly identified the purpose of the provision as “to establish white supremacy in this State.”

At the same time, Eyer explains how the progressives’ emphasis on intent impeded later efforts to force government to reconsider actions that disproportionately excluded people of color and women without good reason. Only after it later became clear that courts would be very slow to find the government’s discriminatory intent did many progressives come to see a doctrinal insistence on intent as a major barrier to realizing the Constitution’s promise of equal protection.

Eyer’s work reminds us how our challenges can consume our attention and energy in ways that make it difficult to recognize change and thus to pivot from positions for which we’ve fought very hard. We should thus take care to remind ourselves of the inevitability and unpredictability of the likely change yet to come. As Eyer concludes, “Where the law’s content has been defined by a social movement’s own successes, it is on the contours of those successes that battles over meaning will be fought. Thus, the history of intent reminds us that it is predictable that doctrines once thought to serve a particular vision of the good will evolve to reflect other competing groups’ normative aspirations. And so too is it predictable that groups seeking constitutional change will ultimately be bound by their victories, just as their losses may also constrain.”

Cite as: Helen Norton, *Recovering Forgotten Struggles Over the Constitutional Meaning of Equality*, JOTWELL (October 6, 2016) (reviewing Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 *Harv. C.R.-C.L. L. Rev.* 1 (2016), available at SSRN), <http://conlaw.jotwell.com/recovering-forgotten-struggles-over-the-constitutional-meaning-of-equality/>.