Unreachable Heights:

Desuetude, Selective Enforcement, and an Arlington Heights Record of Purposeful Discrimination, 1886 to 2026

Travis Gilly* ❧ August 2026 (v1)

Abstract

American law has recognized since 1886 that a statute fair on its face may be administered with an evil eye and an unequal hand, and that unequal administration is itself a constitutional violation. That recognition has never been withdrawn. In 1967 a federal district court connected selective enforcement to the *Yick Wo* doctrine and to the desuetude literature, then dismissed the claim because the defendant had adduced not a scintilla of evidence that the government singled him out. The recognition and the proof problem were both on the record before anything that followed was built.

What followed is this Article's subject. *Washington v. Davis*, *Feeney*, *McCleskey*, *Armstrong*, *Sandoval*, *Iqbal*, and *Dukes* each rest on separate ground. Together they make intent an element, place awareness of consequences outside it, disqualify aggregate proof, condition discovery on evidence only discovery can produce, close the route requiring no intent at all, and bar aggregation. *Inclusive Communities* preserved the surviving private route in 2015 and fitted it with the same instruments. Desuetude, which would have kept dormant rules from remaining available for selective revival, was declined.

The Article does not present that sequence as an indictment. It assembles it as an *Arlington Heights* record, drawn from the Court's own published rationales, and runs the framework against it. The record fails, because *Feeney* places awareness of consequences outside the definition of purpose. The architecture is self-immunizing, and the showing is by construction rather than by assertion.

Two claims follow. A standard provable only from the decisionmaker's own record measures documentation, not purpose. And because reaching internal records requires counsel, time, and the capacity to absorb delay, the remedy is rationed along the same axis as the injury. Five literatures document that pattern independently.

Keywords: civil rights; constitutional law; proof architecture; unreachable remedy; discriminatory intent; disparate impact; burden of proof; plausibility pleading; *Personnel Administrator of Massachusetts v. Feeney*; access to justice; disability rights; civil procedure.

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I. Introduction

In 1886 the Supreme Court held that a San Francisco laundry ordinance, neutral in its terms, violated the Fourteenth Amendment because it had been administered so that Chinese applicants were refused and others were not.[1] The principle the Court announced was that a law fair on its face may still be applied with an evil eye and an unequal hand, and that when it is, the equal protection guarantee is violated by the administration and not by the text.

That principle has never been overruled. It is cited today. It is taught in the first year. It is, on its own terms, an answer to the question this Article takes up: why does a rule stay on the books when nobody enforces it evenly, and what does the law do about the person against whom it is finally enforced?

The answer the law gives is that it does something. The answer this Article develops has three parts. The problem was identified, named, and left unsolved by 1967. Between 1976 and 2011 the Supreme Court then built a proof architecture that makes the doing almost unavailable, each brick laid for a stated and defensible reason. And by 2015 the architecture had begun reproducing itself inside the one private route that survived. The resulting structure distributes the remedy along the same axis that distributes the injury.

A. The claim

Three claims, in order of increasing contestability.

First, descriptive. Seven decisions, read in sequence, close every route to establishing unequal administration: the intent element, the intent standard, the disqualification of aggregate proof, the discovery threshold, the closure of the impact route, the pleading gate, and the aggregation bar. No one of them announces this effect. The sequence produces it.

Second, structural. The distinctive work this architecture does is not denial. It is preservation. Because *Yick Wo* survives, no one can say the law does not recognize the injury. The recognition is what forecloses the argument that recognition is needed. This Article calls

1. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

that legitimation. The term and the underlying insight are not new; they are the central claim of the critical legal studies literature, which argued from the late 1970s that legal forms function to legitimate arrangements they appear to constrain.[2] What this Article adds is specificity and a method: not that law legitimates in general, but that seven identifiable decisions produced the legitimating structure in one identifiable area, and that the structure can be tested by running it against its own author. The term proof architecture is used here for that seven-decision structure.[3][4]

Third, distributional. Every surviving element of proof is an internal record held by the defendant institution: administrative history, contemporaneous statements, minutes, comparator files. Reaching those records requires counsel, filing capacity, and the ability to absorb delay. Those capacities are unevenly distributed along precisely the lines the antidiscrimination guarantee exists to protect. The remedy is therefore rationed by the same mechanism that produces the harm.

B. What this Article is not

This is a jurisprudential argument, not a filable one. *Arlington Heights* supplies an evidentiary framework for challenging a decision by a legislative or administrative body, and the Supreme Court of the United States is neither. There is no defendant here, no cause of action, and no forum. A reader who mistakes what follows for a litigation theory will be right to stop reading.

2. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515 (1991); Alan Hunt, *The Theory of Critical Legal Studies*, 6 Oxford J. Legal Stud. 1 (1986).

3. A full-text search of published American judicial opinions returns no prior use of the phrase, and the uses appearing in the academic literature are in mathematics and physics rather than law. Searched August 2026 across the CourtListener opinion corpus and the Scite literature index.

4. On the movement's internal debates about whether rights discourse is worth retaining given its legitimating function, see Jay M. Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 Mich. L. Rev. 724 (1988); David L. Gregory & Mark Kelman, *A Guide to Critical Legal Studies*, 1987 Duke L.J. 1138. For a sympathetic external critique, see Cornel West, *Critical Legal Studies and a Liberal Critic* (2021). For the principal natural-law objection, see John Finnis, *On "The Critical Legal Studies Movement"*, 30 Am. J. Juris. 21 (1985).

The framework is used as an analytic instrument rather than as a pleading. The question is what happens when the most rigorous test American law supplies for purposeful discrimination is applied to the body that built it. The answer turns out to be informative about the test.

C. Why desuetude matters to all three

Desuetude is the principle that a law long unenforced ceases to bind. Civil law systems recognize versions of it. American courts have overwhelmingly declined to, with one instructive exception.

West Virginia recognizes the doctrine and has set out criteria for it, requiring that the statute proscribe only conduct malum prohibitum, that there be open, notorious, and pervasive violation over a long period, and that there be a conspicuous policy of nonenforcement.[5] The court framed the criteria narrowly, permitting only those statutes whose enforcement would violate due process to die a desuetudinal death, and answered the separation-of-powers objection in a sentence: the legislature may revitalize any statute simply by repassing it.[6]

The American scholarly treatment is older than the case law and reached the same place. Bonfield's survey concluded that nonenforcement raises fair-notice and discretion problems the system does not otherwise address,[7] and Rodgers connected desuetude directly to selective enforcement.[8] Both were cited by *Elliott* in 1967 and by *Printz* in 1992, twenty-five years apart, for the same proposition, and neither generated a doctrine.

That last point disposes of the usual argument against the doctrine. Desuetude does not repeal anything. It requires a legislature that wants a dormant rule enforced to say so again, in public, with its name on it. What American law has chosen instead is a regime in which the rule stays live without anyone having to defend it, and in which the decision to revive it is made by an enforcer rather than a legislature.[9]

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5. *Committee on Legal Ethics of the West Virginia State Bar v. Printz*, 187 W. Va. 182, 416 S.E.2d 720 (1992). The court grounded the criteria in *Poe v. Ullman*, 367 U.S. 497, 501 (1961).

6. *Printz*, 416 S.E.2d at 726.

7. Bonfield, *supra*, 49 Iowa L. Rev. at 417.

8. Rodgers, *supra*, 52 Iowa L. Rev. at 11–12.

9. The closest American engagement with non-enforcement remains *Poe v. Ullman*, 367 U.S. 497 (1961). The Court dismissed for want of a justiciable controversy, holding that the mere existence of a state penal statute is

The refusal is load-bearing. If a dormant rule expired on its own, discretion would have a natural limit and the selective revival problem would not arise. Because dormancy has no legal consequence, every unenforced rule remains available, and availability plus discretion is the precondition for the pattern *Yick Wo* identified.

Poe supplies the second half, and it is sharper than the refusal alone. Non-enforcement did not merely fail to invalidate the Connecticut statute. It insulated the statute from challenge, because the absence of a threat defeated justiciability. The dormant rule was therefore unreachable while dormant and, once revived, reachable only by the person against whom it had been revived, at the point where that person is a defendant. Dormancy is not a weakness of a rule. It is a posture in which the rule cannot be attacked and can still be used.

The doctrine that would prevent the injury was declined; the doctrine that recognizes the injury was retained but made unprovable; and the interval between the two is procedurally immune. That is the shape of the whole subject.

II. The Doctrine That Sees It

A. Yick Wo and its line

The Court has repeatedly acknowledged that discretionary enforcement of facially neutral rules is a vehicle for discrimination, and has said so in language stronger than the remedies it then made available.

In striking a vagrancy ordinance, the Court observed that such laws furnish a convenient tool for harsh and discriminatory enforcement.[10] In striking a stop-and-identify statute, it went

insufficient ground for adjudicating its constitutionality if a real threat of enforcement is wanting, *id.* at 507, and that eighty years of non-enforcement deprived the controversies of the immediacy which is an indispensable condition of constitutional adjudication, adding that the Court cannot be umpire to debates concerning harmless, empty shadows, *id.* at 508. Four years later the same statute was held unconstitutional once it was enforced. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (vagrancy ordinances furnish a convenient tool for harsh and discriminatory enforcement). Quotation verified against the Douglas opinion.

further and located the primary concern of the vagueness doctrine not in fair notice but in arbitrary and discriminatory enforcement.[11] It repeated the point for a gang loitering ordinance.[12]

The vagueness cases are the tell. *Kolender* in particular subordinates fair notice to enforcement discretion outright, holding that the more important aspect of the doctrine is the requirement of minimal legislative guidelines, and describing what follows their absence as a standardless sweep in which officials pursue their personal predilections. That is a complete statement of the mechanism this Article is about, delivered by the same institution whose proof requirements are catalogued in Part III.

What the vagueness line supplies is a remedy against the text. What it does not supply is a route for the person who is not challenging the text at all, but the selection. That person's claim is *Yick Wo*'s, and Part III is what became of it.

B. The argument was made, and answered, in 1967

The connection this Article draws between desuetude, selective enforcement, and *Yick Wo* is not new. A federal district court drew it explicitly, nine years before *Washington v. Davis*.

In *United States v. Elliott* the defendant argued that a 1917 statute never enforced since its promulgation had lapsed by desuetude. The court rejected the argument but conceded the mechanism in terms, observing that the statute contains the potential for abuse that rests in any over-broad administrative discretion, and that its selective enforcement raises equal protection problems analogous to the *Yick Wo* doctrine.[13] It also surveyed the American authorities and found the doctrine's status unclear, noting that while one treatise concluded there were no means

11. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (the more important aspect of the vagueness doctrine is not actual notice but the requirement that a legislature establish minimal guidelines to govern law enforcement, absent which a statute may permit a standardless sweep allowing police, prosecutors, and juries to pursue their personal predilections) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

12. *City of Chicago v. Morales*, 527 U.S. 41, 56, 65 (1999) (a vague law may authorize and even encourage arbitrary and discriminatory enforcement, and the legislature must establish guidelines to prevent it) (citing *Kolender*, 461 U.S. at 357–58).

13. *United States v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967), citing Bonfield, *supra*, 49 Iowa L. Rev. at 417, and Rodgers, *supra*, 52 Iowa L. Rev. at 11–12.

under American law by which a validly enacted statute could be rendered ineffective by non-use, more recent commentators had found some vitality in it.[14]

Then it disposed of the claim on the ground that matters here more than the holding. The defendant, the court said, had adduced not a scintilla of evidence even indicating that the government singled him out by applying an unconstitutional standard.[15]

That was 1967. The doctrinal recognition was on the record, the mechanism was named, and the claim failed for want of proof the claimant had no way to obtain. Everything Part III describes was built afterward, on top of a problem the courts had already identified and already declined to solve.

C. The scholarly diagnosis

The academic literature identified the intent requirement as a remedial device rather than an evidentiary one within six years of its announcement. One early treatment argued that the development of the intent standard after *Davis* is best understood as a stratagem to limit the scope of relief available to the equal protection litigant, and traced the doctrine's growth to judicial hostility toward broad remedial orders rather than to any theory of what discrimination is.[16] Later work developed the point through race consciousness[17] and through the relationship between the intent requirement and the interpretive stakes of *Brown*.[18]

A separate line argues that the intent requirement rests on a psychological premise that the science does not support, because the attitudes that drive discriminatory outcomes are

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14. *Id.* at 325–26, citing 1 Sutherland, *Statutory Construction* §2034 (Horack ed. 1943); Alexander M. Bickel, *The Least Dangerous Branch* 143–56 (1962); Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 Iowa L. Rev. 389 (1963); William Rodgers, *Desuetude as a Defense*, 52 Iowa L. Rev. 1 (1966). The reporter and page are confirmed in two opinions; the year appears as 1963 in *Printz* and as 1964 in *Elliott*, and volume 49 spans both.

15. *Elliott*, 266 F. Supp. at 326.

16. Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 Yale L.J. 328 (1982).

17. Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953 (1993).

18. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935 (1989).

substantially implicit and automatic and therefore fall outside a standard built around conscious purpose.[19]

This Article does not rest on that critique. It accepts the intent requirement as given and asks a narrower question: assuming intent is the element, what has the Court done to the proof of it?

III. The Record

What follows is organized as an *Arlington Heights* record rather than as a doctrinal survey. Each entry is dated, attributed to a decisionmaker, and quoted for the rationale the decisionmaker gave. Factor two of the framework asks for historical background revealing a series of official actions. Factor three asks for the specific sequence. Factor six asks for contemporaneous statements by members of the decisionmaking body. All three are available here in a completeness that is rare, because appellate courts are the one institution that publishes its own administrative history as a matter of course.

Seven decisions, in order.

A. 1976: the element

Washington v. Davis held that official action will not be held unconstitutional solely because it results in a racially disproportionate impact, and that proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.[20] Impact is not irrelevant. It is not the touchstone.

Arlington Heights supplied the evidentiary factors the year after: the impact of the action, the historical background particularly where it reveals a series of official actions taken for invidious purposes, the specific sequence of events leading up to the challenged decision, departures from the normal procedural sequence, substantive departures, and the legislative or

19. Margaret Richardson & Todd L. Pittinsky, *The Mistaken Assumption of Intentionality in Equal Protection Law: Psychological Science and the Interpretation of the Fourteenth Amendment* (2005).

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

administrative history including contemporary statements by members of the decisionmaking body.[21] It also held that a plaintiff need not show the action rested solely on discriminatory purpose, and that proof of purpose as a motivating factor shifts to the defendant the burden of establishing that the same decision would have resulted anyway.[22]

Two features of the *Arlington Heights* list govern everything that follows. Every factor presupposes a discrete decision with a decisionmaker and a date. And every factor is an internal record.

B. 1979: the standard

Feeney defined the element. Purposeful discrimination requires more than intent as volition or intent as awareness of consequences; it means the decisionmaker selected a course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.[23]

Knowledge is expressly outside the standard. A decisionmaker who foresees the injury, proceeds, and is later shown to have foreseen it has not, on this definition, discriminated.

C. 1987: the aggregate

McCleskey presented a multiple regression study controlling for some two hundred thirty nonracial variables and showing a substantial race-of-victim disparity in Georgia capital sentencing. The Court assumed the study valid and held it clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.[24] A defendant must prove that the decisionmakers in his case acted with discriminatory purpose.[25]

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21. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977).
22. *Id.* at 270–71.
23. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).
24. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).
25. *Id.* at 292.

The rationale is stated. There is no limiting principle to the type of challenge brought by McCleskey.[26] The Court is not saying the evidence is weak. It is saying that admitting evidence of this kind has consequences it declines to accept.

Precision is owed here, because the passage sits in the Eighth Amendment portion of the opinion and addresses the slippery slope to disparities of every kind rather than the equal protection proof standard directly. A reader who takes it as a statement about intent doctrine has moved it out of its register. The argument this Article makes does not require that move. Factor six of *Arlington Heights* asks for contemporaneous statements bearing on why the decisionmaker chose as it did, and an institutional-consequences rationale is such a statement in whichever part of the opinion it appears. The Court explained a choice by reference to what admitting the evidence would do to the institution. That is the thing the factor looks for.

McCleskey is where the architecture becomes visible, because the aggregate was the only proof method available for a phenomenon that is by nature aggregate.

D. 1996: the discovery

Armstrong held that to obtain discovery on a selective prosecution claim a defendant must first make a credible showing of different treatment of similarly situated persons.[27] To establish discriminatory effect the claimant must show that similarly situated individuals of a different race were not prosecuted.[28] The Court also held that Rule 16 authorizes examination of government documents material to the defense against the case in chief but not to the preparation of selective-prosecution claims,[29] and it proceeded on a presumption of regularity.[30]

The Court explained the threshold as one that adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.[31]

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26. *Id.* at 318.
27. *United States v. Armstrong*, 517 U.S. 456, 470 (1996).
28. *Id.* at 465.
29. *Id.* at 463.
30. *Id.* at 464 (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926)).
31. *Armstrong*, 517 U.S. at 470.

That sentence is the architecture stated aloud. An institutional interest was weighed against a claimant's interest, and the opinion records which prevailed.

The structural problem is circular. Comparator evidence about who was not charged is held by the charging authority. Discovery is the mechanism for obtaining it. Discovery is conditioned on already having it.

E. 2001: the alternative

Sandoval closed the route that never required intent. Section 601 of Title VI prohibits only intentional discrimination.[32] And there is no freestanding private right of action to enforce the disparate impact regulations promulgated under section 602.[33]

The doctrinal reasoning is about implied rights of action rather than about discrimination. The effect is that a plaintiff who cannot prove purpose has, as against a federally funded recipient, no private route at all.

The consequences were felt fastest in environmental justice litigation, where commentators concluded within a few years that the burden had become virtually insurmountable and that *Davis* and *Sandoval* together had negated the practical reach of both the Equal Protection Clause and Title VI.[34]

F. 2009: the gate

Iqbal generalized plausibility pleading and applied it to purpose. Where the claim is invidious discrimination, the plaintiff must plead and prove that the defendant acted with discriminatory purpose,[35] on the *Feeney* definition, which the Court quoted.[36] Rule 8 does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.[37] And, declining an

32. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

33. *Id.* at 293.

34. Dora Acherman, *Discrimination by Any Other Name: Alternatives to Proving Deliberate Intent in Environmental Racism Cases*, 4 FIU L. Rev. 133 (2008).

35. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

36. *Id.* (quoting *Feeney*, 442 U.S. at 279).

37. *Id.* at 678–79.

invitation to permit limited discovery instead, the Court held that because the complaint was deficient under Rule 8 the plaintiff was not entitled to discovery, cabined or otherwise.[38]

Iqbal and *Armstrong* are the same lock on two doors. Each requires the claimant to possess the evidence before the mechanism for obtaining it will open. *Armstrong* governs the criminal track and *Iqbal* the civil one. *Iqbal* is not a specialized rule; it is the pleading standard for every civil action in federal court, and its reach is measurable. As of August 2026 it has been cited in more than one hundred fifty-six thousand opinions, roughly ten times the next most cited decision in this Article's record.[39]

A reader may object that *Armstrong* does not belong in a civil argument, because prosecutorial discretion carries separation-of-powers protection that administrative decisionmaking does not, and because the presumption of regularity the Court invoked is specific to the executive charging function.[40] The objection is well taken as to rationale and it is the reason the pairing matters.

The two decisions reach the identical procedural result from unrelated premises. *Armstrong* gets there through Rule 16, the charging power, and the presumption of regularity. *Iqbal* gets there through Rule 8, plausibility, and qualified immunity for high-level officials. Neither cites the other's ground. If the same lock appears at the end of two independent chains of reasoning, that is evidence the lock is not an artifact of either chain. A structure that only ever appeared in criminal procedure would be a feature of criminal procedure. This one appears in both, and the paired appearance is what makes it structural rather than doctrinal.

G. 2011: the aggregation

Wal-Mart v. Dukes held that proving a discretionary system produced a disparity is not enough for commonality under Rule 23(a)(2).[41] Contemporaneous commentary placed the decision in

38. *Id.* at 686.

39. CourtListener citation counts, retrieved August 2026: *Iqbal*, 156,387 citing opinions; *Batson*, 16,440; *Mt. Healthy*, 7,492; *Cleburne*, 7,215; *Dukes*, 4,754; *Arlington Heights*, 4,520; *Yick Wo*, 3,802.

40. *Armstrong*, 517 U.S. at 464.

41. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

the same trend as the pleading cases and identified the effect as a heightening of commonality that restricts access to adjudication of the merits.[42]

The significance for this Article is specific. *McCleskey* disqualified the aggregate as evidence. *Dukes* disqualified the aggregate as a procedural vehicle. A pattern claim can be established neither by proving the pattern nor by suing as the group the pattern describes.

The pairing is tighter than chronology suggests. Both decisions confront a claimant whose injury is visible only in aggregate and who therefore must either aggregate the proof or aggregate the parties. *McCleskey* closed the first route on the ground that the aggregate says nothing about the decisionmakers in the claimant's own case. *Dukes* closed the second on the ground that a discretionary system producing a disparity supplies no common question. The reasoning is symmetrical: in each, the aggregate is held to dissolve into individual decisions at exactly the point where it would become actionable. Commentary at the time placed *Dukes* alongside the pleading cases as part of a single trend toward restricting access to merits adjudication.[43]

Note also where this leaves the empirical work. The residual in a wage decomposition, the disparity in a sentencing regression, and the pattern in a promotions dataset are all the same kind of object, and none of them is a route to a remedy.

H. Reading the record

Thirty-five years. Each decision reasoned on its own ground: constitutional interpretation, statutory construction, criminal procedure, civil procedure, class certification. No two of them are in the same doctrinal field. None cites the closure of the others as a reason.

42. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice* (2012).
43. Spencer, *supra*.

Read together they compose a complete enclosure. Intent is required.[44] Intent excludes knowledge.[45] Statistics do not prove intent.[46] Discovery requires proof.[47] The route without intent is closed.[48] Pleading precedes discovery.[49] The class cannot be certified.[50]

That the spread across fields is wide is itself worth noting. A doctrine assembled entirely within equal protection could be revised within equal protection. This one cannot, because four of its seven components are rules of procedure and statutory construction that would have to be revisited on grounds having nothing to do with discrimination.

IV. The Distributional Claim

A. The remedy and the injury travel the same road

Return to the *Arlington Heights* factors. Historical background. Sequence of events. Procedural departures. Substantive departures. Administrative history and contemporaneous statements of the decisionmakers.

Every one is an internal record of the defendant institution.[51] None is observable from outside. Obtaining them requires being in litigation, surviving *Iqbal*, and reaching discovery.[52]

Being in litigation costs money, competence, and endurance. The history of the American bar is in substantial part a history of who has been able to buy those things, and organized legal

44. *Washington v. Davis*, 426 U.S. at 239–42.

45. *Feeney*, 442 U.S. at 279.

46. *McCleskey*, 481 U.S. at 297.

47. *Armstrong*, 517 U.S. at 468–70.

48. *Sandoval*, 532 U.S. at 293.

49. *Iqbal*, 556 U.S. at 686.

50. *Dukes*, 564 U.S. at 355–60.

51. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267–68 (1977).

52. The point generalizes beyond the equal protection setting. Where a legal standard turns on the state of mind of an official actor, the evidence of that state of mind is by definition in the actor's possession, and every procedural rule governing access to it becomes a substantive rule about who can win. On discretion as the operative variable in equality analysis, see Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 Mich. L. Rev. 2409 (2003).

professions have both expanded and restricted access at different moments.[53] A continuance costs the party who cannot carry the delay and costs the institution nothing. The capacity to absorb procedural time is itself a resource, and it is distributed as unequally as any other.[54]

The result is that the class the antidiscrimination guarantee protects is disproportionately the class that cannot reach the proof the guarantee requires. This is not a claim about bad faith by any court.[55] It is a claim about the interaction of two independently reasonable rules: proof must come from inside the institution, and getting inside costs money.[56]

B. What the standard measures instead

If purpose is required, and purpose is provable only from the decisionmaker's own record, then the standard is not measuring how much discrimination occurred. It is measuring how much of it was written down and how reachable the writing is.

That reframing is not rhetorical. It predicts which claims win, and the prediction holds. *Hunter v. Underwood* succeeded on a published convention transcript.[57] *Batson* succeeds on strikes exercised in open court.[58] *Yick Wo* succeeded on an administrative pattern so complete that two hundred applications by Chinese laundrymen were denied and eighty by others granted, which is to say on a record the city itself had generated and could not deny. What these have in common is not the strength of the underlying discrimination. It is the documentary posture of the defendant.

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53. Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148 Daedalus 177 (2019).

54. The clearest measurement of that asymmetry comes from the fee literature, where a flat and facially neutral charge on filing produced a differential drop in claims by disabled workers. Rupert Harwood, *Can International Human Rights Law Help Restore Access to Justice for Disabled Workers?*, 5 Laws 17 (2016).

55. Nor does the argument require one. The scholarly literature has long treated the intent standard as a device for controlling remedial scope rather than as a considered theory of what discrimination is, which is a claim about institutional function rather than about motive. Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 Yale L.J. 328 (1982).

56. The interaction is compounded where the underlying attitudes are implicit rather than deliberate, since the internal record will then contain no statement of the thing the record is being searched for. Margaret Richardson & Todd L. Pittinsky, *The Mistaken Assumption of Intentionality in Equal Protection Law: Psychological Science and the Interpretation of the Fourteenth Amendment* (2005).

57. *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

58. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

Two consequences follow, and both are uncomfortable.

The first is that institutional sophistication is rewarded. An institution that keeps minutes, publishes rationales, and preserves internal debate is more exposed than one that decides informally and writes nothing. A standard that operates this way gives its clearest protection to the least documented decisionmakers, which is the opposite of what an accountability rule should do.[59]

The second is that the standard is systematically blind to the discrimination that predominates. If a substantial share of discriminatory outcomes is produced by attitudes that are implicit rather than deliberate, then the internal record will not contain the thing the record is being searched for, however completely it is kept.[60] A perfectly documented institution staffed entirely by people acting on unexamined assumptions produces a clean record and an unequal outcome, and the standard registers the record.

C. Legitimation

A remedy that exists but cannot be reached does different work than no remedy.

If *Yick Wo* had been overruled, the absence would be a target. Legislatures could be asked to fill it. Advocates could point at a hole. Instead *Yick Wo* is good law, taught and cited, and the sentence about the evil eye and the unequal hand is available to anyone who wants to say that American law takes unequal administration seriously.

It does take it seriously. It has since 1886. And the proof requirements assembled since 1976 mean that taking it seriously changes very little in practice. The recognition is what forecloses the reform argument. That is legitimation, and this Article's structural claim is that it is more stable than denial, because it cannot be attacked as an absence.

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59. This is a variant of the general problem that legality requirements can be satisfied by form rather than substance. For an argument that the equal protection inquiry should turn on whether a governmental action is legitimate rather than on whether an official harbored a proscribed purpose, see Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination* (2018).

60. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Margaret Richardson & Todd L. Pittinsky, *The Mistaken Assumption of Intentionality in Equal Protection Law* (2005).

V. Five Literatures, One Pattern

The distributional claim is testable, and five bodies of scholarship have tested it separately: the general access-to-courts literature, and then one for each of four protected characteristics.

A. Race

The environmental justice literature documented the practical closure first and most directly, concluding that in the decades after *Davis* the burden in that context became virtually insurmountable.[61] The capital literature reached the same conclusion by a different route, finding that defendants alleging discrimination are required to prove something virtually impossible to prove and that the burden is practically impossible to meet.[62] The vote dilution literature traced the intent requirement's spread from *Davis* into an area that had previously run on effects.[63]

B. Access to courts as such

Before the four protected characteristics, the general literature supplies the mechanism in its purest form, and it does so in American courts rather than foreign ones.

The in forma pauperis literature documents the problem this Article calls the internal record, without using that name. Indigent and unrepresented prisoners lose deliberate-indifference claims not because the claims are weak but because courts require expert evidence that a person cannot obtain from a cell, and the fee statute that is supposed to enable their access does not reach the evidence-gathering they would need.[64] Fee restrictions layered on top of that, including under the Prison Litigation Reform Act, have been upheld

61. Acherman, *supra*.

62. Gregor Maučec, *Proving Unlawful Discrimination in Capital Cases: In Quest of an Adequate Standard of Proof*, 33 Utrecht J. Int'l & Eur. L. 5 (2017).

63. Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard after Washington v. Davis*, 76 Mich. L. Rev. 694 (1978).

64. Shon Hopwood, *A Sunny Deposition: How the "In Forma Pauperis" Statute Provides an Avenue for Indigent Prisoners to Seek Depositions Without Accompanying Fees* (2011).

against constitutional challenge on rational-basis grounds even where their application bears no relation to the interest asserted for them.[65]

That is the distributional claim without any protected characteristic in it at all. A neutral cost rule plus an evidentiary requirement that can only be satisfied from inside produces a class of claimants who cannot win claims that may well be meritorious.

C. Disability

The disability literature supplies the cleanest empirical test of the distributional claim, because it studied a cost imposed directly on court access rather than a proof rule. A study of two hundred sixty-five participants following the introduction of employment tribunal fees in the United Kingdom found that fees deterred substantial numbers of disabled workers from bringing discrimination claims, and that the resulting reluctance to litigate appeared to embolden employer conduct that might have been found unlawful had it been tested.[66]

That is the mechanism this Article describes, isolated and measured. A neutral cost on access produced a disparate reduction in claims, and the reduction in claims produced an increase in the underlying conduct.

D. Gender

The gender literature contributes the aggregate that the proof architecture disqualifies. Decomposition studies of the pay gap identify a persistent unexplained residual after controlling for measured human capital and sector.[67] That residual is exactly the form of evidence *McCleskey* held insufficient and *Dukes* held uncertifiable. The doctrinal literature independently documented the burden-allocation fights that structure sex discrimination proof.[68]

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65. Walker Newell, *An Irrational Oversight: Applying the PLRA's Fee Restrictions to Collateral Prisoner Litigation*, 15 CUNY L. Rev. 53 (2011).

66. Rupert Harwood, *Can International Human Rights Law Help Restore Access to Justice for Disabled Workers?*, 5 Laws 17 (2016).

67. Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence* (2006).

68. Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1 (1995); Marilyn V. Yarbrough, *Disparate Impact, Disparate Treatment, and the Displaced Homemaker*, 49 Law & Contemp. Probs. 107 (1986).

E. Sexual orientation

The sexual orientation literature contributes the tier problem. Scholarship on heightened scrutiny identified a paradox in which the doctrinal framework's protections and its costs do not align as expected, and which turns on how the classification is characterized rather than on the severity of the disadvantage,[69] and later work argued that the individualist paradigm of antidiscrimination law is itself a limitation on the claims that can be brought.[70] Post-*Bostock* scholarship examined whether disparate impact theory reaches sexual orientation and gender identity claims under the Fair Housing Act,[71] which is the same question *Sandoval* answered for Title VI.

F. What convergence establishes

Five literatures, four protected characteristics, and five methodologies: doctrinal analysis, comparative human rights, survey research, econometric decomposition, and the procedural-access literature. Each concludes that the proof required is unavailable to the class required to supply it.

The strength of the inference depends on how independent these literatures actually are, and that is an empirical question this Article does not resolve. What can be said is that the methods do not share a common failure mode. A survey of two hundred sixty-five disabled workers and a regression decomposition of the wage distribution are not vulnerable to the same objection, and neither is vulnerable to the objections available against doctrinal argument. Convergence across methods of that kind is the strongest evidence available for a structural claim, because no single field's limitations can account for all four.[72]

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69. Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 Mich. L. Rev. 1528 (2004).

70. Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 Cal. L. Rev. 1271 (2006).

71. Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After Bostock v. Clayton County*, 69 Kan. L. Rev. (2021).

72. On the general value and the limits of methodological triangulation as support for structural claims in legal scholarship, this Article claims no more than the standard inference: agreement among methods with non-overlapping weaknesses raises confidence, and does not establish a mechanism.

VI. Objections

A. That the seven were selected

The most dangerous objection is that the record is curated. Seven decisions are offered as an enclosure while decisions running the other way sit outside the frame. Two in particular.

Batson v. Kentucky arrived one year before *McCleskey* and did the opposite thing in the same courtroom.[73] It held that a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial,[74] shifted the burden to the State to supply a neutral explanation,[75] and refused to let the State rebut by denying discriminatory motive or affirming its good faith.[76] It did this by overruling the evidentiary burden *Swain v. Alabama* had imposed twenty-one years earlier, which had required a defendant to show systematic exclusion across case after case rather than in his own trial.[77] A workable framework for proving discriminatory selection therefore exists, and the Court built it deliberately, by dismantling a proof barrier of its own construction.

Inclusive Communities arrived fourteen years after *Sandoval* and preserved disparate impact under the Fair Housing Act, relying on the statute's results-oriented language and Congress's 1988 ratification.[78]

Neither is answered by distinguishing it, and this Article does not try.

Batson marks a genuine limit on the thesis, and the limit is informative. It operates where the selection happens in a single room, in front of a judge, on a record, in real time, against a comparator pool that is physically present and enumerable. Those conditions describe voir dire

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73. *Batson v. Kentucky*, 476 U.S. 79 (1986).
74. *Id.* at 96.
75. *Id.* at 97.
76. *Id.* at 97–98.
77. *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson*, 476 U.S. at 92–93.
78. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015).

and almost nothing else. Where the comparators can be counted from the counsel table, the proof problem dissolves; where they are inside an institution's files, it does not. *Batson* is therefore evidence for the distributional claim rather than against it, because it isolates the variable: the framework works exactly where the internal record is not needed.

Inclusive Communities cuts differently and it extends the record rather than breaking it. In preserving the claim the Court imposed a robust causality requirement, holding that a disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy causing that disparity, and that racial imbalance does not, without more, establish a prima facie case.[79] It directed courts to examine the prima facie case with care, and held that a plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a claim.[80] It gave defendants a business-necessity analogue,[81] and it limited remedies, warning that orders imposing racial targets or quotas might raise difficult constitutional questions.[82]

Read against Part III those are familiar instruments. The pleading-stage screen is *Iqbal*'s. The disqualification of bare statistical imbalance is *McCleskey*'s. The one surviving private impact route was preserved and, in the same opinion, fitted with the architecture's own hardware. That is a stronger result for this Article than a clean closure would have been, and it is why the record runs past 2011.

The honest scope statement follows. This Article is about the constitutional intent route and the private statutory impact route. It is not about every antidiscrimination doctrine, and it does not claim that no claimant ever wins.

79. *Id.* at 542.
80. *Id.* at 543.
81. *Id.* at 541.
82. *Id.* at 544–45.

B. That claims sometimes succeed

The most serious objection is empirical. Purposeful discrimination claims are not uniformly lost, and a theory predicting total closure is falsified by any win.

The answer is that the wins are informative rather than contrary, and the clearest of them is *Hunter v. Underwood*.[83] A unanimous Court struck down a facially neutral Alabama provision disenfranchising those convicted of crimes of moral turpitude, finding racial purpose behind its 1901 enactment.

Examine what supplied the proof. The evidence of legislative intent available to the courts below consisted of the proceedings of the convention, several historical studies, and the testimony of two expert historians.[84] The delegates to the all-white convention were not secretive about their purpose; its president stated in his opening address that the object was, within the limits imposed by the Federal Constitution, to establish white supremacy in this State.[85]

The claim succeeded because the decisionmakers announced the purpose from a podium and a stenographer wrote it down. That is the evidentiary condition the architecture requires, and it is a condition that eighty-four years of intervening practice has made vanishingly rare. *Hunter* also confirms the burden shift, applying *Mount Healthy* to require the State to prove the same decision would have resulted absent the impermissible purpose.[86]

So the wins mark the boundary rather than disprove it. Where a decisionmaker has published its own animus, the doctrine works. The distributional claim in Part IV is about every case that is not that one.

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

84. *Id.* at 229.

85. *Id.* at 229 (quoting 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21 to September 3, 1901, at 8 (1940)).

86. *Id.* at 228 (applying *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)).

C. That equal protection would reach it anyway

It might be said that the distributional claim overstates matters because a claimant who does establish purpose wins. For the classes this Article treats, that is not uniformly so. Disability is not a suspect or quasi-suspect classification, and classifications reaching it are reviewed for rational basis.[87] A claimant who clears every gate in Part III and proves what *Feeney* demands may still face the most deferential standard the Constitution supplies. The gates and the tier compound rather than substitute.

D. That intent is the right element

The strongest defense of the architecture is that discrimination is a wrong of mind and that a doctrine reaching unintended outcomes reaches too far. That position has serious defenders and predates the criticism.[88] The canonical objection to it is Lawrence's, that a doctrine built on conscious purpose cannot reach discrimination that is unconscious and that this is most of it. The dispute remains live in current litigation over facially neutral statutes with documented discriminatory origins.[89][90] This Article does not dispute that intent may be the correct element. It disputes the compatibility of requiring an element with foreclosing the means of proving it. A legal system may require intent, or it may lock the evidence of intent inside the defendant, but the combination is not a standard of proof. It is a bar.

E. That the record fails the standard

This objection is correct, and it is the thesis rather than a difficulty for it.

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87. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

88. Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976), published the same year as *Washington v. Davis*. For a later treatment sympathetic to the intent requirement's role in equal protection generally while criticizing its extension to class-of-one claims, see William D. Araiza, *Flunking the Class of One/Failing Equal Protection* (2012). For an argument that the correct response is a process-based expansion of heightened scrutiny rather than abandonment of intent, see Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection and Substantive Due Process* (2017).

89. See, e.g., Kevin Scott Jobe, *Anti-discrimination Jurisprudence: US v. Carrillo-Lopez*, 22 Int'l J. Discrimination & L. 404 (2022) (discussing the application of the *Arlington Heights* framework to a 1929 statute).

90. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

Assume the record in Part III is as strong as the argument claims. It supplies a series of official actions over thirty-five years. It supplies departures from what the decisionmaker itself treats as important, most starkly in *McCleskey*, where the Court assumed a two-hundred-thirty-variable regression valid and rejected it anyway. It supplies contemporaneous statements of rationale from members of the decisionmaking body: that there is no limiting principle to the type of challenge brought,[91] and that the discovery threshold adequately balances the Government's interest in vigorous prosecution against the defendant's interest in avoiding selective prosecution.[92] On the ordinary *Arlington Heights* inventory this is a strong showing.

It still fails, and the reason is *Feeney*. Purposeful discrimination requires more than intent as awareness of consequences; it requires action taken because of, not merely in spite of, the adverse effects on an identifiable group.[93] Everything the record establishes is awareness. The decisionmaker knew the consequence, said so, gave its reason, and proceeded. On the standard it wrote, that is not discrimination.

So the demonstration completes. Take the most documented decisionmaker in American public life, one that publishes its own administrative history, states its rationales in print, and leaves a thirty-five-year sequence in the open. Build the strongest available *Arlington Heights* record against it. Apply the standard it created. The record fails.

A reader may object that this is a category error rather than a demonstration, on the ground that judicial decisions are not official action within the *Arlington Heights* sense at all, so the framework was never addressed to this decisionmaker and its failure here proves nothing.

The objection misidentifies what is being measured. The claim is not that the Court is liable. It is that the standard has a reach, and that the reach can be tested. Put the strongest formulation plainly. *Arlington Heights* asks for administrative history and contemporaneous statements of the decisionmakers. The Supreme Court is the one American institution that publishes its complete administrative history as a matter of routine, states its rationales in signed

91. *McCleskey*, 481 U.S. at 318.

92. *Armstrong*, 517 U.S. at 470.

93. *Feeney*, 442 U.S. at 279.

prose, and preserves the dissents that contest them. No legislature, agency, police department, hospital system, or employer produces a record remotely as good. If a standard built around published rationale cannot register purpose in the single decisionmaker whose rationale is always published, then what the standard measures is publication practice, not purpose.

That is a property of the instrument, and it is established without accusing anyone. It is a structural finding, produced by running the standard against its own author under maximally favorable evidentiary conditions and watching it hold. If the test cannot reach purposeful action where the record is this complete, the question of what it reaches where the record is an unpublished internal file is answered before it is asked.

That is what this Article means by self-immunizing, and it is why the showing is a proof by construction rather than a claim about anyone's motives.

F. That the burden shift is a real prize

Arlington Heights does shift the burden to the defendant once purpose is shown as a motivating factor. That prize is genuine and underused. It is also, on the analysis above, available only after the claimant has cleared every gate that this Article describes, which is the point.

VII. Conclusion

The law saw this in 1886 and said so in a sentence that is still quoted.[94] It said so again about vagrancy,[95] about stop-and-identify,[96] and about loitering.[97] A federal court connected selective enforcement to *Yick Wo* and to the desuetude literature in 1967 and then dismissed the claim for want of evidence the claimant could not have obtained.[98] It has never stopped saying it, and the saying has never been the difficulty.

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94. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).
95. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).
96. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).
97. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).
98. *United States v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967).

What was built between 1976 and 2011 is a set of proof requirements, each defensible on its own ground, that together mean the saying rarely produces a remedy.[99] By 2015 the same instruments had been installed inside the one private route that survived.[100] The people to whom the doctrine is addressed are, by the operation of that architecture, disproportionately the people who cannot reach it, because reaching it requires the resources the injury has already taken.[101]

Two things are worth separating in closing.

The first is that this Article accuses no one. Its central demonstration is that the strongest available *Arlington Heights* record, assembled against the one decisionmaker in American public life whose administrative history is published in full, fails the standard that decisionmaker wrote, and fails it for the reason *Feeney* supplies: awareness of consequences is not purpose.[102] No motive is alleged and none is needed. What the demonstration establishes is a property of the instrument.

The second is what that property is. A standard provable only from the decisionmaker's own record measures documentation, not purpose. It is most exacting where the record is fullest and most forgiving where nothing was written down, and it cannot register discrimination that its author never consciously formed. Those are not failures of application. They are what the standard is.

Desuetude would have prevented dormant rules from remaining available for selective revival, and it requires only that a legislature wanting a rule enforced say so again in public.[103] It

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99. *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *United States v. Armstrong*, 517 U.S. 456 (1996); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

100. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542–43 (2015) (robust causality requirement; pleading-stage examination; racial imbalance insufficient without more).

101. The mechanism has been measured directly in two systems. Rupert Harwood, *Can International Human Rights Law Help Restore Access to Justice for Disabled Workers?*, 5 Laws 17 (2016) (tribunal fees; differential deterrence of disabled claimants); Shon Hopwood, *A Sunny Deposition* (2011) (indigent litigants required to produce evidence they have no procedural means of obtaining).

102. *Feeney*, 442 U.S. at 279.

103. *Committee on Legal Ethics of the West Virginia State Bar v. Printz*, 416 S.E.2d 720, 726 (W. Va. 1992).

was declined. *Yick Wo* recognizes selective administration. It was retained. Between the doctrine that was refused and the doctrine that was kept but made unprovable lies an interval that is itself procedurally immune, because a rule not being enforced cannot be challenged and a rule being enforced can be challenged only by its target.[104]

That interval is where this subject lives. Closing it is a question about proof and about cost. It is not a question about whether the law has yet understood the problem. The law understood the problem before the twentieth century began, and said so in a sentence it has been quoting ever since.

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104. *Poe v. Ullman*, 367 U.S. 497, 507–08 (1961).

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