NOTES

End *Arlington Heights*

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ABSTRACT

Legislative motive is back in court, but it shouldn't last. In Coalition for TJ v. Fairfax County School Board*, the Fourth Circuit upheld a facially race-neutral admissions policy to a competitive public magnet school in an* Arlington Heights *challenge despite extensive evidence of the School Board's racially discriminatory motive and the policy's disparate racial impact. The opinions in* TJ *mark the first bout in the next phase of litigation after* Students for Fair Admissions v. Harvard. *This Article examines how the* TJ *decision exemplifies the irredeemable workability issues attendant to judicial examination of legislative motive under* Arlington Heights*, details the aberration from legal history and principle that the* Arlington Heights *regime represents, and argues why, both normatively and legally,* Arlington Heights *should be abandoned.*

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INTRODUCTION

Legislative motive is back in court, but it shouldn't last. The Supreme Court recently found that race-based affirmative action programs constitute unlawful racial discrimination,[1] but the next civil rights battle has just begun. In addition to routine enforcement of the *Harvard* decision through discovery and traditional litigation,[2] civil rights activists[3] and public interest firms are bringing the fight for the promise of equal protection to new contexts,[4] like in law firm fellowships,[5]

1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181, 230–31 (2023).

2. *See* Douglas Belkin, *Affirmative-Action Plaintiff Warns of Consequences If Schools Defy Supreme Court Ruling*, WALL ST. J. (July 13, 2023), https://www.wsj.com/articles/affirmative-action-plaintiff-warns-of-consequences-if-schools-defy-supreme-court-ruling-52865e04 [https://perma.cc/8XD3-UYVD] (discussing letter sent by Edward Blum, the attorney for Students for Fair Admissions, to 150 selective colleges and universities threatening litigation if schools try to work around the constitutional protections recognized in *SFFA*); Press Release, *Do No Harm Files Class Action Lawsuit Against UCLA Medical School for Racial Discrimination in Admissions*, DO NO HARM (May 8, 2025), https://donoharmmedicine.org/2025/05/08/lawsuit-ucla-medical-school-admissions-racial-discrimination [https://perma.cc/M7JE-EK6E].

3. Wade Miller et al., *How to Defeat Left-Wing Racialism*, CITY J. (Summer 2023), https://www.city-journal.org/article/how-to-defeat-left-wing-racialism [https://perma.cc/Q4R6-WFAH].

4. *See* Theo Francis & Lauren Weber, *The Legal Assault on Corporate Diversity Efforts Has Begun*, WALL ST. J. (Aug. 8, 2023), https://www.wsj.com/articles/diversity-equity-dei-companies-blum-2040b173 [https://perma.cc/BJZ6-GPSB].

5. *See, e.g.*, Douglas Belkin & Eril Mulvaney, *Activist Behind Supreme Court Affirmative Action Cases Is Now Suing Law Firms*, WALL ST. J. (Aug. 22, 2023), https://www.wsj.com/us-news/edward-blum-lawsuits-affirmativeaction-law-firms-b8871ab1 [https://perma.cc/SS22-RSY2]; Complaint, Am. All. for Equal Rts. v. Perkins Coie LLP, 3:23-cv-1877 (N.D. Tex. Aug. 22, 2023); Complaint, Am. All. for Equal Rts. v. Morrison & Foerster LLP, 1:23-cv-23189 (S.D. Fla. Aug. 22, 2023). Some have already given up on trying to defend their policies. *See* Erin Mulvaney, *Law Firms Alter Diversity Programs Amid Legal Challenges*, WALL ST. J. (Oct. 9, 2023), https://wsj.com/us-news/law/law-firms-alter-diversity-programs-amid-legal-challenges-5608eab4 [https://perma.cc/9H9W-LV3N] (discussing fellowship program changes by Perkins Coie and Morrison & Foerster).

corporate hiring,[6] grant programs,[7] federal contracting,[8] scholarships,[9] protection from harassment on campus,[10] and admission to the military academies.[11]

But as to school admissions, the law is settled—new litigation here will mostly be about the facts. Schools have varied in their responses to the decision, with some disavowing racially discriminatory policies[12] and others completely

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6. *See* Letter from James K. Rogers, Senior Couns., Am. First Legal Found., to EEOC, (Jan. 11, 2024), https://media.aflegal.org/wp-content/uploads/2024/01/11210910/Nike-EEOC-letter-01112024.pdf [https://perma.cc/3TEA-7EAG]; Letter from Ian D. Prior, Senior Advisor, Am. First Legal Found., to EEOC; (Dec. 19, 2023), https://media.aflegal.org/wp-content/uploads/2023/12/19214240/Hasbro-Letter-EEOC-12192023.pdf [https://perma.cc/C7EW-HULV]; Letter from Ian D. Prior, Senior Advisor, Am. First Legal Found., to EEOC; (Dec. 19, 2023), https://media.aflegal.org/wp-content/uploads/2023/12/19214241/Mattel-EEOC-Letter-12192023.pdf [https://perma.cc/B8CL-S49M]. Many corporations are adjusting their programs to limit their exposure, but by and large are maintaining their programs in a more subtle form. *See* Richard Vanderford, *Corporate America Tweaks Diversity Initiatives Amid Pushback*, WALL ST. J. (Feb. 5, 2024), https://www.wsj.com/articles/corporate-america-tweaks-diversity-initiatives-amid-pushback-062cfe89 [https://perma.cc/C3ZP-3YDK].

7. *See* Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 103 F.4th 765 (11th Cir. 2024) (granting preliminary injunction); First Amended Complaint, Chu v. Rosa, 1:24-cv-00075 (N.D.N.Y. Apr. 5, 2024); Ruth Simon & Theo Francis, *Companies Are Scrapping or Rolling Back DEI Grants*, WALL ST. J. (Oct. 10, 2024), https://www.wsj.com/business/companies-are-scrapping-or-rolling-back-dei-grants-e192efc1 [https://perma.cc/NTR4-893P].

8. *See* Ultima Servs. Corp. v. U.S. Dep't of Agric., 683 F. Supp. 3d 745 (E.D. Tenn. 2023) (granting injunction against use of race to create a rebuttable presumption of social disadvantage in federal contracting); Michael Toth, *Federal Contracting Is the Next DEI Target*, WALL ST. J. (Jan. 15, 2024), https://www.wsj.com/articles/federal-contracting-is-the-next-dei-target-race-affirmative-action-supreme-court-ca60eaf4 [https://perma.cc/MV69-Y6A3]; Judge Glock, *Welcome to the World of Minority Contracting*, CITY J. (Spring 2023), https://www.city-journal.org/article/welcome-to-the-world-of-minority-contracting [https://perma.cc/E4MK-QVG6] ("Government goals and set-asides for 'disadvantaged' firms breed corruption and fraud, deepen racial divisions, and cost taxpayers billions.").

9. *See* Complaint, Do No Harm v. Nat'l Ass'n of Emergency Med. Technicians, 3:24-cv-00011 (S.D. Miss. Jan. 10, 2024) (challenging race-restricted scholarship for emergency medical technician school as unlawful racial discrimination in contracting under 42 U.S.C. § 1981); Verified Complaint, Young Ams. for Freedom v. U.S. Dept. of Ed., 3:24-cv-00163 (D.N.D. Aug. 27, 2024); Lauren Weber, *Ph.D.s Are Next in Fight over Affirmative Action*, WALL ST. J. (Aug. 28, 2024), https://www.wsj.com/us-news/education/ph-d-s-are-next-in-fight-over-affirmative-action-8b1cc36f [https://perma.cc/P3HK-RHMM].

10. *See* Complaint, Kestenbaum v. President & Fellows of Harvard Coll., 1:24-cv-10092 (D. Mass. Jan. 10, 2024) (Jewish students challenging under Title VI of the Civil Rights Act Harvard's alleged deliberate indifference to campus antisemitism).

11. This question was explicitly reserved in the Harvard case. Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. 181, 213 n.4 (2023). Litigation is at various stages at time of writing. *See* Students for Fair Admissions v. U.S. Naval Acad., 707 F. Supp. 3d 486 (D. Md. 2024) (denying relief after bench trial), *appeal docketed*, No. 24-2214 (4th Cir. Dec. 10, 2024); Students for Fair Admissions v. U.S. Mil. Acad., 709 F. Supp. 3d 118 (S.D.N.Y. 2024) (denying preliminary injunction).

12. *See, e.g.*, Joe Killian, *UNC System Issues New Directives After U.S. Supreme Court Ruling on Race in Admissions*, NC NEWSLINE (Aug. 23, 2023), https://ncnewsline.com/2023/08/23/unc-system-issues-new-directives-after-u-s-supreme-court-ruling-on-race-in-admissions [https://perma.cc/WVX4-WNCM] (detailing new directives abandoning written and unwritten race-based admissions policies and practices and as disavowing the use of proxies or pretexts aimed at race); *Statement Regarding Recent U.S. Supreme Court Decision*, UNIV. OF MO. SYS. (June 29, 2023), https://www.umsystem.edu/ums/news/news_releases/202306292029248061_news [https://perma.cc/QX43-CDCD] (discontinuing discriminatory admissions and scholarship practices); Tim Minella, *University of Kentucky Ditches DEI in Latest Victory over Discriminatory Regime*, GOLDWATER INST. (Aug. 26, 2024), https://www.

shutting down their diversity programs.[13] Still others have reaffirmed their commitment to continuing their racial diversity initiatives in some form or fashion.[14] These strategies include the covert use of quota-style "critical mass" policies[15] and attempts by admissions departments to hide their tracks[16] by eliminating

goldwaterinstitute.org/university-of-kentucky-ditches-dei-in-latest-victory-over-discriminatory-regime [https://perma.cc/8DEU-6RZD].

13. *See, e.g.*, Claire Bryan, *Why Seattle Public Schools Is Closing Its Highly Capable Cohort Program*, SEATTLE TIMES (Mar. 31, 2024), https://www.seattletimes.com/education-lab/why-seattle-public-schools-is-closing-its-highly-capable-cohort-program [https://perma.cc/3BNX-LTED] (program designed to turbocharge high-achieving students terminated because the district believed its aggregate racial makeup was "highly inequitable" due to the smaller number of "Black, Latino, Indigenous, Alaskan and Pacific Islander and low-income students" who qualified); Sarah Karp, *Chicago Could Move Away from School Choice. Here's What That Means for Parents and Students*, CHI. SUN-TIMES (Dec. 27, 2023), https://chicago.suntimes.com/education/2023/12/27/24012377/cps-school-choice-education-chicago-mayor-brandon-johnson-magnet-hunger-games-city-hall-downtown [https://perma.cc/T6ZX-B5WL] (signaling the move because the selective schools "have historically been disproportionately white, Asian and middle class"). This approach is reminiscent of the attempts by Virginia and Louisiana to abolish the entire public school system rather than run a racially integrated one. *See* Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218, 221 (1964); Hall v. St. Helena Par. Sch. Bd., 197 F. Supp 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962) (mem.).

14. *See, e.g.*, Harvard University, *President-Elect Claudine Gay Message to the Community*, YOUTUBE (June 29, 2023), https://www.youtube.com/watch?v=AoGjh3tbPm4 [https://perma.cc/3FLY-RPV2] ("The Supreme Court's decision on college and university admissions will change how we pursue the educational benefits of diversity—but our commitment to that work remains steadfast."); Luke Fountain, *Affirmative Action Is No More. What Does UVa Do?*, DAILY PROGRESS (June 30, 2023), https://dailyprogress.com/news/local/education/affirmative-action-is-no-more-what-does-uva-do/article_6469e030-16c5-11ee-a406-77aa7ba87304.html [https://perma.cc/N9C2-HCUT] (detailing various workarounds the University of Virginia is considering to pursue their commitment to racial diversity "even if our ability to pursue that goal is constrained"). *See also* Jeffrey Selingo, *How Elite Colleges Will Work Around the Supreme Court's Ruling*, WALL ST. J. (July 5, 2023), https://www.wsj.com/articles/how-elite-colleges-will-still-seek-diversity-despite-the-supreme-courts-rejection-of-affirmative-action-a2c7f340 [https://perma.cc/4E34-TNFT] (admissions advisor describing strategies such as abandoning standardized testing to hide key evidence of discrimination, focusing on high schools based on their demographics, and expanding recruitment efforts at targeted schools). In the non-admissions context, see also Ray A. Smith & Lauren Weber, *How the Push for Diversity at Colleges and Companies Came Under Siege*, WALL ST. J. (Jan. 4, 2024), https://www.wsj.com/business/how-the-push-for-diversity-at-colleges-and-companies-came-under-siege-036d4065 [https://perma.cc/US5D-35B8] (reporting on companies making minor alterations to "address the areas where they see the most potential legal or reputational risk," but "just plan to be quieter about what they're doing").

15. As tacitly approved by the Civil Rights Divisions at the Departments of Justice and Education in the last presidential administration. *See* Letter from Kristen Clarke, Assistant Att'y Gen., C.R Div., U.S. Dep't of Just. & Catherine E. Lhamon, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ., (Aug. 14, 2023) (reiterating approval of admissions policies that work toward "student bodies [that] reflect the rich diversity of our communities"). For background on critical mass, see generally Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 42 EDUC. RESEARCHER 115 (2014) (describing the idea of a threshold number of students in each racial group before the diversity interest is achieved on campus).

16. *See* Rahem D. Hamid, Vivi E. Lu & Nia L. Orakwue, *'Bad News for Harvard': Future of Affirmative Action in Doubt as Conservative Court Takes Up Admissions Case*, HARV. CRIMSON (Jan. 25, 2022), https://www.thecrimson.com/article/2022/1/25/scotus-admissions-expert-opinions/ [https://perma.cc/94YB-VTCW] (quoting Professor Laurence Tribe, "[u]niversities as intelligent as Harvard will find ways of dealing with the decision without radically altering their composition," but that "they will have to be more subtle than they have been thus far").

objective data like standardized test scores.[17] These schools have begun a game of cat and mouse with civil rights groups in litigation and discovery battles over compliance with the *Harvard* decision.[18] While the Court may eventually have to come back to sort out the "essay loophole" left in its *Harvard* decision, the grounds for this battle have largely already been set, and only time will tell how each policy approach plays out in practice.[19]

Other schools have begun approaching their racial diversity goals more subtly, adopting facially race-neutral policies designed to have non-race-neutral effects.[20] This has included policies that give preference based on socio-economic background;[21] give automatic admission to students with certain class rank cut-offs at all high schools, regardless of school-level competitiveness, as in the "Top 10%" policy at issue in the *Fisher* affirmative action case;[22] or give geographic

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17. *See* Erin Einhorn, *Inside the Vast National Experiment in Test-Optional College Admissions*, NBC NEWS (Apr. 10, 2022), https://www.nbcnews.com/news/us-news/college-admissions-test-sat-act-rcna23574 [https://perma.cc/HWF7-GWUV]. Some schools are finding that the attempt has not been as successful as they had hoped and are reverting to the original justification for having a standardized test serve as an equalizer to "better position Admissions [offices] to identify high-achieving less-advantaged applicants." Editorial, *Dartmouth Sees the Value of the SAT*, WALL ST. J. (Feb. 5, 2024), https://www.wsj.com/articles/dartmouth-reinstates-sat-act-requirement-admissions-standardized-tests-3ed5fb42 [https://perma.cc/TJ33-VBEY].

18. *See* Jason L. Riley, *Some Elite Colleges Dodge the Affirmative-Action Ruling*, WALL ST. J. (Sept. 24, 2024), https://www.wsj.com/opinion/some-elite-colleges-dodge-the-affirmative-action-ruling-85c8939c [https://perma.cc/H3NB-RVJD] ("At Duke, Princeton and Yale, Asian enrollment went down after last year's Supreme Court decision."); Joseph Pisani, *Harvard Enrolls Fewer Students Identifying as Black, More Don't Disclose Race*, WALL ST. J. (Sept. 11, 2024), https://www.wsj.com/us-news/education/harvards-latest-class-fewer-students-who-identify-as-black-more-who-didnt-disclose-their-race-b79c28a6 [https://perma.cc/C9FR-HQT3] ("Enrollment of students who identify as Asian-American remained unchanged at 37%.").

19. *See* Students for Fair Admissions v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181, 230 (2023); Rahem D. Hamid & Neil H. Shah, *Inside the Decision: Here's What the Supreme Court Said About Affirmative Action*, HARV. CRIMSON (June 30, 2023), https://www.thecrimson.com/article/2023/6/30/scotus-affirmative-action-analysis [https://perma.cc/EZ43-NBSQ] (quoting Professor Dershowitz and Dean Chemerinsky discussing the essay "loophole" which "leave[s] open the door to considering race"); Jason L. Riley, *Minorities Reap the Benefit When Affirmative Action Ends*, WALL ST. J. (Sept. 10, 2024), https://www.wsj.com/opinion/minorities-reap-the-benefit-when-racial-preferences-end-higher-education-66d5b7c8?msockid=051eacad0e0368db0b3ebd530fb4691d [https://perma.cc/C2PL-Z7HV] (detailing how in the 1990s "black graduation rates rose sharply after racial preferences ended" in California).

20. *See* Coal. for TJ v. Fairfax Cnty Sch. Bd., No. 23-170, 2024 WL 674659, at *5 n.9 (mem.) (U.S. 2024) (Alito, J., dissenting from denial of certiorari).

21. *See* ANTHONY P. CARNEVALE, ZACHARY MABEL & KATHRYN PELTIER CAMPBELL, RACE-CONSCIOUS AFFIRMATIVE ACTION: WHAT'S NEXT 25–26 (2023); *see also* Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos., 996 F.3d 37, 42 (1st Cir. 2021) (using zip code as proxy for socioeconomic status). Although it does not appear at this juncture that too many universities will end up taking this route. *See infra* note 25.

22. Fisher v. Univ. of Tex., 579 U.S. 365 (2016); *see* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 875 (4th Cir. 2023), *cert. denied*, No. 23-170, slip op. (Feb. 20, 2024); *Governor Hochul Announces Initiatives to Increase Access to Higher Education*, GOV. KATHY HOCHUL (Jan. 9, 2024), https://www.governor.ny.gov/news/governor-hochul-announces-initiatives-increase-access-higher-education [https://perma.cc/R5U2-MGSH]; Mike Porter, *VCU Announces Guaranteed University Admission Program*, VCU NEWS (Oct. 4, 2023), https://news.vcu.edu/article/2023/10/vcu-announces-guaranteed-university-admission-program [https://perma.cc/MJV8-EDGK].

preferences which serve as rough proxies for the racial composition the institution is seeking.[23]

These policies are vulnerable to *Arlington Heights* challenges. Rather than only invalidating actions that explicitly discriminate based on race, *Arlington Heights* declares as facially unconstitutional policies which are neutral on their face, but were enacted with illicit discriminatory motives.[24] Regardless of what form it takes (and there are great policy arguments for many race-neutral changes to admissions policies),[25] this is where the next round of affirmative action litigation will take place —fighting constitutional challenges over the motives of policymakers.

In May 2023, the Fourth Circuit decided just such a case. In *Coalition for TJ v. Fairfax County School Board*,[26] a divided panel upheld a facially race-neutral

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23. *See, e.g.*, *TJ*, 68 F.4th at 875; *Boston Parent*, 996 F.3d at 42 (using zip code as proxy for race).

24. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263–64 (1977).

25. A common call is for universities to abandon legacy admissions or to commit greater resources to allow students from poor backgrounds who can meet the academic rigor of elite universities, but are excluded from the opportunity due to cost. *See, e.g.*, Rikki Schlott, *Bipartisan Congress Wants To Defund Colleges Over Legacy Admissions—It's About Time*, N.Y. POST (Jan. 11, 2024), https://nypost.com/2024/01/11/news/bipartisan-congress-aims-to-defund-colleges-over-legacy-admissions [https://perma.cc/YST2-PBHP]; Ming Hsu Chen, *We Should End Legacy Admissions. But It Won't Make Up for Losing Affirmative Action*, BOS. GLOBE (Jan. 13, 2024), https://www.bostonglobe.com/2024/01/13/opinion/we-should-end-legacy-admissions-it-wont-make-up-losing-affirmative-action [https://perma.cc/RK6K-BH8A]; Michelle N. Amponsah & Emma H. Haidar, *Could Losing Legacy Admissions Sustain Racial Diversity?*, HARV. CRIMSON (Sept. 22, 2023), https://www.thecrimson.com/article/2023/9/22/harvard-without-legacy [https://perma.cc/4QC7-K8N5]. *But see, e.g.*, Jason L. Riley, *Legacy Admissions May Not Be at Odds with Diversity*, WALL ST. J. (Feb. 6, 2024), https://www.wsj.com/articles/legacy-admissions-may-not-be-at-odds-with-diversity-hcbu-campus-culture-b893e6b7 [https://perma.cc/5P3H-VGL4]. This author is partial to these proposals, especially so at government-run schools, and some have admirably taken the plunge on their own or under compulsion of law. *See* Liam Knox, *First Out of the Gate*, INSIDE HIGHER ED. (July 31, 2023), https://www.insidehighered.com/news/admissions/traditional-age/2023/07/31/wesleyan-president-discusses-why-he-ended-legacy [https://perma.cc/GSB8-96VQ]; Nicholas Hatcher, *California Bans Legacy Admissions at Private Colleges*, WALL ST. J. (Oct. 2, 2024), https://www.wsj.com/us-news/education/california-bans-legacy-admissions-at-private-colleges-7818df1d [https://perma.cc/QB59-783F]. But many schools seem more interested in retaining their privileged positions as finishing schools for the well-connected rather than institutions committed to the pursuit of knowledge and pressing the advantage of our young, energetic, bright minds, whatever their background. *See* Christopher Rim, *Some Universities Are Retiring Legacy Admissions But the Ivy League Won't Join Them Without a Fight*, FORBES (July 25, 2023), https://www.forbes.com/sites/christopherrim/2023/07/25/some-universities-are-retiring-legacy-admissions-but-the-ivy-league-wont-join-them-without-a-fight/?sh=3569c95b5a26 [https://perma.cc/HV8N-DTS5] (stating that 28% of Harvard admissions include legacies and describing how few universities have abandoned the policies, despite 75% of Americans disapproving of legacy admissions, and ongoing investigations and lawsuits into the practice); Marc Novicoff, *Why Won't Elite Colleges Deploy the One Race-Neutral Way to Achieve Diversity?*, POLITICO (Sept. 15, 2023), https://www.politico.com/news/magazine/2023/09/15/supreme-court-admissions-elite-schools-00116087 [https://perma.cc/MB8P-TAB9] (detailing how some elite schools have refused to take the socioeconomic status route and predicting that "no other university will try it either"). Nonetheless, for the purposes of this Note, even if these policies were adopted and properly applied in a race-neutral way, under current doctrine, their legality would turn not on the faithfulness of their application, but on the motivation of their adopters. *See infra* Section I.A.

26. 68 F.4th 864 (4th Cir. 2023), *cert. denied*, No. 23-170, 2024 WL 674659 (mem.) (U.S. Feb. 20, 2024).

change in admissions policy for one of the top public magnet high schools in the nation.[27] The policy was explicitly designed to help the school achieve its goal of increasing the number of non-Asian students it admitted so that its student body would better reflect the racial composition of the school system as a whole.[28] Against a challenge by aggrieved Asian-American applicants under the *Arlington Heights* framework, the panel held, contrary to the logic of *Arlington Heights* and the clear evidentiary record, not only that the policy in question was not intended to have a racially discriminatory effect, but that it also had no disparate impact at all.[29] The decision came over a well-reasoned dissent highlighting the facts in the case and making a compelling argument for the opposite outcome under the existing *Arlington Heights* framework.[30]

TJ exposes with striking clarity the perils of deciding facial constitutional challenges on charges of illicit legislative motive.[31] Until the Supreme Court weighs in on these issues definitively, it is hard to see anything but a deep and bitter circuit split developing over these facially race-neutral policies aimed at achieving racial diversity goals. When the Court eventually takes one of these cases up,[32] the ground will be laid for it to revisit *Arlington Heights* in a new context.

This Article first analyzes the tension in the *TJ* decision and its likely implications for future affirmative action litigation. It then highlights the broader problems with *Arlington Heights* most recently demonstrated in *TJ*, arguing that *Arlington Heights* violates fundamental principles of adjudication and broke with core, universally held doctrine that traces from the founding of the Republic to the Warren Court and continues to be applied in other contexts even after *Arlington Heights*. For these reasons, *TJ* should mark the beginning of the end of *Arlington Heights*.

Part I provides a background of *TJ* and *Arlington Heights*. Part II assesses the opinions in *TJ* and how they demonstrate the intractable administrability issues inherent in judicial investigation of legislative motive. Part III contextualizes the current legislative motive regime within the jurisprudential history. Part IV

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27. *Id.* at 871; Renu Mukherjee, *The Next Battle over Racial Preferences*, CITY J. (Autumn 2023), https://www.city-journal.org/article/the-next-battle-over-racial-preferences [https://perma.cc/SWD6-D642].

28. *TJ*, 68 F.4th at 873.

29. *Id.* at 887.

30. *Id.* at 891–906.

31. The policy at issue was adopted by a multi-member elected school board exercising its legislative power, not a state legislature. Nonetheless, because problems with legislative motive analysis apply equally to any legislative body acting within the bounds of its own rules of decisionmaking, I refer to the doctrine as "legislative motive" throughout.

32. The Court appears content to wait for a split to develop. *See* Adam Liptak, *Supreme Court Won't Hear New Case on Race and School Admissions*, N.Y. TIMES (Feb. 20, 2024), https://www.nytimes.com/2024/02/20/us/supreme-court-race-school-admissions.html [https://perma.cc/VNZ3-AF7F]. But it will have numerous opportunities to weigh in when it is ready. *See* Chris Kieser, *Supreme Court Should Revisit Racial Equity in High-School Admissions*, NAT'L REV. (Sept. 11, 2024), https://www.nationalreview.com/bench-memos/supreme-court-should-revisit-racial-equity-in-high-school-admissions [https://perma.cc/Q7WD-V77T].

argues why, on both legal and normative grounds, *Arlington Heights* should be abandoned as a tool for deciding equal protection challenges. Part V addresses potential objections.

I. FACTS AND CONTEXT FOR *ARLINGTON HEIGHTS* AND *COALITION FOR TJ*

A. The Arlington Heights *Framework*

The Court tipped its hat to legislative motive in *Washington v. Davis*.[33] *Davis* involved an equal protection challenge to a verbal skills test for police officers in the District of Columbia. The plaintiffs alleged and showed disparate passage rates across racial groups, but failed to show that the test did anything other than measure the verbal skills ability of those who took it.[34] The Court held that there was no constitutional infirmity in the test itself, which was "neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue," and that disparate impact does not in itself establish an equal protection violation.[35] Nonetheless, the Court surmised in dicta that use of the skills test might have crossed the line if, in addition to the disparate impact, the test was adopted as the result of a "racially discriminatory purpose."[36]

The Court then adopted this motive framework in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[37] There, the plaintiffs alleged that a zoning board improperly denied variances for affordable housing because of a racially discriminatory motive.[38] While the claim was not successful on the merits, the Court provided a non-exhaustive list of factors that courts can examine to identify unconstitutional discriminatory motive.[39] These include, but are not limited to, the historical background of the provision, particularly if it reveals a pattern; the real-world impact of the policy, if extreme; the specific sequence of events leading to the decision; departures from normal procedures or substantive departures from past practice; and legislative or administrative history, including contemporaneous statements from members of the decision-making body, meeting minutes, and reports.[40] In extreme circumstances, the Court even sanctioned calling in legislators to testify about their motives.[41] The Supreme Court has not

33. Washington v. Davis, 426 U.S. 229 (1976).
34. *Id.* at 235–36.
35. *Id.* at 246.
36. *Id.* at 239.
37. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
38. *Id.* at 254–58.
39. *Id.* at 266–68.
40. *Id.*
41. *Id.* at 268. This was not beyond the pale either, as the Court had earlier sanctioned haling a cabinet secretary into court for a 27-day trial to investigate his motivations as to an administrative decision. GELLHORN & BYSE'S ADMINISTRATIVE LAW 1147 (13th ed. 2023) (citing Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971)).

definitively weighed in on whether a threshold showing of disparate impact is an additional requirement, but a number of circuit courts have so held.[42]

In *Hunter v. Underwood*,[43] the doctrine took another turn. There, in a challenge to an Alabama constitutional provision regarding criminal disenfranchisement, the Court tacked on a burden-shifting approach to this doctrine, which the Court began to experiment with in contexts beyond the civil rights statutes that had become well known for their burden-shifting tests.[44] Under this approach, once an impermissible motive is found, the law can still survive the challenge if the government can show that the same legislative action would still have been taken in the absence of the discriminatory motive.[45]

Finally, in *Abbott v. Perez*, the Court emphasized a rebuttable presumption of good faith for the governmental actor, regardless of prior findings in other cases.[46] Consistent with other constitutional doctrines weighing in favor of regularity, the burden is on the plaintiff to show that a legitimate law was passed with illicit motives.[47]

Thus stands the doctrine. While it sounds rather simple, the test in application has not been.[48]

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42. *Compare* Chinese Am. Citizens All. of Greater N.Y. v. Adams, 116 F.4th 161, 164 (2d Cir. 2024) (holding that disparate impact is a necessary element for an *Arlington Heights* claim), Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos., 89 F.4th 46, 56 (1st Cir. 2023) (same), *cert. denied*, No. 23-1137, 2024 WL 5036302 (Mem.) (U.S. 2024), *and* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 879 (4th Cir. 2023) (same), *with* Lewis v. Ascension Par. Sch. Bd., 806 F.3d 344, 358–59 (5th Cir. 2015) (holding that disparate impact is not a necessary element for an *Arlington Heights* claim), Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 549 (3d Cir. 2011) (same), *and* Anderson v. Boston, 375 F.3d 71, 89 (1st Cir. 2004) (same). The uncertainty stems in part from the lack of clarity about what the equal protection right at issue in *Arlington Heights* actually is. If it is freedom from policies adopted with any hint of discriminatory motives, the impact, in theory, should be completely irrelevant. *See Boston Parent*, No. 23-1137, 2024 WL 5036302 (Mem.), at *2–*3 (Alito, J., dissenting from denial of certiorari) (rejecting disparate impact as a necessary element of an equal protection claim and endorsing it as simply one factor among many). *But see infra* note 234 and accompanying text (Justice Scalia noting that a law enacted with a discriminatory motive that "ineptly" failed to achieve its purported ends would simply constitute a failed attempt at violating someone's equal protection rights). If, however, the right, as applied to legislative acts, is for the law to treat similarly situated individuals similarly while pursuing permissible government policies, *see supra* notes 33–35 and accompanying text; *infra* note 323 and accompanying text, then it is not clear that *Arlington Heights* does much of anything to help identify actual violations of the right. *See infra* Sections V.B, V.D.

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

44. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973) (Title VII employment discrimination); Batson v. Kentucky, 476 U.S. 79, 93–98 (1986) (jury selection); Tex. Dept. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527 (2015) (Fair Housing Act).

45. *Underwood*, 471 U.S. at 228.

46. Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018). *Contra* W. Kerrel Murray, *Discriminatory Taint,* 135 HARV. L. REV. 1190 (2022) (arguing for expanding a doctrine of taint and weakening the presumption of good faith).

47. *Abbott*, 138 S. Ct. at 2324.

48. *See infra* Section II.D.

B. TJ *Facts*

In *Coalition for TJ v. Fairfax County School Board*,[49] the Fairfax County School Board, which oversees the Thomas Jefferson High School for Science and Technology, a competitive magnet school in Northern Virginia, changed the school's admissions policy with the stated goal of increasing racial diversity at the school. At the time, the student body was disproportionately more Asian American and less African American, Latino, and Anglo American than the general population of the area, with most students coming from a handful of "feeder" middle schools which disproportionately enrolled students who excelled academically, many of whom were of Asian descent.[50]

The School Board selected its new policy after considering a variety of proposals, paired with expert analysis addressing the likely effect each policy would have on the racial makeup of the incoming class.[51] The policy the Board settled on allocated a seat for the top 1.5% of students at each middle school in the district, regardless of its relative competitiveness, with the remaining 100 seats spread among all applicants, but with a bonus for students from underrepresented schools.[52] The evaluation of individual applications was to be undertaken without any consideration of race or any target percentage for the class.[53] The policy was designed to secure slots for students at underrepresented middle schools, which had disproportionately African-American and Latino student bodies—eight of which had had zero students gain admission during the final year under the old policy.[54] The policy put additional downward pressure on admissions from the feeder middle schools by pegging the preallocated seats to the students' school of attendance rather than to school zones because high-achieving Asian students would frequently attend the feeder schools from outside their home districts.[55]

Throughout the process, various Board members showed their understanding of the likely racial effects of the policy and expressed that those effects were indeed the aim of their policy change, making comments such as that the racial makeup under the prior policy was "unacceptable" and calling out how Asian-Americans are "over-represented."[56] The Board also unanimously adopted a resolution explicitly establishing that the "goal is to have [Thomas Jefferson's] demographics represent the [Northern Virginia] region" because prior policies "did not have the desired impacts with respect to diversity."[57] Some Board members candidly admitted that "there has been an anti [A]sian feel underlying some of this,

49. 68 F.4th 864 (4th Cir. 2023), *cert. denied*, No. 23-170, 2024 WL 674659 (Mem.) op. (Feb. 20, 2024).
50. *Id.* at 872.
51. *Id.* at 872–75.
52. *Id.* at 900 (Rushing, J., dissenting).
53. *Id.*
54. *Id.* at 875 (majority opinion).
55. *Id.* at 901 (Rushing, J., dissenting).
56. *Id.* at 895.
57. *Id.* at 896.

hate to say it lol," with some believing that "Asians hate us."[58] Others acknowledged that the policy change was being driven by the Superintendent, who "ha[d] made it obvious with 'racist' and 'demeaning' remarks and . . . '[c]ame right out of the gate blaming' Asian students and parents."[59]

The Board regularly considered and requested demographic data as it considered policy options.[60] At one point it even rejected a lottery proposal because it "left too much to chance" and could not "guarantee an increase in racial/SES [socio-economic status] diversity."[61] In evaluating the factors in the "holistic" review system that it ended up adopting, the Board adjusted the relative weights of each factor to "change who got in."[62] It also rejected an alternative proposal that used geographic subregions because it could "continue to admit more students from a few top-performing FCPS middle schools."[63]

The Board's efforts to change the racial makeup of the school were successful.[64] Instead of Asian-American students making up 73% of the class, the new policy reduced that percentage to 54%.[65]

Students and parents sued, alleging that the change in policy was motivated by impermissible discriminatory intent based on race and that the policy should be invalidated under *Arlington Heights*.[66] The district court ruled for the plaintiffs on summary judgment, but the Fourth Circuit panel reversed and rendered summary judgment for the School Board.[67]

II. HOW THE *COALITION FOR TJ* JUDGES' DIFFERENT APPROACHES TO *ARLINGTON HEIGHTS* DEMONSTRATE THE INCURABLE WORKABILITY ISSUES WITH EXAMINING LEGISLATIVE MOTIVE

A. Panel Majority and Concurrence

The majority ruled that Asian-American students suffered from no disparate impact under the policy because Asian students (in the aggregate) continued to receive offers of admission in a higher proportion than their percentage of the applicant pool under the new policy.[68] Rather than applying a before-and-after analysis, which the court protested might immutably lock in the existing statistics, the court opted instead for a group-to-group comparison under the new policy.[69]

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58. *Id.* at 901.
59. *Id.*
60. *See id.* at 898–900.
61. *Id.* at 898.
62. *Id.*; *Id.* at 871 (majority opinion).
63. *Id.* at 900 (Rushing, J., dissenting).
64. *Id.* at 902.
65. *Id.* at 894, 875–76 (majority opinion).
66. *Id.* at 876.
67. *Id.* at 871.
68. *Id.* at 881–82.
69. *Id.* at 879–81.

The court also found no discriminatory motive targeting Asian Americans in particular on the part of the Board.[70] The court credited the claim that the motive of the Board was to improve overall diversity, not a particular invidious motive against Asian Americans.[71] It found that the evidence relied on by the dissent suggesting otherwise was "sparse," and took a narrow view of precedent repudiating the practice of racial balancing, finding that the Board was not pursuing such balancing under that narrower view.[72]

The concurring judge noted how, at the admissions department, the admissions process was formally race-blind, while acknowledging that that has no bearing on an *Arlington Heights* challenge.[73] He went on to argue that the illicit motive must be to "disadvantage any applicant based on race," a claim unsupported by the evidence in the concurrence's view.[74] He also found that the disparity was smaller than that in other cases which affirmed the policies at issue.[75]

Finally, the concurrence pointed to prior Supreme Court affirmative action opinions that argue in favor of race-neutral alternatives in the narrow tailoring prong of strict scrutiny, taking those statements to mean that such policies are constitutionally approved as efforts to "undo the effects of past discrimination."[76]

B. Dissent

The dissenting judge went deeper into the record and found that the evidence clearly established a discriminatory motive due to the explicit statements of the Board members, a resolution they unanimously adopted, and the pervasive consideration of race throughout the entire process.[77] She also found that the stark and immediate reduction in admissions easily satisfied any measure of disparate impact.[78]

Finding that the motive and impact "ripen[ed] into proof" of discrimination, she would have shifted the burden to the Board to show the policy would have been enacted even without the discriminatory motive, a burden that they would not have been able to carry.[79] Therefore, the Board would have to satisfy strict scrutiny, a standard they would certainly fail due to the small universe of compelling interests that can justify racial discrimination.[80] By the dissent's reckoning, the change in policy was unconstitutional, and the Board would have to justify any future changes in policy with motivations that do not violate the rights of Asian-American students.[81]

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70. *See id*. 882–86.
71. *Id*. at 885–86.
72. *Id*. at 882–86.
73. *Id*. at 888–89 (Heytens, J., concurring).
74. *Id*. at 889.
75. *Id*. at 889–90.
76. *Id*. (internal quotation omitted).
77. *See id*. at 905–06 (Rushing, J., dissenting).
78. *Id*. at 902–03.
79. *Id*. at 903, 905.
80. *Id*. at 905–06.
81. *Id*. at 906.

C. Analysis

As a matter of principled application of *Arlington Heights*, the dissent has the better reasoning. On impact, by the majority's reckoning, the school system could deliberately cut an outperforming racial group "down to size" to match their proportion of the population, and no disparate impact would have occurred.[82] Such a determination is inconsistent with the purpose of *Arlington Heights*, which is specifically aimed at preventing such group-targeted policies. While "success rate"[83] may be appropriate to examine in some contexts, when the challenge is to a *change* in policy, rather than to a new or existing policy, before-and-after makes more sense.

From an evidentiary standpoint, an existing admissions policy found in the wild that produces admissions demographics identical to the racial makeup of the region of eligible students, in a vacuum, would not in itself raise a suspicion of disparate impact. In this situation, the "success rate" of each demographic group would be identical provided that their application rate was the same as well. But additional context may make that close proportionality suggestive of impermissible racial balancing, such as if some admissions criteria are not in fact evenly distributed along racial lines. For something like SAT scores in the college context, where there is a persistent average academic skills gap between Asian-American students and African-American students to the tune of 300 points, racially proportionate outcomes might still raise suspicion.[84]

But for a changed admissions policy that produces demographics significantly different than the prior policy, a significant change in outcomes easily suggests that the policy change may have had something to do with it. While more context and evidence would be necessary and the change may be unrelated to race, it defies common sense to say that the change is irrelevant when assessing whether the change itself was lawful so long as it moves particular racial groups closer to proportional representation. As it relates to a change in policy, the *change* disproportionately impacts one group even if the resulting policy, in a vacuum, would not.

On motive, a common problem in *Arlington Heights* cases is the absence of a smoking gun, certainly as to the legislative body as a whole, even if the court has direct evidence as to individual legislators. But this case involved a unanimous resolution enacted by the legislative body explicitly adopting and declaring their motivations. The *TJ* court also did not have the benefit of the *SFFA* decision, which made clear that "admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the

82. *See id.* at 884 (majority opinion).

83. *Id.* at 881.

84. Heather Mac Donald, *Affirmative Action Bred 50 Years of "Mismatch,"* WALL ST. J. (July 10, 2023), https://www.wsj.com/articles/racial-preferences-bred-50-years-of-mismatch-harvard-sat-scores-equality-7942bd8e [https://perma.cc/7574-LYA6].

expense of the latter."[85] The *TJ* court thus incorrectly rejected that argument.[86] The zero-sum environment is inconsistent with the court's finding that the policy can survive *Arlington Heights* if the Board's diversity rationale is pursued with benign motives toward African-American and Latino applicants rather than discriminatory motives toward Asians.[87] In admissions, those motives are two sides of the same coin.

Some scholars have argued that cases such as *TJ* are not on a collision course with *Arlington Heights* because they have been approved by the Court, pointing to statements by the Court which speak positively about using race-neutral alternatives to pursue diversity goals.[88] They have argued that a concurrence by Justice Kennedy signaling approval of race-neutral proxies constitutes a holding entitled to stare decisis treatment under the *Marks* rule.[89] They also argue that a majority decision on the Fair Housing Act in which Justice Kennedy quoted the earlier concurrence constitutes a holding as to the Equal Protection Clause.[90] More careful analysis reveals that these statements are definitively dicta.

First, as to the Kennedy concurrence, he agreed that strict scrutiny applied in that case and that the provision was not narrowly tailored.[91] Those two propositions had five votes and were sufficient to resolve the case. The portion of his concurrence that diverged from the majority was not a concurrence on narrower grounds necessary for the outcome, but a partial dissent as to the Court's repudiation of diversity as a compelling interest in itself.[92] The case involved an explicit racial classification subject to strict scrutiny. A majority of the Court struck down the program because the district "failed to show that they considered methods other than explicit racial classifications."[93] Kennedy's disagreement on the compelling interest front as it relates to racial proportionality and his endorsement of race-neutral policies, which were not at issue in the case, were therefore purely dicta. Second, the Fair Housing Act case involved statutory interpretation, not the Equal Protection Clause.[94] While Justice Kennedy

85. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181, 218–19 (2023).

86. *TJ*, 68 F.4th at 885.

87. *See* Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 174 (2024).

88. *Id.* at 183–84, 231 (the Court called the efforts "commendable" and a Kennedy concurrence endorsed the use of race-conscious measures); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 538–49 (2003) (arguing for various ways to reconcile race-neutral affirmative action programs ("alternative action") with *Arlington Heights*).

89. Starr, supra note 87, at 183–85 (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782–98 (Kennedy, J., concurring in part and concurring in the judgment)).

90. *Id.* at 186–87.

91. *Parents Involved*, 551 U.S. at 787, 790 (Kennedy, J., concurring in part and concurring in the judgment) ("I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means.").

92. *Id.* at 787–89 ("This is by way of preface to my respectful submission that parts of the opinion by The Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.").

93. *Id.* at 735 (majority opinion).

94. Tex. Dept. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 546 (2015).

quoted the language from his earlier concurrence favorably, he did so with a "cf." cite and in a part of the opinion not necessary for the outcome—in a section allaying concerns that allowing disparate impact claims under the FHA could lead to excessive consideration of race.[95] While Supreme Court dicta in a majority opinion is persuasive and perhaps somewhat predictive as an endorsement of a particular approach, a holding it is not.[96]

And for good reason. When it made these statements, the Court was confronting explicit racial classifications with no record or argument raising *Arlington Heights*. Adversarial presentation with facts under which the outcome is decided by the legal question at hand sharpens the issues and demands the careful judicial attention that underlies a well-reasoned holding. None of that is present in these cases. The various affirmative action cases in the past that endorsed race-neutral alternatives all involved the narrow tailoring analysis, not an independent approval of race-neutral classifications aimed at racial results. It does not make sense to treat these cases as creating an exemption from *Arlington Heights*, not only because it was not presented, but also because the end result of running afoul of *Arlington Heights* is strict scrutiny. In cases where there was a compelling interest, it did not matter whether an explicit racial classification or a discriminatory motive triggered that scrutiny. The same tailoring analysis would have applied either way.

Finally, these race-neutral programs cannot pass strict scrutiny today because the Court rejected their aims as compelling interests in *SFFA*.[97] To the extent race-neutral policies were recognized as legal in the past, that recognition was only for a limited time as a part of the compelling interest of correcting specific, identified instances of past discrimination—and that time period has ended.[98] Even if the TJ program is narrowly tailored, it cannot be said to further a compelling state interest this far removed from the past discrimination.

Based on these considerations, it's hard to see how other circuits will not come out the other way in cases like *TJ*.[99] A circuit split is likely to develop

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95. *Id*. at 545.

96. *See* BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKY, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT 54–56 (2016).

97. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181, 207 (2023); Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 905–06 (4th Cir. 2023) (Rushing, J., dissenting).

98. *See SFFA*, 600 U.S. at 317 (Kavanaugh, J., concurring).

99. The First Circuit recently decided a similar case. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos., 996 F.3d 37 (1st Cir. 2021) (denying preliminary injunction), *aff'd*, 89 F.4th 46 (1st Cir. 2023) (on fuller treatment, affirming denial of 60(b) motion), *cert. denied*, No. 23-1137, 2024 WL 5036302 (Mem.) (U.S. 2024). The program started by giving slots to those with the top 20% of GPAs across all schools. *Id*. at 53. For the rest of the applicants, the board then divided the city into zip codes and admitted students from the top of each list for each zip code, starting with the zip code that

sooner rather than later.[100]

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had the lowest aggregate family income and then ascending to the highest. *Id.* Where student achievement was not consistent across zip codes, this meant that students with lower GPAs in poorer zip codes were admitted in front of students with higher GPAs in wealthier zip codes.

The court upheld the policy even after newly discovered text messages revealed clear racial animus. *Id.* at 63. The evidence included decision makers saying that race-neutral plans "actually [did not] go far enough" because it did not exclude enough Asian and White students and were embarrassed by a "Hot mic!!!" catching one of them "making fun of the Chinese names." *Id.* at 53. Board members also shared, in text messages during the meeting, "Wait til the White racists start yelling [a]t us" and "sick of westie whites," and "I hate WR" (a predominately white neighborhood, West Roxbury) with another member agreeing, "me too." *Id.* at 54.

The district court found that "it is clear from the new record that the race-neutral criteria were chosen precisely because of their effect on racial demographics," that is, "but for the increase in Black and Latinx students at the Exam Schools, the Plan's race-neutral criteria would not have been chosen." 2021 WL 4489840, at *15. Nonetheless, according to the court, the record failed to show "any legally cognizable disparate impact." *Boston Parent*, 89 F.4th at 54.

The Court's denial of certiorari drew even more attention than *TJ* did, with Justice Gorsuch weighing in along with Justices Alito and Thomas to acknowledge "a number of significant concerns about the First Circuit's analysis." *Boston Parent*, No. 23-1137, 2024 WL 5036302 (Mem.), at *1 (U.S. 2024) (statement of Gorsuch, J.). As in *TJ*, Justice Alito expressed significantly similar concerns with the First Circuit's methodology. *Id.* (Alito, J., dissenting from denial of certiorari) ("The following events might sound familiar."). When describing the First Circuit's agreement with the Fourth that there is no disparate impact so long as Asian Americans are still overrepresented as a group, he said "the error has metastasized and spread." *Id.* at *2. He accurately concluded that the view "threatens to perpetuate race-based affirmative action in defiance of *Students for Fair Admissions*" and would "reject root and branch this dangerously distorted view of disparate impact." *Id.* at *3.

100. The Second Circuit recently split from the other circuits on the methodological question of how to measure disparate impact. *See* Chinese Am. Citizens All. v. Adams, 116 F.4th 161 (2d Cir. 2024). That case involved a change in admissions policies to the most competitive high schools in New York City. *Id.* at 164. The city changed the qualifications under its separate admissions pipeline for economically disadvantaged students and increased the number of seats allocated to it from 5% to 20%. *Id.* at 164. Rather than measuring eligibility based on the individual, as it had before, the city also required the student to attend a middle school that on average had a certain threshold of economic disadvantage based on an "Economic Need Index." *Id.*

The city made the change "with the stated goal of creating a wider and more diverse pool of applicants" for the schools. *Id.* The mayor of New York called the existing racial statistics at the schools a "monumental injustice." *Id.* at 167. The City admitted that it "model[ed] the effects that various [Economic Need Index] cutoffs would have on the racial composition of the students," bragging in a press release that the revised program would result in a significant increase in the number of offers going to African American and Latino individuals. *Id.* They selected the particular community economic condition cutoffs as "a way to support greater geographic, racial, and socioeconomic diversity" at the schools. *Id.* (internal quotation marks omitted). The chancellor said, "I just don't buy into the narrative that any one ethnic group owns admission to these schools. *Id.* The city's "modeling also projected that the changes to the Discovery Program would decrease the number of Asian Americans" at the schools. *Id.*

The plaintiffs in the case sued based on the adverse impact the policy change had on Asian American students who were economically disadvantaged, but attended middle schools which were comparatively well off. *Id.* at 165. Their categorical exclusion from 20 percent of the seats was the harm underlying the claim. *Id.* Under the original program, Asian American students made up a plurality or majority of all the competitive schools, a greater proportion than that of the city as a whole, with African American and Latino students gaining admission at a lower proportion than that of the city as a whole. *Id.* at 166.

The first year of the program actually saw a small increase in the overall Asian American demographic in addition to increases for African American and Latino students, all at the expense of Anglo students. *Id.* at 168. This unexpected change for the benefit of Asian American students as a whole resulted from dramatic increases in the economic ratings of many of the middle schools disproportionately attended by Asian American students. *See id.* at 168–69. The district court dismissed, applying a test that required a negative impact on aggregate demographic data to establish disparate

D. Administrability Issues

The disagreements demonstrated by the majority, concurrence, and dissent are not confined to this case, or even the affirmative action context. The case highlights a long-lasting, repeatedly failed attempt to bring predictability and consistency to a doctrine that is incapable of becoming workable.

Arlington Heights ushered in an utterly manipulable standard that cannot be applied in a principled fashion. *Arlington Heights* established factors for showing improper motive which sounded simple,[101] but have only proven unruly, and no amount of adjustment and fine tuning has been able to rein it in.

A few examples are in order.

- The Court has said foreseeability is not enough to show improper motive.[102] Except when it is.[103]
- The sequence of events or departure from normal procedures can show improper motive.[104] But following normal procedures will not do much for you.[105]
- An improper motivation need not be the dominant motivation.[106] Except when it must be.[107]

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impact. *Id.* at 169. It found one- to two-percent decreases at a few of the individual schools too minor to constitute disparate impact. *Id.*

The Second Circuit rejected this test because Asian American students do not experience the admissions program as members of a group, but as individuals. *See id.* at 175. "It is undisputed that a large group of Asian-American students at certain middle schools across New York City was excluded from the revised Discovery Program under the new criteria." *Id.* at 176. And a significant number of the economically disadvantaged plaintiffs were excluded from eligibility because of their comparatively-more-advantaged peers. *Id.* at 177 ("11 of 24 majority-Asian-American middle schools were rendered ineligible . . . .") For them, the policy does create a disparate impact, and if that disparate impact was on account of their race, the city would have to satisfy strict scrutiny. *Id.* at 177.

Because the district court did not make a determination on discriminatory motive and discovery was not granted for that purpose, the Second Circuit had to assume without deciding that discriminatory motive could be proven on remand. *Id.* at 179.

101. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977).

102. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278–79 (1979) (upholding state hiring policy that gave preference to veterans even though they knew it would disproportionately benefit men).

103. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979) (affirming lower court conclusion that foreseeable consequences can nonetheless show discriminatory motive).

104. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) (approving use of objective, traditional districting principles such as compactness, contiguity, and respect for political subdivisions as baseline normal procedures).

105. *See* Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. 178, 189 (2017) (holding that following traditional districting principles does not remove strict scrutiny or win the case, even if the legislature could have drawn the lines in accordance with those traditional criteria).

106. *Arlington Heights*, 429 U.S. at 265.

107. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) (to win a redistricting challenge, the plaintiff must show "that race was the predominant factor motivating the legislature").

- When important policy factors point one way and the legislature goes another, that can show improper motive.[108] But following some important factors gets the legislature no credit.[109]
- Legislative history and statements are relevant.[110] But it can be clear error to rely on them.[111]
- "Intentional" legislative inaction is not good evidence for showing an improper motive.[112] Except when it is.[113]
- Historical background of discrimination is a relevant factor.[114] But not relevant enough to justify making a decision based on it.[115] Or perhaps even at all.[116]
- Voter sentiments do little to color the provision in question.[117] Except when they do.[118]
- Statutes passed with racially discriminatory motives are unconstitutional.[119] Unless the legislature convinces the court it would have passed the statute anyway.[120]

The courts can't even agree on whether an *Arlington Heights* claim even requires a showing of disparate impact because of how foggy and imprecise the Court has been over the years in identifying what exactly the equal protection right *Arlington Heights* purports to vindicate even is.[121] And this is just from

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108. *Arlington Heights*, 429 U.S. at 267.

109. *See* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 272 (2015) (holding adjustments in redistricting made to ensure equal population do not count in evaluating predominance).

110. *Arlington Heights,* 429 U.S. at 268.

111. *See* Easley v. Cromartie, 532 U.S. 234, 257 (2001) (holding that the district court committed clear error when it concluded that legislator statements about racial balancing and emails admitting to moving the "Greensboro Black community" to a different district supported a finding of racial motivation).

112. *See* City of Mobile v. Bolden, 446 U.S. 55, 71 n.17 (1980) (rejecting the notion that a prior decision without improper motive creating an at-large voting system can become unconstitutional if it remains unchanged due to an alleged improper motive later on).

113. *See* Rogers v. Lodge, 458 U.S. 613, 626 (1982) (striking down at-large voting system that was admittedly passed with neutral origins because it had been "subverted to invidious purposes" and the failure to affirmatively change it had discriminatory motive).

114. *Id.* at 623–26.

115. *See Bolden*, 446 U.S. at 73–74 (rejecting lower court factual findings that history of discrimination rendered at-large voting system unconstitutional).

116. *See id.* at 74 ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."); Abbott v. Perez, 585 U.S. 579, 603 (2018) (rejecting "taint" theory based on a prior finding of discriminatory motive and applying identical standard of review on subsequent challenge).

117. *See* Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 195–97 (2003) (discounting voter sentiment in a referendum as unreflective of state action).

118. *See* Crawford v. Bd. of Educ., 458 U.S. 527, 545 (1982) (crediting support from the electorate as obviating discriminatory motive).

119. *See* Washington v. Davis, 426 U.S. 229, 239–41 (1976).

120. *See* Hunter v. Underwood, 471 U.S. 222, 228 (1985) (allowing burden shifting).

121. *See supra* note 42 and accompanying text.

cases at the Supreme Court. *Arlington Heights* suggests there are any number of other factors still out there undiscovered.[122]

Even if the Court could perfectly fine tune the system, numerous issues remain that are inherent in the hunt for legislative motive that will never be eliminated. Among these are the inference issue, the findings of fact issue, and the baseline issue.

1. The Inference Issue

Because finding motive involves interpreting circumstantial evidence, the judicial factfinder is asked to make a number of inferences. Those inferences often come out wildly differently depending on which factfinder you ask. A set of North Carolina cases demonstrates the problem.

In *Holmes v. Moore*, a lame-duck Democratic majority on the state supreme court struck down a race-neutral voter ID law, finding that the haste with which the lame-duck Republican supermajority that passed the law pursuant to a newly enacted constitutional amendment betrayed a discriminatory motive.[123] The court inferred a racial motivation to explain Republicans' rejection of proposed Democratic amendments.[124] This inference was consistent with similar findings in federal court regarding the same provisions at the preliminary injunction phase, and the state intermediate appellate court earlier in the case.[125] The legislature would have to pass the law again without the benefit of a supermajority.

On rehearing, the newly constituted court, now with a Republican majority, held the exact opposite.[126] Where the prior court had inferred discriminatory motive in the selection of which ID's would be valid, the new court applied the presumption of good faith and found that none of the evidence overcame that presumption.[127] This was consistent with similar inferences and reversal of the preliminary injunction in federal court.[128]

These five courts were all working with identical evidence. *Arlington Heights* allows the facial constitutionality of a democratically enacted statute to turn on mere inferences from circumstantial evidence. Such inferences are manipulable in a way that facts regarding the actual effect of legislation are not, and are especially problematic because of deferential appellate rules about findings of fact.

Arlington Heights is distinct from other fact-bound inquiries, which are an inherently squishy, but perfectly legitimate part of the judicial system. When it comes to tort cases, criminal cases, or contract cases, inferences are necessary for the legal system to recognize the way the real world works. Conversely, current

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122. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

123. 881 S.E.2d 486, 510 (N.C. 2022).

124. *Id.* at 506.

125. N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15 (M.D.N.C. 2019); Holmes v. Moore, 840 S.E.2d 244, 265 (N.C. App. 2020).

126. Holmes v. Moore, 886 S.E.2d 120 (N.C. 2023).

127. *Id.* at 139.

128. N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020).

Arlington Heights doctrine asks courts to do opposite things: assess evidence of motive, including inferences therefrom, while also applying a presumption of good faith that attaches to all legislative enactments paired with the high standard for facial challenges. These directives are at war with each other. Formally speaking, the presumption should almost always be determinative because it requires factual inferences to be drawn in favor of the constitutionality of the act in question. Unless the act is "unexplainable on any ground other than race," the enactment should be found to not have been enacted based on race. But that is not how the courts have applied *Arlington Heights*.

2. The Findings of Fact Issue

Arlington Heights challenges frequently turn on findings of fact. This feature invites a game of cat and mouse between trial and appellate courts. First, it tempts district courts, often sitting with a single judge, to attempt to tie the hands of reviewing courts by making flimsy factual findings that support desired policy results.[129] Second, it places appellate courts in the unenviable position of either deferring to dodgy factual findings, or, more likely, also misbehaving *sub rosa* by declining to defer to findings of fact that are not clearly erroneous in order to achieve or counter policy-driven inferences.[130]

Compounding this problem is the oddity of facial unconstitutionality under *Arlington Heights* turning on factual findings. The standard formulation of facial challenges is that they will only be sustained when "no set of circumstances" exists under which the statute could be constitutional.[131] This is traditionally considered to be a legal question, one that is frequently answered without concrete facts in front of the court. In this context, factual findings seem only to be relevant in that they can show that a set of circumstances *does* exist which could defeat the facial challenge, such as if gerrymandered maps were drawn with regard to party affiliation. This might explain the lesser deference findings of fact seem to receive on appeal under *Arlington Heights*. Nonetheless, the attempted combination of factfinding with a facial constitutional challenge is, at most, an uncomfortable one.

3. The Baseline Issue

Arlington Heights requires a baseline showing of disparate impact in addition to the showing of motive in several circuits.[132] *TJ* amply demonstrates this issue and the manipulability of the baseline and denominator when measuring

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129. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480–81 (1979) (Powell, J., dissenting) (upholding under deference to factual findings "a chain of 'presumptions'" and legal "fictions" in order to attribute state action to existing housing patterns).

130. *See, e.g.*, *id.*; Easley v. Cromartie, 532 U.S. 234, 257 (2001) (reversing despite the Court "conced[ing] the record contains a modicum of evidence" to support the factual findings).

131. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

132. *See supra* note 42; Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

impact.[133] One court may find a disparate impact by picking a smaller denominator, but the next might make the impact disappear by picking a larger denominator. The fight over the baseline is inherent in the enterprise, and, given its fact-sensitive nature, is particularly susceptible to inconsistency, or worse, manipulation.[134]

TJ is just one standard example of *Arlington Heights* factfinding. The motive standard simply cannot be made workable.

III. HISTORY OF JUDICIAL EXAMINATION OF LEGISLATIVE MOTIVE

To better understand where the Court went wrong, it is worthwhile to examine the history. Where over the past 200 years, Chief Justice Marshall, Chief Justice Chase, Chief Justice White, Chief Justice Rehnquist, Chief Justice Warren, Justices Field, Scalia, and Thomas, recent unanimous Courts, and every single state court agree about the impropriety of judicial examination of legislative motive, one might begin to suspect that the doctrine has taken a wrong turn.

A. Before Arlington Heights

Chief Justice Earl Warren articulated a vision of a judiciary that understood its important, but limited role in the messy process of democratic lawmaking:

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:
>
> 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.'
>
> Inquiries into congressional motives or purposes are a hazardous matter . . . when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. . . . We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.[135]

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133. *See supra* Sections II.A, D.3.

134. *See* Harness v. Watson, 47 F.4th 296, 314–16 (5th Cir. 2022) (en banc) (upholding a felony disenfranchisement provision where judges disagreed on the relevant denominator for evaluating racial impact—the general population versus the general felon population).

135. United States v. O'Brien, 391 U.S. 367, 383–84 (1968) (cleaned up) (quoting McCray v. United States, 195 U.S. 27, 56 (1904)); *see also* Arizona v. California, 283 U.S. 423, 455 & n.7 (1931) (collecting almost a dozen Supreme Court cases reflecting the long history of refusing to inquire into legislative motive).

Chief Justice Marshall addressed the same principle in the face of a claim of corruption by the Georgia legislature.[136] He was wary of the power he was asked to take for the judiciary, "[i]f the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned."[137] He rejected the power, declaring that "[i]f the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law," courts may not "sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."[138]

Chief (then-Associate) Justice White explained why avoiding the investigation of legislative motive was essential to retaining the checks and balances of our Constitutional system: "[t]o announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority."[139] He recognized that the logical conclusion of the principle was that "the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."[140] To him, the answer to the problem of legislative abuse lay not in a "mere act of judicial usurpation . . . but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."[141]

Chief Justice Chase agreed, too, acknowledging that the courts "are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution."[142]

And even if an improper motive were to be assumed, Justice Field explained that ill motives do not "thereby change[] [the ordinance] from a legitimate police regulation, unless in its enforcement it is made to operate only against the class" claiming animus.[143] In applying the rule, he looked to the statute itself:

136. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 129–30 (1810).
137. *Id.* at 130.
138. *Id.* at 131.
139. *McCray*, 195 U.S. at 54.
140. *Id.*
141. *Id.* at 54–55.
142. *Ex parte* McCardle, 74 U.S. 506, 514 (1869).
143. Soon Hing v. Crowley, 113 U.S. 703, 711 (1885).

> There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments.[144]

Every single state high court agreed, too: Alabama,[145] Alaska,[146] Arizona,[147] Arkansas,[148] California,[149] Colorado,[150] Connecticut,[151] Delaware,[152] Florida,[153]

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144. *Id.* at 710.

145. Ables v. S. Ry. Co., 51 So. 327, 329 (Ala. 1909) ("[T]he principle is settled that the courts cannot inquire in to the motives of the legislative department . . . . If the legislative department is untrue to the trusts imposed upon it, other remedies must be applied." (citations omitted)).

146. *See* Warren v. Boucher, 543 P.2d 731, 735 (Alaska 1975) ("We must infer the purposes and intentions of the framers from the language of the constitution itself . . . ."); State Dept. of Nat. Res. v. Tongass Cons. Soc'y, 931 P.2d 1016, 1019 (Alaska 1997) ("In general, judicial inquiries into the motives of those enacting or rejecting proposed legislation are to be avoided." (citing S.C. Educ. Ass'n v. Campbell, 883 F.2d 1251, 1257 (4th Cir. 1989))).

147. State *ex rel.* Conway v. S. Pac. Co., 145 P.2d 530, 532 (Ariz. 1943) ("The courts do not inquire into the motives of the legislature." (quoting State v. Pate, 138 P.2d 1006, 1010 (N.M. 1943))), *rev'd on other grounds sub nom.* S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

148. City of Little Rock v. Town of North Little Rock, 79 S.W. 785, 786 (Ark. 1904) ("It is equally clear that we cannot inquire into the motives of the Legislature in passing the act . . . .").

149. Stockton & Visalia R.R. Co. v. Common Council of Stockton, 41 Cal. 147, 158 (1871) ("[W]e are not here to pass upon the motives of the authors of the statute. Though 'corruption may invade the halls of legislation, and the interests of the people be betrayed by their chosen representatives' . . . the constitutional authority of these functionaries to enact this statute would, nevertheless, be precisely as broad and deep in its measure as though the Act in question were admitted to have found its inspiration in the wisest statesmanship and the purest public virtue."); *see also* Werner v. S. Cal. Assoc. Newspapers, 216 P.2d 825, 830 (Cal. 1950) ("[A] judiciary must judge by [the] results, not by the varied factors which may have determined legislators' votes." (quoting Daniel v. Fam. Sec. Life Ins. Co., 336 U.S. 220, 224 (1949) (other citation omitted))).

150. *See* Platte & Denver Canal & Milling Co. v. Dowell, 30 P. 68, 71 (Colo. 1892) ("Courts will not presume dishonest or improper motives on the part of legislative bodies.").

151. Carroll v. Socony-Vacuum Oil Co., 68 A.2d 299, 306 (Conn. 1949) ("'[A] statute must be tested by its operation and effect.' The motive of the legislature is immaterial." (quoting Near v. Minnesota, 283 U.S. 697, 708 (1931) (citations omitted))).

152. State *ex rel.* McVey v. Burris, 49 A. 930, 931 (Del. 1901) ("It is no function of this court to pass upon the motives of the legislature in the discharge of their duty.").

153. West v. Town of Lake Placid, 120 So. 361, 365 (Fla. 1929) ("The constitutionality of a statute, however, is not to be tested by influence brought to bear to secure its enactment, or by motives or purposes which may have actuated the Legislature.").

Georgia,[154] Hawaii,[155] Idaho,[156] Illinois,[157] Indiana,[158] Iowa,[159] Kansas,[160] Kentucky,[161] Louisiana,[162] Maine,[163] Maryland,[164] Massachusetts,[165] Michigan,[166]

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154. Clements v. Powell, 116 S.E. 624, 625 (Ga. 1923) ("We are not at liberty to inquire into the motives of the Legislature. The courts will conclusively presume that no general laws are ever passed, either through want of information on the part of the Legislature, or because it was misled." (citations omitted)).

155. State v. Bunn, 440 P.2d 528, 536 (Haw. 1968) ("In determining the constitutional validity of Act 48, the motivation of the Legislature in enacting it, or its assumption as to its efficacy in producing more convictions, is immaterial. What is material is the actual action which the Legislature took.").

156. Blaine Cnty. v. Heard, 45 P. 890, 890 (Idaho 1896) ("[I]t [is] not the province of the court to inquire, through the medium of the journals or otherwise, into the motives which prompted the legislature, or any member or members thereof, in the enacting of a law." (citing Wright v. Kelly, 43 P. 565 (Idaho 1895))).

157. People *ex rel*. Woodyatt v. Thompson, 40 N.E. 307, 312 (Ill. 1895) ("Nor can the courts inquire into the motives which may have moved the general assembly to enact the statute in question, making the apportionment as it was made.").

158. Wright v. Defrees, 8 Ind. 298, 302–03 (1856) ("The powers of the three departments are not merely equal,–they are exclusive, in respect to the duties assigned to each. They are absolutely independent of each other. It is now proposed that one of the three powers shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the legislature were governed in the enactment of a law. If this may be done, we may also inquire by what motives the executive is induced to approve a bill or withhold his approval; and, in case of withholding it corruptly, by our mandate compel its approval. To institute the proposed inquiry would be a direct attack upon the independence of the legislature, and a usurpation of power subversive of the constitution.").

159. Miners' Bank of Dubuque v. United States, 1 Greene 553, 565 (Iowa 1848) (investigating legislative motives would "extend the jurisdiction of the courts, from expounding the law as they find it, to decisions of what the law should be, a doctrine repudiated by all enlightened courts").

160. Campos v. Garden City Co., 201 P.2d 1017, 1019 (Kan. 1949) ("Courts do not inquire into the motive or wisdom of legislation. Such considerations are solely the province of the lawmakers.").

161. Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Joseph E. Seagram & Sons, Inc., 211 S. W.2d 122, 125 (Ky. 1948) ("It is firmly settled that the courts will not inquire into motives which impel or the expediency or wisdom of legislative or administrative action, for that does not affect its legality or validity." (citing O'Bryan v. Highland Apt. Co., 128 Ky. 282 (1908) (other citations omitted))).

162. State *ex rel*. Blaise v. City of New Orleans, 76 So. 244, 245 (La. 1917) ("It is no longer an open question that the motives which may induce the Legislature to pass a law are beyond judicial inquiry." (citations omitted)), *superseded on other grounds by statute*, 1918 La. Acts No. 27 (codified at La. Stat. Ann. § 33:4731–32), *as recognized in* State *ex rel*. Civello v. City of New Orleans, 97 So. 440, 445 (La. 1923).

163. Inhabitants of Skowhegan v. Heselton, 102 A. 772, 773 (Me. 1917) ("The motive of the framers to discriminate against a certain class, which does not appear from the language of the ordinance or statute, will not make the enactment void or unconstitutional." (citation omitted)).

164. Mayor of Balt. v. State *ex rel*. Bd. of Police, 15 Md. 376, 461 (1860) ("[W]hile the motives of the Legislature can have no effect upon the efficiency of the laws, neither can they be regarded by the judiciary when testing their power to pass them.").

165. Paine v. City of Boston, 124 Mass. 486, 490 (1877) ("For, although the circumstances surrounding and accompanying the passage of the order may be given in evidence, it does not by any means follow that the motives, reasons and considerations which operated upon the minds of the members of the council to induce them to vote for an order which partakes so much of the character of legislation, are competent or proper.").

166. People v. Marxhausen, 171 N.W. 557, 575 (Mich. 1919) ("While we may not inquire into the intent of the legislator, we are bound to ascertain the legislative intent; and this we must determine by what is done by the Legislature as an entity.").

Minnesota,[167] Mississippi,[168] Missouri,[169] Montana,[170] Nebraska,[171] Nevada,[172] New Hampshire,[173] New Jersey,[174] New Mexico,[175] New York,[176] North

167. Jewell v. Weed, 18 Minn. 272, 277 (1872) ("Being the act of the legislature passed, (so far as appears) in compliance with the constitution, reasons too plain to warrant mention forbid this court to inquire into the motives which prompted the action of those who promoted it, or of the legislature by which it was passed. *Having passed*, it is *law*, and nothing in the history of its origin or passage can furnish any reason why the *courts* should not execute it.").

168. Pagaud v. State, 13 Miss. 491, 497 (1845) ("The legislative intent can be deduced from the legislative acts alone. In construing statutes, courts may look to the history and condition of the country as circumstances from which to gather the intention. Testimony to explain the motives which operated upon the law-makers, or to point out the objects they had in view, is wholly inadmissible. It would take from the statute law every semblance of certainty, and make its character depend upon the varying and conflicting statements of witnesses."). The principle here is particularly dangerous because it can be applied in other contexts, too. For example, if a court finds that the voters elected a particular candidate or supported a particular referendum because they were misinformed, influenced improperly, or had what the court considered an evil motive (like preventing mass immigration or criminalizing abortion, take your pick), the court could set aside that election or referendum to protect the people from themselves. *See* Paul Kirby & Nick Thorpe, *Romania's Cancelled Presidential Election and Why It Matters*, BBC (Dec. 6, 2024), https://www.bbc.com/news/articles/cx2yl2zxrq1o [https://perma.cc/8EZG-TZJK]. Whatever that court would claim to be vindicating, it's not democracy.

169. State *ex rel*. Blakeman v. Hays, 49 Mo. 604, 607–08 (1872) ("The motives which actuated the law-makers in the passage of the act, we are precluded from examining or looking into. The Legislature is a co-ordinate branch of the State government, and in the enactment of laws is entirely independent of the judiciary; and if the laws are otherwise legal, the courts have no power to annul or set them aside on the ground that the members acted from improper or unlawful views.").

170. State v. Safeway Stores, 76 P.2d 81, 85 (Mont. 1938) ("It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government . . . ." (quoting Bunting v. Oregon, 243 U.S. 426, 437 (1917) (other citations omitted))).

171. Bradshaw v. City of Omaha, 1 Neb. 16, 22 (1871) ("It is easy in any of these cases for an individual to charge the legislature with having acted improperly and from wrong motives; and if the courts can enter upon a consideration of such questions, they may easily draw within their jurisdiction the whole legislative power of the State, and set aside the laws from their own views of the facts, when they find themselves differing with the legislature as to what is proper, just and politic. One coordinate department of the government would thus be made subordinate to another, which would exercise a supervisory power, limited only by its own discretion.").

172. City of Reno v. Stoddard, 167 P. 317, 319 (Nev. 1917) ("The motives of the Legislature are not subject to judicial inquiry.").

173. *In re* Farnum, 51 N.H. 376, 378 (1871) ("We are not, however, to inquire into the motives of the legislature, or to judge of the wisdom of their acts. Our plain and simple duty is, to declare and apply the law . . . .").

174. Two Guys From Harrison, Inc. v. Furman, 160 A.2d 265, 279 (N.J. 1960) ("If a legislator votes for a measure to further some undisclosed, invalid purpose, he is accountable to his conscience alone. The Judiciary may not interfere with the exercise of lawful power upon the assumption that a wrongful purpose caused it to be exerted." (citing McCray v. United States, 195 U.S. 27, 54 (1904))).

175. State v. Pate, 138 P.2d 1006, 1010 (N.M. 1943) ("The courts do not inquire into the motives of the legislature.").

176. Bacon v. Miller, 160 N.E. 381, 384 (N.Y. 1928) ("With the motives which actuated the board of aldermen we have nothing to do at all events.").

Carolina,[177] North Dakota,[178] Ohio,[179] Oklahoma,[180] Oregon,[181] Pennsylvania,[182] Rhode Island,[183] South Carolina,[184] South Dakota,[185] Tennessee,[186] Texas,[187]

177. People *ex rel.* Van Bokkelen v. Canaday, 73 N.C. 198, 226 (1875) ("It is the effect of the act and not the intention of the legislature which renders it void." (emphasis omitted) (citing Jacobs v. Smallwood, 63 N.C. 112 (1869))).

178. State v. Wallace, 187 N.W. 728, 732 (N.D. 1922) ("[C]ourts are not to inquire as to the motive of the Legislature . . . ." (citations omitted)).

179. State *ex rel.* Evans v. Dudley, 1 Ohio St. 437, 450–51 (1853) ("[A]s to the manner the law under consideration was passed through the legislative body[,] it is only necessary to say that such considerations cannot be permitted to influence judicial action. The members of that body were responsible for their official conduct, to the people that elected them, but not to the judicial tribunals. The only question that can here arise, is one of constitutional power. If that is found to exist, however, much they may have abused the confidence reposed in them, it can in no degree justify a court in usurping power to remedy the evils they may have committed.").

180. Atchison, Topeka & Santa Fe Ry. Co. v. State, 113 P. 921, 923 (Okla. 1911) ("No human government can be devised in which powers must not be somewhere reposed which may be abused. It is not irrational to hold that, when a legislative body has put forth a bill meaning to do so, and that bill has been duly authenticated in the prescribed manner, then the common safety of law-abiding citizens requires that the court should respect it as law, without inquiring into the modes of its passage. It is this consideration which lies at the foundation of the rule everywhere recognized, that no law can be impeached for fraudulent motives actuating the legislators . . . ." (quoting Webster v. City of Little Rock, 44 Ark. 536, 548 (1884))) (overruling aberrant cases which failed to follow the rule).

181. Stoppenback v. Multnomah Cnty., 142 P. 832, 837 (Or. 1914) ("Whatever reason prompted the passage of the statute or prevented an exercise of the referendum power with respect thereto are legislative questions, and not subject to inquiry by the judicial department, the duties of which are limited to a consideration of the fundamental law involved.").

182. Sunbury & Erie R.R. Co. v. Cooper, 33 Pa. 278, 283 (1859) ("However far the legislature may depart from the right line of constitutional morality, we have no authority to supervise and correct their acts on the mere ground of fraudulent or dishonest motives. We know of no such check upon legislation, and would not desire to see such a one instituted. The remedy for such an evil is in the hands of the people alone, to be worked out by an increased care to elect representatives that are honest and capable. If the judiciary have such authority, then every justice of the peace is competent to sit in judgment upon every act of legislation which disorderly moralists or knavish or ignorant anarchists may choose to charge as fraudulent.").

183. Gorham v. Robinson, 186 A. 832, 837 (R.I. 1936) ("That we do not believe that any law, the constitutionality of which is brought in question before us, is in accordance with sound principles of good government, cannot justify this court in holding it unconstitutional. And, as Judge Cooley has rightly said, '[t]he validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt.' These are matters for the electorate to consider, but not for this court." (citation omitted)).

184. State v. Cardozo, 5 S.C. 297, 312 (1874) ("So far as it implies any wrong or improper motive on the part of the Legislature in the particular enactment, it is beyond the control of the judicial department. It cannot examine into the inducements to any act. Public and proper motives are alone to be attributed to the Legislature.").

185. McFarland v. Barron, 164 N.W.2d 607, 611 (S.D. 1969) ("[I]f a statute appears on its face to be constitutional and valid, we may not inquire into the motives of the legislature.").

186. Williams v. City of Nashville, 15 S.W. 364, 366 (Tenn. 1891) ("If the act in question is unwise and oppressive, the bill may be remedied by repeal or amendment. The courts have nothing to do with the policy of legislation, nor the motives with which it is made." (citations omitted)).

187. *See* Anderson Cnty. v. Hous. & Great N. R.R. Co., 52 Tex. 228, 239 (1879) ("It is not for the courts to impute improper motives to the Legislature.").

Utah,[188] Vermont,[189] Virginia,[190] Washington,[191] West Virginia,[192] Wisconsin,[193] and Wyoming.[194]

Yet the Court in *Arlington Heights* abandoned this deeply rooted principle against examining legislative motive. The principle sounds in the separation of powers and the very concept of a limited and restrained judiciary. The risk of judicial usurpation under *Arlington Heights* is simply too high. It is at odds with separation-of-powers principles and with a previously unbroken and unanimously held practice of respecting the legislative power by declining to entertain inquiries into why the legislature did what it did.

B. After Arlington Heights

Even after opening the door in *Arlington Heights*, the Court continued to come back to the old principle in other contexts.

In *City of Erie v. Pap's A.M.*, the Court upheld an ordinance banning nude dancing against a First Amendment challenge.[195] In finding a legitimate government end toward which the ban was aimed, the Court upheld the measure while observing that "[r]espondent's argument that the ordinance is 'aimed' at suppressing expression through a ban on nude dancing" based on public statements by the city attorney that it "was not intended to apply to 'legitimate' theater productions . . . is really an argument that the city council also had an illicit motive in enacting the ordinance."[196] Even if the council subjectively had that motive, the Court's duty was to disregard such possibilities and rule based on the ordinance

188. State v. Carman, 140 P. 670, 672 (Utah 1914) ("[W]hat view the Legislature may have entertained is wholly immaterial to us . . . . The question we must solve is: What is the law? And, when we have solved that question, the reason why it was made the law, while perhaps interesting, is without any force.").

189. Lucia v. Vill. of Montpelier, 15 A. 321, 324 (Vt. 1888) ("And here it may be said that as to the legislative acts and discretion of the higher legislative bodies the motives and the intent of individual legislators are not subject-matter for judicial inquiry.").

190. Meade v. Commonwealth, 43 S.E.2d 858, 862 (Va. 1947) ("We are not, however, called upon to pass upon the reasons for the rule, or the wisdom of the law. A lack of good reason may be ground for the legislature to change the law; but we must construe the law as it is."), *overruled on other grounds by* Brown v. Commonwealth, 292 S.E.2d 319 (Va. 1982).

191. Ettor v. City of Tacoma, 106 P. 478, 481 (Wash. 1910) ("We cannot inquire into the motive of the Legislature. It is enough that it had the power to repeal the old law, and has exercised it."), *rev'd on other grounds*, 228 U.S. 148 (1913).

192. Slack v. Jacob, 8 W. Va. 612, 630 (1875) ("Were acts of the Legislature subject to be impeached and declared void because the courts might deem the reasons or motives of their enactment mistaken or unsatisfactory, there would be but little certainty as to the validity of statutes upon any subject, and as little security to the rights of property or other things dependent thereon.").

193. State *ex rel*. Klefisch v. Wisc. Tel. Co., 195 N.W. 544, 548 (Wisc. 1923) ("[T]he motives which prompted the Legislature to exercise its power in this respect are not subject to judicial review, approval, or condemnation." (citations omitted)).

194. Rasmussen v. Baker, 50 P. 819, 828 (Wyo. 1897) ("Whatever the actual purpose was, even if there existed at that time a misconception of the provision, it must bow to the supremacy of the words themselves. They constitute the only safe and reliable index of the intent and purposes of the convention and the people.").

195. 529 U.S. 277, 283 (2000).

196. *Id*. at 292.

itself and any proper governmental ends toward which it could rationally be oriented.[197]

Similarly, in administrative law, courts look to see if the record supports the conclusion as stated by the agency.[198] If there appears to be a discrepancy or outside influence, the court will still affirm an action if it could have been taken on the record, regardless of the 'actual' motive.[199]

So too for legislative immunity, a closely related doctrine which prevents individual legislators from being sued for harms caused by their legislative acts. Writing for a unanimous Court, Justice Thomas explained that whether an act is legislative cannot be determined by motives, and that the immunity doctrine would be a paper tiger if a plaintiff could avoid dismissal simply by alleging illicit motive.[200] The Court continued, "it is simply 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'"[201]

The religious context reveals similar reliance on the old rule after taking a bad trip into legislative motive with the *Lemon* test. *Lemon v. Kurtzman*[202] attempted to create a "grand unified theory"[203] of the Establishment Clause by only upholding government action when (1) the policy has a secular legislative purpose, (2) it does not have the principle or primary effect of advancing or inhibiting religion, and (3) it does not foster an excessive entanglement with religion.[204] While the first prong seems to indicate the ends toward which the statute is directed, application of the *Lemon* test eventually fell into the purpose-motive trap,[205] with the court treating it as a legislative motive element.[206]

Wallace v. Jaffree exemplifies the old motive regime in Establishment Clause cases. There, Alabama had passed a law which added "or voluntary prayer" to an existing law which authorized a one-minute moment of silence during the school day for "meditation."[207] No one disputed that there was "nothing wrong" with having a minute of silence during the day, and the addition of "or voluntary

197. *Id.* This is consistent with common, sensible judicial review principles, which continue today. *See* Walt Disney Parks & Resorts U.S., Inc. v. Desantis, 716 F. Supp. 3d 1216, 1226–27 (N.D. Fla. 2024).

198. *See* Sierra Club v. Costle, 657 F.2d 298, 407–10 (D.C. Cir. 1981).

199. *See id.*

200. Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).

201. *Id.* at 55.

202. 403 U.S. 602 (1971), *abrogation recognized by* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022).

203. *Kennedy*, 597 U.S. at 534.

204. *Lemon*, 403 U.S. at 612–13.

205. *See infra* notes 255–65 and accompanying text (on the slippery distinction between purpose and motive).

206. *See* Wallace v. Jaffree, 472 U.S. 38, 56 n.42 (1985) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring))).

207. *Id.* at 40.

prayer" to the statute did not change the school's policy an iota because students were already allowed to pray during the moment of silence.[208]

The Court looked to a statement that the bill's sponsor put into the legislative record that the law allowing for meditation or prayer was "'an effort to return voluntary prayer' to the public schools."[209] The sponsor later testified that he had no other motive, and the state did not present evidence of any other motive either.[210]

The Court made clear that the motive made the difference: "The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday."[211] Therefore, the statute violated the First Amendment, and even would have done so if they were convinced that the addition of the words "or voluntary prayer" was purposeless.[212]

While it did not affect the free exercise of any students or establish any particular state religion, the motives behind the provision signaled that the state thought prayer was a good thing—and that the Constitution could not brook, even if the law had no effect at all.[213]

In the end, perhaps recognizing it was a failed and unworkable experiment, the Court abandoned the *Lemon* test.[214]

The Court took a stab at legislative motive under the Free Exercise Clause as well. It cited *Arlington Heights* as it tried to wrestle with the tricky issue of what laws are neutral.[215] In analyzing a law which, in response to the creation of a Santeria church in the town, banned certain kinds of animal butchering that included Santeria ritual sacrifices, the Court endorsed the search for "the city council's object."[216] If they enacted the ordinance "because of" rather than "in spite of" the effect on religious practice, that would result in strict scrutiny, even if the law was otherwise neutral on its face.[217] The record included many hostile statements by members of the council, the public, and the city attorney.[218] This was an alternative theory which supported the Court's finding that the law was not neutral because the ordinances "by their own terms" targeted religious exercise, with provisions "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."[219]

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208. *See id.* at 41.
209. *Id.* at 56–57.
210. *Id.* at 57.
211. *Id.* at 59.
212. *See id.* at 59–60.
213. *Id.* at 60.
214. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022) (acknowledging abandonment of the *Lemon* test).
215. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993).
216. *Id.*
217. *See id.* at 540, 546.
218. *Id.* at 541–42.
219. *Id.* at 542. The Court has not since definitively rejected the use of legislative motive in the free exercise context, but its doubt remains ongoing and recent Free Exercise cases have not turned on that question. *See, e.g.,* Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 636 (2018)

Justice Scalia took direct issue with the examination of legislative motive of this sort because it was out of step with our history and the text of the constitution.[220] It was unprincipled because the law, in his view, is embodied in the text itself.[221] Whether the law violates the substantive provisions of the constitution must be based on the law, not the subjective motivations of those who voted for it.[222] Chief Justice Rehnquist joined the opinion.[223]

Amid so great a cloud of witnesses, it is perhaps somewhat surprising how badly *Arlington Heights* missed the mark.

IV. WHY *COALITION FOR TJ* SHOULD MARK THE BEGINNING OF THE END OF *ARLINGTON HEIGHTS*

For the reasons highlighted by *TJ* and other cases attempting to make sense of the doctrine, *Arlington Heights* can and should be abandoned on both legal and normative grounds.

A. Legal Argument – Stare Decisis Analysis

Dobbs v. Jackson Women's Health Organization[224] most comprehensively discusses how the Court today decides stare decisis questions. The *Dobbs* factors are: (1) the nature of the error, (2) the quality of the reasoning, (3) workability, (4) disruptive effects on other areas of the law, and (5) reliance interests.[225] All five factors weigh decisively in favor of overruling *Arlington Heights*.

1. Nature of the Error

The nature of the error refers to the significance to and context of the issue.[226] Decisions of constitutional caliber that affect major issues and are difficult to correct in the political process (without a constitutional amendment) will receive

("Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. . . . In this case, however, the remarks were made . . . by an adjudicatory body deciding a particular case."); *Kennedy*, 597 U.S. at 526 (involving a policy which by its terms directly targeted religious practice); Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (deciding case "under the rubric of general applicability"); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 479 (2020) (deciding case based on direct targeting of religious status); Carson v. Makin, 596 U.S. 767, 780 (2022) (same); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017) (same); Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 17 (2020) (deciding case based on direct categorization of churches); Tandon v. Newsom, 593 U.S. 61, 62–63 (2021) (same).

220. *Lukumi*, 508 U.S. at 557–58 (Scalia, J., concurring).

221. *See id.*

222. *See id.* at 557–59 (citing Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting)) (explaining how a law that fails to inhibit free exercise does not inhibit free exercise, while one that does, does, regardless of motive).

223. *Id.* at 557.

224. 597 U.S. 215 (2022).

225. *Id.* at 268.

226. *See id.* at 268–69 (comparing the constitutional significance of *Plessy v. Ferguson* to that of *Roe v. Wade*).

less staying power due to the greater deleterious effects of judicial error.[227] On the flipside, the more narrow the effects of the decision are and the closer it is to an "arcane corner of the law," the more deference it will receive.[228] Additionally, when a decision upends the proper allocation of authority within our republic, such decisions "[should] be[] overruled at the earliest opportunity[.]"[229] Such is the case here, as the decision improperly usurped the role of evaluating the motives of legislators from the voters and placed it in the hands of judges. It also threw out of whack the balance between the legislature and the judiciary by upending the presumption of good faith and constitutionality that applies to legislative acts.

Add to this the nature of what is being overturned. Where the Court refers to internal procedures or modes of decision, so-called "interpretive" or "methodological precedent,"[230] the substantive rights of parties are not directly affected, and prior cases settling particular statutes need not have their results overturned for a new test to be applied on a forward-looking basis.[231]

Such is the case here, where *Arlington Heights* presents a method of identifying equal protection violations. The strength of precedent and justification for hewing to the *Arlington Heights* framework is thus comparatively light. To the extent that it holds that the Equal Protection Clause contains a substantive right to be free from laws passed with discriminatory motive despite not otherwise violating equal protection, traditional stare decisis analysis decisively supports overruling such a holding as an atextual outgrowth of the poor reasoning described below.

2. Quality of the Reasoning

The quality of the reasoning relates to the logical force of the decision.[232] Where a decision breaks from prior practice, commits logical error, lacks textual support, or relies on cases that do not support its conclusion, its force as precedent is weakened.[233]

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227. *See id.* (discussing the need for the Court to maintain the power to overrule cases that unfairly conflict with the Constitution's principles and values).

228. *Id.* at 268.

229. *Id.*

230. *See generally* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101 (2020) (describing the underappreciated role of methodological precedent regarding how courts make decisions and arguing that such precedent does exist and is followed to some extent). The adoption of a new test can potentially lead to the displacement of decisions based on that old test, but other stare decisis factors like reliance carry much more weight in the statutory context and in cases dealing with specific applications. *See* GARNER ET AL., *supra* note 96, at 31 (explaining that "when the Supreme Court overturns the standard that it had previously used . . . the results reached under the old standard" are not binding precedent (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66–67 (1996); Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 691–93 (3d Cir. 1991))); *id.* at 79 ("[T]he *modes of analysis* that courts use in analyzing statutes or legal decisions influence judicial decision-making. Modes of analysis aren't binding on future courts in the same way as legal rules are.").

231. *Cf.* Kisor v. Wilkie, 588 U.S. 558, 622–26 (2019) (Gorsuch, J., concurring) (arguing for lesser *stare decisis* effect for "abstract default rule[s] of interpretative methodology that settles[] nothing of [their] own force").

232. *See Dobbs*, 597 U.S. at 269–70 (finding that *Roe* had not been grounded in "text, history, or precedent").

233. *See id.*

a. Textual Support

There is no textual basis on which to hang the contention that the Equal Protection Clause invalidates law enacted with bad motivations rather than laws that in fact deny equal protection by their operation.[234] Judges must apply the law as they find it. Under our system, positive law is promulgated through bicameralism and presentment, or through other democratic processes, depending on the government body. Provided those requirements are followed, it is not appropriate for the judicial branch to do anything other than analyze that law the same as any other law, regardless of how it came to be. The Court never explained how discriminatory motive affects the *protection* that the law gives, which is the textual hook it must hang its hat on.[235]

b. Precedent

The cases the *Arlington Heights* and *Washington v. Davis* Courts cited did not support the conclusions they reached. Further, the Court inadequately distinguished more relevant cases that pointed the other way. The result was an unworkable doctrine inconsistent with the rest of the law.

The biggest case the Court had to confront was *Palmer v. Thompson*.[236] In *Palmer*, the Court plainly stated the question posed in an equal protection challenge: "[T]he issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike."[237] The Court continued, "Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of 'the equal protection of the laws.'"[238] While it was clear that the legislators did not want to operate integrated swimming pools, the Court was nonetheless bound by its inability to consider that in determining the constitutionality of the action. "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[239]

Even the dissenters agreed with this proposition. "A candidate may be defeated because the voters are bigots. A racial issue may inflame a community causing it to vote a humane measure down. The federal judiciary cannot become involved

234. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558–59 (1993) (Scalia, J., concurring) (describing the Court's tradition of considering a law's effects—rather than the subjective motivations of the enacting legislature—when determining its validity and finding that an act adopted with "evil motives" that nonetheless "ineptly" failed to actually discriminate would not in fact violate the constitution).

235. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977) (taking as given that disparate impact plus discriminatory motive amounts to denial of equal protection).

236. Palmer v. Thompson, 403 U.S. 217 (1971).

237. *Id.* at 226.

238. *Id.*

239. *Id.* at 224.

in those kinds of controversies. The question . . . is not what the motive was, put [sic] what the consequences are."[240]

The *Arlington Heights* Court sidestepped this principle by pointing to other cases that purportedly endorsed the use of motive,[241] but the Court in *Palmer* had it right. Only in *Washington v. Davis* did the Court (with the same nine justices that decided *Arlington Heights*) say, in dicta, that motive could be a legitimate factor.[242]

Cases the Court relied on related to discrimination by individuals in executive or judicial roles, where the assessment of motive is meaningful,[243] including in the employment context.[244] Others dealt with whether particular lines on district maps were in fact drawn on the basis of race rather than other factors and were not explainable in any other way.[245] Some merely pass on the actual effect of the laws[246] or grant unfettered discretion to government

240. *Id.* at 236 (Douglas, J., dissenting); *id.* at 271 (Marshall, J., dissenting) (joined by Brennan & White, JJ.).

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

242. Washington v. Davis, 426 U.S. 229, 243 (1976).

243. *See* Strauder v. West Virginia, 100 U.S. 303 (1879) (considering the spirit of the Fourteenth Amendment alongside a West Virginia statute that "singled out and expressly denied" colored peoples' jury participation); Akins v. Texas, 325 U.S. 398, 403 (1945) (describing the "wide range of choice" enjoyed by the jury commissioners—who had been "appointed by the judge of the trial court"—in selecting a grand jury); Alexander v. Louisiana, 405 U.S. 625, 628–29 (1972) (discussing the State's responsibility to not "deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice"); Carter v. Jury Comm'n, 396 U.S. 320, 335–37 (1970) (discussing the wide range of choice left to commissioners); Cassell v. Texas, 339 U.S. 282, 287–90 (1950) (finding discrimination existed when commissioners have "exclude[d] all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve"); Patton v. Mississippi, 332 U.S. 463, 468–69 (1947) (dismissing the Mississippi Supreme Court's proportionality analysis in attempting to disprove systematic racial discrimination in jury selection); Smith v. Texas, 311 U.S. 128 (1940) (upholding the Fourteenth Amendment's prohibition on racial discrimination when selecting grand juries); Pierre v. Louisiana, 306 U.S. 354, 362 (1939) (describing the principles that entitle "every colored man . . . in the selection of jurors to pass upon his life, liberty, or property . . . shall be no exclusion of his race, and no discrimination against them because of their color"); Neal v. Delaware, 103 U.S. 370, 397 (1880) (upholding the constitutional provision that "no agency of the State", nor its "officers or agents[,]" may "deny any person within its jurisdiction the equal protection of the laws); Hill v. Texas, 316 U.S. 400, 404 (1942) (finding racial discrimination in contravention of the Equal Protection Clause in grand juror selection); Avery v. Georgia, 345 U.S. 559 (1953) (finding that the State of Georgia had failed to meet its burden to overcome a prima facie case of discrimination); Whitus v. Georgia, 385 U.S. 545 (1967) (finding similar circumstances to *Avery*, *supra*); Turner v. Fouche, 396 U.S. 346, 361 (1970) (same as *Avery*, *supra*); Eubanks v. Louisiana, 356 U.S. 584, 587 (1958) (reaffirming *Patton*, *supra*).

244. *See Davis*, 426 U.S. at 244 n.12 (listing cases in the public employment context that caused a disproportionate racial impact, amounting to violations of the Equal Protection Clause).

245. *See* Gomillion v. Lightfoot, 364 U.S. 339, 340–42 (1960) (striking down a map that drew an "uncouth twenty-eight-sided figure" which carved out almost every African American in Tuskegee after determining it was in fact drawn on racial lines); Wright v. Rockefeller, 376 U.S. 52, 58 (1964) (upholding majority-minority districts due to factual findings that they were not in fact drawn by race); Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973) (school district boundaries).

246. Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964) (Virginia shutting down government schools in one county denied equal protection vis-à-vis the rest of the state, but would not have if they had shut down all of them); Hunter v. Erickson, 393 U.S. 385 (1969); James v. Valtierra,

officials.[247] Others incorporated by reference factors which were explicitly discriminatory by their inevitable effect,[248] while some excessively entangled the state in explicit discrimination by private individuals, triggering state action.[249] In none of them was legislative motive necessary to make a finding of unconstitutionality.

It should be no surprise that the subjective motivations of some or even many legislators were bent toward evil ends when they passed laws that were in fact discriminatory. But in none of the cases the Court cited did the outcome of the case turn on legislative motivation—rather, either non-legislative action was at issue or the laws themselves *in fact*, by inevitable operation, denied equal protection or violated some other provision of the Constitution.

c. Scholarship

Investigation into the motivations of legislators was never going to work out—and the scholarly community knew it.

As in the abortion context, Professor John Hart Ely spoke prophetically when discussing the *Arlington Heights* regime.[250] "[A]nalyses that purport to test a classification against the purposes that 'actually' inspired it will necessarily be charades, invalidations on such grounds inevitably unconvincing."[251] He suggests that "the purpose that will most comfortably establish the rationality of a classification—that is, the purpose that fits its terms most closely—is most likely to be the purpose that generated it."[252] He continued, "[t]hus, far from its taking a court determined to uphold the statute at all costs to conclude that the purpose that is most helpful constitutionally is probably the one that inspired it, it would usually take a court hell-bent on invalidation to reach any other conclusion."[253] "I'm skeptical that a method of forcing articulation of purposes can be developed that will be both workable and helpful."[254]

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402 U.S. 137 (1971); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (law violates freedom of the press by basing tax on mere publication).

247. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (board deciding whether Chinese laundries can operate under standardless policy); Schnell v. Davis, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd per curiam* 336 U.S. 933 (1949) (arbitrary power to elections officials under indeterminate standard on a literacy test for voting).

248. *See* Guinn v. United States, 238 U.S. 347 (1915) (grandfather clause for voting); Lane v. Wilson, 307 U.S. 268 (1939) (grandfather clause referring to election held under the illegal grandfather clause in *Guinn*).

249. *See* Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (striking down constitutional amendment promoting private discrimination).

250. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 278 (2022) (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973)); JOHN HART ELY, DEMOCRACY & DISTRUST 16–18, 125–131, 136–145 (1980).

251. ELY, *supra* note 250, at 126.

252. *Id.* at 126–27.

253. *Id.* at 127.

254. *Id.* at 129.

The word "purpose" deserves much of the blame for where the *Arlington Heights* Court went wrong because it is a slippery legal term.[255] "Purpose" means "end," as well as "intention."[256] Past references to legislative purpose must be in the "end" sense. This usage goes back to the earliest days of the republic.[257]

Professor Ely addressed the purpose-motive confusion.[258] His main objection is that courts have used the terms interchangeably and turned them into mere signals of whether they approve of the examination of motive or not.[259]

Ely rightly criticized prior attempts to distinguish purpose and motive by their proximity to the goals individual legislators believed they were pursuing by their votes.[260] That distinction would lead to unmanageable standards: "Although I would think the effort ill-advised, one might attempt to work out a detailed calculus for determining when to refer to, and how much weight to attach to, the various evidentiary sources."[261] Sources include "the terms of the law in issue, those effects which must have been foreseen by the decision makers, the historical context in which the law was passed, and the legislative history and other recorded statements of intention."[262] But even if such distinctions are possible in theory, there is "no law which would prevent a commentator from labeling those motivations which can be inferred in accordance with his calculus 'purposes' and calling all others 'motives.'"[263]

Sound familiar? *Arlington Heights* adopts a number of these unworkable standards later. Nonetheless, Ely was right to say that courts sifting through evidence of this sort does not solve the "paradox" of the Supreme Court's use of the term "purpose."[264] That is because purpose is something completely different.

Purpose is generally easy to discover. For example, the purpose of a tax is to contribute to the fisc. The purpose of a time limit on appeal is to close off appeal after a certain time.[265] Purpose then, is the specific objective end toward which a

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255. *See* Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis of Reformulation*, 25 UCLA L. Rev. 181, 197 (1977) (discussing the distinction between purpose and motive as it relates to evaluating the legislative purpose of policies in performing interest analysis for choice of law purposes).

256. *Purpose*, BLACK'S LAW DICTIONARY (4th rev. ed. 1968).

257. *See, e.g.* McCulloch v. Maryland, 17 U.S. 316, 324 (1819) ("The true view of the subject is, that if it be a fit instrument to an *authorized purpose*, it may be used, not being specially prohibited." (emphasis added)).

258. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217 (1970) [hereinafter Ely, *Legislative Motivation*] (describing the distinction between legislative "motive" and "purpose," particularly as employed by "commentators and lower courts").

259. *Id.*

260. *See* Ira M. Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104, 115–16 (1961) (evaluating "purpose" versus "motives" of legislatures in the context of public-school segregation).

261. Ely, *Legislative Motivation*, *supra* note 258, at 1220.

262. *Id.*

263. *Id.*

264. *Id.* at 1221.

265. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 34–35 (2012).

law is oriented. This is the "ends" part of the various tests in constitutional tiers of scrutiny analysis, which explains the presence of the term in constitutional litigation.

At bottom, the question is not what the motive was, but whether the legislative body had the authority to adopt the law and whether the law in fact denies equal protection by its operation. If it does not and the legislature does have the authority, then it is for the voters, not the court, to respond to any motives they infer.

3. Workability

Workability examines whether the rule in question can be understood and applied in a consistent and predictable manner.[266] As explored above, *Arlington Heights* fails this test at every turn.[267] When a test "is difficult to apply and yields unprincipled results" and the "'crucible of litigation' . . . has produced only consistent unpredictability," there is no reason to continue the "sisyphean task of trying to patch together" the doctrine.[268]

Justice Gorsuch's compelling concurrence in *Loper Bright*, rooted in a deep common law understanding of stare decisis, reinforces the truth that some judicial experiments fail.[269] There, overruling *Chevron* made sense because it "represent [ed] a grave anomaly when viewed against the sweep of historic judicial practice."[270] *Chevron* was overruled in part because "[t]hroughout its short life, this Court has been forced to supplement and revise *Chevron* so many times that no one can agree on how many 'steps' it requires, nor even what each of those 'steps' entails."[271] *Chevron*'s malleable test caused the "search for ambiguity [to] devolve[] into a sort of Snark hunt."[272] *Arlington Heights* has had numerous supplements and revisions as well, as the Court has tried and failed to square it with the rest of judicial practice.[273]

A relatively recent development in the political question doctrine adds more color to this issue as well. In addition to the "textually demonstrable commitment to a coordinate branch" of government standard,[274] the Court recently gave teeth to the category of "no judicially manageable standard."[275] For partisan redistricting, the Court determined that decisions regarding appropriate limits on gerrymandering are best left to the legislatures, since various legitimate factors could lead to the adoption of any particular map and the baseline issue would be

266. Dobbs v. Jackson Women's Health Org., 597 U.S. 217, 280–81 (2022).

267. *See supra* Section II.D.

268. Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (encouraging the Court to abandon the unworkable *Lemon* test).

269. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

270. *Id.* at 448 (Gorsuch, J., concurring).

271. *Id.* at 436.

272. *Id.* at 437.

273. *See supra* Sections I.A, II.D.

274. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 229, 237–38 (1993) (holding that the Senate's trial of impeachments is a nonreviewable political question).

275. Rucho v. Common Cause, 588 U.S. 684, 696, 702 (2018).

intractable.[276] Difficulties have also arisen in the context of racial gerrymanders under the Fifteenth Amendment.[277] A similar dynamic is at play in *Arlington Heights*, where the evaluation of mixed motives among a large body of legislators is inherently difficult to weigh and quantify. Where the legislature is working within the bounds of their power, evaluating motives is best left to the voters.[278]

4. Effect on Other Areas of the Law

When a decision's application disrupts other settled areas of law, the purpose of stare decisis is not served by following the decision.[279] Such disruptions suggest that the decision may have been incorrect because it is out of step with the broader legal environment. Overruling decisions that disrupt other areas of law increases stability, rather than reducing it.[280] And the greater the disruption, the greater the importance of overruling the aberrant case.

With open season on legislative motive, no law is safe from ad-hoc nullification in an *Arlington Heights* claim.[281] Laws from every sector have been questioned by advocates and activists based on alleged illicit motive—motive unmoored from the question of whether the laws in fact deny equal protection by their operation.[282]

Arlington Heights has weakened various fundamental legal principles. It has diluted the strict standard of facial constitutional challenges, leading to the absurdity that when presented with two facially identical laws, one can be *facially* valid and the other not.[283] The standard has disregarded the doctrine of constitutional avoidance[284] and weakened other presumptions in favor of legality.[285] It flies in the face of the long- and still-acknowledged rule against investigating

276. *Id.* at 715–16.

277. *See* Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 40 (2024) (Thomas, J., concurring in part) ("There are no judicially manageable standards for resolving claims about districting, and, regardless, the Constitution commits those issues exclusively to the political branches. . . . The Court's insistence on adjudicating these claims has led it to develop doctrines that indulge in race-based reasoning inimical to the Constitution.").

278. *See supra* Part III; *e.g.*, notes 141, 182–83 and accompanying text.

279. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 217, 286–87 (2022).

280. *See id.*

281. *Cf. id.* at 286 ("[N]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.") (internal citation omitted).

282. *See supra* Section II.D.

283. *See supra* Section II.D.2.

284. *See* United States v. Salerno, 481 U.S. 739, 744 (1987) ("A facial challenge to a legislative Act . . . must establish that no set of circumstances exists under which the Act would be valid."). Even accepting *Arlington Heights* as a given, the courts acknowledge that there is a circumstance which exists under which the act would be constitutional—if it had been enacted without impermissible motive—but strike the law down anyway.

285. The *Arlington Heights* standard is unique in that it admits that the law it invalidates is facially valid while facially striking it down.

legislative motive[286] and warps the application of the rules of appellate deference to factfinding.[287]

In opening the door to tell legislatures to reenact the same law,[288] it has encouraged the treatment of a coordinate branch of government with contempt and ridicule[289] and has created farcical claims in its wake.

One stark example bears mentioning. In Iowa, an evenly divided state supreme court declined to dissolve a permanent injunction against a heartbeat abortion law after *Roe v. Wade* was overturned.[290] Arguing that a heartbeat bill passed by both houses of the legislature and signed by the governor does not constitute law in Iowa, three justices claimed that "the legislature was enacting a hypothetical law" rather than an actual law of the state, and therefore the challenged statute could not take effect unless it was passed again with the requisite motivation.[291] The justices said that "[t]oday, such a statute might take effect .... But uncertainty exists about whether a fetal heartbeat bill would be passed today," and therefore the law was not actually the law.[292]

Three other justices pointed out the absurdity of this approach. Effectively, they explained, their colleagues thought that "[t]he legislature ... didn't really mean it when they enacted the statute" and based their decision on their "view of [the] legislators' *motivations* when they pass[ed] [the] law[]."[293] They concluded that the heartbeat law "is an actual law. And contrary to [our] colleagues' assertion, the legislature does not need to 'reenact [the statute]' to demonstrate that it is an actual law."[294] When courts let legislative motivation in, there is no principle by which anyone can tell which laws on the books are real and which ones are not without asking a judge first.

Arlington Heights has abandoned the "basic premise of our legal order: that we are governed not by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable."[295] It has turned the courts of law into courts of lawfare for litigants who lost at the legislature and instead

286. *See supra* Part III.

287. *See supra* Sections II.D.1–2.

288. *See* Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. REV. 947, 979–1001, 1012–13 (2022) (approving of the reenactment enterprise and proposing more adjustments to the motive inquiry).

289. *See generally* Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts*, 63 N.C. L. REV. 879 (1985) (arguing in favor of dragging lawmakers to court to testify about their motives in legislation).

290. Planned Parenthood of the Heartland, Inc. v. Reynolds, Iowa S. Ct. No. 22-2036, 2023 WL 4635932, at *2 (June 16, 2023) (opinion of Waterman, J.). The case was not an *Arlington Heights* challenge, but the acceptance of legislative motive opened the door for reasoning like this.

291. *Id.* at *4 (opinion of Waterman, J.).

292. *Id.*

293. *Id.* at *24 (opinion of McDermott, J.).

294. *Id.* at *14 (opinion of McDonald, J.).

295. Kisor v. Wilkie, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring).

turn to requesting judgments from courts that give them the appearance of politicization.[296]

As with the Court's abortion jurisprudence, "[w]hen vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine has failed to deliver the principled and intelligible development of the law that *stare decisis* purports to secure."[297]

5. Reliance

The reliance factor accords stronger staying power to rules which people rely on when arranging their affairs "where advance planning of great precision is most obviously a necessity," typically in contract or property law.[298] There is no such reliance here, since *Arlington Heights* is simply a test which purports to help identify equal protection violations. The intangible expectation that some judicial tools will continue to be available is not concrete reliance for stare decisis purposes.[299]

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Stare decisis does not support keeping *Arlington Heights* around any longer. The constant doctrinal adjustments and inconsistent results that occur each time *Arlington Heights* meets a new set of facts shows that the rule cannot achieve its goal with consistency. So the choices are to "continue to make up new [motive] rules" or to return "to the approach to judicial review that prevailed for most of our history."[300] The answer should be easy. "[I]f the rule of law means anything, it means that we are governed by the . . . words found in statutes and regulations, not by their authors' private intentions. This is a vital part of what it means to have 'a government of laws, and not of men.'"[301]

Like with legislative history, "anyone who thinks that by excluding legislative [motive] we will be excluding predictable results has not read the cases."[302] As Justice Cardozo once said, "when a rule, after it has been duly tested by experience, has been found to be inconsistent . . . there should be less hesitation in frank avowal and full abandonment."[303]

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296. *See* Cooper v. Harris, 581 U.S. 285, 335 (2017) (Alito, J., concurring) ("There is a final, often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare.").

297. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 287 (2022) (internal quotation omitted).

298. *Id.* (internal quotation omitted).

299. *See id.* at 288–90 (perceptions about the law in the national psyche and possible implications for other precedents not before the court are not tangible reliance interests).

300. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2443 (2019) (Gorsuch, J., concurring).

301. *Id.* at 2441 (Gorsuch, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

302. *See* SCALIA & GARNER, *supra* note 265, at 388.

303. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921).

B. Normative Argument

1. Textualism

For the textualists among us, there are strong reasons to abandon this legislative motive regime. Some of textualists' greatest objections to living constitutionalism and various other interpretive theories regard their squishiness and inability to ensure a consistent and known written law based on an objective standard.[304]

Besides being an intuitive methodology tied up with the very nature of written law,[305] textualism is also predicated on the idea that the "intent" of a legislature is reflected in the text and context of its enactments and nothing else.[306] Legislative history, indeed, was one of Justice Scalia's mortal enemies,[307] as was the notion that the law we are governed by is based on the motive of Congress rather than the meaning of Congress's enactments.[308]

This is part of the nature of legislative and democratic decision making generally. "The Legislature" is a corporate body, essentially a file folder that can only act with the consent its members. But it is nonetheless separate from them. In our system, the Legislature speaks with the force of law only through the bicameralism and presentment process or through the treaty power.[309] This means that for the Legislature to act, some combination of up to 536 people must come together for it to speak with the force of law. In such an arrangement, how can any unified intent be found other than the text that they all agreed on?[310] Speeches by individual legislators, then, as mere voters for one part of the process in which the corporate Legislature acts, mean nothing if they are not incorporated into the law that is the "supreme power" which speaks.

Textualists rely on the idea that if every legislator in both houses and the President shared an intent, even if they spoke in unison, if they do not write that intent down, it is not law.[311] In a government of written laws, and not of men, what can someone subject to the laws look to except what was enacted?[312]

A necessary part of this regime, then, is the idea that "The Legislature," which is the only entity with the power to make laws, cannot have any meaningful motive or intent other than the words that it speaks in enacted law. When evaluating the meaning and constitutionality of the law, all that judges can examine is if the Legislature had the power to make the enactment or not and whether the

304. SCALIA & GARNER, *supra* note 265, at 403–10.

305. *Id.* at 78–92 (Fixed-Meaning Canon, what the words meant when they were adopted, they continue to mean now).

306. *Id.* at 56–58 (Supremacy-of-Text Principle, "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means").

307. *Id.* at 369–90 (describing "the false notion that legislative history is worthwhile in statutory interpretation").

308. *Id.* at 391–96.

309. U.S. CONST. art. I, § 7, cl. 2; *id.* art. II, § 2, cl. 2.

310. SCALIA & GARNER, *supra* note 265, at 391–93.

311. *Id.* at 374–75.

312. *See id.*; *e.g.*, *supra* note 166 and accompanying text.

enactment in fact violates some provision of the constitution. Textualists, then, must reject notions of "legislative motive."

2. Social Justice

Those that follow a social justice framework should also reject legislative motive. The *TJ* case itself, which by all lights appears to have fallen on the wrong side of our legislative motive test, would be on very solid footing in the absence of this motive regime. Race-neutral programs designed to advance diversity would be valid provided they are explainable on any ground other than race and otherwise make distinctions that are consistent with legitimate legislative aims. And since there is no constitutional obligation for a school system to run magnet schools based on pure merit,[313] a change to a zip code or top 10%-style program would almost certainly present no constitutional issue.

The free-roaming license that the legislative motive regime gives to judges can do nothing but limit the universe of creative new ways to solve problems of social justice. In a legal reality where race blindness is part of our positive law,[314] examination of legislative motive could prove to be a significant roadblock for those who do not believe it is enough to simply have neutral laws that lack any regard for the racialized realities underneath.

Practically speaking, it cannot be good for social justice interests to have a legal standard that allows plaintiffs to go to court and allege a violation of the Constitution's commitment to colorblindness by pointing to statements by legislators expressing support for statutes which advance an equitable agenda.[315] This is an open invitation to interest groups and judges to let the constitutionality of such statutes rise and fall based on the political priors of the legislators. One can only imagine a case where statements on the campaign trail about promoting diversity, equity, and inclusion could lead to the invalidation of neutral laws passed

313. Some schools that admit on a pure lottery basis have found success in educating disadvantaged students of all racial backgrounds. *See, e.g.,* Ray Domanico, *Corps Values*, CITY J., Autumn 2024, at 64, 64–71. The New Orleans Military & Maritime Academy has achieved top marks for student progress, standardized test scores, and student outcomes while enrolling a class that is 84.4% economically disadvantaged, 41.8% Latino, 28.1% African American, 22.5% Anglo American, and 7.6% all others. *Id.* at 69–70. It has done so by fostering discipline by demanding "respect and taking responsibility" and a "meritocratic culture" of "high standards" with a merit-demerit system, utilizing work-study and technical training, mandating participation in JROTC, creating space for mentorship among the students, and focusing on character in every classroom. *Id.* at 64, 67–68. As a result, 56% graduate with an industry-based credential, more than half of the students go to college, another 15 to 20% join the armed services, and the remainder go to technical school or the workforce. *Id.* at 69. School boards would do well to shift their focuses to replicating the successes of schools like the New Orleans Military & Maritime Academy if they want to help bridge academic skills gaps and other group-level inequalities.

314. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181, 204 (2023) ("The time for making distinctions based on race has passed.").

315. *See* Plessy v. Ferguson, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting) ("[T]he Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of [civil] rights.").

by that legislator. In a world where hostilities to DEI programs are increasing,[316] this tool could prove to be a potent one in the hands of DEI's opponents.

V. OBJECTIONS

Abandoning a standard developed with the stated goal of ferreting out hidden racial discrimination could open the door to some abuses. While the ultimate consequences of a proper legal decision are significantly less relevant for judges to consider, what tools remain in the event of a change in the law is a legitimate concern for advocates seeking to advance their clients' interests. This part addresses some of the pressure points in the equal protection landscape without *Arlington Heights*. My suggestion of these alternative tools comes with less conviction and thoroughness than my demonstration of the impropriety of *Arlington Heights* as a tool. Nonetheless, the part provides some examples and useful analogies that can be used as a starting point for advocates as potential tools to combat misbehaving government actors.

A. Abandoning Arlington Heights *Would Mean that There Are No Options for Litigants and Courts to Address Racially Discriminatory, but Facially Neutral Policies Passed by Legislatures*

There are many tools still available that do not require inquiries into legislative motive. Policies clearly violative of equal protection have been backed by plenty of benign motives and justifications throughout history. Among them: slavery being a positive good and segregation preserving harmony, reducing resentment, preventing violence, and providing health benefits.[317] Justice Stevens recognized this problem in *Davis,* explaining, "[i]n my judgment . . . subjective good faith . . . would [not] save [the challenged verbal skills test] if it were otherwise invalid," but decided the test was constitutional because it was "in fact neutral."[318] He continued:

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316. *See* Charles Lipson, *Code Red: DEI Is in the ICU*, SPECTATOR (Jan. 2, 2024), [https://perma.cc/23DWGG3Y]; Editorial, *The DEI Rollback of 2023*, WALL ST. J. (Dec. 26, 2023), https://www.wsj.com/articles/dei-wisconsin-oklahoma-state-universities-88ecc684 [https://perma.cc/9NNL-3BE6]; Howard Levitt, *Claudine Gay Resignation May Signal the Beginning of the End of Woke DEI Cabal*, FIN. POST (Jan. 5, 2024), https://financialpost.com/fp-work/howard-levitt-claudine-gay-resignation [https://perma.cc/4ESP-NG4A]; Andy Kessler, *Pop Goes the DEI Bubble*, WALL ST. J. (Jan. 21, 2024), https://www.wsj.com/articles/pop-goes-the-dei-bubble-affirmative-action-claudine-gay-harvard-esg-blackroc k-39c77d13 [https://perma.cc/PU3P-A355]; Marcela Rodrigues, *Gov. Abbott Signs DEI Bill Into Law, Dismantling Diversity Offices at* Colleges, DALL. MORNING NEWS (June 14, 2023), https://www.dallasnews.com/news/education/2023/06/14/gov-abbott-signs-dei-bill-into-law-dismantling- diversity-offices-at-colleges/ [https://perma.cc/67F8-SZSF]; *Governor Ron DeSantis Signs Legislation to Strengthen Florida's Position as National Leader in Higher Education*, FL. GOVERNOR'S. OFF. (May 15, 2023), https://www.flgov.com/2023/05/15/governor-ron-desantis-signs-legislation-to-strengthen-floridas-position-as-national-leader-in-higher-education/ [https://perma.cc/HRG3-FTDZ]; *Governor Stitt Signs Anti-Discrimination Executive Order, Takes Aim at DEI Measures*, OK.GOV (Dec. 13, 2023), https://oklahoma.gov/governor/newsroom/newsroom/2023/december2023/governor-stitt-signs-anti-discrimination-executive-order–takes-.html [https://perma.cc/EDH3-4NEJ].

317. *See SFFA*, 600 U.S. at 267–68 (2023) (Thomas, J., concurring).

318. Washington v. Davis, 426 U.S. 229, 254–55 (1976) (Stevens, J., concurring).

> It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.
>
> . . . the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. . . . [W]hen the disproportion is as dramatic as in [*Gomillion*] or [*Yick Wo*] it really does not matter whether the standard is phrased in terms of purpose or effect.[319]

Justice Stevens has it right. The model used in the First Amendment context is instructive. Consider flag burning. The validity of a law which affects "expressive conduct" turns on a number of factors.[320] The key factor—the statute being "unrelated to the suppression of free expression"—seems to point to legislative motive.[321] But it is actually getting at something else entirely, something that can be used in the equal protection context.

Under this model, penalizing someone for flag burning under a law banning open burning of any object within 50 feet of a building would be lawful, but punishing the same person under a law that specifically bans flag burning would not be. Both laws have the purpose of preventing certain acts of burning, but one of them, on its face, is unrelated to expression (preventing building fires), while the other has a much more direct relationship to the "expressive" part of the expressive conduct (preventing a specific, unpopular kind of burning because of the message it conveys).

The government interests that can justify the first law cannot justify the second. Note how in this analysis, no reference to the motive of the legislature is necessary. If the first law had been passed in response to flag burning on the courthouse steps or for perfectly benign reasons, it would be legitimate either way. Similarly, if the second law had been passed for some benign reason or to suppress a disfavored viewpoint, it would be illegitimate either way.

Imagine a school system with two competitive magnet high schools: one is a STEM high school, the other a Spanish immersion high school designed for those interested in language. Instruction at the STEM high school will be provided only in English. Instruction at the immersion high school will be primarily in Spanish, but also in English.

Next, imagine the school board, with serious animus toward Latinos, publicly announced in a unanimous resolution on the same day, adopts a facially neutral policy for all applicants adding two requirements for admission to both high

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319. *Id.* at 253–54.

320. United States v. O'Brien, 391 U.S. 367, 377 (1968).

321. *Id.*; *see also* Maria Colombo & Connor P. Fraley, *Laboratories of Democracy: North Carolina's Experiment with the Unalienable Right to the Fruits of Your Own Labor*, 2 J.L. & CIV. GOVERNANCE TEX. A&M (forthcoming 2025) (manuscript at 50–52) (on file with authors) (describing careful means-ends scrutiny in the economic liberty context).

schools: first, the students must be fluent in English and, second, the students must not be fluent in Spanish. Assume there are no state constitutional rights to education at issue, that language fluency is not a suspect classification, and the policy disproportionately leads to the exclusion of Latino students from both schools.

Now imagine two Latino students, one who is only fluent in Spanish and another who is fluent in both Spanish and English. Both would like to gain admission to both schools. Both students are otherwise qualified, but are denied at both schools. They raise an equal protection challenge. But since the court cannot look at motive and no independent constitutional right is at issue, are our students simply out of luck?

The Board will argue that the policy has no reference to ethnicity and applies equally to all applicants. They have legitimate interests in both requirements. Their reason for the English fluency requirement is that both schools provide English language instruction and it would not make sense to give a seat to a student who will not be able to learn without interpreter resources that they are unable (and, for our hypothetical, not required) to provide. Their justification for the second requirement is that they do not want to provide seats to students who already know Spanish because they are already too well educated and want to help maximize and equalize educational benefits.

For our Spanish-only student, he is truly out of luck. As applied to the STEM school, the requirement of fluency in the language of instruction is aligned with the educational mission there. And as applied to the Spanish immersion school, the no-Spanish-fluency requirement is aligned with the educational mission there as well. A student already fluent in Spanish has less to learn at a Spanish immersion school. The Board must answer to the voters for this student.

How about the bilingual student? As to the Spanish immersion school, he too will be out of luck due to his advanced language skills. But what about the STEM school? He satisfies the English requirement, but was denied because of his Spanish fluency. How does excluding this student from the STEM school align with the no-Spanish policy's goal of maximizing and equalizing educational benefits? It doesn't. The interest in maximizing educational benefits that supports exclusion at the immersion school cannot justify exclusion at the STEM school—regardless of the motives of the Board. Under equal protection, our bilingual student would have a judicial remedy for the STEM school—even if he is not Latino.

As in the First Amendment context, equal protection issues can be evaluated by the legitimate ends toward which laws are actually ordered. It may not capture every unsavory legislative act, but it can catch cunningly designed laws that in fact violate equal protection.

B. Abandoning Arlington Heights *Would Mean that Courts Can No Longer Enforce Any Standard that Turns on Racially Discriminatory Motives*

Abandoning *Arlington Heights* does not mean that courts cannot ever consider the motives of government actors—particularly in the executive branch. As courts judge the intent of individuals in criminal cases, so too can they continue to apply standards that require a showing of subjective intent, as in employment discrimination cases, jury selection, or selective enforcement.

On the legal front, the executive obligation under equal protection is distinct from the legislative one. Because legislative equal protection is only embodied in the statutes themselves, the question of equal protection is limited to the law itself, regardless of its provenance. But the executive obligation is different. It requires the law to be faithfully executed without regard to persons, neutrally applying the law as written. Under this distinct obligation, discrimination in enforcement is itself a violation of equal protection which courts are obligated to remedy.

On the evidentiary front, executive challenges generally will turn on the mental state of individuals, who, unlike corporate legislatures, are subject to meaningful inquiries into motive. And while executive officers often receive a presumption of regularity, that presumption does not combine with other legal standards to prevent the presumption from being displaced by evidence of what the actor actually did. The question in such a case is whether discrimination *occurred*, not whether a legislature had the power to adopt a particular policy and if any set of circumstances exists in which the law *could* be constitutionally applied.

The separation of powers concerns are not as stark either. In an as-applied challenge to executive action, the judiciary is asked to vindicate equal protection by invalidating the discriminatory application of the law at issue. The remedy is limited and tailored to the harm, leaving the neutral and generally applicable law in place for everyone else.

C. Abandoning Arlington Heights *Would Mean that Government Actors Will Be Emboldened to Oppress Unpopular Minorities So Long as Laws Are Neutrally Drawn and Within Their Power to Enact*

It is no objection to observe that a power can be abused.[322] That fact is a given in any allocation of power within government. So the question is not whether shifting power away from judges will increase the possibility that the legislatures will get away with abusing their powers in the short term, but whether we should be more concerned about abuse by a large, regularly elected group of legislators or by singular or small groups of unelected judges who, by design, answer to no one.

322. *See supra* notes 136–141 and accompanying text.

D. Abandoning Arlington Heights *Would Mean that Disparate Impact, No Matter How Extreme, Cannot Serve as Evidence that a Law Is Unconstitutional*

To the extent that this objection turns on the idea that disparate impact is a denial of equal protection in itself, it is simply incorrect. Equal protection means the law applies equally to everyone similarly situated, not that it must have an equi-proportional group-level effect.[323]

Nonetheless, disparate impact can be relevant, or even determinative, as in the redistricting context. If "legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race," equal protection can be violated.[324] Such laws, "unexplainable on grounds other than race,"[325] can be invalidated with no need to investigate motive.

These cases have helpful analogs in other contexts, such as when state courts must determine if a particular legislative enactment which classifies cities or counties in some facially neutral way is in fact special legislation barred by the state constitution.

One court describes its test as a three-step inquiry: first, the court must determine the end or purpose of the enactment; second, it applies the law to the situation at hand; and third, it evaluates whether the classification, *as it actually operates*, makes a reasonable classification with reference to its ends.[326] In that case, the New Jersey Supreme Court faced a statute which exempted certain special vocational school districts from taxation for vocational schools in the greater county. The initial bill did that in general fashion, but the legislative process resulted in a bill that only exempted districts in counties with populations between 550,000 and 700,000 and a density of more than 3,000 people per square mile, and only applied to programs that had been in existence for at least 20 years.[327] These restrictions narrowed the legislation from affecting all counties to three counties (with the population minimum), then to one county (with the population maximum and density requirement), then to the single municipality which had lobbied them for the bill in the first place (with the longevity provision).[328]

The court identified two purposes the statute served: first, to prevent double taxation and, second, to promote the development of new programs.[329] It found that the statute was not drawn in a way to rationally advance those goals because, as to tax relief, it excluded many similarly situated municipalities subject to the same burden and, as to development of schools, excluded counties both larger and smaller than the one identified in the statute without any evidence suggesting

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323. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.").

324. Shaw v. Reno, 509 U.S. 630, 649 (1993).

325. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

326. *See* Town of Secaucus v. Hudson Cnty. Bd. of Tax'n, 628 A.2d 288, 294 (N.J. 1993).

327. *Id.* at 290–91.

328. *Id.*

329. *Id.* at 294.

lesser need in those counties.[330] Further, the longevity requirement actually worked to *dis*courage the development of more schools.[331] In sum, the classification did not align with the ends of the statute in actual operation, and the legislation, which on its face appeared to be general legislation, was in fact unconstitutional special legislation.[332] The court made that determination without reference to the motives of the legislature.[333] Other states conduct similar inquiries that serve as useful touchstones for how courts work to identify the actual operation of statutes.[334]

The First Amendment context provides another analogy, as in the case of facially content-neutral restrictions on all "First Amendment activities" at the airport[335] or banning all live performances in a borough.[336] While these bans do not target particular subject matter or viewpoints, there is no way to read the restriction as neutral with regard to expression, regardless of the motives of the enactors.

Even if in these cases an improper motive is clear as a matter of deduction, the infirmity in the law is the *fact* that it denies equal protection, not the motive that lies behind it. Admittedly, this is often a high bar, but it is nonetheless a tool that can be and has been effectively used in the cases sampled here. These tools, unlike *Arlington Heights*, are in harmony with broader constitutional doctrine.

CONCLUSION

The response to the recent affirmative action ruling is leading the courts toward the next big legal question: is it constitutional under *Arlington Heights* for an

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330. *Id.* at 295–96.

331. *Id.* at 296.

332. *Id.* at 297–98.

333. *See generally id.* The court also acknowledged that the legislature was candid in the legislative history that the legislation would exempt the specific named city. *See id.* at 291.

334. *See, e.g.*, City of Asheville v. State, 794 S.E.2d 759, 770 (N.C. 2016) (striking down a law transferring city sewers to a state authority because the facially neutral classifications were not "germane to the law" or based on a "reasonable and tangible distinction"); Knoop v. City of Little Rock, 638 S. W.2d 670 (Ark. 1982) (striking down law that changed methods of electing the mayor for cities of certain populations because of the lack of a connection between election methods and city size); *In re* Vill. of Vernon Hills, 658 N.E.2d 365 (Ill. 1995) (striking down special fire district statute affecting intermediate-sized counties only as not being "founded upon a rational difference of situation or condition existing in the persons or objects upon which the classification rests" in relation to the "objects and purposes" of the statute); Jefferson Cnty. Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866, 868 (Mo. 2006) (striking down a fire district regulation with a very narrow population band as lacking a "substantial justification"), *standard overruled by* City of Aurora v. Spectra Commc'ns. Grp., 592 S. W.3d 764, 779–81 (Mo. 2019) (rejecting the substantial justification standard for one that places the burden on the challenger and that "does not require unearthing the legislature's subjective intent in making the classification"); Jackson Cnty. v. State, 207 S.W.3d 608 (Mo. 2006) (upholding population classification requiring competitive bidding while distinguishing laws with closed-ended characteristics from those with open-ended ones and upholding a law that created an open-ended population band), *test modified by City of Aurora*, 592 S.W.3d at 781–82 (using the open-versus-closed distinction as relevant to evaluating rational basis rather than as a per se indicator of the presence of special legislation).

335. *See* Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987).

336. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

educational institution to, with the intent of advancing racial diversity, adopt a facially race-neutral policy in a zero-sum environment that helps achieve those racial diversity goals? The principled answer is "no."

Coalition for TJ v. Fairfax County School Board is a model for this question. It spotlights the intractable issues in the *Arlington Heights* regime. In the face of widespread adoption of race-neutral admissions policies designed to advance racial diversity, a deep circuit split is likely to develop in short order.

The history of judicial examination of legislative motive shows that *Arlington Heights* was an aberration and a departure from longstanding background rules of adjudication. Where, as here, Chief Justice Marshall, Chief Justice Warren, Justices Scalia and Thomas, and so many others are in agreement, far be it from anyone to stand in their way.

Textualists would count the end of *Arlington Heights* as a win supporting the principle that "the law" is embodied in the text, not the motives of legislators. Abandonment would also open legal space for those interested in advancing social justice, especially in school admissions where a principled application of *Arlington Heights* would invalidate many policy changes currently being contemplated by universities and school boards. On a broader level, *Arlington Heights* could be an existential threat to all policies motivated by the values of diversity, equity, and inclusion. The stare decisis factors weigh decisively against retaining *Arlington Heights*.

In abandoning the long tradition against scrutinizing legislative motivation, *Arlington Heights* has revealed the wisdom of the old rule, for

> it hath been an ancient observation . . . that whenever a standing rule of law of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.[337]

When the Court takes up the next round of affirmative action cases, it should affirmatively abandon *Arlington Heights*.

337. 1 WILLIAM BLACKSTONE, COMMENTARIES *70.