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From *Washington* to *Arlington Heights* and Beyond: Discriminatory Purpose in Equal Protection Litigation

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*Robert G. Schwemm**

When the Supreme Court decided *Washington v. Davis*[1] on June 7, 1976, it began a new era in civil rights law. Rejecting the contention that state action is unconstitutional solely because it operates to injure more blacks than whites, the Court held that proof of discriminatory purpose is necessary to establish a claim of racial discrimination under the equal protection clause. In two cases decided the following term—*Village of Arlington Heights v. Metropolitan Housing Development Corp.*[2] and *Castaneda v. Partida*[3] —the Court reaffirmed its commitment to the discriminatory purpose requirement, but was badly divided on how to apply the requirement in different contexts. Only five members of the Court joined Justice Powell's opinion applying the new standard in *Arlington Heights*; Justice White, the author of *Davis*, dissented. The division within the Court was even more dramatic in *Castaneda*, in which the Court for the first time found the necessary discriminatory purpose, but only by a five-to-four vote with three separate dissenting opinions, including one by Justice Powell. Only Justice Blackmun joined the Court's opinion in all three cases.[4]

This article reviews the history of the purpose-effect controversy in the Supreme Court opinions and lower court decisions that preceded *Washington v. Davis* and then analyzes the three recent Supreme Court decisions to see how the discriminatory purpose requirement has been applied and to identify the unresolved issues in the application of the requirement to future equal protection

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1. 426 U.S. 229 (1976).

2. 429 U.S. 252 (1977).

3. 97 S. Ct. 1272 (1977).

4. Justice Stevens also did not dissent from any of these decisions. He joined the Court's opinion in *Davis* and in *Castaneda* and did not participate in *Arlington Heights*.

cases. The introduction traces the background of the purpose-effect problem and the significance of its resolution in *Davis*. The facts and holding of *Davis* are then considered, followed by a review of the relevant precedents, including those relied on or disapproved of in *Davis*. The second half of the article is devoted to a detailed analysis of the opinions in *Davis, Arlington Heights*, and *Castaneda*, and examines the legal standard adopted, the application of that standard, and the major issues left unresolved by the Court.

I. INTRODUCTION

In deciding cases under the equal protection clause, the Supreme Court applies the now familiar "two-tier" analysis: state action is subjected to strict judicial scrutiny if it impinges on a "fundamental right" or discriminates against a "suspect class," but it need only be rationally related to a legitimate state interest if neither a fundamental right nor a suspect class is involved.[5] In theory, the state can satisfy the strict scrutiny test by demonstrating that its action was necessary to advance a compelling state interest.[6] In practice, however, the Court's determination that the state has invaded a fundamental right or discriminated against a suspect class is tantamount to a decision that the state has violated the equal protection clause.[7] On the other hand, if the state's action adversely affects neither a fundamental right nor a suspect class, the state's burden of justification under the "mere rationality" standard is so slight that the Court almost invariably upholds the action, no matter how unwise or imperfect it may be.[8]

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5. *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). *But see* Gunther, *In Search of Evolving Doctrine—A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); note 8 *infra*. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

6. *E.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944); *cf.* McLaughlin v. Florida, 379 U.S. 184, 191-93 (1964) (racial classifications in most circumstances are irrelevant to any constitutionally acceptable legislative purpose).

7. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting); Gunther, *supra* note 5, at 8.

8. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 487 (1970); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting). The Court has, however, given the "rationality" standard some teeth in certain contexts, such as in challenges to state laws that discriminate on the basis of sex, *e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Reed v. Reed, 404 U.S. 71 (1971), or on the basis of legitimacy, *compare* Trimble v. Gorden, 97 S. Ct. 1459 (1977) *with* Fiallo v. Bell, 97 S. Ct. 1473 (1977) *and* Matthews v. Lucas, 427 U.S. 495 (1976). Some commentators have suggested that an intermediate standard of review is being employed in these areas, *see, e.g.*,

The critical issue in most equal protection cases, therefore, has become whether a fundamental right or a suspect class is involved at all. In resolving this issue in recent decisions, the Court has focused its attention on two types of questions. First, it has defined what rights are fundamental and what classes are suspect for purposes of equal protection analysis. Thus, the Court has accorded fundamental status to criminal defendants' rights,[9] interstate travel,[10] voting,[11] first amendment interests,[12] and certain uniquely private rights,[13] but has denied this status to welfare benefits,[14] housing,[15] education,[16] and public employment.[17] The Court has recognized classifications based on alienage,[18] race,[19] and national origin[20] as suspect, but has refused to scrutinize strictly classifications based on sex,[21] legitimacy,[22] wealth,[23] or age.[24] The process of identifying fundamental rights and suspect classes has led to the second question in cases in which the rights of a suspect class are affected:

Gunther, *supra* note 5, *passim*, although the Supreme Court has not explicitly recognized that such a middle-level standard exists. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

9. Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

10. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). *But see* Sosna v. Iowa, 419 U.S. 393 (1975).

11. Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

12. Police Dep't v. Mosley, 408 U.S. 92 (1972); Williams v. Rhodes, 393 U.S. 23 (1968).

13. Eisenstadt v. Baird, 405 U.S. 438 (1972); *see* Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967).

14. Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

15. Lindsey v. Normet, 405 U.S. 56 (1972).

16. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

17. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

The Court purported to explain why some rights are fundamental and others are not for purposes of equal protection analysis in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). According to Justice Powell's opinion, "the answer lies in assessing whether [the right is] explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34. If the right is guaranteed, strict scrutiny is appropriate. If it is not, the right is not considered "fundamental," and the rational basis test applies.

18. *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). *But see* Mathews v. Diaz, 426 U.S. 67 (1976).

19. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

20. *E.g.*, Oyama v. California, 332 U.S. 633 (1948).

21. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Johnson, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A. L. REV. 235 (1975). *But see* note 8 *supra*.

22. Mathews v. Lucas, 427 U.S. 495 (1976). *But see* note 8 *supra*.

23. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971).

24. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

how is a court to determine whether the challenged state action actually discriminates against a well-recognized protected class, such as a racial minority, for purposes of equal protection analysis?

Several Supreme Court opinions before *Washington v. Davis* considered this second question, but none addressed the issue directly and the guidance provided by these opinions was sparse and arguably inconsistent.[25] Clearly, as the Court noted in 1972 in *Jefferson v. Hackney*, "unproved allegations of racial discrimination" will not suffice to invoke the strict scrutiny standard and thus invalidate a racially neutral and otherwise legitimate law.[26] On the other hand, in the course of striking down a city charter provision banning enforcement of a local fair housing ordinance, the Court indicated in 1969 in *Hunter v. Erickson*[27] that a facially neutral law that burdens minorities is as invidious for equal protection purposes as a law that discriminates on its face. Two major school desegregation decisions of the early 1970's seemed to distinguish between two groups of cases. In the first group proof of intentional discrimination was unnecessary to establish an equal protection violation because a segregated school system once had been mandated by law.[28] In the second group—cases of de facto segregation—proof that the segregated schools were caused by intentional state action was necessary.[29]

The importance of the question whether discriminatory impact alone was sufficient to trigger strict scrutiny of a facially neutral law without proof that the law was also racially motivated was heightened during this time by two developments. First, civil rights groups and litigants realized that the Supreme Court's willingness to strike down state laws requiring racial separation in the aftermath of *Brown v. Board of Education*[30] would not guarantee full and equal opportunities to minorities. A variety of state actions that appeared racially neutral could and did disadvantage those groups whose his-

25. For a more detailed review of these pre-*Davis* precedents, see text accompanying notes 74-157 *infra*.

26. 406 U.S. 535, 547 (1972). In *Jefferson*, the Court upheld the Texas system of computing welfare benefits against a number of statutory and constitutional challenges. Rejecting the equal protection claim, Justice Rehnquist's opinion for a five-man majority noted that, absent proof that the system was "the result of racial or ethnic prejudice," the fact that the least favored of Texas's four aid programs had a substantially larger percentage of minority recipients than did the other programs did not require the system to meet the strict scrutiny test. *Id.*

27. 393 U.S. 385 (1969).

28. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

29. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

30. 347 U.S. 483 (1954).

tory of deprivation made them the special concern of the equal protection clause. As Professor Brest recently noted:

> The first order of business in the era following *Brown* was to halt the ongoing, pervasive, and often overt practices of discriminatory exclusion of blacks from schools, voting booths, jobs, restaurants, housing, and the like. . . . By the late 1960's, the civil rights enforcement effort had eliminated the most flagrant practices. Covert discrimination continued to flourish, however, and the very successes of the 60's dispelled any notions that blacks would quickly become integrated into the economic and social life of the nation.[31]

The second development was the Court's hostile response in the early 1970's to litigants seeking to attack "covert discrimination" by expanding the list of rights regarded as fundamental under the equal protection clause. If blacks generally received an inferior education, lived in lower quality housing, and depended more on public assistance than did whites, then according a special status under the equal protection clause to these basic needs would benefit blacks indirectly. The suggestion of official discrimination against minorities that lurked in the background of many of these cases was therefore no accident.[32] When the Court refused to extend fundamental right status to housing, education, or any other human need and determined that wealth was not a suspect classification,[33] the focus of equal protection challenges to facially neutral laws that disadvantaged minorities narrowed substantially.

If the issue of what constituted discrimination against blacks under the equal protection clause narrowed, the contexts in which claims of discrimination arose did not. With little guidance from the Supreme Court, lower courts struggled with numerous claims that official acts affecting the availability of public services, employment, and housing denied equal protection because of their adverse impact on minorities.[34] Time and again, these cases required the lower courts to decide whether a statute or official practice not shown to be racially motivated nevertheless harmed a suspect class because its impact fell more heavily on blacks than on whites. By 1976, when the Supreme Court decided to confront the purpose-effect issue directly in *Washington v. Davis*, it had become one of

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31. Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2 (1976) [hereinafter cited as *Antidiscrimination Principle*].

32. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 15 n.38, 57 n.113 (1973).

33. *See* notes 14-17 & 23 *supra*.

34. *See, e.g.*, cases cited in Washington v. Davis, 426 U.S. 229, 244 n.12 (1976).

the most controversial and important civil rights issues of the decade.[35]

II. *Washington v. Davis*

The plaintiffs in *Washington v. Davis* challenged the validity of "Test 21," a written verbal ability test developed by the Civil Service Commission for general use throughout the federal service, which the District of Columbia Metropolitan Police Department used to screen its recruits. Two black candidates for police positions who had failed the test intervened in a suit originally filed by black officers alleging that the promotion policies of the department were racially discriminatory. The intervenors claimed that some of the department's recruiting practices, including its use of Test 21, excluded a disproportionately high number of black applicants from the force and thereby discriminated against them on the basis of race in violation of their constitutional and statutory rights.[36]

The Metropolitan Police Department required all applicants to answer correctly at least forty of the eighty questions on Test 21, and the failure rate of black recruits was over four times as high as the failure rate of whites.[37] The unsuccessful candidates moved for summary judgment on their constitutional challenge to Test 21, relying solely on the test's "highly discriminatory impact in screening out black candidates" and their allegation that the test results bore no relationship to on-the-job performance; they made no claim of "intentional discrimination or purposeful discriminatory acts."[38] The defendants, who included the District of Columbia and federal officials responsible for making appointments to the department, also filed motions for summary judgment, arguing that the rejected applicants were entitled to relief on neither constitutional nor statutory grounds.

The district court upheld the test.[39] The plaintiffs' proof that

35. *See Antidiscrimination Principle, supra* note 31, at 4-5.

36. Because the defendants were federal and District of Columbia officials, the basis of the constitutional claim was the due process clause of the fifth amendment, which contains "an equal protection component" prohibiting invidious discrimination by the United States. Washington v. Davis, 426 U.S. 229, 239 (1976) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)). The plaintiffs and intervenors also relied on the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1970), and on a District of Columbia statute, D.C. CODE § 1-320 (1973), both of which prohibit employment discrimination based on race.

37. Among the police applicants who took Test 21 in the District of Columbia from 1968 to 1971, 57% of the blacks failed the test as compared to a failure rate of 13% for whites. Davis v. Washington, 512 F.2d 956, 958-59 (D.C. Cir. 1975).

38. Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972).

39. Davis v. Washington, 348 F. Supp. 15 (D.D.C. 1972).

Test 21 had not been validated in terms of job performance and that the failure rate of blacks was substantially higher than that of whites, along with the fact that the racial mix of the police force was not the same as the racial mix of the city, was considered sufficient "to shift the burden of the inquiry to defendants."[40] Judge Gesell held that the defendants had met this burden, however, by showing that forty-four percent of the successful applicants in recent years were black, a figure approximating the racial mix of the recruiting area,[41] and by showing that the department had made "a vigorous, systematic, and persistent affirmative effort to enroll black policemen."[42] Furthermore, the district court accepted the department's arguments that its officers increasingly needed the verbal skills which Test 21 purported to examine and that the plaintiffs' proposal that the department either abandon the test or lower the passing score would frustrate the department's legitimate interest in improving its professional standards.[43] Judge Gesell concluded that the test was neither "designed nor operates to discriminate against otherwise qualified blacks"[44] and that "[t]he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability."[45]

The court of appeals reversed.[46] In a two-to-one decision, it held that Test 21's "racially disproportionate impact" placed a heavy burden on defendants to prove that the test was related to actual

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40. *Id.* at 16.

41. *Id.* The district court considered the relevant recruiting area to be within a 50-mile radius of Washington, D.C. On appeal, the plaintiffs argued that the pertinent population figures should be those of the city alone, where the proportion of blacks was much higher than in the surrounding areas. *See* 512 F.2d at 960 n.24. The court of appeals declined to resolve this dispute, finding it immaterial to the ultimate issue presented, and the Supreme Court ignored the matter as well.

42. 348 F. Supp. at 17. Indeed, Judge Gesell even suggested that one of the reasons for the higher black failure rate on Test 21 was that the department's affirmative recruiting program had encouraged educationally deficient blacks to apply. *Id.* The court concluded that "[t]he Metropolitan Police Department is a model nationwide for its success in bridging racial barriers." *Id.* at 18.

43. Thus the district court did not view the issue presented in *Davis* as whether a challenged practice could be held unconstitutional on the basis of its discriminatory impact without proof that the practice was racially motivated. The trial court instead focused on whether the test had been sufficiently "validated," that is, shown to be a fair test of those skills actually needed by police officers. The opinion included only three citations, all of which dealt with the validation of personnel tests in employment discrimination cases. These cases supported Judge Gesell's finding that, although Test 21 had not been proven to be a predictor of successful job performance, it was "reasonably and directly related to the requirements of the police recruit training program." *Id.* at 17.

44. *Id.*

45. *Id.* at 18.

46. Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975).

job performance. Furthermore, the court held that the defendants had not met this burden by introducing a "validation study" showing that the test was an accurate predictor of success in the department's recruit training program. Citing a number of recent decisions invalidating employment tests with comparative failure rates for blacks and whites less dramatic than Test 21's four-to-one ratio, the court concluded that the plaintiffs had shown the racially disproportionate impact of Test 21 as a matter of law, even if the percentage of blacks in the department reflected the racial mix of the overall local population. The court maintained that evidence of the defendants' affirmative efforts to recruit black officers—indeed, the whole question of the employer's intent—was irrelevant to the controlling issue, which was "the discriminatory *effect* of Test 21 itself."[47]

To support its holding that the racial effect of the test was unconstitutional, the court of appeals relied on *Griggs v. Duke Power Co.*[48] In *Griggs* a unanimous Supreme Court held that the use of a standardized intelligence test that disqualified a greater percentage of black job applicants than white applicants violated Title VII of the Civil Rights Act of 1964 despite the absence of any intentional discrimination by the employer. Although Title VII did not apply to governmental employers until two years after the plaintiffs filed their complaints in *Davis*,[49] the court regarded the standards set forth in *Griggs* as controlling both the constitutional and section 1981 claims, noting that "many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII."[50]

The heart of the court of appeals' opinion in *Davis* was the court's conviction that an employment test adopted without any intent to discriminate could nevertheless unfairly injure blacks. The opinion noted that low scores on a generalized intelligence test would disqualify otherwise qualified black applicants by reflecting

47. *Id.* at 960.

48. 401 U.S. 424 (1971). The Court in *Griggs* decided that Title VII regulated the objective consequences of employment practices and did not simply outlaw practices established for racial reasons. The Court held that once a plaintiff made a showing of discriminatory effect, the burden shifted to the employer to show that the discriminatory practice "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* at 431. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance," the Court said, "the practice is prohibited." *Id.*

49. *See* 512 F.2d at 957 n.2.

50. *Id.*

their segregated and inferior educational opportunities more than their ability to be police officers.[51] The court expressly chose the phrase "racially disproportionate impact" instead of "discrimination" to avoid the pejorative connotations that were not warranted by a purely statistical showing of Test 21's disparate racial effect.[52] The court even commended the department on the success of its affirmative hiring efforts apart from the use of Test 21, but noted that "it is self-evident that use of selection procedures that do not have a disparate effect on blacks would have resulted in an even greater percentage of black police officers than exists today."[53]

The court of appeals held that defendants had failed to justify the exclusionary impact of Test 21, because the evidence did not demonstrate that test results were related to successful performance of a police officer's job. The defendants had submitted a 1967 Civil Service Commission study showing a relationship between applicants' scores on Test 21 and recruits' scores on examinations given during the department's training program. The court, however, maintained that this study, far from validating Test 21, "prove[d] nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations."[54] Furthermore, the court denied that the test's relation to training performance was relevant, because training performance alone was of little or no value in predicting effective job performance.[55]

The court of appeals agreed with the trial judge that improving professional standards was a legitimate departmental interest. Having concluded that Test 21 was not job related, however, the court predicted that elimination of the test would not lower police standards.[56] The conclusion that Test 21's racially disproportionate impact involved the department in invidious discrimination against blacks followed only because that impact was not the result of job-related requirements. Hence, the basic thrust of the court of appeals' opinion had a certain compelling simplicity: If use of Test 21 hurt blacks more than whites and if it did not help the department pick better police officers, then the equal protection principle of the Constitution required that it be abandoned.[57]

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51. *Id.* at 961.
52. *Id.* at 958 n.6.
53. *Id.* at 961.
54. *Id.* at 962.
55. *Id.* at 964-65.
56. *Id.* at 965.
57. This is not to say that the court of appeals treated the issue in *Davis* as a simple

By the time *Davis* reached the Supreme Court, it seemed an unlikely vehicle for major pronouncements on equal protection principles. Even the defendants did not dispute the applicability of the Title VII-*Griggs* standards to the constitutional claim.[58] Instead, their petition only raised the issue of the application of those standards, in particular whether Test 21 was job related. Nevertheless, the Court determined that it should decide whether the "effect" standard developed in *Griggs* applied to an equal protection claim. On behalf of a seven-man majority,[59] Justice White found that the case presented an appropriate occasion to "notice a plain error not presented"[60] and concluded that because the standards for sustaining a claim of racial discrimination under the Constitution were more demanding than those under Title VII, the judgment of the court of appeals should be reversed. Although the Court reaffirmed the *Griggs* holding that hiring practices that disqualified substantially disproportionate number of blacks and that were not validated in terms of job performance violated Title VII without a showing of discriminatory purpose, it held that "proof of discriminatory racial purpose is . . . necessary in making out an equal protection violation."[61]

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one. On the contrary, one of the striking features of the majority's opinion was its analysis of the huge number of recent precedents in discrimination suits against public employers, most of which had been decided in the three years since the district court's decision. Many of these cases also involved challenges to civil service tests in which the ultimate issue was often whether the tests were job related, an issue that had caused substantial controversy both before and after the Supreme Court's decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See, e.g.*, Cooper & Sobol, *Seniority and Testing Under the Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Co.*, 72 COLUM. L. REV. 900 (1972); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968).

In *Davis*, the question of Test 21's validity as a predictor of successful job performance divided the court of appeals. In his dissent, Judge Robb agreed with the trial court that the department had met its burden by showing that the test was related to the requirements of the police training program and argued that Test 21 on its face was a fair and reasonable test of the verbal skills needed by a competent policeman. Thus, he accepted the standards by which the majority evaluated both the legal bases of plaintiffs' claim and plaintiffs' proof of discriminatory impact, including the premise that evidence of a significantly higher black failure rate on the test shifted to defendants the burden of justifying use of the test by proof that it was job related.

58. *See* 426 U.S. at 238 n.8, 249 n.15.

59. Justice Brennan filed a dissent, joined by Justice Marshall, in which he argued that the plaintiffs should prevail on their statutory claim and that therefore decision of the constitutional issue was unnecessary. 426 U.S. at 256-70. Justice Stewart joined the Court's opinion on the constitutional issue only. 426 U.S. at 252. Justice Stevens joined the Court's opinion and filed a separate concurring opinion. 426 U.S. at 252-56.

60. *See* 426 U.S. at 238; SUP. CT. R. 40(1)(d)(2).

61. 426 U.S. at 245.

According to Justice White's opinion, a consistent line of the Court's decisions dating back to *Strauder v. West Virginia*[62] as well as sound policy considerations supported the requirement that a claim of racial discrimination under the equal protection clause be based on proof of discriminatory racial purpose. He found that the Court's decisions on jury discrimination, racial gerrymandering, school segregation, and other forms of discrimination "adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[63] The Court distinguished two opinions written in the early 1970's—*Palmer v. Thompson*[64] and *Wright v. Council of Emporia*[65]—that had suggested that a showing of racial effect would suffice to prove a violation of the equal protection guarantee, and the Court specifically "disagreed" with numerous recent lower court decisions "to the extent" that their focus on discriminatory impact had ignored the requirement of a discriminatory purpose in finding an equal protection violation.[66] In Justice White's view, these decisions, although "impressively demonstrat[ing] that there is another side to the issue,"[67] were erroneous, because the Supreme Court had never "embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[68]

In addition to distinguishing its prior equal protection decisions, the Court seemed to fear that dangerous consequences would follow from the use of the disproportionate impact analysis in equal protection litigation:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing stat-

62. 100 U.S. 303 (1880).

63. 426 U.S. at 240.

64. 403 U.S. 217 (1971).

65. 407 U.S. 451 (1972).

66. 426 U.S. at 244 n.12. Justice Stevens specifically refused to express an opinion on the merits of these cases, 426 U.S. at 254 n.*, 256, although he otherwise joined the majority opinion, and Justice Brennan's dissent criticized this list of disapproved cases for its inclusion of Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), which the Court had already determined to review in the next term. 426 U.S. at 257 n.1.

67. 426 U.S. at 245.

68. *Id.* at 239.

> utes that may be more burdensome to the poor and to the average black than to the more affluent white.[69]

The Court noted that sales taxes, bridge tolls, license fees, and minimum wage laws could be considered to have a disproportionate impact on blacks.[70]

Applying the appropriate equal protection standard to the claim in *Davis*, the Supreme Court held that the plaintiffs had not shown Test 21 to be a "purposeful device to discriminate against Negroes."[71] The test was racially neutral on its face, and the Court found its use a rational means of upgrading the verbal skills required of police officers.[72] Justice White did indicate that a law's disproportionate impact might help prove the necessary discriminatory racial purpose—indeed, that it might suffice in some cases to establish a prima facie case that would shift the burden of proof to the government to show that legitimate, nonracial considerations prompted its action.[73] Nevertheless, the Court concluded that the higher black failure rate on Test 21 was insufficient to prove a discriminatory purpose, because the department's affirmative recruiting efforts, the high percentage of blacks in recent recruit classes and the force in general, and the proven relationship of the test to the police training program "negated any inference that the Department discriminated on the basis of race."[74]

III. The Purpose-Effect Issue Before *Davis*

A. *The Supreme Court Precedents*

All seven justices who reached the constitutional issue in *Davis* agreed that proof of discriminatory racial purpose was necessary to establish an equal protection claim.[75] This unanimity on so difficult

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69. *Id.* at 248.

70. *Id.* at 248 n.14.

71. *Id.* at 246.

72. *Id.* at 245-46. The majority opinion also held that Test 21 satisfied all statutory standards for test validity as well, because of its direct relationship to the police training program. 426 U.S. at 248-52. Justice Stewart did not join this part of the Court's opinion. 426 U.S. at 252. Justice Brennan, joined by Justice Marshall, dissented, arguing that Test 21 did not satisfy the statutory standards, because only proof that the test was directly related to actual job performance could justify its discriminatory impact. 426 U.S. at 256-70. Because the dissenters believed that the applicable statutes prohibited the department's use of Test 21, they found it unnecessary to address the issues raised by plaintiffs' constitutional claim. For a discussion of the statutory issues involved in *Davis*, see Lerner, *Washington v. Davis: Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263.

73. 426 U.S. at 241-42.

74. *Id.* at 246.

75. *See* notes 59 & 72 *supra*.

a matter was surprising, because the many courts of appeals that had struggled with the same issue in recent years had almost always expressed the opposite view.[76]

How could the lower courts have been so consistently wrong, when, according to Justice White, a century of Supreme Court precedents demonstrated that discriminatory purpose, not effect, was the touchstone of an equal protection violation? The answer is that the Court had not been consistent in its treatment of illicit legislative purpose as a basis for challenging governmental action on constitutional grounds.[77] Indeed, its opinions on this subject had been confusing and contradictory, particularly in the civil rights field.[78]

Despite the *Davis* opinion's assertion to the contrary, the Supreme Court decisions involving racial discrimination before *Brown v. Board of Education*[79] shed little light on the purpose-effect issue. Many of these decisions invalidated laws that were discriminatory on their face, such as the West Virginia statute limiting jury service to whites that was struck down in *Strauder*.[80] Obviously, both the purpose *and* the effect of such a law was to prevent blacks from becoming jurors. Similarly, the administration of facially neutral selection procedures that resulted in the total or almost total exclusion of minorities, whether from jury service[81] or the opportunity to

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76. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977); Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975); Castro v. Beecher, 459 F.2d 725, 732-33 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1176-77 (2d Cir. 1972); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (5th Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291 (9th Cir. 1970); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1200 (D. Md.), *aff'd in pertinent part sub. nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973). *But see* Smith v. Troynan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

77. Legislative purpose as it is used in this context is different from the concept of legislative purpose that a court often uses as an aid to statutory construction. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1213-14 (1970).

78. *See* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99 [hereinafter cited as *Legislative Motive*]; Ely, *supra* note 77, at 1208-12.

79. 347 U.S. 483 (1954).

80. Strauder v. West Virginia, 100 U.S. 303 (1880).

81. *See, e.g.*, Cassell v. Texas, 339 U.S. 282 (1950) (limitation of no more than one black grand juror on each panel); Patton v. Mississippi, 332 U.S. 463 (1947) (no black jurors in 30 years); Hill v. Texas, 316 U.S. 400 (1942) (no black grand jurors in 16 years or more); Smith v. Texas, 311 U.S. 128 (1940) (five black grand jurors in a seven-year period); Pierre v. Louisiana, 306 U.S. 354 (1939) (no black grand jurors in 40 years); Hale v. Kentucky, 303 U.S. 613 (1938) (no black jurors in 30 years); Norris v. Alabama, 294 U.S. 587 (1935) (no black jurors in a "long number" of years); Rogers v. Alabama, 192 U.S. 226 (1904) (no black jurors); Carter v. Texas, 177 U.S. 442 (1900) (no black jurors); Neal v. Delaware, 103 U.S. 370 (1880)

run a laundry in a wooden building,[82] discriminated in both purpose and effect. Likewise, "grandfather clause" exceptions to voter qualification statutes were held unconstitutional during this period even though their terms did not explicitly discriminate against blacks, because "the standard itself inherently brings that result into existence."[83] Thus, in the era governed by *Plessy v. Ferguson*,[84] when examples of official action involving blatant discrimination and discrimination that was "unmistakable, although . . . somewhat disguised"[85] were not uncommon, the Supreme Court reviewed laws that were both intended to, and did in fact, discriminate on the basis of race. Consequently, these cases did not compel the Court to distinguish between purpose and effect. Similarly, in the years immediately following *Brown v. Board of Education*,[86] the Court used the equal protection clause to strike down laws that provided on their face for segregated parks,[87] beaches,[88] golf courses,[89] and buses[90] without any inquiry into what it must have recognized as the obvious purpose of these laws: requiring the impermissible result of racial segregation in public facilities.[91]

(no black jurors); Strauder v. West Virginia, 100 U.S. 303 (1880) (no black jurors). For a discussion of the latest Supreme Court jury discrimination decision, Castaneda v. Partida, 97 S. Ct. 1272 (1977), see text accompanying notes 389-449 *infra*.

82. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). For a discussion of whether the relevance of illicit purpose should turn on whether the government action is "legislative" or "administrative," see Ely, *supra* note 77, at 1284-89 (concluding that it should not).

83. Guinn v. United States, 238 U.S. 347, 364 (1915). *See also* Lane v. Wilson, 307 U.S. 268 (1939); Myers v. Anderson, 238 U.S. 368 (1915).

84. 163 U.S. 537 (1896).

85. Guinn v. United States, 238 U.S. 347, 361 (1915).

86. 347 U.S. 483 (1954).

87. New Orleans City Parks Improvement Ass'n v. Detiege, 358 U.S. 54 (1958).

88. Mayor & City Council v. Dawson, 350 U.S. 877 (1955).

89. Holmes v. Atlanta, 350 U.S. 879 (1955).

90. Gayle v. Browder, 352 U.S. 903 (1956).

91. The Supreme Court decided many of these segregation cases after *Brown* by short per curiam orders. The Court's method of disposing of these cases raised the question of whether the ultimate basis for these decisions was that the challenged segregation did *in fact* disadvantage blacks, *see, e.g.*, Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960), or whether segregation was unconstitutional simply because it was *intended* to hurt blacks, thereby causing them to be officially "stigmatized" as inferior citizens, an injury distinct from any actual disadvantage they may have suffered as a result of the segregation, *see* Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104, 113-15 (1961). Obviously, the answer had important implications for the issue of whether the focus of an equal protection case should be on the purpose or the effect of the law under review, *see* Ely, *supra* note 77, at 1293-94 n.265, but the Court did not specify one or the other, and the commentators were in disagreement on the matter. *Compare* Black, *supra, with* Heyman, *supra*. *See also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

Only after the full impact of *Brown* had come to be appreciated by local officials was the Supreme Court called upon to examine the basis for invalidating a state law that did not contain a racial classification on its face but was clearly designed to maintain segregation. In 1960, in *Gomillion v. Lightfoot*,[92] the Court reversed an effort by the Alabama legislature to change the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure,"[93] which would have excluded almost all the city's four hundred black voters, but none of its whites. Although Justice Frankfurter, speaking for the majority, noted that the "result"[94] and "inevitable effect"[95] of the change would be to discriminate against blacks, he also spoke of illicit purpose: "[T]he conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[96] The Court's answer to the state's argument that it had the power to redraw municipal boundary lines was that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end."[97]

Four years later, in *Griffin v. County School Board*,[98] the Court invalidated Virginia's "generally lawful" acts of allowing a county to abandon its public schools and paying tuition grants to students attending private schools, because the state had acted "for one reason, and one reason only: to insure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school."[99] Because the Virginia plan "was created to accomplish . . . the perpetuation of racial segregation by closing public schools and operating only segregated schools," Justice Black's opinion concluded that it "works to deny colored students equal protection of the laws."[100]

Neither *Gomillion* nor *Griffin*, however, established the Court's preference for discriminatory purpose or discriminatory effect as the focus of judicial analysis of an equal protection challenge to a facially neutral law. Both cases involved state actions that were

92. 364 U.S. 339 (1960).
93. *Id.* at 340.
94. *Id.* at 341.
95. *Id.* at 342.
96. *Id.* at 341.
97. *Id.* at 347.
98. 377 U.S. 218 (1964).
99. *Id.* at 231.
100. *Id.* at 232.

clearly undertaken for racial reasons and that undeniably produced discriminatory results, and the unanimous opinions in both cases expressed concern over the unacceptable results of the actions as well as their illicit purposes. *Wright v. Rockefeller*,[101] decided the same term as *Griffin*, illustrated the Court's ambivalence about the purpose-effect issue. In *Wright* the Court upheld the boundaries of the Manhattan congressional districts against a charge of racial gerrymandering, because plaintiffs "failed to prove that the New York Legislature was *either* motivated by racial considerations *or* in fact drew the districts on racial lines."[102]

During the second half of the 1960's, the Court continued to leave clues, albeit inconclusive ones, as to the proper weight to accord the purpose and the effect of state action that allegedly discriminated against blacks. In *Reitman v. Mulkey*,[103] California voters had amended their constitution to guarantee homeowners the right to sell or lease their property to anyone they chose. The Court invalidated the amendment because it significantly encouraged and involved the state in private housing discrimination. Justice White's opinion for the five-man majority concluded that determining whether California had impermissibly involved itself in private discrimination required an assessment of the amendment's "potential impact."[104] He adopted an approach that examined the constitutionality of the amendment in terms of "its 'immediate objective', its 'ultimate effect', and its 'historical context and the conditions existing prior to its enactment.' "[105] Although the new provision did not include any express reference to race, it was adopted soon after the state had passed a series of fair housing laws. The Court maintained that both the "ultimate impact" and the only conceivable purpose of the amendment were to nullify these fair housing laws and to authorize private racial discrimination in the housing market.[106] On behalf of the four dissenters, Justice Har-

101. 376 U.S. 52 (1964).

102. *Id.* at 56 (emphasis added). Despite this language, Professor Ely has concluded that *Wright* "unmistakably embraced" the proposition that the Court would intervene only if the challenged state action *intended* to distinguish on the basis of race, Ely, *supra* note 77, at 1251, and Justice White's opinion in *Davis* relied on *Wright* as requiring purposeful discrimination, 426 U.S. at 240. This reading of *Wright* seems rather one-sided, and certainly Justice White's suggestion in *Davis* that the dissenters in *Wright* also agreed that purpose was controlling is hard to reconcile with Justice Douglas's argument in *Wright* that legislative motives are irrelevant. *See* 376 U.S. at 61-62 (Douglas, J., dissenting).

103. 387 U.S. 369 (1967).

104. *Id.* at 380.

105. *Id.* at 373.

106. *Id.* at 374-76, 381.

lan focused on the "general effect" of the amendment,[107] which he found to be racially neutral. Moreover, Justice Harlan criticized the majority for examining intent at all, arguing that "the grounds which prompt legislators or state voters to repeal a law do not determine its constitutional validity. That question is decided by what the law does, not by what those who voted for it wanted it to do."[108] He conceded, however, that the amendment could be struck down if there were "persuasive evidence of an invidious purpose or effect."[109]

The Court was less divided two years later in *Hunter v. Erickson*,[110] when it struck down an amendment to the Akron city charter requiring the approval of fair housing ordinances by referendum. The challenged provision covered any ordinance protecting housing rights "on the basis of race, color, religion, national origin or ancestry,"[111] and Justice White's opinion noted that this explicitly racial classification made its discriminatory nature even more apparent than that of the law invalidated in *Reitman*.[112] The Court, however, did not refer specifically to either the purpose or the effect of the charter amendment, but rather examined the history of racial segregation in Akron and concluded that although the referendum requirement applied to all persons, "the reality is that the law's impact falls on the minority."[113] In a separate concurring opinion joined by Justice Stewart, Justice Harlan explained the change in his vote from *Reitman* by noting that the Akron provision had "the clear purpose" of making it more difficult to enact legislation benefiting minorities.[114]

The Court's decisions rejecting equal protection claims were equally vague about the purpose-effect issue. For example, Justice Stewart's opinion in *Dandridge v. Williams*,[115] which upheld a Maryland welfare system that placed a dollar limit on AFDC grants regardless of the family's size or its actual need, noted the absence of any "contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect."[116] During the same term, in *Evans v.*

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107. *Id.* at 390.
108. *Id.* at 390-91.
109. *Id.* at 391.
110. 393 U.S. 385 (1969).
111. *Id.* at 387.
112. *Id.* at 389.
113. *Id.* at 391.
114. *Id.* at 395.
115. 397 U.S. 471 (1970).
116. *Id.* at 485 n.17.

Abney,[117] the Court again seemed to rely on both intent and effect in affirming the decision of the Georgia courts to return a segregated park to the testator's heirs rather than to force the park's desegregation. Writing for the majority, Justice Black contended that "there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will."[118] The effect of the Georgia decision was also nondiscriminatory, the opinion argued, because it

> eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued.[119]

A possible resolution of the purpose-effect issue, suggested by Justice Stewart's dictum in *Dandridge*, was that a law was unconstitutional if it involved *either* a racially discriminatory purpose *or* a racially discriminatory effect. Congress had adopted this approach in the Voting Rights Act of 1965.[120] The Act restricts the changes that an affected city can make in its voting practices to those changes that are approved by the Attorney General or do "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[121] Moreover, this disjunctive interpretation of the purpose-effect standard would be similar to the "purpose or primary effect" test that the Court was then developing in cases under the establishment clause of the first amendment.[122]

Instead, the Court seemed to adopt an effect test in 1971 in

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117. 396 U.S. 435 (1970).

118. *Id.* at 445. *But see id.* at 452 (Brennan, J., dissenting).

119. *Id.* at 445.

120. 42 U.S.C. §§ 1971-1973 (1970).

121. 42 U.S.C. § 1973c (1970); *see, e.g.*, City of Richmond v. United States, 422 U.S. 358 (1975).

122. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); text accompanying notes 266-68 *infra*. The commentators, however, wanted it one way or the other, although they disagreed about which approach was preferable. One commentator argued that the proper question was whether the effect of a law, not its purpose, was prohibited, although illicit purpose could serve as evidence of what the effect might be. Note, *Legislative Purpose and Constitutional Adjudication*, 83 HARV. L. REV. 1887, 1893 (1970). "[I]t should be quite the other way around," argued Professor Ely in a major article on motivation in constitutional law that appeared at about the same time. Ely maintained that when the context required an examination of racial purpose or effect, purpose should be the constitutional point-in-chief, with effect available merely as evidence of what the lawmakers intended. Ely, *supra* note 77, at 1221 n.51.

Palmer v. Thompson.[123] By a five-to-four vote, the *Palmer* Court upheld the decision of the Jackson, Mississippi city council to close rather than desegregate its public swimming pools. The record included ample evidence that racial animus had motivated the closing.[124] The city had continued to maintain segregated parks, libraries, golf courses, and other public facilities long after the Supreme Court had declared these practices unconstitutional. In 1962, after Jackson's black residents won a declaratory judgment in their suit to desegregate all of the city's public facilities, Jackson's Mayor Thompson announced that "we are not going to have any intermingling" in the swimming pools and suggested that the city would instead sell the pools or close them down.[125] Throughout the next year, the mayor made a number of other public statements about Jackson's determination to retain segregation in its recreational facilities, and the five public swimming pools remained segregated, four for whites and one for blacks. Jackson did not open the pools in 1963. After the conclusion of the appellate proceedings in the desegregation suit, Jackson integrated its other public facilities, but the city council decided not to operate the pools on a desegregated basis, claiming that it could not do so safely or economically. Three pools closed permanently; the city sold one to Jackson State, a predominantly black college, and returned the fifth to the YMCA, which allowed only whites to use it.

Jackson's black citizens, seeking to compel the city to reopen the pools on an integrated basis, filed a new complaint alleging that Jackson, in violation of the equal protection clause, had closed its swimming pools to avoid desegregating them. In rejecting this claim, the Supreme Court decided that the accusation of illicit motivation was insufficient as a matter of law, because "no 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."[126] Although Justice Black's majority opinion acknowledged that language in some of the Court's recent opinions, such as *Griffin v. County School Board*[127] and *Gomillion v. Lightfoot*,[128] suggested that the motive or purpose behind a law was relevant to its constitutionality, he maintained that "the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the

123. 403 U.S. 217 (1971).
124. This evidence is summarized in Justice White's dissent. *Id.* at 246-54.
125. *Id.* at 250 (White, J., dissenting).
126. *Id.* at 224.
127. 377 U.S. 218 (1964).
128. 364 U.S. 339 (1960).

States to behave as they did."[129] Examining the "actual effect" in *Palmer*, Justice Black concluded that the closing of the Jackson swimming pools affected blacks and whites alike and thus did not constitute a denial of equal protection.[130]

Justice Black's rationale for preferring effect over purpose as a method of analyzing equal protection claims was his concern about the hazards of declaring a law unconstitutonal on the basis of its sponsors' motives.[131] Chief among these hazards was the difficulty, if not the impossibility, of ascertaining the sole or dominant motivation for a legislative decision. The Jackson city council, for example, may have decided to close the public swimming pools because of its opposition to racial integration or because it believed the pools could not be operated safely or economically under the circumstances or for some combination of these and other reasons. In addition, Justice Black noted the futility of any attempt to invalidate a law enacted for illicit reasons, because the governing body could simply reenact it for different reasons.[132] Thus, the Supreme Court's general objection to judicial review of legislative motivation compelled it to conclude in *Palmer* that the proper constitutional focus in an equal protection claim was the actual effect, not the purpose, of the challenged state action.

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129. 403 U.S. at 225. The Court's reading of *Griffin* and *Gomillion* as turning on effect rather than purpose and its declaration that purpose was not relevant to judging an equal protection claim were severely criticized by Justice White in the principal dissent in *Palmer*, 403 U.S. at 264-65, and by a number of commentators as well, *e.g.*, *Legislative Motive*, *supra* note 78, at 99-100; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 95 (1971) [hereinafter cited as *1970 Term*]. Justice Black was not the first, however, to conclude that *Gomillion* was a case of discriminatory effect, not purpose. Three years before in United States v. O'Brien, 391 U.S. 367 (1968), in which the Court rejected a claim that the draft card burning statute was unconstitutional because Congress had passed it to stifle dissent, Chief Justice Warren warned against judicial inquiry into congressional motivation and argued that *Gomillion* actually stood "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional." *Id.* at 384.

130. This view that the termination of a segregated service has the same effect on blacks and whites for equal protection purposes was reminiscent of Justice Black's position in Evans v. Abney, 396 U.S. 435, 445 (1970). Justice White, on the other hand, argued that the city's decision operated unequally, because it "stigmatized" black citizens by expressing the "official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility." 403 U.S. at 266. He also suggested that blacks would be deterred from asserting their constitutional rights if officials could respond to a desegregation order by closing public facilities, 403 U.S. at 269, which was another reason that the city's action affected blacks more adversely than whites.

131. 403 U.S. at 224-25 (relying on United States v. O'Brien, 391 U.S. 367 (1968)).

132. *Id.* at 225. In addition to the difficulty of ascertaining motivation and the futility of invalidating an otherwise permissible law, two other objections to judicial inquiry into legislative motives are "the disutility of invalidating what may otherwise be a perfectly good law" and "the general impropriety of the inquiry." *Legislative Motive*, *supra* note 78, at 119.

The Court's analysis of the record in *Palmer*, however, indicates that the Court was not required to make a clear choice between purpose and effect, and therefore its announced preference for effect over purpose was more gratuitous than dispositive. Having expressed concern about the pitfalls of inquiring into the motives of a legislative body, the opinion nevertheless proceeded to note that the courts below had made just such an inquiry and that substantial evidence supported the lower courts' conclusion that legitimate safety and economic considerations governed the city council's decision.[133] Thus, according to the majority, the petitioners in *Palmer* had failed to establish that either the actual effect or the purpose—at least the dominant purpose—of the closing of the Jackson swimming pools was to discriminate against blacks. In contrast, the dissenters adamantly maintained that both the purpose and the effect of the decision were discriminatory.[134]

Although all of the justices may thus have been convinced that both the purpose and the effect of Jackson's decision supported their respective decisions, *Palmer* differs from previous Supreme Court decisions in its determination to confront and resolve the question of whether illicit racial purpose, apart from effect, could establish an equal protection violation. The Court was badly divided on the issue, but the answer that the majority purported to give was neither ambivalent nor vague: A law does not violate the equal protection clause solely because those who voted for it were racially motivated. Indeed, the majority held that the motive or purpose behind a law is irrelevant to its constitutionality and that the law must be judged only by its actual effect.

Despite the clarity of its opinion, the strength of *Palmer* as a precedent was questionable. Only five justices joined the majority opinion, and two of them, Chief Justice Burger and Justice Blackmun, wrote separate concurring opinions that suggested that the closing of swimming pools and similar recreational facilities were governmental actions that the Court would examine less closely than state action affecting more essential services such as educa-

133. *See* 403 U.S. at 225.

134. With respect to purpose, for example, Justice White's detailed review of the evidence led him to conclude that the plaintiffs had established the causal link between the desegregation order and the pool closings, 403 U.S. at 254, and that the record did not support Jackson's claimed interests in preserving order and saving money, *id.* at 259. In judging the effect of the closings, he decided, as he had for the Court in Hunter v. Erickson, 393 U.S. 385, 391 (1969), that the impact of the city's facially neutral action in reality fell on the minority, because closing the pools amounted to an official expression that blacks were inferior and that their efforts to desegregate public facilities could result in complete loss of those facilities. 403 U.S. at 240-41, 266-70.

tion.[135] The concurring justices also expressed the fear that a decision against Jackson would require the city to operate the pools indefinitely no matter how serious the financial burden became.[136] Their opinions thus foreshadowed two points that would arise again in *Davis* and *Arlington Heights*. First, the concurring opinions suggested that the appropriate standard for evaluating an equal protection claim might vary with the type or significance of the law being challenged. The dissenters vigorously objected, arguing that minority access to public recreational facilities should receive the same constitutional protection as minority access to public schools.[137] Nevertheless, the concurring justices indicated that they subjected Jackson's decison to close its swimming pools to a lesser degree of judicial scrutiny than would have been appropriate were a claim of educational discrimination involved.[138]

Second, the concurring opinions suggested that a court deciding an equal protection claim must consider whether the relief requested might unfairly burden the defendants. The complaint sought to have Jackson reopen its swimming pools and operate them on a desegregated basis. The city, however, claimed that the pools could not be operated economically. Both Chief Justice Burger and Justice Blackmun expressed concern that if Jackson lost, the Court's judgment would require the city to operate the pools at a deficit for an indefinite period.[139] This suggestion that the merits of

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135. 403 U.S. at 227-28 (Burger, C.J., concurring); *id.* at 229 (Blackmun, J., concurring).

136. *Id.* at 228 (Burger, C.J., concurring); *id.* at 229-30 (Blackmun, J., concurring).

137. *Id.* at 233-40 (Douglas, J., dissenting); *id.* at 261-70 (White, J., dissenting); *id.* at 272 (Marshall, J., dissenting).

138. Focusing on the inherent importance of the right asserted was not a novel idea in equal protection analysis. *See* cases cited notes 9-17 *supra*. The view expressed by Chief Justice Burger and Justice Blackmun in *Palmer*, however, seemed to reflect more their sense of the practical realities of local government than it did a well conceived legal judgment. Nevertheless, they obviously considered the nature of the right harmed by official action important to the resolution of the equal protection claim. Indeed, to the extent that they were persuaded to join Justice Black's admonition against judicial examination of legislative motivation because of their desire to uphold Jackson's authority to terminate nonessential services, *Palmer*'s determination that effect, not purpose, was to govern equal protection cases might be thought limited to only certain types of discrimination claims.

139. 403 U.S. at 228 (Burger, C.J., concurring); *id.* at 229-30 (Blackmun, J., concurring). Again, the concurring justices' position seemed to be based on what they believed were the practical realities of municipal government. Their fears were obviously not quieted by the dissents' response that requiring Jackson to reopen its pools under the facts presented here would not prevent a city that acted for nonracial reasons from abandoning a previously rendered service. *See* 403 U.S. at 259-60 (White, J., dissenting); *id.* at 273 (Marshall, J., dissenting). It was intriguing that *Palmer* should raise, much less turn on, this dispute over proper relief, because the issue in the case was whether the black citizens of Jackson were being denied equal protection in the first place, not whether the court could fashion an

an equal protection claim might turn on whether the anticipated relief could prove to be a financial hardship for the defendant seemed a novel and premature consideration. Had petitioners prevailed on the merits and won a permanent injunction requiring Jackson to operate the pools even in the face of substantial deficits, the city would then have had ample opportunity to seek an adjustment in the decree[140] or to appeal its provisions. The Supreme Court had, of course, already reviewed the scope and propriety of a number of equitable decrees designed to remedy equal protection violations, particularly in school desegregation cases.[141] Moreover, the Court had often approved or required decrees that necessitated substantial expenditures by public defendants.[142]

When a complex question of relief in a school desegregation case did reach the Court a year later in *Wright v. Council of Emporia*,[143] the Court relied on *Palmer* in announcing that discriminatory effect, not purpose, governed its decision. The issue in *Emporia* was whether the district court had acted properly in enjoining a city's withdrawal from a county school system that would

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effective and fair decree to correct an admittedly unconstitutional condition. *Id.* at 226. Ironically, relief had been an issue in the original desegregation suit, in which the district court's denial of an injunction on the grounds that a declaratory judgment would be sufficient had been the subject of an unsuccessful appeal by the plaintiffs. *Id.* at 248-49. The case that reached the Supreme Court, however, called not for a determination of whether the subsequent decision to close the pools conflicted with the declaratory judgment, but whether the decision to close violated the equal protection clause.

140. *See id.* at 273 (Marshall, J., dissenting).

141. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968); Griffin v. County School Bd., 377 U.S. 218 (1964). *See also* Carter v. Jury Comm'n, 396 U.S. 320, 329-40 (1970) (jury selection).

142. Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); cases cited note 141 *supra*. *But see generally Antidiscrimination Principle, supra* note 31, at 36. This is not, however, to belittle the concern expressed in the concurring opinions in *Palmer*. The Court's experience with cases of official discrimination during this time increasingly involved it in difficult questions of relief which the concurring justices may have sought to avoid. (The trend, however, was to continue. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976); Milliken v. Bradley, 418 U.S. 717 (1974)). In addition, the request by Jackson's black citizens that the pools, which had been closed to everyone in the city, be reopened because of a history of segregation, may have suggested another highly controversial and still emerging issue—the propriety of granting special preferences to racial minorities—which the Court was not yet fully prepared to confront. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974); Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977). Nevertheless, the concurring opinions in *Palmer*, added to the close vote by which the Court decided the case, undercut the strength of the Court's holding that an effect test governed equal protection claims, at least to the extent that correction of the state action challenged required an unusual affirmative decree.

143. 407 U.S. 451 (1972).

have impeded the process of court-ordered desegregation then underway in the county's schools. The court of appeals had reversed. It evaluated the city's action on the basis of its "primary purpose" and concluded that Emporia's primary purpose for creating its own school district was to provide for better education, not to maintain as much racial separation as possible in its schools.[144] In a five-to-four decision, the Supreme Court upheld the injunction. The Court noted that its prior decisions did not support the "dominant purpose" test adopted by the court of appeals, and it cited *Palmer* for the proposition that the attempt to find the dominant motivation of a city council or school board would be difficult and fruitless.[145] The Court concluded that judicial inquiry into legislative motivation was simply irrelevant, because the proper measure of any desegregation plan was its effectiveness and because the existence of a permissible purpose could not sustain an action that had an impermissible effect.[146] Furthermore, Emporia's argument that its benign purpose should have permitted it to withdraw its schools from the county system was undercut by the district court's finding that race was indeed a factor in the city's decision.[147] Thus, the Supreme Court's decision may be interpreted as involving discriminatory purpose as well as discriminatory effect. Still, the Court's opinion in *Emporia*, as in *Palmer*, undertook to distinguish between an approach that focused on effect and one that rested on motivation or purpose, and the Court specifically endorsed the former.[148]

The following term, the Court returned to the problem of deciding the merits of an equal protection claim in *Keyes v. School Dis-*

144. Wright v. Council of Emporia, 442 F.2d 570, 572, 574 (4th Cir. 1971).

145. 407 U.S. at 461-62.

146. *Id.* at 462.

147. *See id.* at 461.

148. *Id.* at 462. The equal protection violation on which *Emporia* was based was the enforcement until 1969 of racial segregation in the county's school system. 407 U.S. at 459. Thus, unlike *Palmer*, the issue before the Court was not whether the city's action amounted to "an independent violation," but whether that action was inconsistent with the desegregation order that the district court had entered to correct the original violation. An indication of the significance of this difference was the fact that the four dissenters in *Palmer*, who had argued for the relevance of discriminatory purpose, joined with Justice Stewart to form the majority in *Emporia*. The Court's decision to focus on effect rather than purpose in upholding the injunction against Emporia was not, therefore, a precedent for how a court was to judge a claim of official discrimination on the merits, as Justice White's opinion in *Davis* was to note. 426 U.S. at 243. *See also* Green v. County School Bd., 391 U.S. 430, 437-38 (1968); Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (Brown II); Ely, *supra* note 77, at 1289-91. *Emporia* did, however, underscore the point made in *Palmer* that determining the motivation behind a legislative act was extremely difficult. It also showed that in the proper circumstances the Court would invalidate state action on the basis of its discriminatory effect, even if the prescribed relief appeared to "lock in" the defendants to a system that they had legitimate reasons for wanting to change. *But see* 407 U.S. at 470.

trict No. 1,[149] the first school desegregation case to reach the Supreme Court from outside the South since *Brown v. Board of Education* was decided.[150] The plaintiffs in *Keyes* alleged that the Denver school system, which had never operated under any law requiring racial segregation, was nevertheless segregated as a result of the school board's manipulation of attendance zones, selection of school sites, and adoption of a neighborhood school policy. The plaintiffs conceded that because no statutory dual system had ever existed, they were required to prove "not only that segregated schooling exists but also that it was brought about by intentional state action."[151] The issue was whether the plaintiffs had to establish that the entire school district, or only the schools in one area of the city had been intentionally segregated. The Court held that proof that Denver had engaged in a policy of deliberate racial segregation in a substantial part of its system could serve to establish a prima facie case that the entire system was unlawfully segregated. Hence, at least "in the special context of school desegregation cases,"[152] *Keyes* indicated that in the absence of a history of officially mandated segregation, a necessary element of an equal protection claim was "*purpose* or *intent* to segregate."[153] The parties, however, never contested this issue, and the record did include evidence of discriminatory effect as well as discriminatory purpose throughout the entire school system.[154]

This review of the Supreme Court's analysis of discriminatory purpose and effect in its equal protection decisions before *Davis*

149. 413 U.S. 189 (1973).

150. *Id.* at 217 (Powell, J., concurring).

151. *Id.* at 198.

152. *Id.* at 208.

153. *Id. See generally* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

154. *See, e.g.*, 413 U.S. at 203-04. Justices Douglas and Powell filed separate concurring opinions in *Keyes*, arguing that the Court should not recognize any constitutional difference between de jure and de facto segregation. *Id.* at 214-17 (Douglas, J., concurring); *id.* at 217-53 (Powell, J., concurring). One of Justice Powell's reasons for preferring to base his decision on the racial effect, not the purpose, of the school board's decisions was to avoid the difficulties that *Palmer* and *Emporia* had indicated were involved in the judicial search for segregative intent. *Id.* at 227. *See also id.* at 230-31, 233-35. An effect test, he argued, would better ensure that there would be no place for racial discrimination, subtle or otherwise, in the decisions of public school officials, *id.* at 227, because plaintiffs would not have to undertake "the initial tortuous effort of identifying 'segregative acts' and deducing 'segregative intent,' " *id.* at 224. A test based on purpose would not only make an equal protection case difficult to prove, Justice Powell noted, it would also lead to "fortuitous, unpredictable and even capricious" results. *Id.* at 233. The same condition or decision that was justified by a legitimate purpose in one case could be struck down as improperly motivated in the next, "especially since the Court has never made clear what suffices to establish the requisite 'segregative intent' for an initial constitutional violation." *Id.*

suggests several conclusions. Justice White was correct in *Davis* when he wrote that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[155] The conclusion that should immediately follow this one, however, is that the Court had not rejected this proposition either. *Davis* was the first case in which the Court considered the merits of an equal protection claim on the basis of "racially disproportionate impact" or discriminatory effect alone. Only in *Emporia* did the record establish a segregative effect resulting from an arguably nonracial purpose, but the infirmity in *Emporia* was that the effect of the state action was inconsistent with an outstanding desegregation order, not that this effect alone was sufficient to establish an independent constitutional violation. In all other cases, including *Palmer*, the majority claimed to be convinced that both the purpose and the effect of the state action supported its decision, whether that decision invalidated the action as involving a racial classification or upheld it as nondiscriminatory.

Nor did the language of the Court's various opinions resolve the purpose-effect issue. Some opinions suggested that either discriminatory purpose or discriminatory effect violated the equal protection clause. *Gomillion* and *Griffin* invalidated state actions that did in fact discriminate, but apparently on the ground that the actions were "solely concerned" with maintaining racial segregation. Justice Black's opinion in *Palmer* then "rewrote history"[156] by announcing that these decisions actually turned on effect. The majority in *Palmer* maintained that the search for a sole or dominant purpose was illusory in general and irrelevant in equal protection cases in particular. Finally, in *Keyes* the Court held that segregative intent must be proved in some school desegregation cases, but not in others. In light of this performance, the lower courts and litigants who were then struggling with the purpose-effect issue might have been more relieved than annoyed when the Court failed to make any significant new pronouncements on the subject in 1974 and 1975. In any event, Justice White's statement in *Davis* that the Court's precedents had not endorsed the plaintiffs' effect theory was just another way of saying that the justices had not yet resolved the matter one way or the other. Precedent certainly did not clearly support the Court's holding in *Davis*.

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155. 426 U.S. at 239. *See also* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 546 (1977).

156. *Antidiscrimination Principle*, *supra* note 31, at 27.

B. The Lower Court Decisions

The question remains why the lower courts, if they were indeed free of controlling precedent and subject to apparently conflicting signals from the Supreme Court, so consistently used the equal protection clause to invalidate employment tests and other official actions on the basis of disproportionate racial impact.[157] An examination of the lower courts' opinions suggests that the principal reason was that, at least in the employment discrimination cases, the most relevant precedent was *Griggs v. Duke Power Co.*[158] Although the lower courts explicitly recognized that the Title VII standards established in *Griggs* were not directly applicable to equal protection analysis,[159] the courts regarded the specific type of case as the key to determining whether to focus on effect or purpose in judging an equal protection claim. The manner in which the Supreme Court had dealt with different kinds of racial discrimination cases in the past appeared to authorize the lower courts' approach. If state action allegedly violated a prior desegregation order, for example, *Emporia* established a clear preference for an analysis based on the effect, not the purpose, of that action. *Keyes*, on the other hand, held that to establish an equal protection violation in "the special context of school desegregation,"[160] segregative intent was a necessary element, unless the segregation could be traced to a local law that had once required racially separate schools. Evaluating cases in which state officials discontinued public recreational facilities, *Evans v. Abney* and *Palmer* called for yet another analysis. The concurring justices in *Palmer*, for example, joined the majority's determination to focus on effect rather than purpose in part because they believed that substantial discretion should be accorded to municipal decisions affecting such nonessential services. If state action blocked laws beneficial to minorities, *Reitman* and *Hunter* judged the action in terms of its immediate objective, ultimate impact, and historical context.[161]

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157. *See* cases cited note 76 *supra*.

158. 401 U.S. 424 (1971).

159. *E.g.*, Castro v. Beecher, 459 F.2d 725, 732-33 (1st Cir. 1972); Wade v. Mississippi Coop. Extension Serv., 372 F. Supp. 126, 143 (N.D. Miss. 1974). *See also* cases cited in Davis v. Washington, 512 F.2d 956, 958 n.2 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

160. 413 U.S. 189, 208 (1973).

161. Another "special context" was the jury discrimination cases. Since 1880 the Court has held that a criminal conviction cannot stand if the state has "deliberately and systematically" denied to members of the defendant's race the right to participate as jurors, *see* Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972), and no other area, including school segregation, has provided the Supreme Court with so many opportunities to decide cases of racial discrimination under the equal protection clause. *See* cases cited note 81 *supra*. *Davis*

If the decisions of the Supreme Court did not help resolve the purpose-effect issue, neither did the commentators in the law reviews.[162] Most commentators provided little guidance about the proper roles of purpose and effect in equal protection analysis. Only Professor Ely's article on motivation in constitutional law[163] and Professor Brest's rebuttal to *Palmer v. Thompson*[164] provided any helpful guidance about the proper roles of purpose and effect in equal protection analysis, and they, too, agreed that: "The extent to which a judicial determination of motivation is relevant to the outcome of a case depends on the substantive doctrine in the particular area of law involved."[165]

If different standards governed each type of racial discrimination case, the lower courts could hardly be faulted for turning to *Griggs* for guidance in judging equal protection claims brought by minorities whose poor performance on standardized intelligence tests disqualified them from public employment. Before *Davis* the Supreme Court had not decided such a case, but its unanimous opinion in *Griggs* held that a showing of racial purpose was unnecessary in a Title VII employment discrimination action. Under Title VII a private company's use of an employment test that excluded a markedly disproportionate number of blacks was unlawful, unless

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relied on language from a number of the Court's opinions in jury discrimination cases indicating that they turned on discriminatory purpose, not merely the fact of minority exclusion. 426 U.S. at 239-41. Even if these opinions did focus on purpose, however, the Court developed the principles governing these claims long ago—as Justice White, himself, pointed out four years before *Davis, see* Alexander v. Louisiana, 405 U.S. at 628-29—in cases in which the exclusion of blacks from jury service was either required by law or else was so overwhelming that it clearly reflected both a racial purpose and a discriminatory effect. *See* cases cited note 81 *supra. But see* Swain v. Alabama, 380 U.S. 202 (1965). In any event, the point is that jury discrimination claims, whether they turned on purpose or not, were to be governed by well settled principles that had been established *in previous jury discrimination decisions*. Alexander v. Louisiana, 405 U.S. at 628-29.

162. *See Legislative Motive, supra* note 78, at 102.

163. Ely, *supra* note 77.

164. *Legislative Motive, supra* note 78.

165. *Id.* at 102 n.46. Professors Ely and Brest did differ, however, about which types of racial discrimination cases should turn on illicit purpose. Professor Ely argued that purpose is determinative only when the state must make a random or discretionary choice, *e.g.*, jury selection and redistricting cases. Ely, *supra* note 77, at 1261-75, 1281-84. Professor Brest took the position that clear proof of discriminatory purpose could serve to invalidate a wider variety of state actions, including the decision to close the public swimming pools in *Palmer*. *Legislative Motive, supra* note 78, at 130-34. The point is not whether either Ely or Brest provided a complete and accurate list of which types of discrimination cases turned on purpose and which on effect, but rather that both agreed that the type of case could make a difference in determining what the proper judicial focus should be. *See also* Perry, *supra* note 155 (arguing after *Davis* that discriminatory purpose should govern jury and redistricting cases, but that a test based on discriminatory impact should apply to employment discrimination, exclusionary land use, and school desegregation cases).

the company showed that the test was job related. Many of the early appellate opinions that applied *Griggs* to discrimination claims involving government employment recognized the anomaly of holding a public employer to a lower standard than that which the Supreme Court demanded of a private company.[166] The lower courts were even more confident of the correctness of their conclusion that effect governed claims of equal protection violations in government employment decisions after 1972, when Congress appeared to ratify this position by amending Title VII to cover governmental employment.[167] Furthermore, the Supreme Court's unanimous opinion in *McDonnell-Douglas Corp. v. Green*[168] in 1973 cited two of the lower court decisions, *Chance v. Board of Examiners*[169] and *Castro v. Beecher*,[170] along with *Griggs* to illustrate the purposes of Title VII. The Court's action appeared to endorse those cases,[171] thus indicating that Title VII and equal protection standards for judging employment discrimination claims were the same.[172]

The early appellate decisions also relied on *Griggs* to establish the defendant's burden of justification in an employment examination case. *Chance* and *Castro*, for example, noted that this burden, which only required the employer to show that its test was "a reasonable measure of job performance,"[173] was much less demanding than the compelling interest standard ordinarily triggered by racial classifications under the equal protection clause.[174] Indeed, the lower courts' reliance on *Griggs* was motivated in part by a desire to uphold governmental employment practices that were job related despite their disproportionate impact on minorities.[175]

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166. Castro v. Beecher, 459 F.2d 725, 733 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972). *But see* Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1205 (D. Md.), *aff'd sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973). *See generally* Tyler v. Vickery, 517 F.2d 1089, 1096-97 (5th Cir. 1975).

167. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 211 (codified at 42 U.S.C. § 2000e(a) (Supp. V 1975)). *See, e.g.*, Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975).

168. 411 U.S. 792, 800 (1973).

169. 458 F.2d 1167 (2d Cir. 1972).

170. 459 F.2d 725 (1st Cir. 1972).

171. Ironically, *Davis* specifically disapproved of both *Chance* and *Castro*. 426 U.S. at 244 n.12.

172. *See, e.g.*, Vulcan Society v. Civil Serv. Comm'n, 490 F.2d 387, 394 n.9 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973).

173. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

174. Castro v. Beecher, 459 F.2d 725, 733 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1177-78 (2d Cir. 1972).

175. *Id.* Subsequent lower court decisions also focused on whether the challenged employment practice was job related, often without discussing whether or how this standard compared with the rational basis or strict scrutiny tests of traditional equal protection analy-

More importantly, the lower court opinions that Justice White disapproved of in *Davis*, at least those involving the validity of a test for public employment, showed a more sophisticated understanding of the difficulties of judging an equal protection claim solely on the basis of discriminatory effect than he gave them credit for. Aside from his effort to read the Court's precedents as consistently turning on discriminatory purpose in all types of cases, Justice White's only reason for rejecting an effect test was his fear that such a standard would invalidate minimum wage laws, bridge tolls, and a variety of other government actions, unless the state could establish a compelling interest.[176] Justice White apparently feared that any law involving a standardized economic burden or benefit could be challenged as racially discriminatory, no matter how legitimate its purpose, because it was relatively "more burdensome to the poor and to the average black than to the more affluent white."[177] The lower court decisions that preceded *Davis* did not provide any basis for this fear. No reported decisions struck down bridge tolls because they had the effect of discriminating against minorities. The horrors envisioned by Justice White simply had not materialized. Moreover, in their treatment of equal protection challenges to employment tests that disproportionately disqualified blacks from public service—challenges that could hardly be considered farfetched after *Griggs*—the lower courts generally based their decisions on whether the tests were job related. The courts indicated—often explicitly—that a finding of discriminatory effect did not necessarily result in a demand for a compelling governmental justification in all cases.

The actions of the lower courts demonstrate that a discriminatory effect test need not open the floodgates to a wave of unprecedented equal protection challenges to racially neutral tax, welfare, and regulatory laws if the standard for judging the government's justification for these laws is flexible. The Supreme Court, however, has refused to provide any flexibility in the standard for judging claims of official racial discrimination. Under the Court's rigid two-

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sis. *E.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973); Arnold v. Ballard, 390 F. Supp. 723, 736, 737 (N.D. Ohio 1975); Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (D. Minn. 1972), *rev'd on other grounds*, 498 F.2d 143 (8th Cir. 1974). Actually, in view of the Supreme Court's holding in *Davis* that Test 21 had been validated to meet the job-relatedness requirement, 426 U.S. at 248-52, its additional conclusion that the test did not violate the equal protection clause was not necessarily inconsistent with these decisions. *See, e.g.*, Arnold v. Ballard, 390 F. Supp. 723 (N.D. Ohio 1975) (rejecting an equal protection claim because the challenged test was shown to be job related).

176. 426 U.S. at 248.

177. *Id.*

tier method of equal protection analysis, the state's burden of justification is generally governed by the rational basis test, but only a compelling state interest can justify a law that is racially discriminatory, and the burden of establishing such an interest has proved insurmountable. Obviously, the two-tier analysis, developed by the Court in cases in which the challenged law created express racial classifications,[178] focuses entirely on whether the law involves racial discrimination and then accepts or summarily rejects the state's justification accordingly. Perhaps disregarding the justification for a law was appropriate in an era when discriminatory state action invariably reflected both an invidious purpose and an impermissible effect. When the purpose is nonracial and only the effect is discriminatory, however, the courts could sensibly require that the justification for the challenged action be somewhat less than compelling on the one hand, but greater than that demanded of a racially neutral law on the other. This more flexible approach was not only the basis for many of the lower court decisions that focused on the job relatedness of government employment tests,[179] but also was adopted by the Supreme Court in analyzing recent equal protection actions involving sex discrimination and other newly emerging claims.[180]

Although the rigidity of the traditional two-tier approach had prompted substantial criticism in the law reviews[181] and from within the Court itself,[182] the Court continued to apply this method of equal

178. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

179. *See* note 175 *supra*.

180. *See* note 8 *supra*.

181. *See, e.g., The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 113-14 (1973):

> In the two-tier analysis the Court must reach these results in order to avoid the necessity of requiring a compelling state interest to justify the system. This problem is a general one. Forcing the great range of personal interests into two polar categories, fundamental and nonfundamental, and the great range of possible classification into two other polar categories, suspect and neutral, makes it impossible for a court's opinion to reflect subtle gradations and distinctions which cumulatively may have been significant to the court in reaching its result. Because the opinion cannot display the full grounds for decision, it seems strained and unconvincing.

See also Nowak, *Realligning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. REV. 1071, 1071-75 (1974); Perry, *supra* note 155, at 559-61; Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 950-53, 1017 (1975).

182. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317-21 (1976) (Marshall, J., dissenting); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Jefferson v. Hackney, 406 U.S. 535, 574-76 (1972) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 62-63 (Brennan,

protection analysis throughout the early 1970's, and it refused to modify the analysis for racial discrimination claims in *Davis*. Thus, the Court's fear in *Davis* of the far-reaching and inevitable consequences of an effect test was essentially self-induced, reflecting its own failure to provide a sufficiently flexible form of equal protection analysis for racial discrimination cases rather than any outrageous decisions by the lower courts.[183]

Even under the traditional two-tier approach, however, the Supreme Court's own decisions of the early 1970's indicated that the *Davis* Court's fear of an effect test was groundless. First, in *James v. Valtierra*,[184] *Jefferson v. Hackney*,[185] and *San Antonio Independent School District v. Rodriguez*[186] the Court established that state action that was relatively more burdensome to the poor was not on that ground alone racially discriminatory for equal protection purposes. In *Valtierra*, for example, the Court upheld a provision of the California Constitution that required the approval of every low-rent housing proposal by a community referendum. The Court simply stated that the provision did not rest on distinctions based on race.[187] The lesson of the Court's opinions that a classification based on wealth does not automatically constitute proof of racial discrimination was not lost on the lower courts,[188] including those that focused on discriminatory effect.[189] Second, *Palmer v. Thompson* showed that an effect test for racial discrimination claims under the equal protection clause would not inevitably favor civil rights claims over governmental interests. If the Supreme Court could decide that the "actual effect" of closing the Jackson swimming pools was not racially discriminatory, surely it could fashion an equal protection

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J., dissenting); Vladis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring); Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring); *id.* at 211-14 (Stevens, J., concurring).

183. *But cf. Antidiscrimination Principle, supra* note 31, at 26, 52-53 (concluding that an effect test is judicially unmanageable).

184. 402 U.S. 137 (1971).

185. 406 U.S. 535 (1972).

186. 411 U.S. 1 (1973).

187. 402 U.S. at 141 (quoting Hunter v. Erickson, 393 U.S. 385 (1969)). The *Valtierra* opinion does not explicitly adopt a purpose or effect test for judging racial discrimination claims. It was written by Justice Black the same year that he delivered the majority opinion in *Palmer v. Thompson*, thus suggesting that *Valtierra* employed an effect, rather than a purpose test in deciding that the challenged provision did not rest on "distinctions based on race."

188. *See, e.g.*, Mahaley v. Cuyahoga Metropolitan Hous. Auth., 500 F.2d 1087, 1093-94 (6th Cir. 1974); Citizens Comm. for Faraday Wood v. Lindsay, 362 F. Supp. 651, 658-59 (S.D.N.Y. 1973), *aff'd*, 507 F.2d 1065, 1068 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

189. *See, e.g.*, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

analysis based on discriminatory effect that would not invalidate bridge tolls and sales taxes.[190] The Title VII standard for judging racial discrimination focused on effect according to *Davis*,[191] but no one had ever suggested that Title VII prohibited a company from paying equal wages to employees of all races on the ground that this was more burdensome to the poor black than to the more affluent white. An effect test might require more judicial attention to the problem of defining just what constituted "discriminatory effect,"[192] but *Palmer* showed that this type of approach could be applied without ignoring legitimate state interests.[193]

If the lower courts' decisions applying the *Griggs* standard to public employment discrimination cases posed no threat of an equal protection clause out of control, perhaps it was their adoption of a discriminatory effect test in other contexts that troubled the Court in *Davis*. Justice White's list of disapproved cases included seven decisions that relied on effect in analyzing claims of racial discrimination against zoning, public housing, and other official actions outside the employment field,[194] all of which were decided without the benefit of a Supreme Court precedent as pertinent as *Griggs*. The opinions in these seven cases reflected the lack of controlling or even helpful precedents by relying more on policy considerations

190. Indeed, the "pro-civil rights" justices in *Palmer* opposed the discriminatory effect test as too restrictive, *e.g.*, 403 U.S. at 241-43, 265 (White, J., dissenting), a fact of no little irony in view of Justice White's opinion in *Washington v. Davis*. *See generally Legislative Motive, supra* note 78.

191. *See* 426 U.S. at 246-48.

192. The task is long overdue, and the Court itself has contributed considerably to the confusion over what "discriminatory effect" means by using a variety of terms to refer to the concept, *see, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 373, 380 (1967) ("ultimate effect," "potential impact"); Palmer v. Thompson, 403 U.S. 217, 225-26 (1971) ("actual effect"); Keyes v. School Dist. No. 1, 413 U.S. 189, 227, 232 (1973) (Powell, J., concurring) ("effect"); Washington v. Davis, 426 U.S. 229, 238, 239, 242 (1976) ("differential impact," "disproportionate impact"), and by failing to provide any reasoned basis for its definition of "discrimination." *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). For purposes of equal protection analysis, the task of defining "discriminatory effect" would be no more difficult—and in light of the experience gained under *Griggs*, it might even be easier—than the task of defining "discriminatory purpose."

193. The Court's decisions refusing to subject state welfare and state educational financing systems to strict scrutiny, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40-44 (1973); Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972), also demonstrated that the Court would not permit equal protection analysis to result in undue judicial intrusion into areas traditionally thought to involve substantial legislative discretion.

194. 426 U.S. at 244 n.12. Significantly, none of these cases involved school desegregation or jury discrimination, contexts in which the Supreme Court precedents arguably had established a purposeful discrimination requirement. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Alexander v. Louisiana, 405 U.S. 625 (1972). The lower courts apparently did not extend their discriminatory effect analysis to these contexts, because they concluded that the choice of an effect or a purpose test depended on the particular context involved.

and the purposes of the equal protection clause than did the public employment decisions, which were often decided exclusively on the authority of Title VII employment discrimination cases.

Nothing in the disapproved decisions conflicted with Justice White's observation in *Davis* that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."[195] Agreement concerning this general statement of purpose, however, did not help resolve the issue of whether the only official conduct violative of the equal protection clause was willful discrimination.[196]

The lower court opinions concluded that the purpose of the equal protection clause could not be fulfilled unless the clause were construed to prohibit conduct that had the effect of discriminating on the basis of race. This conclusion derived primarily from the lower courts' view that the requirement of governmental neutrality contained in the equal protection clause was not merely a restraint on state action, but was also an affirmative guarantee of minority equality.[197] Certainly purposeful racial discrimination is unconstitutional; if its vice lies in depriving blacks of certain rights and benefits,[198] however, then the equal protection clause arguably should also invalidate all state action that disadvantages blacks, even if the discrimination results from seemingly neutral requirements, such as an employment test, or from the majority's unconscious neglect of or indifference toward minorities.[199] As Professor Ely said in the context of jury discrimination cases: "The harm which accrues to a litigant from the underrepresentation of his race on the jury which sits in judgment on him is exactly the same whether the underrepresentation was achieved intentionally or unintentionally."[200]

Moreover, focusing on the plaintiff's injury as opposed to the government's intent in order to determine whether official conduct is racially discriminatory for equal protection purposes was hardly unprecedented. The Court in *Palmer* determined that the closing of

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195. 426 U.S. at 239.

196. *See* Perry, *supra* note 155, at 548.

197. *See generally* Ely, *supra* note 77, at 1255-56; Perry, *supra* note 155, at 555-56.

198. *But see* notes 91 & 130 *supra; Legislative Motive, supra* note 78, at 109, 116 n.109; *Antidiscrimination Principle, supra* note 31, at 9-11, 34.

199. The danger in such [suspect class] cases is not only that the legislature or officials will act out of hostility or on the basis of assumptions of the inferiority of the minority group, but also, and more likely, that they will fail to accord the same weight to the burdens to be placed on minorities that they would were these burdens imposed on their more powerful constituents.

The Supreme Court, 1975 Term, 90 HARV. L. REV. 58, 120 (1976) [hereinafter cited as *1975 Term*]. *See also Antidiscrimination Principle, supra* note 31, at 7-8, 14.

200. Ely, *supra* note 77, at 1257.

the Jackson swimming pools was nondiscriminatory because it deprived whites and blacks alike of the same benefit.[201] Similarly, even before *Palmer*, a number of Supreme Court opinions had included language that supported this view. In *Burton v. Wilmington Parking Authority*,[202] for example, the Court held that a private restaurant that refused to serve blacks could not be permitted to operate as part of a public parking facility. The Court announced that "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."[203] As this statement from *Burton* implies, however, it is impossible to decide questions of minority rights under the equal protection clause without also considering what the corresponding state responsibilities are. The issue of whether discriminatory effect or discriminatory purpose should govern equal protection claims thus involves questions concerning the government's duty to accommodate the needs of minorities, which is one of the reasons that the purpose-effect issue has become so important in recent years.[204]

Traditionally, the equal protection clause has been thought to require only that the states not act on the basis of race.[205] No great extension of this principle is involved in using an effect standard, as *Emporia* did, to judge state action that allegedly perpetuates past de jure segregation, which after all was racially motivated in the first place. It is another thing, however, to subject all official conduct that results in unintended racial discrimination to strict scrutiny, because this would effectively require state officials to act upon racial considerations to avoid violating the equal protection clause.[206] Thus, strict scrutiny would require the abandonment of an otherwise rational and appropriate employment test or zoning decision, for example, if it turned out to harm blacks more than whites.

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201. 403 U.S. at 225-26.

202. 365 U.S. 715 (1961).

203. *Id.* at 725.

204. *See Antidiscrimination Principle, supra* note 31, at 4-5. The Supreme Court's resolution of the purpose-effect issue under the equal protection clause at about the same time that it has been called upon to consider the constitutionality of governmental affirmative action programs is not entirely coincidental. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974); Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977).

205. *See generally* Ely, *supra* note 77, at 1255-56; Perry, *supra* note 155, at 555-56.

206. *Compare* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) *with* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). *See generally* Ely, *supra* note 77, at 1255-69; Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 379-80, 382-83 (1966).

Consequently, officials could avoid judicial invalidation of their actions only by consciously considering the racial impact of those actions.

The response of the lower court decisions disapproved of in *Davis* was that officials *should* be required to consider the racial impact of their decisions. Three of those opinions sounded this theme explicitly by quoting from Judge Wright's classic statement in *Hobson v. Hansen*:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous to private rights and the public interest as the perversity of a willful scheme.[207]

Moreover, basing an equal protection decision on discriminatory effect does not raise all of the problems that are generally associated with affirmative action. A requirement that the government take affirmative steps to undo the present effects of past discrimination would impose a different and substantially heavier burden than a requirement that government simply not act to exacerbate those effects, absent a compelling justification.[208] Although an equal protection analysis based on effect would create difficult problems of relief, including the need for affirmative decrees, an analysis focusing on purpose would not avoid these difficulties. In any event, the lower court decisions that held official action unconstitutional on the basis of discriminatory effect did not thereby violate the neutrality principle that underlies the equal protection clause.[209]

Nevertheless, the Supreme Court was troubled by the specter of affirmative action in *Davis*. Claiming to "have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory,"[210] Justice White said that black candidates who failed the test had no more of an equal protection claim than unsuccessful white applicants did. How these statements could come from the same court that decided *Griggs v. Duke Power Co.*[211] is baffling. The issue in both *Davis* and

207. 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc) (holding unconstitutional the de facto segregation that existed in the District of Columbia schools).

208. *See* Perry, *supra* note 155, at 561-62.

209. *But see id.* at 556-57.

210. 426 U.S. at 245.

211. 401 U.S. 424 (1971).

Griggs was whether the defendant's use of a racially neutral employment test that disproportionately excluded blacks "discriminat[ed] on the basis of race."[212] *Griggs* answered "Yes," concluding that the lack of discriminatory purpose by the company was irrelevant. *Davis* answered "No," apparently finding the proposition mystifying, if not indeed dangerously radical. The *Davis* Court maintained that the standards for proving discrimination under the equal protection clause and Title VII are different,[213] but this is simply a statement of the result the Court reached, not a reason for making the distinction in the first place.

In *Griggs*, the Court focused on discriminatory effect in order to implement Title VII's purpose of achieving equality of employment opportunities and of eliminating practices that operated to perpetuate the effects of prior employment discrimination.[214] The employment test operated to the disadvantage of the petitioners in *Griggs* in part, the Court noted, because blacks generally had long received inferior education in segregated schools.[215] Therefore *Griggs* defined discrimination in terms of effect because the Court was willing to view the plaintiffs not merely as injured individuals, but as members of a disadvantaged racial group. The Court presumed that the plaintiffs' poor performance on the test was directly traceable to past discrimination that their racial group had suffered.[216] The Court had taken a similar approach in earlier equal protection cases,[217] as well as in some of its other decisions interpreting remedial civil rights legislation.[218] The *Davis* Court, however, curtly dismissed the notion that their race entitled the unsuccessful black applicants to any special consideration[219] and thus refused to consider one of the major reasons advanced in *Griggs* for analyzing

212. *See* 426 U.S. at 239. *Compare id. with* Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) (construing Title VII, which prohibits discrimination "because of . . . race").

213. 426 U.S. at 246-48. *But see* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

214. *See* 401 U.S. at 429-30.

215. *Id.* at 430. As Justice Powell subsequently wrote for a unanimous Court, "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).

216. The plaintiffs in *Griggs* made no showing that they themselves had actually received inferior educations as a result of having to attend segregated schools.

217. *E.g.*, Alexander v. Louisiana, 405 U.S. 625 (1972) (unanimous opinion by White, J.); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968). *See generally Antidiscrimination Principle*, *supra* note 31, at 33-34.

218. *E.g.*, Gaston County v. United States, 395 U.S. 285 (1969) (construing the Voting Rights Act of 1965).

219. 426 U.S. at 246.

discrimination in terms of effect rather than purpose.[220]

Despite the Court's concern in *Griggs* that facially neutral practices might perpetuate past discrimination, the opinion made clear that the focus on discriminatory effect under Title VII need not and should not require employers to take affirmative action on behalf of blacks. Title VII did not "guarantee a job to every person regardless of qualifications," wrote Chief Justice Burger, nor did it "command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[221] Subsequent Title VII cases demonstrated the Court's ability to judge discrimination claims on the basis of effect with substantial flexibility and without endorsing discriminatory preferences or eliminating every employment practice that arguably burdened a group protected by the statute.[222] Similarly, the lower court opinions that *Davis* repudiated did not contend that state action must affirmatively accommodate minority needs to comply with the equal protection clause nor did they adopt a discriminatory effect test as a way of helping blacks. Many of them cited *Griggs*, of course, but very few explicitly relied on school segregation or other forms of historical deprivation as a basis for their decisions.[223]

Nor did the lower courts appear to make much of the fact that

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220. *See generally* Perry, *supra* note 155, at 557-59.

> To what extent should laws employing no racial criterion but having a disproportionate racial impact . . . be subject to a burden of justification heavier than mere rationality? By definition, such laws disadvantage blacks to a greater extent than whites. The degree of disadvantage is arguably less when discriminatory purpose is absent, because a discriminatory purpose carries with it a stigma of racial inferiority. But surely the disadvantage—for example, failure to get a job because of a poor performance on a written examination—is serious nonetheless. It might be asked: Isn't the disadvantage the same for a black person who fails an employment test as for a white person who fails the same test? But the question misses the point. The relevant perspective is less that of the disadvantaged individual than the perspective of the entire racial minority. The *disproportionate* character of the disadvantage, because it constitutes a severe impediment to the racial minority in its difficult struggle to escape the legacy of slavery and oppression and to achieve real social equality, is especially burdensome.

Id. at 558 n.99.

221. 401 U.S. at 430-31.

222. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); International Brotherhood of Teamsters v. United States, 97 S. Ct. 1843 (1977); Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977); Dothard v. Rawlinson, 97 S. Ct. 2720 (1977).

223. *But see* Davis v. Washington, 512 F.2d 956, 961 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976). In *Davis*, of course, there *had* been a long history of unconstitutional racial segregation in the District of Columbia schools. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

proving an equal protection claim was easier if effect were the key instead of purpose, although this must have been apparent.[224] Indeed, little in the opinions of the lower courts supports Professor Brest's suggestion that *Palmer v. Thompson* induced them "to conceal decisions based on discriminatory motivation in the guise of disproportionate impact."[225] Although many of the sixteen cases disapproved in *Davis* did include convincing evidence of racial purpose, the decisions focusing on discriminatory effect relied much more often on *Griggs* than on *Palmer*. In fact, the only opinion discussing *Palmer*'s effect-oriented interpretation of the Supreme Court's equal protection precedents was Judge Wisdom's concurring opinion in *Hawkins v. Town of Shaw*,[226] which was also the only one of the sixteen cases that, like *Palmer*, dealt with municipal services. In light of *Palmer*'s clear preference for judging equal protection claims by effect and its admonitions about the difficulty of ascertaining legislative motivation, Justice Black's opinion may well have affected the lower courts more than their opinions indicate, but what is striking about their decisions is not how often they relied on *Palmer*, but how rarely it was cited.

In summary, Justice White's fear that sustaining plaintiffs' claim in *Davis* would open the floodgates to a torrent of equal protection litigation jeopardizing the most legitimate of state actions on racial discrimination grounds was unjustified.[227] Certainly the performance of the lower courts whose opinions *Davis* rejected was no cause for alarm. The Supreme Court's own equal protection cases appeared to focus on effect or purpose depending on the type of discrimination involved, and the decisions applying *Griggs* in public employment cases were following the closest precedent available. In judging employment practices that disproportionately excluded

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224. Numerous legal scholars have noted the difficulties of establishing that racial considerations prompted official action. *E.g.*, Ely, *supra* note 77, at 1275, 1279, 1283, 1333; Gunther, *supra* note 5, at 46-47. More importantly, the Supreme Court had relied on this difficulty as an important reason for focusing on effect rather than purpose in *Palmer* and *Emporia*. Justice Powell's concurrence in *Keyes* had also argued that a purpose test in school desegregation cases would make the plaintiff's burden far more difficult. Furthermore, *Griggs*, which vividly demonstrated the importance of the issue by sustaining a claim based on effect that had failed below on the basis of purpose, had noted concern that a purpose test might permit the continuation of covert discrimination. 401 U.S. at 435.

225. *Antidiscrimination Principle, supra* note 31, at 27.

226. 461 F.2d 1171, 1174-75 (5th Cir. 1972) (Wisdom, J., concurring).

227. The "floodgates" argument should not be particularly persuasive in this context. As Professor Ely has argued, "the observation that a constitutional doctrine will have far-reaching implications cannot count as a refutation; whatever else we may or may not know about the adoption of the Fourteenth Amendment, it plainly was intended to make a difference." Ely, *supra* note 77, at 1256.

blacks by a job-related standard, many of these decisions provided a more sympathetic way of evaluating government justifications than was available under the traditional two-tier analysis. Indeed, the flexible approach of the lower courts would have upheld the employment test in *Davis*, if the Supreme Court had used that case only to hold that the statutory standards of job-relatedness were satisfied by a showing that the test predicted training school performance. Even if the Court maintained its rigid two-tier method of equal protection analysis in all race cases, however, none of the lower court decisions that focused on discriminatory effect either endorsed or required preferential treatment for minorities or their claims. First, *Griggs* clearly indicated that preferential treatment would be inappropriate under an effect test. Second, bridge tolls and sales taxes that applied to everyone were not being attacked as racially discriminatory, nor was there any likelihood that they would be, so long as the Supreme Court's effect analysis under *Griggs* permitted equal pay for all employees. Finally, *Palmer* demonstrated that the Court could judge equal protection cases on the basis of effect without unduly encouraging civil rights claimants or ignoring legitimate governmental interests. In short, *Davis* undertook to settle one of the most important and complex civil rights issues of the day by concluding that only purposeful discrimination violated the equal protection clause in a case in which the issue was not argued by the parties, in which its resolution was not necessary to the Court's decision, in which the precedents appeared to conflict, and in which the only justification advanced to support the Court's conclusion was an unrealistic fear of a purely theoretical danger.[228]

IV. The Purpose Requirement Applied

The Supreme Court is now completely committed to a rule requiring proof of discriminatory purpose in all types of racial discrimination cases under the equal protection clause. Only Justices Brennan and Marshall did not join the Court's opinion on this issue in *Davis*, arguing that the statutory issues made it unnecessary for them to reach the constitutional question. Seven months later in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, however, they too endorsed the requirement that purposeful

228. For one of the more cryptic criticisms of *Davis*, see "Has the Supreme Court Abandoned the Constitution," *Saturday Review* (May 28, 1977), 10, in which an official of the ACLU Foundation argues that *Davis* is "perhaps the single worst decision in the past 80 years."

discrimination is a prerequisite to an equal protection violation.[229] Finally, in reversing a criminal conviction on jury discrimination grounds in *Castaneda v. Partida*,[230] the entire Court agreed that the issue was whether the alleged discrimination was purposeful, although the five-to-four decision and five separate opinions showed that there is substantial disagreement among the members of the Court as to the application of the purpose requirement.

The lack of consensus that surfaced in *Castaneda* is not surprising. Indeed, it is a fairly safe prediction that courts will be struggling with problems concerning the application of the purposeful discrimination requirement for years. The requirement is new, at least in many contexts,[231] and as Justice Powell pointed out three years before *Davis*, the Supreme Court has never made clear what suffices to establish discriminatory purpose under the equal protection clause.[232] Professor Ely's study of motivation in constitutional law, however, outlines the relevant inquiry:

> Anyone who concludes that legislative or administrative motivation is sometimes relevant to constitutional questions will inevitably become concerned with the methodology by which such motivation is to be determined. 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: 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.[233]

The rather off-handed tone of this passage was understandable in 1970, but after *Davis*, something of the effort he described is not only advised in racial discrimination cases under the equal protection clause, it is required.

A. Washington v. Davis

1. The Legal Standard

Justice White's opinion in *Washington v. Davis* provides a starting point for determining the showing necessary to establish purposeful discrimination. Initially, he distinguished between laws

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229. 429 U.S. 252, 271-72 (1977) (Marshall, J., concurring in part and dissenting in part).

230. 97 S. Ct. 1272 (1977).

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

232. Keyes v. School Dist. No. 1, 413 U.S. 189, 233 (1973) (Powell, J., concurring).

233. Ely, *supra* note 77, at 1220.

that expressly create racial classifications and laws that are neutral on their face, implying that those in the former category are presumptively the products of discriminatory purpose.[234] The fact that the terms of the charter provision struck down in *Hunter v. Erickson* referred to race played a critical role in his opinion for the Court there,[235] and this factor could also serve to explain many of the Court's other equal protection decisions from *Strauder v. West Virginia*[236] in 1880 to *Loving v. Virginia* in 1967.[237]

Laws that create express racial classifications are now rare, and the significance of *Davis* for modern equal protection litigation lies not in what the opinion says about these laws, but in what it says about laws with facially neutral provisions. Justice White's opinion indicates that discriminatory purpose will be difficult to prove in these cases. Although the opinion acknowledges that the courts may infer invidious purpose from a law's discriminatory impact and other relevant—but unspecified—facts,[238] the decisions cited in support of this proposition illustrate that the disparate impact on minorities must be overwhelming to permit an inference of discriminatory purpose. In one of the cases cited, *Yick Wo v. Hopkins*,[239] the board of supervisors denied laundry licenses to every one of the two hundred Chinese who applied, but permitted eighty non-Chinese to conduct laundry businesses under similar conditions. All of the other decisions struck down jury discrimination that either totally or almost totally excluded blacks. For example, in the most recent of these decisions, *Alexander v. Louisiana*,[240] no blacks were on the grand jury that indicted the defendant although over twenty-one percent of the people in the county who were eligible for grand jury service were black.[241] In his opinion for a unanimous Court, Justice White noted that the probability that a truly random selection system would produce the exclusionary effect in *Alexander* was one in twenty thousand. Hence, the Court held that the substantial dispar-

234. *See* 426 U.S. at 241. Whether government affirmative action-minority preference programs violate the equal protection clause is beyond the scope of this article, *see* notes 142 & 204, but this part of the *Davis* opinion does suggest that such a program stands a better chance of surviving judicial scrutiny if preferences are based on functional factors, *e.g.*, previous conditions of poverty or poor educational opportunities, rather than race.

235. 393 U.S. 385, 389 (1969).

236. 100 U.S. 303 (1880).

237. 388 U.S. 1 (1967).

238. 426 U.S. at 241-42.

239. 118 U.S. 356 (1886). In his concurring opinion in *Davis*, Justice Stevens noted that the disproportionate impact in *Yick Wo* was so dramatic that it really did not matter whether the equal protection standard was phrased in terms of purpose or effect. 426 U.S. at 254.

240. 405 U.S. 625 (1972).

241. *Id.* at 627-28.

ity between the proportion of blacks chosen for jury duty and the proportion of blacks in the eligible population created a strong inference that racial discrimination, not chance, had produced the result.[242]

The *Davis* opinion's reliance on the jury discrimination cases may indicate other characteristics of the proof necessary to establish purposeful discrimination. The first has to do with the showing necessary for a prima facie case. The jury decisions held that a prima facie case of invidious discrimination was established if the system of selection provided the opportunity for discrimination, for example, by including a racial designation on the prospective juror's information card, and if the degree of minority exclusion was striking.[243] This showing, according to *Alexander*, shifted "the burden of proof . . . to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."[244] The *Davis* opinion quoted this passage,[245] thus suggesting that proof of discriminatory impact might satisfy the purpose requirement in all types of racial discrimination claims under the equal protection clause if the impact is substantial and is not explained on nonracial grounds by the government.[246]

The jury discrimination decisions also held that the state could not rebut a prima facie case simply by claiming to have acted in good faith. In *Whitus v. Georgia*[247] and *Alexander v. Louisiana*,[248] both cited in *Davis*, the Court held that the testimony of a jury commissioner that no consideration was given to race during the selection procedure was insufficient to defeat a prima facie case of systematic exclusion. As Justice White wrote in *Alexander*: "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."[249]

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242. *Id.* at 630 & n.9.

243. *See, e.g., id.* at 630-32; Turner v. Fouche, 396 U.S. 346, 361 (1970); Eubanks v. Louisiana, 356 U.S. 584, 587 (1958).

244. 405 U.S. at 632.

245. 426 U.S. at 241.

246. For a similar approach in the context of school desegregation, see Keyes v. School Dist. No. 1, 413 U.S. 189, 208-10 (1973). As Justice Stevens cautioned in his concurring opinion in *Davis*, however, "the burden of proving a prima facie case may well involve differing evidentiary considerations" in the various types of equal protection claims that might arise. 426 U.S. at 253.

247. 385 U.S. 545 (1967).

248. 405 U.S. 625 (1972).

249. *Id.* at 632 (quoting Hernandez v. Texas, 347 U.S. 475, 482 (1954)). *See also* Keyes v. School Dist. No. 1, 413 U.S. 189, 210-13 (1973). "[I]t is not enough, of course, that the school authorities rely upon some allegedly logical, rationally neutral explanation for their

The *Davis* Court's reliance on the jury discrimination decisions raises the issue of how the court could find purposeful discrimination if the officials responsible for the challenged state action did not consciously discriminate. The answer seems to be that Justice White's understanding of the discriminatory purpose requirement calls for an objective assessment of the law rather than a subjective analysis of the lawmaker's motives. He does not discuss this distinction explicitly in *Davis*, but, even apart from his reliance on the jury discrimination cases, it is suggested by his opinion in a number of ways. The *Davis* opinion always used the word "purpose," or one of its derivatives, to describe the type of discrimination that a plaintiff challenging state action must establish. This careful and consistent usage contrasts sharply with the Court's previous equal protection opinions, which often used "purpose," "intent," and "motive" as if the terms were synonymous.[250] The only time that Justice White referred to motivation was when he distinguished *Palmer v. Thompson* as holding not that discriminatory effect could establish an equal protection violation, but "that the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations."[251]

The procedural posture in which the Court decided *Davis* also suggests that "the totality of relevant facts"[252] that permits an inference of purposeful discrimination is primarily an objective, nonmo-

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actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Id.* at 210.

250. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 198, 210, 213, 232 (1973) ("intentional," "deliberate," "purpose"); Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) ("motivation," "motives," "purpose"); Evans v. Abney, 396 U.S. 435, 445 (1970) ("motivated," "intent"). *But see* Reitman v. Mulkey, 387 U.S. 369, 390-91, 395 (1967) (Harlan, J., dissenting) (legislators' "intent" distinguished from law's "purpose").

There may be little real difference for purposes of constitutional adjudication between the concepts of a law's "purpose" and the lawmakers' "motives" in enacting it. *See generally* Ely, *supra* note 77, at 1217-21. The *Davis* opinion's care in speaking only of purpose, however, suggests a difference in the *type of evidence* to which these two concepts refer, with "purpose" connoting objective facts and "motive" implying the subjective feelings of the lawmakers.

251. 426 U.S. at 243. Justice White, of course, dissented from this holding in *Palmer*, 403 U.S. at 242-43, but he also argued there that reliance on evidence of motive was unnecessary to find that the prior desegregation order, not legitimate purposes, prompted the decision to close the pools. *Id.* at 254-55, 258-60. A similar theme was apparent in his opinions for the Court in *Reitman* and *Hunter*, which examined the laws struck down in those cases in terms of their immediate objective, ultimate effect, and historical context, not on the basis of evidence of the motives of the individual electors and legislators who voted for the laws. Indeed, in a case such as *Reitman*, determining the individual motives of all, or even a majority of, the citizens who voted for the challenged law would be nearly impossible. *But see Legislative Motive, supra* note 78, at 124 n.144.

252. *See* 426 U.S. at 242.

tivational matter. The district court decided *Davis* on cross motions for summary judgment. Each side had supported its position with sworn affidavits. Neither side had presented witnesses. Ordinarily in these circumstances, summary judgment is inappropriate if the defendants' motives are a material and disputed element of the cause of action.[253] Although the plaintiffs never claimed that racial motivation had prompted the use of Test 21,[254] the Supreme Court did not reject their claim because of a failure in pleading or because of the absence of any evidence concerning the subjective state of mind of the responsible police officials. Instead, Justice White undertook to review and assess the objective facts of the case that he considered significant in order to determine whether Test 21 "reflects" a racially discriminatory purpose.[255]

Perhaps the most important of these objective facts in Justice White's view was that the test served a legitimate purpose that the defendants were constitutionally empowered to pursue. "It is untenable," he wrote, "that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing."[256] Justice Stevens, who sought in his concurring opinion to rely even less on subjective evidence than the Court did, was also influenced by the fact that Test 21 served the neutral and legitimate purpose of requiring all applicants to demonstrate a minimum level of reading ability, a skill that he considered "manifestly relevant" to police work.[257]

The fact that the discriminatory action resulted from an acceptable, even laudable, government purpose made *Davis* readily distinguishable from *Reitman*, in which the state had no interest in encouraging private housing discrimination, and from the jury discrimination cases, in which the state's interest in the initial selection procedures was merely to produce the needed number of prospective jurors on a purely random basis.[258] Similarly, the pivotal issue in *Palmer* was whether the city's decision to close the pools served any nonracial purpose. Justice White's dissent in *Palmer*

253. *See, e.g.*, Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962); Denny v. Seaboard Lacquer, Inc., 487 F.2d 485, 491 (4th Cir. 1973); Pettit v. Gingerich, 427 F. Supp. 282, 288 (D. Md. 1977).

254. *See* 426 U.S. at 235, 237.

255. *Id.* at 239, 245-46.

256. *Id.* at 245-46.

257. *Id.* at 254.

258. *See* Ely, *supra* note 77, at 1261, 1263-65.

argued that the record did not support Jackson's claims of possible violence and financial loss,[259] but the concurring opinions of the Chief Justice and Justice Blackmun indicated that the city had sufficient discretion to pursue what the justices believed were its legitimate interests.[260] A similar concern influenced the Court to uphold the Texas system of computing welfare benefits against a racial discrimination challenge in *Jefferson v. Hackney*,[261] a decision that the *Davis* opinion cited twice.[262]

As *Palmer* demonstrates, conceiving a legitimate purpose for any state action is usually possible, no matter how strong the evidence is that racial motivations prompted the action. One of the reasons that the Supreme Court was so badly divided in *Palmer* was that it had traditionally accepted the proferred justifications for state action unless they were clearly a sham. Indeed, Professor Ely's 1970 review of the Court's decisions concluded:

> Whenever the Court . . . has set for itself the question whether a choice was generated by a rational and otherwise inoffensive criterion on the one hand or an unconstitutional one on the other, it has concluded that the illegitimate motivation has not been convincingly shown, sometimes in the face of substantial evidence to the contrary.[263]

Ely noted that part of the Court's reluctance to find a constitutional violation when state action appeared to involve both an illicit and a legitimate purpose could be traced to its earlier efforts to determine whether the improper purpose was "dominant,"[264] an effort that Ely regarded as misguided and unduly restrictive.[265] The *Davis* opinion does not state whether the necessary discriminatory purpose must be the dominant basis in order for the state action to violate the equal protection clause. Two relatively minor points made by Justice White, however, suggest that the presence of *any* nonracial governmental purpose may defeat any equal protection claim. First, in arguing that *Palmer* had actually focused on purpose, not effect, he read *Palmer* to hold that evidence of racial motivation on the part of the Jackson officials could not impeach

259. 403 U.S. at 254-55, 258-60.

260. *Id.* at 227-30.

261. 406 U.S. 535, 546-47 (1972). *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40-44 (1973).

262. 426 U.S. at 240-41, 244.

263. Ely, *supra* note 77, at 1275.

264. *Id.* at 1266-67.

265. *Id.* at 1266-68; *see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 & n.11 (1977).

the city's legitimate purposes of preserving peace and avoiding deficits. The implication is that *Palmer* not only survives *Davis*, but that its holding, as reinterpreted, protects state action that serves a legitimate governmental interest, even if racial considerations also clearly motivated the action. Second, in arguing that *Palmer* did not mean that legislative purpose was generally irrelevant in constitutional adjudication, the *Davis* opinion cited another 1971 decision, *Lemon v. Kurtzman*.[266] In *Lemon* the Court reviewed an establishment clause challenge to state aid programs for parochial schools on the basis of a three-part test. One part of the test examined whether the programs had a secular purpose. Justice White's reliance on *Lemon* and other decisions involving public aid to church-related schools to demonstrate the Court's willingness to inquire closely into the purpose of a challenged statute is misleading, however, because the Court's acceptance of the government's alleged secular purpose has become largely pro forma in these cases.[267] Recent decisions invalidating school aid programs on establishment clause grounds invariably find that at least one of their purposes is constitutionally permissible, but proceed to hold that they fail to meet one of the other two requirements of the test: that the program's primary effect must not be to advance religion and that it must not result in excessive entanglement between government and religion.[268] Of course, the very fact that these two other independent grounds are available may explain why the Court's analysis of legislative purpose in establishment clause cases has been so superficial. Nevertheless, if Justice White intended to suggest that this type of analysis was appropriate in equal protection litigation after *Davis*, establishing the necessary discriminatory purpose will be impossible in all but the most egregious instances of racial discrimination.

2. *The Legal Standard Applied*

Even if racial discrimination need not be the sole or the dominant purpose of state action to violate the equal protection clause,

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266. 403 U.S. 602 (1971) (cited in Washington v. Davis, 426 U.S. 229, 244 n.11 (1976)).

267. *See* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1178-81 (1974); *1975 Term*, *supra* note 199, at 135 n.16.

268. *See, e.g.*, Roemer v. Board of Public Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971). For the exception that proves the rule, see Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a state statute that prohibited the teaching of evolution on the ground that the law's purpose was to enforce fundamentalist religious beliefs in violation of the first amendment).

establishing a violation on the basis of discriminatory impact will still be extremely difficult if the state action challenged serves some legitimate governmental interest. In *Davis*, the task was impossible. The police department had no history of de jure discrimination, the test did not discriminate on its face, and most of the other traditional indicators of racial purpose were absent as well. The Court was not experienced at examining facially neutral government actions for evidence of discriminatory purpose, and what experience it had did not involve subtle forms of discrimination. The records in the jury discrimination cases and in *Gomillion*, for example, were "tantamount for all practical purposes to a mathematical demonstration" that the decisions invalidated were based solely on race.[269] In other cases decided by the Court, the timing of the challenged actions indicated racial purpose, either because the official actions appeared to be taken in response to recent desegregation orders, as in *Griffin*, or because they sought to invalidate recently enacted civil rights laws, as in *Reitman* and *Hunter*.

In contrast, the record in *Davis* contained nothing suspicious about the timing or other "legislative history" of the department's decision to use Test 21. The plaintiffs based their entire racial discrimination claim on the fact that the failure rate of black applicants was four times as high as the failure rate of whites. Justice White stated that "[e]ven agreeing with the District Court that the differential racial effect on Test 21 called for further inquiry,"[270] the evidence did not warrant the conclusion of purposeful discrimination. Specifically, he stated that the facts that the police department had affirmatively recruited blacks, that the racial composition of recent recruit classes and the force in general roughly reflected the population mix of the overall area, and that the test predicted training school performance negated any inference that the use of Test 21 discriminated on the basis of race for equal protection purposes.

Although the Court relied on both subjective and objective factors to reach this conclusion, these facts supported two essentially objective conclusions that favored the defendants. First, they greatly reduced the significance of the discriminatory impact of Test 21 as proof that the department's overall employment practices discriminated against black candidates as a group. As the district court had said, the higher black failure rate might be traced in part to the department's affirmative recruiting program, which had at-

269. *See* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).
270. 426 U.S. at 246.

tracted many applications from poorly qualified blacks.[271] The proper perspective, Justice White implied, was the department's overall procedures for hiring police officers. The fact that these procedures, including the use of Test 21, produced a recruit class that was forty-four percent black in a recruiting area that was also forty-four percent black hardly established a racial effect substantial enough to suggest discriminatory purpose. The second point favoring the defendants was the validation study showing Test 21's relationship to the police training program. This study buttressed the department's claim of a legitimate purpose for Test 21 by establishing that the test actually served the purpose for which it was used. Thus, the goal of improving police oral and writing skills was not merely an unsupported rationalization for discriminatory action, as Justice White had viewed the city's justifications in *Palmer*.

These two facts also seemed to be at the heart of Justice Stevens's concurring opinion. Rather than relying on the defendants' affirmative recruiting efforts or any other evidence of their subjective good faith, Justice Stevens based his decision to uphold Test 21 on two "objective" considerations. First, the test served a legitimate governmental purpose. Second, the evidence of racially disproportionate failure rates for Washington, D.C., police applicants could not alone overcome the presumption that Test 21, which was widely used throughout the federal service, was in fact racially neutral in its effect as well as its purpose.[272]

Thus, the specific factors that both the Court and Justice Stevens believed negated any inference of purposeful discrimination in *Davis* reinforced the earlier indications in Justice White's opinion that two crucial elements of a claim based on discriminatory effect are the overall size and significance of that effect and the legitimacy of the government's alleged nonracial purpose. Ironically, if the Supreme Court had adopted an effect test outright, the Court would consider the same objective facts, because the result of a finding of racial discrimination is only the application of a more exacting standard for evaluating the state interest involved. Under the purpose test of *Davis*, on the other hand, the question of whether the government in fact pursued a legitimate interest comes in the "front door" during the initial determination of whether the plaintiff has established racial discrimination. Because the Court's inflexible

271. 348 F. Supp. at 17.

272. For another statement of Justice Stevens's view that the courts should determine discriminatory purpose on the basis of objective evidence, rather than on the basis of the subjective motivation of the officials involved, see Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766, 2776 (1977) (Stevens, J., concurring).

two-tier method of equal protection analysis has made the determination of racial discrimination decisive, the *Davis* approach provides a better opportunity to consider the governmental interests involved in a racial discrimination case, and no doubt the Court's concern for legitimate governmental interests influenced it to adopt the discriminatory purpose test.

The deficiency in the analysis suggested by *Davis* is that it accords undue deference to the government's justifications for actions that in fact discriminate against minorities. Thus, even though the evidence in *Davis* supported the conclusion that the purpose of Test 21 was legitimate, the department actually may have decided to use the test because it secretly desired to limit the number of black recruits. Certainly the department should have known that standardized intelligence tests often eliminate disproportionately high numbers of blacks.[273] Consequently the department's use of Test 21, whether or not the department was also concerned with reading skills, could conceivably have involved a discriminatory purpose. Interestingly, Justice White never contended that the opportunity for racial discrimination was absent in *Davis*, as the Court had done in rejecting equal protection claims in *Jefferson v. Hackney*[274] and *San Antonio Independent School District v. Rodriguez*.[275] In any event, although the existence of a discriminatory purpose is possible in a case like *Davis*, proof of the illicit purpose may not be, particularly if the responsible public officials are careful to create a proper "legislative history" for their decision.[276] Indeed, if Justice White's reinterpretation of *Palmer v. Thompson* survives, even incriminating public statements would not establish a racial purpose, if the government is able to show that its action also served a legitimate interest.

Surely the Court must have been aware in *Davis* that governmental action "is frequently the product of compromise, of collective decisionmaking and of mixed motivation"[277] and that to uphold actions that involve a permissible as well as a racial purpose would

273. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975) (Federal Service Entrance Examination, which, like Test 21, was developed by the Civil Service Commission and was used generally throughout the federal service, *see* 426 U.S. at 234, shown to have a disproportionate impact on blacks).

274. 406 U.S. 535, 547-48 (1972).

275. *See* 411 U.S. 1, 51 n.108 (1973).

276. *See generally Legislative Motive, supra* note 78, at 125-26. Legislators have learned to do this to circumvent first amendment limitations on state aid to religious educational institutions. *See* cases cited note 268 *supra; 1975 Term, supra* note 199, at 135 n.16 (1976).

277. 426 U.S. at 253 (Stevens, J., concurring). *See generally* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

permit racial considerations to influence official decisionmaking. One response to this concern is for the Court to consider only objective factors in searching for discriminatory purpose, and Justice White's opinion implied that this was the proper approach. Justice Stevens was even more definite in favoring a purely objective review. Noting that it was "unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker,"[278] his concurring opinion argued that objective evidence of what actually happened was usually more probative than evidence about the actor's state of mind, because "normally the actor is presumed to have intended the natural consequences of his deeds."[279]

This simple torts maxim may be tremendously important in future equal protection litigation. The maxim's presumption has already proved a powerful weapon in school desegregation cases, in which the element of racial intent has been found on the basis of acts, "the foreseeable consequence of which is segregation."[280] Not every showing of discriminatory effect, however, will shift the burden to the government in accordance with the maxim's presumption.[281] Justice Stevens himself was careful not to advocate any general rules about proof in these cases,[282] and, more importantly, only his opinion, not the Court's, proposed the presumption. Although Justice White's discussion of the prima facie case concept considered a similar burden-shifting device, the opinion implied only that a showing of a *substantial* discriminatory effect would shift the burden to the government. After going to such lengths in *Davis* to establish discriminatory purpose as a general requirement under the equal protection clause, the Court is unlikely to permit that requirement to be presumptively satisfied in all contexts by a showing of discriminatory effect.[283]

Although the focus in *Davis* on objective evidence may help

278. 426 U.S. at 253.

279. *Id.*

280. Hart v. Community School Bd. of Educ., 512 F.2d 37, 51 (2d Cir. 1975); *see* Armstrong v. Brennan, 539 F.2d 625 (7th Cir. 1976); Arthur v. Nyquist, 429 F. Supp. 206, 210-11 (W.D.N.Y. 1977); Reed v. Rhodes, 422 F. Supp. 708, 796 (N.D. Ohio 1976). *But see* Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977); Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1976).

281. *But see 1975 Term, supra* note 199, at 120-21 (1976).

282. *See* 426 U.S. at 253-54.

283. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977). *See also* Butler v. Cooper, 554 F.2d 645, 647 (4th Cir. 1977); United States v. City of Chicago, 549 F.2d 415, 435 (7th Cir. 1977); Guardian Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm'n, 431 F. Supp. 526, 534-35 (S.D.N.Y. 1977).

equal protection claimants to establish their claims, it hardly guarantees the success of all claims challenging racially-based state actions, especially if those actions also appear to serve legitimate government interests. Moreover, equal protection claimants face even greater problems of proof in challenges to state action that is essentially negative in character, such as a decision to close public swimming pools or to block a proposal that would benefit minorities. The Supreme Court considered a claim of this character in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[284]

B. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*

1. *Background*

In *Arlington Heights*, the Metropolitan Housing Development Corporation (MHDC) sought to build 190 townhouse apartments for low- and moderate-income tenants under a federal subsidy program in the Village of Arlington Heights, Illinois. Arlington Heights is a Chicago suburb that in 1970 had a population of 65,000 people, 99.9% of whom were white. Forty percent of the eligible applicants for MHDC's proposed development were likely to be black and Mexican-American, thus increasing Arlington Heights' minority population by over one thousand percent.[285] The site chosen for the development was part of an eighty-acre parcel on which the Clerics of St. Viator, a Catholic religious order, maintained their novitiate and a high school. The Viatorians had optioned a vacant fifteen-acre corner of this property at a low price to permit MHDC to build the first units of subsidized housing in the village. The entire Viatorian property, as well as all of the land surrounding it, was zoned for single-family purposes, so in 1971 MHDC applied to the village for rezoning of the development site to a multiple-family classification. The Arlington Heights Plan Commission held three public hearings to consider the MHDC proposal. The hearings drew large, demonstrative crowds, and the debate focused not only on the zoning aspects of the proposal, but also on the "social issue"—whether racially integrated subsidized housing was desirable at this location in Arlington Heights.[286] After the plan commission recommended by a divided vote that the zoning change be denied, the village's board

284. 429 U.S. 252 (1977).

285. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

286. 429 U.S. at 257-58.

of trustees held a public hearing on September 28, 1971, and voted six-to-one to deny the rezoning petition.

The following June MHDC and three black prospective tenants of the development sued Arlington Heights and its board of trustees.[287] The plaintiffs alleged that the village's refusal to permit MHDC to build the subsidized apartments violated various constitutional and statutory provisions, including the equal protection clause and Title VIII of the Civil Rights Act of 1968,[288] because the purpose and the effect of the refusal to rezone was the perpetuation of racial segregation in Arlington Heights. The principal relief sought was an injunction preventing the village from interfering with construction of the proposed development.[289]

The defendants moved to dismiss the complaint on the grounds, *inter alia*, that the plaintiffs lacked standing. After the district court denied this motion, the plaintiffs filed their answer, and a year of discovery ensued. During the course of discovery, the plaintiffs deposed one of the trustees and asked her why she had voted against the proposal. She refused to answer, claiming that her motives were privileged. After the question of privilege was certified and briefed, the district court upheld the defendants' position on the authority of *Palmer v. Thompson* and *United States v. O'Brien*.[290] The court made the same ruling when the case went to trial in January 1974, and, consequently, the plaintiffs offered "no direct evidence by which to determine the motive or mental processes of the trustees."[291] The district court noted, however, that "motives are irrelevant if the effect is illegal,"[292] citing *Gautreaux v. Romney*,[293] one of the cases that *Davis* was to disapprove of two years later. Nevertheless, the court ruled for Arlington Heights. It held that the Fair Housing Act was inapplicable to the facts of the case[294] and that the other constitutional and statutory provisions relied on by plaintiffs prohibited racial discrimination but not dis-

287. The individual plaintiffs sought to maintain the action as a class action, but the district court declined to certify the class. *Id.* at 258 n.3. The trial court did allow a second nonprofit organization and a Mexican-American individual to intervene as plaintiffs. *Id.* at 258-59.

288. The Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1970 & Supp. V 1975).

289. *See* 517 F.2d at 411. The complaint also sought, *inter alia*, money damages and attorneys' fees.

290. *See* the district court's "Decision on Plaintiffs' Discovery Motions" (July 10, 1973), *printed in* Appendix, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., No. 75-616, at 62-63 (Oct. Term 1975).

291. 373 F. Supp. 208, 210 (N.D. Ill. 1974). *See also* Trial Transcript at 161-63.

292. 373 F. Supp. at 210.

293. 448 F.2d 731, 738 (7th Cir. 1971).

294. 373 F. Supp. at 209. *But see* note 324 *infra*.

crimination against the poor.[295] The court also commented on the circumstantial evidence concerning racial motivation. It found that although large groups of local residents opposed MHDC's development because of opposition to minority or low-income groups, the plaintiffs had not shown that this consideration motivated the trustees, who in fact had been "motivated . . . by a legitimate desire to protect property values and the integrity of the Village's zoning plan."[296]

In a two-to-one decision, the Court of Appeals for the Seventh Circuit reversed.[297] Proceeding in what the Supreme Court later called "a somewhat unorthodox fashion,"[298] the court ignored the statutory issues and focused exclusively on the equal protection claim. The court of appeals agreed with the district court that, regardless of the village board's motivation, the refusal to rezone would be unconstitutional if it had a racially discriminatory effect, absent a compelling state interest,[299] but unlike the district court, it concluded that the plaintiffs had established a discriminatory effect. The court of appeals found that the village's decision would have a disproportionate impact on blacks. Although blacks constituted only eighteen percent of the population of the Chicago metropolitan area, they made up forty percent of the area's low- and moderate-income residents who were eligible for the MHDC development and were thus affected by the village's decision. Citing *James v. Valtierra*,[300] however, the court held that this disparity alone did not establish racial discrimination violative of the equal protection clause, and it proceeded to assess the village's decision "not only in its immediate objective but its historical context and ultimate effect."[301]

The historical context included the facts that Arlington Heights had grown from a small village in 1950 to the most residentially segregated city in the Chicago area among municipalities with over 50,000 residents; that the village's spectacular and highly segregated growth patterns paralleled those of the suburban area where it was located, which from 1960 to 1970 had also taken some 100,000 jobs from the City of Chicago; and that Arlington Heights had never permitted or supported any subsidized housing within its borders,

295. 373 F. Supp. at 210-11.
296. *Id.* at 211.
297. 517 F.2d 409 (7th Cir. 1975).
298. 429 U.S. at 271.
299. 517 F.2d at 412-13.
300. 402 U.S. 137 (1971).
301. 517 F.2d at 413; *see* 429 U.S. at 260 n.6.

even though the massive growth in its area had created a desperate and growing need for low- and moderate-income housing there.[302] With one judge dissenting, the court of appeals also found that the ultimate effect of the village's refusal to permit construction of the MHDC development was to block the only opportunity to have any subsidized, integrated housing in Arlington Heights and thus to perpetuate massive residential segregation in the area.[303] Arlington Heights had an affirmative duty to alleviate this problem of de facto housing segregation, the court maintained; the fact that the village had "so totally ignored its responsibilities in the past" contributed to the court's conclusion that the rejection of the MHDC proposal had "racially discriminatory effects."[304]

The court of appeals then analyzed the village's claimed justifications for its decision and held that neither maintaining the integrity of the zoning plan nor protecting neighboring property values were compelling interests for equal protection purposes. The village's "buffer policy" provided that multiple-family zoning would only be permitted adjacent to a single-family neighborhood if it served to buffer that neighborhood from a different type of zone, such as a commercial area. The defendants argued that granting the MHDC petition would violate the integrity of the plan, because single-family residences were located on two sides of the proposed site, but plaintiffs maintained that their development could be considered a buffer against the Viatorian buildings on the other two sides. More importantly, the plaintiffs argued that the buffer zone policy was a "sham." Although the village used the policy to justify its denial of MHDC's petition, the village had regularly ignored the policy in approving some sixty prior zoning changes for commercial apartment developers. The court of appeals reviewed the evidence concerning the village's decisions on these other rezoning petitions and determined that the village had applied the buffer zone policy in some commercial cases and overlooked it in others.[305] Thus, although the evidence did not require the conclusion that the village would have approved MHDC's proposal if the petition had been for market-rate apartments, the inconsistency shown by the village's prior decisions indicated that its interest in applying the buffer policy was not "compelling."[306] Moreover, the court noted, the planning rationale behind the buffer policy would have only minimal

302. *See* 517 F.2d at 411, 413-15.
303. *Id.* at 414-15.
304. *Id.* at 415.
305. *Id.* at 412.
306. *Id.* at 415.

applicability to the low-rise, open-space development planned by MHDC, because the proposed townhouses were similar to the adjacent single-family homes in terms of density, architecture, and other characteristics. These facts also led the court of appeals to discount the asserted reliance of local homeowners on the buffer policy and thus to hold that the village's concern for diminished property values also was not compelling.

The Supreme Court granted the defendants' petition for *certiorari* on December 15, 1975.[307] The case was briefed and set for argument later in the term, but the argument date was subsequently moved from April to October 1976. In the meantime, the Court delivered its opinion in *Washington v. Davis*, which listed the appellate decision in *Arlington Heights* among those lower court decisions that the Court disapproved of.[308]

Thus, despite their victory below, the plaintiffs in *Arlington Heights* came to the Supreme Court with a heavy burden. In addition to *Davis*, they confronted two other lines of adverse Supreme Court precedent. First, the Court had historically accorded great deference to municipal zoning decisions. In the fifty years since it upheld the constitutionality of zoning laws in *Euclid v. Ambler Realty Co.*,[309] the Court only once held that a local zoning decision violated the fourteenth amendment, and that was in 1928.[310] During most of these years, the Court simply refused to hear any zoning cases, but when it returned to the field in the 1970's it continued to defer to the decisions of zoning authorities.[311] In 1974 in *Village of Belle Terre v. Boraas*[312] the Court rejected an equal protection challenge to a zoning ordinance that restricted land use to one-family dwellings. Justice Douglas's opinion for seven members of the Court held that "[w]e deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective.' "[313] He found the objective of the Belle Terre ordinance permissible, and therefore constitutional, rhapsodizing:

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307. 423 U.S. 1030 (1975).

308. 426 U.S. at 244 n.12.

309. 272 U.S. 365 (1926).

310. Nectow v. City of Cambridge, 277 U.S. 183 (1928). *See also* Moore v. City of East Cleveland, 97 S. Ct. 1932 (1977).

311. *See generally* Comment, *Exclusionary Zoning and a Reluctant Supreme Court*, 13 WAKE FOREST L. REV. 107 (1977).

312. 416 U.S. 1 (1974).

313. *Id.* at 8.

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[314]

The second line of unfavorable precedent confronting the *Arlington Heights* plaintiffs was the series of decisions in which the Supreme Court refused to consider the poor the equivalent of racial minorities and therefore declined to apply strict scrutiny to state actions that discriminated against them.[315] As the Seventh Circuit recognized in *Arlington Heights*, these decisions meant that the village's action preventing the MHDC development did not require a compelling justification simply because blacks would constitute a high number of the low- and moderate-income persons who would be eligible for the development.[316] Of course, a zoning ordinance would be unconstitutional if it expressly created racially segregated areas,[317] but the Supreme Court had indicated that a challenge to a zoning decision that prevented the construction of low- and moderate-income housing just on the basis that a disproportionate number of those in need of such housing were minorities was another matter.[318]

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314. *Id.* at 9. Even Justice Marshall, the lone dissenter on the merits, agreed

> that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), that deference should be given to governmental judgments concerning proper land-use allocation.

Id. at 13. He argued, however, that deference did not require judicial abdication and that courts should not permit land-use controls to be employed "as a means of confining minorities and the poor to the ghettos of our central cities." *Id.* at 14.

315. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971).

316. Nor would the Court subject the zoning decision to strict scrutiny on the ground that it impinged on the plaintiffs' right to housing, because housing is not a fundamental interest under the equal protection clause. *See* 429 U.S. at 259 n.5 (citing Lindsey v. Normet, 405 U.S. 56 (1972)).

317. *E.g.*, Buchanon v. Warley, 245 U.S. 60 (1917).

318. The Supreme Court's antagonistic attitude toward challenges to exclusionary zoning decisions was evident in Warth v. Seldin, 422 U.S. 490 (1975). In *Warth*, the five-to-four decision of the Court dismissed the plaintiffs' constitutional challenge to an exclusionary zoning ordinance of a wealthy Rochester suburb on standing grounds because "their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts." *Id.* at 506. The same five justices who made up the majority in *Warth* (Burger, Stewart, Blackmun, Powell, and Rehnquist) were also the only ones to find for the defendants on the merits in *Arlington Heights*, lending some support

Finally, the plaintiffs in *Arlington Heights* confronted *Washington v. Davis*. The parties submitted an additional round of briefs discussing the implications of the *Davis* decision. In an effort to distinguish their case from *Davis*, the plaintiffs argued that they had always claimed that the village's decision was the result of purposeful discrimination and that the record supported that contention.[319] Specifically, they argued that the community's racial hostility to the MHDC proposal, not zoning considerations, caused the trustees to deny the rezoning petition.[320] The trustees' decision, as the court of appeals' analysis of its historical context and ultimate effect demonstrated, reflected a determination to maintain residential segregation in the area, which satisfied the *Davis* requirement of discriminatory racial purpose.[321]

None of the justices agreed. In an opinion for five members of the Court, Justice Powell first rejected the argument that the plaintiffs lacked standing[322] and then held that they "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."[323] He concluded by remanding the case to the court of appeals for consideration of plaintiffs' claims under the Fair Housing Act.[324] Justice Stevens, who had sat on the Seventh Circuit when it decided *Arlington Heights*, did not participate.[325] Justice Marshall, joined by Justice Brennan, concurred in the Court's decision on standing and in its discussion of

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to Justice Douglas's assertion in *Warth* that the majority read this type of complaint "with antagonistic eyes." *Id.* at 518 (Douglas, J., dissenting).

319. Respondents' Reply to the Petitioners' Supplemental Brief at 7, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) [hereinafter cited as Reply Brief] (copy on file at the office of the University of Illinois Law Forum).

320. [P]etitioners' review of Lincoln Green was clearly not directed toward the merits of the proposal because all of the professional evidence that was produced favored it, all of the suggestions of the Arlington Heights' staff and Plan Commission were incorporated into the Lincoln Green plans, and petitioners never received nor even asked for the professional opinion of their own zoning and planning expert regarding the proposal (App. I 68; Tr. 114-115). What petitioners *did* respond to was the overwhelming, hostile, unprecedented reaction of the community against Lincoln Green, which often involved racially explicit statements and which, the Village President stated, was "a mandate to reject this proposal."

Reply Brief, *supra* note 319, at 7-8.

321. *Id.* at 3-10.

322. 429 U.S. at 260-64 (distinguishing Warth v. Seldin, 422 U.S. 490 (1975)).

323. 429 U.S. at 270.

324. On remand, the court of appeals reaffirmed its earlier holding that the village's refusal to rezone had a racially discriminatory effect and held that the effect would suffice to establish a violation of the Fair Housing Act if no other suitable land was available in Arlington Heights for the MHDC development. It then remanded the case to the district court for a determination of this question. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).

325. 429 U.S. at 271.

the discriminatory purpose requirement.[326] Both justices dissented, however, from the Court's application of that requirement to the plaintiffs' equal protection claim, arguing that the case should be remanded to the court of appeals for further proceedings consistent with *Davis*. Justice White also favored remand of the equal protection claim in a separate dissent in which he criticized "[t]he Court's articulation of a legal standard nowhere mentioned in *Davis*. . . ."[327]

2. *The Legal Standard*

Justice Powell's articulation of the applicable legal standard did expand on what had been said in *Davis*, although the most important thing about *Arlington Heights* was its affirmation that the discriminatory purpose requirement of *Davis* applied to all types of racial discrimination claims under the equal protection clause. Justice Powell addressed some of the questions about the requirement that the *Davis* opinion left open, perhaps because he believed, as he had four years earlier in *Keyes*, that the Court had never made clear what was necessary to establish discriminatory purpose for an initial equal protection violation.[328]

First of all, he stated that "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes."[329] Justice Powell recognized, as had Justice Stevens's concurrence in *Davis*, that a legislative or administrative decision is often the consequence of numerous competing considerations and is rarely the result of a single, or even a "dominant" or "primary," purpose. He noted that removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting a law,[330] and he concluded that "racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."[331]

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326. *Id.* at 271-72.

327. *Id.* at 272.

328. Keyes v. School Dist. No. 1, 413 U.S. 189, 233 (1973) (Powell, J., concurring).

329. 429 U.S. at 265. *But see* text accompanying notes 262-68 *supra*.

330. 429 at 265 n.11 (citing McGinnis v. Royster, 410 U.S. 263, 276-77 (1973)).

331. 429 U.S. at 265-66. *Accord*, Ely, *supra* note 77, at 1266-68; *Legislative Motive*, *supra* note 78, at 116-19, 128, 130-31. According to Professor Brest,

> [i]t is incorrect to pose the question of motivation: did the decisionmaker make this decision to serve legitimate or to serve illicit purposes . . . . It is entirely possible that he had both objectives in mind, but the rule should be invalidated if the illicit objective played any material role in the decision.

Id. at 119 n.123. Thus, a complainant should prevail if he proves "that illicit motivation

Nevertheless, Justice Powell maintained that proof that a decision was motivated in part by a discriminatory purpose does not necessarily invalidate that decision, but only shifts to the defendant "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."[332] Justice Powell's justification for this conclusion, however, is not convincing. He argued that if the same decision would have been made in the absence of any discriminatory purpose, the decision did not cause any injury to the complaining party. This completely ignores the concern that the Supreme Court has often shown for the stigma that official discrimination imposes on blacks.[333] As Professor Brest has said: "A member of a minority group does have a complaint against being subjected to the opprobrium emanating from even a 'good' decision adopted for discriminatory reasons."[334]

One explanation for Justice Powell's view on this point is that he failed to distinguish between the showing necessary to establish an equal protection violation on the one hand and the appropriate relief after a violation is established on the other. In *Arlington Heights*, for example, the plaintiffs sought an injunction preventing the village from interfering with the construction of the MHDC development. Arguably, injunctive relief would be inappropriate had both racial discrimination and legitimate zoning considerations motivated the trustees' action. Otherwise, a finding of racial purpose would require the village to accept the development no matter how inappropriate it might be from a zoning standpoint—even if the development, for example, were eighty stories high and located in the middle of an area of $100,000 houses. Absent the problem of appropriate relief, however, it is clear, at least in theory, that the rejection of even this proposal on the basis of race should be held unconstitutional.[335] The appropriate relief in these circumstances would not be an order requiring the construction of the project, but invalidation of the decision and a "remand to the legislature" for reconsideration of the proposal on the basis of purely legitimate factors.[336] Justice Powell is not the first to confuse questions of substantive law with questions of appropriate relief in civil rights

played a non-trivial part in the decisionmaking process, so that it might have affected the outcome." *Id.* at 119.

332. 429 U.S. at 270 n.21.

333. *See* notes 91 & 130 *supra*.

334. *Legislative Motive*, *supra* note 78, at 116 n.110.

335. It is theoretical only because the case would be impossible to prove if municipal officials kept silent.

336. The judicial response of remanding to the legislature is a familiar technique in constitutional law. *See generally* Gunther, *supra* note 5, at 43-46.

cases.[337] Moreover, his statement that a showing of discriminatory purpose would not establish an equal protection violation, but would merely shift the burden to the defendants was simply dictum, because the Court held that the plaintiffs in *Arlington Heights* had failed to make the required showing of racial purpose in the first place.[338] If the Supreme Court persists in this approach, however, it should at least place on the government a heavy burden of proving that the challenged action would have been the same even in the absence of the proven discriminatory purpose.[339]

Justice Powell's comments should not be confused with the concept of a prima facie case discussed in *Davis*. The latter is concerned with whether and how the plaintiff proves discriminatory purpose. If he produces evidence sufficient to establish a prima facie case of discriminatory purpose—and what is "sufficient" may well depend on the context involved, as Justice Stevens indicated in *Davis*—the burden of proof on the issue of purpose shifts to the government.[340] The concept of the prima facie case of discriminatory purpose, however, is distinct from Justice Powell's additional proposition in *Arlington Heights*, that *after discriminatory purpose has been established*, the government may still prevail by proving that the same action would have resulted in the absence of the discriminatory purpose.

In addition to Justice Powell's conclusion that racial purpose need not be the sole or dominant basis for the challenged state action, his statement of the legal standard in *Arlington Heights* differs from *Davis* by focusing on motivation. In contrast to Justice White's opinion in *Davis*, which carefully articulated the standard only in terms of "purpose," the *Arlington Heights* opinion not only used "purpose" and "intent" interchangeably,[341] but also indicated that the crucial question is whether the discriminatory intent or purpose was "a motivating factor" in the decision under review.[342] This choice of words, coupled with Justice Powell's observation that

337. *See* text accompanying notes 138-42 *supra*.

338. 429 U.S. at 270 & n.21.

339. *See Legislative Motive*, *supra* note 78, at 117-18, 126.

340. What the government's burden is at this point is not entirely clear. It may be a burden of producing evidence, *i.e.*, it *will* lose if it stands silent, or it may be a burden of persuasion, *i.e.*, it *may* lose if it stands silent, *see* text accompanying notes 434-48 *infra*, and this in turn may depend in part on whether the discriminatory purpose issue is considered a question of law or a question of fact, another subject considered by the insightful concurring opinion of Justice Stevens in *Davis*. *See* 426 U.S. at 253. Indeed, this whole matter was to prove a source of great confusion and division among the justices two months later in Castaneda v. Partida, 97 S. Ct. 1272 (1977).

341. 429 U.S. at 265.

342. *Id.* at 265-66, 270.

legislators and administrators take many considerations into account in reaching their decisions,[343] suggests that a court may appropriately examine the subjective motives of official decisionmakers as well as the objective consequences of their actions.[344] Indeed, the opinion indicates that the court may consider all direct and circumstantial evidence of intent that is available.[345]

The Court's opinion in *Arlington Heights* also went beyond the *Davis* standard by listing three broad "subjects for proper inquiry" relevant to determining whether discriminatory purpose was one of the motivating factors in the challenged decision.[346] Justice Powell observed, as had Justice White in *Davis*, that racial impact might be an important starting point.[347] He noted that the disproportionate racial impact in *Yick Wo* and *Gomillion* had been extreme, however, and concluded that a statistical pattern of discriminatory impact would rarely be determinative, except perhaps in the jury discrimination cases, in which the selection process should be completely random.[348] In most other situations, Justice Powell argued, the historical background and legislative history of the state action would require review. The historical background included such questions as whether a series of prior actions apparently resulted from racial purposes and whether the sequence of events leading up to the challenged action was suspicious, because, for example, it departed from the normal procedures followed or substantive factors considered in taking similar official action. Furthermore, Justice Powell indicated that a court could consider contemporary statements by members of the decisionmaking body, minutes of its meet-

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343. *Id.* at 265.

344. The Court, however, suggested one limitation on the judicial examination of the lawmakers' motivation. Noting that an inquiry into motives represents "a substantial intrusion into the workings of other branches of government," Justice Powell concluded that "[p]lacing a decisionmaker on the stand is therefore 'usually to be avoided.' " 429 U.S. at 268 n.18 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)). This view seems unduly restrictive and not a little naive. The responsible officials are likely to appear voluntarily to testify about the "legitimate" purposes for their action, at least when a decision of a local governmental body is involved, and such appearances should constitute waivers of whatever "privilege" of silence they may have had. And if government officials are likely to testify, plaintiffs should have an opportunity before trial to discover not only the substance of their testimony, but also any information that appears reasonably related to the subject matter of that testimony. *See* FED. R. CIV. P. 26(b)(1). *But see* 429 U.S. at 270 n.20; note 290 *supra*.

345. 429 U.S. at 266.

346. *Id.* at 266-68.

347. *Id.* at 266. *Arlington Heights*, like *Davis*, did not distinguish between discriminatory "effect" and discriminatory "impact." *See* note 192 *supra*.

348. 429 U.S. at 266 n.13. This approach reinforces the suggestion of Justice Stevens in *Davis* that the proof necessary to establish discriminatory purpose may well vary in different contexts. 426 U.S. at 253 (Stevens, J., concurring).

ing, and its reports to determine the legislative or administrative history of the challenged action, and "in some extraordinary instances," the members themselves might be called to the stand, although their testimony "frequently will be barred by privilege."[349] Justice Powell stated that this list of evidentiary sources was not exhaustive, and the list's subjects of inquiry are not at all surprising in light of the Court's prior equal protection decisions.[350] The discussion of the relevance of historical background, for example, included citations to *Griffin, Keyes,* and *Reitman*. Nevertheless, because the Court undertook to develop this list and because seven of the eight justices who participated in the case joined this part of the opinion, the list is likely to be an important guide in future cases.

3. *The Legal Standard Applied*

More revealing than Justice Powell's list of potentially relevant subjects was his use of the evidence in *Arlington Heights* to conclude that the plaintiffs had failed to carry their burden of proof. Indeed, considering the posture of the case when it reached the Supreme Court, the very fact that he conducted a thorough review of the evidence at all is significant. Both the trial court and appellate decisions in *Arlington Heights* preceded *Washington v. Davis*, and both focused on discriminatory effect, although, as Justice Powell noted, the district court also found that hostility to minority groups had not motivated the defendants' decision, and the court of appeals did not overturn this finding as clearly erroneous.[351] In these circumstances, the Supreme Court might simply have vacated the judgment of the court of appeals and remanded the case for reconsideration in light of the new legal standard enunciated in *Davis*.[352] If, on the other hand, the Court considered the district court's determination about the trustees' motivation to be, fortuitously, the very finding of fact that was dispositive under the *Davis* standard, then the Court could have reversed the appellate decision simply because the district court's finding was not clearly erroneous.[353]

The Supreme Court chose neither of these alternatives. Rather, it determined that discriminatory purpose had not been a motivating factor in the village's decision based on an independent review

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349. 429 U.S. at 268.

350. *See* text accompanying notes 269-70 *supra*.

351. 429 U.S. at 268-69.

352. *See id.* at 272 (White, J., dissenting).

353. *See id.* at 273 (White, J., dissenting). *See generally* FED. R. CIV. P. 52(a); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).

of the evidence. This independent review by the Court demonstrates two important points. First, although Justice Powell's opinion implied that some weight should be accorded to the trial court's finding on the discriminatory purpose issue, the review undertaken by the Court in *Arlington Heights* indicates that the Supreme Court has not yet decided whether this issue of purpose is to be treated on appeal as a question of fact or a question of law, or, indeed, whether the characterization of the issue might not vary depending on the context involved.[354] Second, the Court apparently will not refrain from deciding equal protection cases that were tried in the era before *Washington v. Davis*, even though evidence of discriminatory purpose may be understandably sparse in the records. In *Arlington Heights*, Justice Powell dismissed the plaintiffs' contention that they had been foreclosed from asking the trustees why they voted against the MHDC proposal. He maintained that the district court's action was not improper "[i]n light of respondents' repeated insistence that it was effect and not motivation which would make out a constitutional violation."[355] The Court's suggestion that the plaintiffs waived the issue of discriminatory purpose is patently unfair. The complaint did allege that the village's decision had both a discriminatory purpose and a discriminatory effect. The trial court, not the plaintiffs, decided that inquiry into the trustees' motivation was impermissible under *Palmer v. Thompson*, by ruling that the case was governed by an effect standard only. The defendants, not the plaintiffs, sought this ruling on the irrelevance of the trustees' purpose.[356] These circumstances hardly suggest that the plaintiffs waived their right to present direct evidence of racial purpose in *Arlington Heights*. In other actions tried before *Davis* much, now relevant, evidence relating to discriminatory purpose will not have been presented to or considered by the lower courts. Nevertheless, the Supreme Court's action in *Arlington Heights* suggests that the Court will continue to review these cases on the merits, despite inadequate records and resulting prejudice to plaintiffs.[357]

Justice Powell began his review of the *Arlington Heights* record by considering whether the impact of the village's decision would bear more heavily on racial minorities than on whites. He apparently concluded that the showing that minorities made up forty

354. *See also* Washington v. Davis, 426 U.S. 229, 253 (Stevens, J., concurring).
355. 429 U.S. at 270 n.20.
356. *See* text accompanying note 290 *supra*.
357. *See* 429 U.S. at 271-72 (Marshall, J., concurring in part and dissenting in part).

percent of the income groups eligible for the MHDC development, but only eighteen percent of the overall Chicago area population established discriminatory impact. This conclusion is rather surprising if the Court considers "discriminatory impact" an indicator of illicit racial purpose. As the court of appeals had recognized, these statistics had no independent significance concerning the racial nature of *this* municipal decision, beyond the fact that blacks are disproportionately represented among low- and moderate-income groups in the Chicago area. This fact, while deplorable, would be true even if the defendant were a small, poor, totally integrated village instead of Arlington Heights. Moreover, reliance on this type of statistical comparison proves too much as well as too little, because it would favor housing proposals designed to resegregate the area rather than integrate it. According to Justice Powell's analysis, the racial impact of the village's decision would be substantially greater—and thus more suggestive of an impermissible purpose—if MHDC had proposed a totally black-occupied project instead of the integrated development it actually proposed.[358] A statistical comparison of the racial mix of the overall population with the racial mix of the group affected by the challenged decision obviously can be relevant in racial discrimination cases, particularly when the claim is that the state has excluded minorities from a jury panel or a job opportunity or some other desired right or benefit.[359] Nevertheless, official action need not be exclusionary to violate the equal protection clause. As the school desegregation cases demonstrate, governmental decisions that intentionally perpetuate segregation and prevent interracial association may also be unconstitutional. When this is the essence of a plaintiff's claim, as it was in *Arlington Heights*, the statistical comparison used by Justice Powell may not be very significant in analyzing the discriminatory impact of the decision under review.[360]

Although the *Arlington Heights* opinion was overly concerned with the fact that minorities are disproportionately represented

358. *See* Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1018 (E.D. Pa. 1976), *aff'd*, 564 F.2d 126 (3d Cir. 1977) (minorities make up 95% of waiting list for proposed public housing project). *See generally* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).

359. *See, e.g.*, Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977). *See generally* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L.L. REV. 128, 166-67 (1976) [hereinafter cited as *Title VIII Litigation*].

360. *See* Stingley v. City of Lincoln Park, 429 F. Supp. 1379 (E.D. Mich. 1977). In evaluating proof of discriminatory effect, "[j]udges should consider why statistical evidence is valuable given the rationales for the prima facie case and should weigh the particular strength or weaknesses of statistical and other evidence according to the historical and evidentiary circumstances in each case." *Title VIII Litigation*, *supra* note 359, at 167.

among poorer income groups, it totally ignored the massive residential segregation in the village and the other facts about the racial impact of the trustees' decision that were unique to Arlington Heights. The Court did not mention the tremendous growth that the village had experienced in recent years, much less the fact that blacks accounted for less than one tenth of one percent of these new residents when the black population of the Chicago metropolitan area was growing to eighteen percent. The opinion recognized neither the expert testimony in the record demonstrating that Arlington Heights was the most segregated large municipality in the entire metropolitan area nor the fact that this segregation was almost certainly caused by racial discrimination.[361] No mention was made of the tremendous movement of jobs from Chicago to the Arlington Heights suburban area with the resulting need for local low- and moderate-income housing or of the village's denial of all proposals for subsidized housing developments while approving some sixty rezoning petitions for over 5,200 market-rent apartments.[362]

Thus, the Court neglected to consider a large portion of the "historical background" of the village's refusal to rezone the site of the proposed MHDC development. Whereas the Seventh Circuit had suggested that this background created an affirmative duty on the part of the village not to interfere with the MHDC proposal,[363] the Supreme Court apparently considered this history completely irrelevant. Certainly in *Arlington Heights*, even though no direct evidence of the trustees' motivations had been introduced, "the totality of relevant facts" that *Washington v. Davis* said should be examined for discriminatory purpose indicated a much more indifferent, if not actually hostile, official attitude toward minorities than in *Davis*. The real question, however, was whether the village's segregated growth pattern was "relevant" in evaluating the trustees' denial of the MHDC rezoning petition, and *Arlington Heights* implied that it was not. For all that appears in Justice Powell's opin-

361. *See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413-14 n.1 (7th Cir. 1975). The number of blacks in Arlington Heights in 1970 would have been over 3,200, not 27, if the housing market there had been governed only by economic factors and random choice. *See* Plaintiffs' Exhibit 50 (50 WR-9) (copy on file at the office of the University of Illinois Law Forum); Reply Brief, *supra* note 319, at 5 n.*.

362. *See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 412, 414-15 (7th Cir. 1975); Brief for Respondents at 11, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) [hereinafter cited as Respondents' Brief] (copy of file at the office of the University of Illinois Law Forum).

363. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 415 (7th Cir. 1975). This duty not to interfere, however, does not necessarily suggest an affirmative duty of the village to provide low-income housing itself. *See* Acevedo v. Nassau County. 500 F.2d 1078, 1081 (2d Cir. 1974); *Title VIII Litigation, supra* note 359, at 170.

ion, the racial impact of the village's decision would have been exactly the same if Arlington Heights had been a small suburb with thousands of minority residents and scores of subsidized housing developments.

The historical background that the Court did consider relevant was the sequence of events immediately preceding the trustees' decision to deny the rezoning petition.[364] Here, the Court found little to "spark suspicion." Justice Powell noted that the rezoning request generally progressed according to the usual procedures and suggested that the village plan commission had actually gone out of its way to accommondate MHDC by scheduling three hearings instead of one. These conclusions are misleading. The record clearly established that Arlington Heights did not respond to the MHDC proposal as just another rezoning request. Racially explicit letters appeared in the local newspaper,[365] and thousands of residents signed petitions opposing the development. The plan commission held its additional hearings in a high school auditorium to hold the demonstrative overflow crowds, not so much to consider the merits of the MHDC proposal as to accommodate the unprecedented number of homeowners and "civic" group spokesmen who wanted to register their opposition to the development.

The fact that many local residents opposed the development for racial reasons does not necessarily mean that the trustees denied the rezoning petition for the same reasons. Conceivably, an official could ignore expressions of racial bias by his constituents and still reach the decision those constituents desired, and courts should not lightly assume otherwise. When the evidence of community racial hostility is strong, however, a rebuttable presumption that this hostility affected the official decision is appropriate,[366] particularly

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364. 429 U.S. at 269-70.

365. *See* Plaintiffs' Exhibits 48-1, 48-2, 48-3, 48-7, 48-9 (copy on file at the office of the University of Illinois Law Forum).

One letter from a local resident appearing in the Arlington Heights Herald a month before the first Plan Commission hearing began:

> "Concerning your editorial, 'Housing: An Ignored Issue': It isn't ignored, it's unwanted. We do resist low-income housing because it is a ploy to export blacks from Chicago to integrate the suburbs. That came out forcefully in the St. Viator Housing proposal."

Another letter complained:

> "I'm a bit tired of hearing and reading about the Low Income Housing in Arlington Heights for the benefit of our colored and Spanish-American friends in Chicago. One wonders who is running our village, our [Village President] Walsh or Mayor Daley."

Respondents' Brief, *supra* note 362, at 17-18.

366. Lower courts considering claims similar to the plaintiffs' in *Arlington Heights* have

when one of the decisionmakers states, as the Arlington Heights village president did, that "the objections of the residents is [*sic*] a mandate to reject this proposal."[367] Hence, Justice Powell's conclusion that the procedural history of the MHDC zoning hearings was not suspicious is simply not consistent with the record in *Arlington Heights*. After *Davis*, the plaintiff in an equal protection case is essentially required to prove a negative—that the challenged decision was not based on any reason other than racial discrimination—and this is difficult enough without the Court ignoring evidence of an official decisionmaker's awareness of the racial hostility of his constituents.

Another reason why Justice Powell found that the historical background of the village's decision was unsuspicious was that the site selected for the MHDC development had always been zoned for single-family purposes. He noted that "we would have a far different case" if the land had originally been zoned for apartments and the town had changed the zoning classification to single-family after learning of MHDC's plans to build integrated housing.[368] This is true, but not nearly as significant as the Court's opinion suggested. A town may choose to zone its residential land in either of two ways. It may determine in advance where certain uses are permitted, or it may, like Arlington Heights, apply a single-family classification to all vacant land as a holding device and grant specific rezoning petitions for particular multiple-family developments.[369] In the former situation, if a developer like MHDC chose a site already zoned for apartments, a municipality bent on preventing the development would have to change its prior determination immediately and rezone the land to single-family uses. Such a change would indeed indicate that nonzoning considerations were at work. A zoning scheme like that of Arlington Heights, however, could be used intentionally to discriminate against an integrated housing development in a similar, albeit less obvious way. The town could simply wait until the developer had submitted a proposal, which might well be comparable to previously accepted commercial developments in

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recognized the probative value of evidence of white hostility in establishing that official action excluding subsidized housing was racially motivated. *See, e.g.*, Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1210 (8th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 113 (2d Cir. 1970), *cert. denied*, 301 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970); Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976), *aff'd*, 564 F.2d 126 (3d Cir. 1977).

367. Respondents' Brief, *supra* note 362, at 19.

368. 429 U.S. at 267.

369. *See* Reply Brief, *supra* note 319, at 16 n.*

its impact on the surrounding neighborhood, and then reject it in an apparently "neutral" action that merely maintains the status quo.[370] There is evidence to suggest that Arlington Heights did exactly that. Prior to the MHDC decision, the village had approved some sixty petitions for zoning changes from single-family to multiple-family in its "comprehensive plan," including proposals for apartment developments next to every high school in town except St. Viator's and for dozens of others next to existing single-family neighborhoods.[371]

Thus, although finding discriminatory purpose in a municipality's refusal to rezone may be difficult, it should be possible if a court examines not only the specific decision challenged, but also the town's disposition of similar petitions to rezone. If a town has no zoning history or evidence is not available or not persuasive for some other reason, a plaintiff may be unable to meet his burden of proving discriminatory purpose, but what is perplexing about *Arlington Heights* is that the evidence existed, but the Court hardly considered it. Rather, Justice Powell limited his examination of the "historical background" in *Arlington Heights* to the sequence of events set in motion by the MHDC petition and did not include any reference to the village's other rezoning decisions. The contrast between the perspective of the historical background taken in *Arlington Heights* and Justice White's broader approach in *Davis* is striking. Justice White considered not only the police department's use of Test 21, but also the overall results of its entire recruiting program. The perspective chosen by the Court was crucial in both cases, and in both cases, it favored the defendants.

Justice Powell's "shorter" perspective may be a necessary corollary of his interpretation that discriminatory purpose must be "a motivating factor" of official action. If the question is whether racial considerations actually motivated the six individual trustees who voted against the MHDC petition, then other zoning decisions made by other trustees going back to 1959 could hardly be relevant. The problem of which time frame to use in evaluating the government's purposes is another important issue left unresolved by *Davis*. In

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370. In seeking to identify unconstitutional motivation . . ., courts should not consider themselves bound by any rigid action-inaction distinction. A racially motivated decision not to alter attendance zone lines should trigger a judicial demand for an explanation as readily as a racially motivated decision to redraw them, though the proof problems are likely to be more substantial.

Ely, *supra* note 77, at 1292.

371. *See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 412 (7th Cir. 1975); Respondents' Brief, *supra* note 362, at 11 n.**.

some cases, the Supreme Court has said that the original purpose at the time of the enactment of a law controls, but other precedents in other contexts indicate that a law's purpose can change over time and that the case should turn on what the "modern" purpose is.[372] Neither *Davis* nor *Arlington Heights* explicitly dealt with this question, but Justice Powell's opinion implied that the answer in equal protection cases will depend on whether discriminatory purpose is perceived as an objective matter of the operation of the challenged state action or a subjective matter of the state of mind of the individual lawmakers. Because the Court defined the ultimate issue in *Arlington Heights* as whether race was "a motivating factor" in the trustees' decision to reject the MHDC proposal, it focused on the trustees' purposes at the time of that decision, not on the purposes reflected in the overall history of the village's land use policies.

The Court's emphasis on motivation may increase the difficulties of proving equal protection violations in another way. Justice Stevens had indicated in *Davis* that he would presume that an official intended the natural consequences of his actions.[373] This presumption would hold government officials responsible for what they do or at least make them explain why holding them responsible in a given case would be unfair. Thus, after a showing of discriminatory effect, the burden on the discriminatory purpose issue would shift to the government, even though the responsible official may not have intended or even considered the racial consequences of his action.[374] If, as *Arlington Heights* implies, the proper focus is not the government action, but rather the actual state of mind of the officials taking that action, then Justice Stevens's presumption seems inappropriate. Indeed, the Court in *Arlington Heights* treated the fact that the village's decision had a discriminatory effect as "without independent constitutional significance"[375] and held that the plaintiffs had failed to make even a threshold showing of discriminatory purpose. Thus, although the *Arlington Heights* standard that racial purpose must be "a motivating factor" may help equal protection plaintiffs because they need not establish that race was the sole or dominant factor, the standard could also work against them by requiring proof that the defendants were actually motivated by racial animus.

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372. *See, e.g.*, City of Richmond v. United States, 422 U.S. 358 (1975); McGowan v. Maryland, 366 U.S. 420 (1961).

373. 426 U.S. at 253 (Stevens, J., concurring).

374. *See Legislative Motive, supra* note 78, at 105 & n.59.

375. 429 U.S. at 271.

Justice Powell's review of the *Arlington Heights* record concluded with the "legislative history" of the village's decision.[376] He noted that the minutes of the plan commission and board of trustees meetings indicated that their members focused almost exclusively on the zoning questions raised by the MHDC petition. This is hardly surprising. Even if the officials had decided to discriminate, it is unlikely that they would have announced their true intentions publicly. Indeed, they may well have sought to build a record of "innocent" statements.[377] As the Tenth Circuit has observed: "If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection."[378]

To contend in this day and age that the absence of bigoted comments in official minutes and reports tends to prove that the responsible officials are not racially motivated is unreasonable. Justice Powell's reliance on the minutes of the meetings may be more sophisticated, however, because he also noted that the zoning considerations referred to in the minutes of the MHDC hearings were the very ones that the village relied on at trial. Thus, his point may be that regardless of the absence of racial remarks, if the government "changes its story" about which legitimate purpose its action allegedly serves between the time it takes that action and the time it defends it in court, an inference of racial purpose could arise. As Professor Gunther suggested in a different context, the Court might assess the challenged action "in terms of the *state's* purposes, rather than hypothesizing conceivable justifications of its own initiative."[379]

Justice Powell's concern with the village's zoning considerations in his review of the proof of racial discrimination is consistent with the approach taken in *Davis*. In *Davis* the court considered the role of Test 21 in the police department's efforts to upgrade the quality of its personnel before concluding that the plaintiffs failed to establish a discriminatory purpose. Clearly, the Court intends to use its new racial purpose requirement to review the legitimacy of the government's claimed interests at the initial stage of its equal protection analysis rather than waiting until after deciding the discrimination issue, when the result of this examination of the state's interests is always a predictable and therefore inconsequential final

376. *Id.* at 270.
377. *See* note 276 *supra*.
378. Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970).
379. Gunther, *supra* note 5, at 46.

step. The opinions in *Davis* and *Arlington Heights* suggest that if the challenged state action advances any legitimate governmental interest, the Court will uphold it as not involving a racial purpose. Essentially, the plaintiff must prove that the claimed justifications for the law neither prompted its passage nor are served by its enactment. This proof will be difficult in all contexts, but in matters such as zoning, in which the courts accord substantial deference to the judgment of local government officials, it may be impossible.

Arlington Heights continued the Supreme Court's tradition of extreme deference to municipal zoning decisions. Justice Powell's opinion accepted both the village's concern for neighboring property values and its claim that the MHDC proposal was inconsistent with its buffer policy. He concluded that "[t]here is no reason to doubt" that some local homeowners had relied on the maintenance of single-family zoning in the area.[380] Actually, this claim was subject to considerable doubt. First, the builders of the neighboring houses could not have relied on the comprehensive zoning plan, because their houses were built years before the plan was adopted.[381] Even if the homes had been sold to new owners after the adoption of the plan, the new residents certainly could not expect all of the Viatorian land to remain vacant indefinitely. They should have known that when it was developed it could be used for apartments, because Arlington Heights had permitted multiple-family developments next to every other high school in the village.[382] In fact, the Court should not have treated the reliance claim as a separate defense at all. The claim is meaningless apart from a consideration of the zoning aspects of the MHDC proposal, because only *reasonable* reliance deserves judicial protection and what is reasonable depends on how the village's legitimate zoning policies applied to the MHDC site. Local homeowners, for example, could not have a reasonable reliance interest in enforcing a zoning scheme against MHDC that specifically provided that only whites live on the Viatorian property.[383]

With respect to the zoning considerations, Justice Powell held that the village had applied its buffer zone policy "too consistently for us to infer discriminatory purpose from its application in this case."[384] The evidence on this issue indicated that this policy had

380. 429 U.S. at 270.

381. *See* Respondents' Brief, *supra* note 362, at 34 n.*.

382. *Id.* at 11 n.**.

383. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 415 (7th Cir. 1975); *see* Buchanon v. Warley, 245 U.S. 60 (1917).

384. 429 U.S. at 270.

apparently led to the denial of some rezoning petitions although the village had also ignored the buffer policy and approved a number of other developments next to single-family neighborhoods.[385] In other words, the plaintiffs established no clear pattern of the *Yick Wo* or *Gomillion* variety, and under these circumstances, the Court was unwilling to reject the village's zoning justification and infer discriminatory purpose. The Court's conclusion is both important and revealing. When the application of a policy has been inconsistent and arbitrary, the policy provides the opportunity to discriminate against minorities, at least when the opportunity for discrimination is present because the officials know the race of the applicants. In *Arlington Heights*, however, this very inconsistency led Justice Powell to uphold the challenged action. Although the Court may not be so deferential when examining other kinds of official action, *Arlington Heights* provides municipal officials with almost unlimited discretion to make exclusionary zoning decisions.[386] The Court did not hold that the trustees' rejection of the MHDC proposal was "correct" in light of the applicable zoning criteria; the Court merely determined that the rejection was not so clearly wrong as to suggest that the trustees failed to consider any zoning criteria at all. Thus, in order to establish the necessary racial purpose in a case like *Arlington Heights* by showing the absence of any legitimate government purpose, the plaintiff may have to prove that the challenged decision would not even satisfy the rational basis test of traditional equal protection analysis; that is, establishing discriminatory purpose may only be possible when it is not necessary.

In summary, *Arlington Heights* showed that the Supreme Court was unanimous in its determination to apply *Davis*'s discriminatory purpose requirement to all types of racial discrimination claims under the equal protection clause, but it also showed that the articulation and application of that requirement could still divide the Court. Justice Powell stated that determining the existence of discriminatory purpose in a particular case demanded "a sensitive inquiry" into all of the evidence available, but only four other members of the Court joined his "inquiry" which often was neither sensitive nor convincing. His use of the lower court findings was uncertain; his analysis of the racial impact of the trustees' decision was shallow; his examination of the community's response to the MHDC

385. *See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 412 (7th Cir. 1975).

386. *But see* cases cited at 429 U.S. at 267 nn.16-17; Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976), *aff'd*, 564 F.2d 126 (3d Cir. 1977).

proposal and the village's zoning history was almost nonexistent; and his review of the defendant's justifications for their action was so deferential that it was meaningless. Nevertheless, the Court did leave open the possibility that a municipal zoning decision could violate the equal protection clause in a more egregious case, and, by remanding *Arlington Heights* for consideration of the statutory claim, it also suggested that the Fair Housing Act might prohibit a zoning decision with a discriminatory effect.[387]

Arlington Heights demonstrated much more vividly than *Davis* just how difficult it will be to prove purposeful discrimination, particularly if the challenge is to essentially passive or indifferent state action that perpetuates de facto segregation and if that action involves the exercise of substantial governmental discretion. Perhaps the only way to prove such a case would be to show that the responsible officials personally intended to discriminate.[388] The Court indicated that this type of subjective evidence is relevant, although judicial inquiry into subjective intent may generally prove more helpful to government defendants than to minority claimants. Indeed, the question of whether to focus on the objective consequences or the subjective motives of the challenged state action was once again before the Court two months later when it again considered the discriminatory purpose requirement in *Castaneda v. Partida*.[389]

C. *Castaneda v. Partida*

1. *Background*

Castaneda was a jury discrimination case. In March 1972, Rodrigo Partida was indicted for burglary by the grand jury of the district court of Hidalgo County, Texas.[390] After his trial and conviction, he moved for a new trial on the ground that the county's grand jury selection process discriminated against Mexican-Americans. The evidence submitted by Partida in support of his motion consisted almost entirely of census data and Hidalgo County grand jury records.[391] The statistics showed that Mexican-Americans were often summoned as grand jurors, but at a substantially lower rate than other residents in the county. Although 79.1% of the county's population was made up of Spanish-language and Spanish

387. *See* note 324 *supra*.

388. *See 1970 Term*, *supra* note 129, at 95.

389. 97 S. Ct. 1272 (1977).

390. *Id.* at 1275.

391. Partida also testified about the general existence of discrimination against Mexican-Americans in this area of Texas. *Id.*

-surnamed persons, the percentage of Spanish-surnamed grand jurors in Hidalgo County during the previous decade had ranged from 29.7% to 52.5%, with an average figure of 39.0%.[392] Additionally, the census figures indicated that Mexican-Americans in this south Texas area tended to have low incomes, poor jobs, substandard housing, and low levels of education. The state offered no evidence of its own. The record did reveal, however, that three of the five jury commissioners were Mexican-Americans and that ten of the twenty grand jurors summoned in Partida's case and five of the twelve who returned his indictment, including the foreman, had Spanish surnames. The trial judge, who was also a Mexican-American and who had appointed the jury commissioners, denied the defendant's motion for a new trial.

After exhausting his state remedies, Partida filed a habeas corpus petition in federal court, arguing that the underrepresentation of Mexican-Americans on the Hidalgo County grand juries violated the fourteenth amendment. The district court held a hearing at which the state transcript was introduced. None of the jury commissioners appeared, but the state trial judge did testify about his selection of the commissioners and the instructions he gave them. He also described the Texas grand jury selection process, in which the jury commissioners, who are appointed by the trial judge, first select fifteen to twenty citizens as potential jurors. The trial judge then interrogates the candidates under oath to determine whether they meet the various qualifications for grand jurors spelled out in the Texas statute[393] and selects a grand jury of twelve.

The district court ruled for the state.[394] In a lengthy opinion, Judge Garza found that the statistics produced by Partida, although not entirely reliable, did make out a "*bare prima facie* case" of invidious discrimination.[395] The judge, however, believed that the fact that Mexican-Americans constituted a "governing majority" in the county rebutted the prima facie showing. The court of appeals reversed, holding that the "governing majority" theory alone did not rebut Partida's prima facie case.[396] One week after deciding

392. The Court treated "Spanish-surnamed" and "Mexican-American" as synonyms for the census designation "Persons of Spanish Language or Spanish Surname," *id.* at 1276 n.5.

393. *Id.* at 1275. The statute requires that a grand juror must be a citizen of Texas and of the county, be a qualified voter in the county, be of sound mind and good moral character, be literate, have no prior felony convictions, and be under no pending felony indictments. *Id.*

394. Partida v. Castaneda, 384 F. Supp. 79 (S.D. Tex. 1974).

395. *Id.* at 90.

396. Partida v. Castaneda, 524 F.2d 481 (5th Cir. 1975).

Washington v. Davis, the Supreme Court granted *certiorari* in *Castaneda* to consider whether Texas had met its burden of rebutting a prima facie case of jury discrimination.

The Supreme Court held that Texas had not.[397] In a five-to-four decision, the Court decided that the substantial underrepresentation of Mexican-Americans on the Hidalgo County grand juries coupled with the highly subjective selection procedure in which Spanish-surnamed people could be readily identified established a prima facie case of discrimination. Justice Blackmun's opinion analyzed the statistical evidence offered by Partida and concluded that the selection procedure was not racially neutral with respect to Mexican-Americans. Of the 870 persons summoned as potential grand jurors in the eleven-year period preceding Partida's indictment, 339, or thirty-nine percent, were Mexican-Americans. The Court noted that in a county where Mexican-Americans accounted for seventy-nine percent of the overall population the expected number of Mexican-Americans called for jury duty would be about 688 and the likelihood was less than 1 in 10^{140} that a random procedure would select as few as 339.[398] The state had suggested that using the county's total population figures was misleading, because they included a substantial number of people who were illiterate, too young, or for some other reason ineligible to serve as jurors.[399] Justice Blackmun responded that under the Texas system of selecting grand jurors, qualifications were to be tested by the trial judge, not by the jury commissioners, whose only responsibility was to produce a certain number of prospective jurors from throughout the county.[400] Moreover, even if the jury commissioners had considered qualifications, Mexican-Americans would still account for sixty-five percent of the people who were eligible to serve, and the likelihood that only thirty-nine percent would be chosen by chance was still less than 1 in 10^{50}.[401] Finally, an analysis of the data for the two-and-one-half-year period during which the current state trial judge had supervised the selection process showed that only 100 of the 220 persons called were Mexican-Americans. The Court regarded the likelihood of these figures resulting from a random selection method—less than 1 in 10^{25}—as negligible.[402] Because the Texas system provided ample opportunity for discrimination against

397. Castaneda v. Partida, 97 S. Ct. 1272 (1977).
398. *Id.* at 1281 n.17.
399. *See id.* at 1276 nn.6 & 8; *id.* at 1285-86 (Burger, C.J., dissenting).
400. *Id.* at 1276 n.8, 1282.
401. *Id.* at 1276 n.8.
402. *Id.* at 1281 n.17.

Mexican-Americans, *Castaneda* held these statistics sufficient to shift the burden of proof to the state to dispel the inference of intentional discrimination. The Court then determined that neither the testimony of the state trial judge nor the "governing majority" theory could explain the statistical disparities established, because "discriminatory intent can be rebutted only with evidence in the record about the way in which the commissioners operated and their reasons for doing so."[403]

The dissenters produced three separate opinions,[404] each attacking a different aspect of the Court's judgment. Chief Justice Burger argued that the census data produced by Partida were so unreliable that they could not establish a prima facie case. Justice Powell found the claim of intentional discrimination inherently improbable in a county where Mexican-Americans constituted a governing majority. He believed that "[t]he most significant fact in this case" was that three of the five jury commissioners were Mexican-Americans,[405] and he agreed with the federal district judge that "[i]f people in charge can choose whom they want, it is unlikely they will discriminate against themselves."[406] Both the Chief Justice and Justice Powell also argued that the statistical disparities in *Castaneda* were much less significant than they were in earlier cases in which the Court had sustained racial discrimination claims, because the previous cases invariably involved the total or almost total exclusion of minorities from participation on juries.[407] Justice Rehnquist joined both of these opinions, and Justice Stewart indicated substantial agreement with them in a separate dissent that argued for reversal of the court of appeals' judgment on the ground that the district court's findings were not "clearly erroneous."[408]

The tone of the *Castaneda* dissenting opinions is almost one of betrayal. These four justices had been in the seven-to-two majority in *Davis* that initially established the discriminatory purpose requirement. The loss of Justice White and Justice Stevens still left them with a five-man majority in *Arlington Heights* and with the knowledge that all nine justices, including Justices Marshall and

403. *Id.* at 1283.

404. *Id.* at 1285-86 (Burger, C.J., dissenting); *id.* at 1286-87 (Stewart, J., dissenting); *id.*, at 1287-92 (Powell, J., dissenting). In addition, Justice Marshall, who joined the Court's opinion, filed a concurring opinion. *Id.* at 1283-85.

405. *Id.* at 1291 (Powell, J., dissenting).

406. *Id.* (quoting the district court, 384 F. Supp. at 90).

407. *Id.* at 1285-86 (Burger, C.J., dissenting); *id.* at 1289-90 n.4 (Powell, J., dissenting); *see* note 81 *supra*.

408. 97 S. Ct. at 1286 (Stewart, J., dissenting).

Brennan, agreed with the discriminatory purpose requirement in theory. In neither earlier case had any justice found that the requirement was satisfied. All that changed in *Castaneda*. Justice Blackmun left the coalition that had held the balance of power in *Davis* and *Arlington Heights* to lead a new majority in *Castaneda*, which held that the discriminatory purpose necessary for an equal protection violation had been shown.

2. *The Legal Standard*

To give the dissenters their due, the result does seem strange. It is hard to believe that the Hidalgo County jury commissioners actually intended to discriminate against Mexican-Americans. It seems much more likely, for example, that racial animus motivated the trustees in *Arlington Heights* when they voted to block the MHDC housing development. The Court's response in *Castaneda* was that the discriminatory purpose issue must be decided by reviewing the specific facts established in each case, not by speculating about the possible racial attitudes of Mexican-Americans or other ethnic groups.[409] In *Castaneda*, the state produced no evidence about how the commissioners went about selecting prospective jurors, an omission that Justice Blackmun considered both inexplicable and dispositive. The statistical disparities might be explained, he stated, but Texas had simply not done so. The state was held to have violated the equal protection clause, simply because of its failure to respond to Partida's prima facie showing of purposeful discrimination.

The Court's attitude illustrates that discriminatory purpose is to be judged on a case-by-case basis. As Justice Powell's concurring opinion in *Keyes* had noted, a purpose test means that the court can uphold an action in one case and invalidate essentially the same action in the next.[410] *Castaneda* explicitly recognizes this and, indeed, goes one step farther by indicating that the same condition *and* the same purpose may lead to different results, because of differences in the proof offered. In the future, government attorneys faced with jury discrimination claims probably will call the jury commissioners to testify about their selection procedures,[411] which,

409. 97 S. Ct. at 1282-83. *See also id.* at 1283-85 (Marshall, J., concurring).

410. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 233 (1973) (Powell, J., concurring).

411. *See* 97 S. Ct. at 1292 (Powell, J., dissenting). Justice Powell expressed sympathy for the state's lawyers in *Castaneda*, because he felt that they could not have anticipated the legal standards that the Court applied. Compare his unsympathetic attitude toward a similar dilemma faced by the *Arlington Heights* plaintiffs. 429 U.S. at 270 n.20.

Justice Blackmun implied, would produce a significantly different record on the discriminatory purpose issue.[412] Hence, *Castaneda* has probably sown the seeds of its own destruction. (Ironically, *Davis* and *Arlington Heights* are also "obsolete," because plaintiffs with similar claims now will bring them under the civil rights laws, which have been held to prohibit discriminatory effects,[413] rather than under the equal protection clause.) Although the particular results reached by the Supreme Court may thus not be particularly important, the Court's approach in searching for discriminatory purpose in *Davis, Arlington Heights*, and *Castaneda* remains highly significant. Because the Court itself has now recognized that the actual results produced by a purpose test are of limited precedential value, litigants and lower courts necessarily will have to consider the discriminatory purpose issue in light of the particular facts available in each case and use the methodology demonstrated in the Court's equal protection precedents.

The very fact that the issues in *Castaneda* deeply divided the Supreme Court make the decision highly instructive on methodology. The case again raised the question of whether an equal protection claimant must produce proof that racial bias actually motivated the responsible officials. *Castaneda* apparently answered "no," at least in the context of jury discrimination cases. The evidence that the Court held to establish a prima facie case of purposeful discrimination was almost entirely statistical. The data demonstrated that the lower proportion of Mexican-American grand jurors did not result by chance, and the Court noted that the selection system provided ample opportunity for discrimination.[414] Partida did testify in general about discrimination against Mexican-Americans in the area, but not about jury selection in particular. Partida offered no direct evidence about how the individual jury commissioners operated or about their motives.

Another indication that the objective results of the challenged system were the Court's primary concern in *Castaneda* is that the Court determined to examine the grand jury records for the previous eleven-year period.[415] The actual commissioners who picked the prospective jurors for Partida's case had been in office for less than two-

412. 97 S. Ct. at 1278, 1282.

413. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (Title VIII); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (Title VIII).

414. 97 S. Ct. at 1278, 1281.

415. *Id.* at 1276 & n.7, 1280-81.

and-one-half years, and the percentage of Mexican-American jurors had risen recently. Whereas Mexican-Americans accounted for thirty-nine percent of all the prospective grand jurors called from 1962 to 1972, they made up fifty-two percent of the 1972 array from which Partida's grand jury was selected. Therefore, as in *Arlington Heights*, the time frame by which the Court decided to judge the state's actions was important in *Castaneda*, but in contrast to the *Arlington Heights* approach, Justice Blackmun chose a longer time period, which this time worked against the government.[416]

Justice Blackmun did not explain why he chose the longer time frame. The Court apparently considered the eleven-year period because Partida produced data for that period and because the state did not attack the period selected. The length of the time period selected for examination, however, is a significant indication of what evidence the Court considers relevant. The current statistics were clearly the most probative of the way the 1972 jury commissioners intended to perform in Partida's case, but only the longer time frame demonstrated the way the overall system had performed in recent years. Prior jury discrimination cases had focused on the overall performance of jury selection procedures, and *Castaneda*'s reliance on these precedents demonstrated the Court's conviction that neither *Davis* nor *Arlington Heights* changed the standards set by the earlier decisions. The issue that governed *Castaneda* was whether the substantial underrepresentation of Mexican-Americans resulted from purposeful discrimination.[417] The issue was not, as *Arlington Heights* suggests it should have been, whether purposeful discrimination was "a motivating factor" in the commissioners' decisionmaking process.

Thus, *Castaneda* reinforces the notion that what constitutes proof of discriminatory purpose will vary in different contexts. Specifically, it holds that in order to establish discriminatory purpose "in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or . . . group . . . by comparing the pro-

416. Chief Justice Burger, dissenting, argued that only recent statistics were relevant, and he complained that the "use of Hidalgo County's practices some 10 years earlier seems to me entirely indefensible." *Id.* at 1286. The Court responded that it was up to the state to show why the 11-year period offered by Partida was unreliable, which the state had failed to do. *Id.* at 1281. Justice Blackmun also suggested that the different time frames were not as significant as they might appear, because even the figures for the last two-and-one-half years showed that the percentage of Mexican-Americans called was too low to have been produced by a random selection procedure. *Id.* at 1281 n.17.

417. 97 S. Ct. at 1279-80.

portion of the group in the total population to the proportion called to serve as grand jurors, over a significant time."[418] Consequently, *Castaneda*'s reliance on statistical and other objective evidence from an eleven-year period reaffirms prior jury discrimination decisions holding that the relevant consideration is the result produced by the challenged selection procedure "over a significant time."

3. The Legal Standard Applied

Ironically, the choice of a time period favorable to Partida, and indeed the holding of *Castaneda*, demonstrate again how difficult proof of discriminatory purpose is. Partida prevailed, barely, because he produced statistics showing first, that the selection process substantially underrepresented Mexican-Americans in a way that a random procedure would not, and second, that the underrepresentation had persisted for a decade or more. Significantly, Partida was able to produce evidence showing underrepresentation only because the state kept jury records for previous years. Without these records, Partida would have been unable to present reliable proof of how many Mexican-Americans had been included among the prospective grand jurors and thus would have been unable to show that the selection process disproportionately excluded minority members. The Hidalgo County records did not designate the race or national origin of the person called, but examination of the names revealed which prospective jurors were Spanish-surnamed, which the Court was willing to equate with Mexican-Americans.[419] A black defendant, however, presumably would be unable to use similar records to prove that blacks had been substantially underrepresented. Statistical analysis of the kind that helped to establish Partida's claim requires both the availability of relevant data and a sufficient number of official decisions to provide a statistically significant sample. When this evidence is available, as it often is in jury discrimination cases, the type of analysis used in *Castaneda* is possible. In challenges to individual laws or decisions, however, and in many other equal protection contexts, comparable statistics will not be available, and the claimant will have to rely on other types of less persuasive evidence.[420]

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418. *Id.* at 1280 (relying on Hernandez v. Texas, 347 U.S. 475, 478-80 (1954)).

419. *See* 97 S. Ct. at 1276 n.5.

420. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); text accompanying notes 364-72 & 384-86.

> The determination that a particular decision was illicitly motivated . . . typically depends on more intuitive and impressionistic inferences. Statistical techniques gener-

The second element of Partida's statistical proof was that Mexican-Americans had been substantially underrepresented among those called for grand jury service for at least eleven years prior to his indictment. As a matter of precedent, this aspect of *Castaneda* is also somewhat disturbing, because it suggests that an equal protection claimant may have to prove that the discriminatory state action that harmed him was part of an overall pattern of discrimination directed against his race or national origin. Similarly, the *Arlington Heights* opinion specifically included prior discriminatory acts among its list of "subjects for proper inquiry."[421] The suggestion was that MHDC might have prevailed if it had shown that the village had blocked integrated housing developments on other occasions. Justice Powell did recognize that a single racially motivated decision could be unconstitutional,[422] but the problem is proving such racial motivation when the discrimination is not blatant. The practical implication of *Arlington Heights* and *Castaneda* may be that government officials may intentionally discriminate "for a while" before they are in any danger of losing an equal protection suit.

The absence of a substantial state interest in *Castaneda* also distinguished it from *Davis* and *Arlington Heights*. Texas certainly had a legitimate interest in setting reasonable qualifications for its grand jurors and in producing a sufficient number of jurors to carry out judicial business, but, as the Court recognized, the commissioners' job was not to test the qualifications of the prospective jurors.[423] That was the duty of the trial judge. The commissioners' only responsibility was to produce a list of candidates, and if they had used an unbiased selection procedure, they should have called persons of all backgrounds on a fairly random basis.[424]

Thus, Partida's proof that the underrepresentation of Mexican-Americans did not result from a purely random selection process was significant only because of the particular circumstances of his case. As in *Davis* and *Arlington Heights*, the Court weighed the importance of the state interest as part of the initial determination

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ally are of less assistance in explaining the basis for a particular decision than in explaining the basis for a pattern of decisions. It often is not clear what events count as salient data for the inference, the sample is likely to be small, and the data are likely to consist of events so lacking in similarity as to preclude systematic analysis.

Legislative Motive, *supra* note 78, at 114-15 n.104.

421. 429 U.S. at 267-68.

422. *Id.* at 266 n.14. *See also* Ely, *supra* note 77, at 1264 n.173.

423. 97 S. Ct. at 1276 n.8, 1282.

424. *Id.*

of whether the plaintiff had made a showing of discrimination, but in *Castaneda* the Court did not consider the interest legitimate or substantial. Similarly, once the Court decided the discrimination issue, it did not bother with the second stage of traditional equal protection analysis, in which the state interest is examined as either rational or compelling. The determination of the discriminatory purpose issue decided the entire case.

In other contexts, a showing of minority underrepresentation by itself will not prove discriminatory purpose if the underrepresentation is the product of state action that the Court believes also serves a legitimate purpose or deserves judicial deference. In *Arlington Heights*, for example, expert testimony established that 3,200 blacks would live in the village if no housing discrimination existed and if residential patterns were based solely on economic factors and random choice,[425] a fact that Justice Powell ignored in upholding the trustees' discretionary zoning power. In *Castaneda*, the Court probably would not have sustained the discrimination claim if the challenge had been directed against the trial judge's part of the selection system, in which some discretion in testing the prospective jurors' qualifications would be acceptable, instead of against the jury commissioners, whose role was not to judge qualifications.

Justice Powell's dissent in *Castaneda* argued that "one may agree that the disproportion did not occur by chance without agreeing that it resulted from purposeful invidious discrimination."[426] In response, Justice Blackmun wondered what the cause could be, if not either chance or discrimination. The jury commissioners may have decided to test the qualifications of prospective jurors before calling them,[427] even though this was not among their statutory responsibilities. If they did engage in some "winnowing out" process, however, the Court held that "it was incumbent on the state to call the commissioners and to have them explain how this was done."[428]

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425. *See* note 361 *supra*. Of course, Arlington Heights did not directly limit the number of blacks living in the village, but its zoning decisions in general and its rejection of the MHDC petition in particular arguably encouraged the private housing discrimination that caused these segregated residential patterns. *See* Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

426. 97 S. Ct. at 1287.

427. The state trial judge who appointed the commissioners "testified that he had instructed them about the qualifications for a grand juror and the exemptions provided by law." 97 S. Ct. at 1278.

428. 97 S. Ct. at 1276 n.8. *See also id.* at 1278, 1282.

Castaneda's approach shows that the Court will presume that an official "intended the natural consequences of his deeds,"[429] at least in many jury discrimination cases and perhaps in other contexts in which the official does not have substantial discretionary authority. Moreover, it indicates that the Court has no general objection to personalized evidence of the jury commissioners' motives or subjective mental processes. Indeed, the entire opinion implies that the state was remiss in failing to produce testimony about "the motivations and methods of the grand jury commissioners who selected persons for the grand jury lists."[430] Thus, although *Castaneda* demonstrates that an equal protection claimant can establish purposeful discrimination on the basis of purely objective evidence, it does not preclude the use of more subjective testimony nor does it conflict with Justice Powell's admonition in *Arlington Heights* that the courts should consider all available evidence of intent.[431]

Finally, Justice Blackmun's approach reflects his belief that motivation testimony is essentially rebuttal evidence, which the government should have the burden of producing. This burden is placed on the government basically as a matter of fairness. The jury commissioners are "the only ones in a position to explain the apparent substantial underrepresentation of Mexican-Americans and to provide information on the actual operation of the selection process."[432] Because the state failed to call the commissioners, any inference drawn from the absence of their testimony was apparently drawn against the state, not against Partida.[433] Hence, the *Castaneda* approach differs from that of *Arlington Heights*, because in the earlier decision, Justice Powell considered the lack of direct evidence concerning the trustees' racial motives to be a factor supporting his conclusion that the plaintiffs had not met their threshold burden of proving discriminatory purpose.

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429. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

430. 97 S. Ct. at 1282-83.

431. 429 U.S. at 266. *But see* 97 S. Ct. at 1288-91 (Powell, J., dissenting) (suggesting that the majority had not adequately considered all of the "subjects of proper inquiry" that *Arlington Heights* identified as relevant to the discriminatory purpose issue).

432. 97 S. Ct. at 1278.

433. *See generally Title VIII Litigation, supra* note 359, at 157-58.

> Rather than require the plaintiff to discover all possible justifications and demonstrate that each was not involved or is not legitimate, considerations of fairness, convenience, and judicial economy suggest that the defendant, with inherently greater access to information about his own operations and motivations, be required to demonstrate the reasons for his conduct.

Id. at 157.

Castaneda, however, did not really draw any inferences for or against either party as a result of the absence of evidence of the motives of the jury commissioners. Instead, the Court simply determined that showing how the commissioners actually operated was not a necessary element of Partida's prima facie case. Nevertheless, these concepts are related. The consequence of holding that a particular element need not be proved by an equal protection claimant is that the absence of any evidence on that point will not defeat his claim. Similarly, the absence of evidence will not make the evidence that he has produced in support of his claim any less persuasive, as long as the government is in a better position than the claimant to produce evidence concerning its own officials' motives and states of mind. Perhaps the basic lesson of *Davis, Arlington Heights*, and *Castaneda* is that the elements of a prima facie case of discriminatory purpose may vary in different contexts, as Justice Stevens observed in *Davis*,[434] because the burden of proof may depend on what evidence is available and which party controls that evidence.

Because *Davis, Arlington Heights*, and *Castaneda* all indicate that discriminatory purpose is essentially an evidentiary matter, presumptions, burden of proof, and the concept of a prima facie case have become vitally important in this area.[435] As *Castaneda* demonstrates, however, the justices disagree over how these concepts apply to the proof of an equal protection claim. In particular, substantial differences of opinion concerning the meaning of a "prima facie case" are evident in the various *Castaneda* opinions. Some of these differences are attributable to the use of the phrase in *Castaneda* to describe two or three separate and distinct concepts.

In civil litigation generally, a "prima facie case" refers to that quantum of evidence that a party with the burden of proof must produce to avoid suffering a directed verdict (*i.e.*, to *permit* a judgment in his favor). The party must introduce sufficient evidence on every necessary element of the claim to permit a finder of fact, acting reasonably, to decide the issue in that party's favor.[436] Satisfying this burden of producing evidence, however, does not guaran-

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434. 426 U.S. at 253 (Stevens, J., concurring).

435. Indeed, Brown v. Bd. of Educ., 347 U.S. 483 (1954), itself may be viewed essentially as a case that established the irrebuttable presumption that racially separate schools are unequal for purposes of the equal protection clause. *See also* Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOSOPHY & PUB. AFF. 3, 23-25 (1975) (discussing the presumptions and burden of proof aspects of *Keyes*).

436. Additional complications may arise if the finder of fact is a jury. No jury sat in *Davis, Arlington Heights*, or *Castaneda*, however, and because the primary relief sought in most racial discrimination claims under the equal protection clause is equitable, the fact-finder will usually be a judge. *But see* Curtis v. Loether, 415 U.S. 189 (1974); note 289 *supra*.

tee victory, because the evidence introduced may not convince the factfinder that the claim is supported by a preponderance of the evidence. Used in this sense, a prima facie showing does not shift the burden of proof to the opposing party, who may still win, even if he produces no rebuttal evidence whatsoever. The Supreme Court's concern, however, has been with whether the evidence is sufficient to shift the burden of proof to the government. This issue is essentially whether the equal protection claimant has introduced sufficient evidence on an issue to *require* a directed verdict in his favor absent any evidence in rebuttal. A subsidiary issue is *which* burden of proof is shifted to the government—merely the burden of producing some rebuttal evidence or the entire burden of persuasion on the discriminatory purpose issue.

The justices were badly divided on this question in *Castaneda*. Chief Justice Burger's dissent viewed Partida's statistical evidence as so unreliable that it could not establish a prima facie case that would shift the burden to the state.[437] Thus, he considered the proof inadequate as a matter of law to sustain Partida's claim, which sounds very much like a determination that the burden of production was not satisfied in the first place.

The other dissenters took different approaches that implied a somewhat more charitable view of Partida's evidence. Justice Stewart was alone in arguing that the district court's judgment should be upheld simply because its findings were not "clearly erroneous."[438] This suggests that the proof may have been legally sufficient to sustain the claim and perhaps may even have persuaded another judge to find for Partida, but it was not strong enough to justify overturning the trial judge's ruling for the state. Nevertheless, none of the other justices treated discriminatory purpose in *Castaneda* as merely a factual finding governed by the "clearly erroneous" standard.[439] This much deference to the trial judge's decision seemed inappropriate, because the proof was essentially statistical and the opportunity to observe the witnesses and judge their credibility was of minimal importance. Except for Justice Stewart, the Court's attitude on this point will probably bear out Justice Stevens's prediction in *Davis* that "[t]he extent of deference one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a

437. *See* 97 S. Ct. at 1286 & n.1.
438. *Id.* at 1286.
439. *See generally* note 353 *supra*.

question of fact or a question of law, will vary in different contexts."[440]

Justice Powell's dissent followed his approach in *Arlington Heights*. He seemed to accord some, unspecified amount of weight to the district court's judgment,[441] but he also conducted an independent review of the evidence.[442] His basic concern was not with which party must produce the evidence, but with what he perceived as the equal protection claimant's continuing burden of persuasion—or more accurately, his risk of nonpersuasion—on the discriminatory purpose issue. Thus, his dissent in *Castaneda* argued that "it matters little" whether Partida ever established a prima facie case or not,[443] because the record did include rebuttal evidence that "satisf[ied] the State's burden of production—even assuming that respondent's evidence was sufficient to give rise to such a burden."[444] Similarly, the evidence in *Arlington Heights* simply did not persuade Justice Powell that race was a motivating factor in the trustees' decision, although it was surely sufficient to have satisfied the plaintiffs' burden of production. In Justice Powell's view, then, the prima facie case concept should not alter the way the Court appraises the ultimate issue, which continues to be whether the claimant has proved purposeful discrimination by a preponderance of the evidence.[445]

The majority in *Castaneda* disagreed. Its conception of the legal significance of a prima facie case of discrimination was fundamentally different from that of the dissenters. The Court determined that Partida's proof not only satisfied his burden of production and his initial burden of persuasion, but it also shifted the burden of persuasion to the state "to dispel the inference of intentional discrimination."[446] Furthermore, *Castaneda* held that the evidence produced by Texas was insufficient as a matter of law to meet this burden. The state did not return the burden of persuasion to Partida simply by introducing some rebuttal evidence, such as the testimony of the state trial judge and the "governing majority" figures.

The majority's understanding of the prima facie concept in *Castaneda* is clearly correct. Prior jury discrimination cases established that a prima facie showing of discrimination shifts the burden

440. 426 U.S. at 253 (Stevens, J., concurring).
441. 97 S. Ct. at 1292.
442. *Id.* at 1290-92.
443. *Id.* at 1291.
444. *Id.* at 1292.
445. *Id.*
446. *Id.* at 1282.

of persuasion to the state and that not all types of rebuttal evidence are legally sufficient to meet the burden. As Justice Blackmun noted in *Castaneda*, for example, the Court's precedents have long established that a prima facie case is not rebutted simply by a jury commissioner's protestation that race played no part in the selection process.[447] These decisions implicitly reject the view that the burden of persuasion always remains with the claimant. Thus, Justice Powell's approach is inconsistent with the Court's historic determination that a prima facie showing of purposeful racial discrimination under the equal protection clause serves to shift not only the burden of production to the government, but the burden of persuasion as well.[448]

Justice Powell was right, however, about one thing in *Castaneda*: the case was unique.[449] He was referring to the fact that Mexican-Americans were the governing majority in Hidalgo County, but *Castaneda* was unique for other, more important, reasons. The decision marked the first time the Supreme Court held that an equal protection claimant had satisfied the new discriminatory purpose requirement established by *Davis*. It demonstrated again, however, just how difficult proof of the requirement would be, for *Castaneda* also involved a uniquely one-sided record. Ample statistical evidence clearly established a substantial and ongoing discriminatory effect. The particular state action challenged afforded little room for legitimate governmental discretion. Moreover, the state produced practically no evidence. The fact that the Supreme Court voted only five to four to sustain Partida's claim under these circumstances can hardly comfort those faced with the task of proving discriminatory purpose in the future.

V. Conclusion

The Supreme Court's decision in *Washington v. Davis* that only purposeful racial discrimination violates the equal protection clause marks the beginning of a new era in civil rights law. Despite Justice White's contention that this requirement was supported by a century of precedent, the Court had never before determined whether the discriminatory effect of official action alone would suffice to establish racial discrimination for equal protection purposes. Indeed, *Davis* itself did not require this holding, because the *Davis*

447. 97 S. Ct. at 1282 n.19. This principle was also recognized in a number of the jury discrimination cases that the *Davis* opinion cited. *See* 426 U.S. at 241.

448. *See Title VIII Litigation, supra* note 359, at 157-58 & n.178.

449. *See* 97 S. Ct. at 1290.

majority maintained that the plaintiffs had failed to show even a discriminatory effect. If the circumstances of *Davis* raised any questions about the Court's commitment to a discriminatory purpose test, however, they were quickly resolved in *Arlington Heights*, in which the Court upheld state action that did have a discriminatory effect on the ground that it was not motivated by a racial purpose.

Only in recent years, of course, has the purpose-effect issue taken on major significance in civil rights cases. Equal protection claims throughout the 1960's had focused on official action that was obviously intended to be discriminatory. Consequently, a choice between effect and purpose was unnecessary to decide these cases. The Court's opinions adopted a variety of approaches for evaluating racial discrimination claims, some appearing to focus on purpose, some on effect, some on both, and some implying that either a discriminatory purpose or a discriminatory effect would be unconstitutional. These opinions were not only inconsistent and confusing, but they also suggested that the proper standard might vary depending on the particular context or the nature of the right being asserted.

Certainly language in many of these decisions justified efforts by civil rights claimants to challenge official action on the basis of discriminatory effect. The importance of these efforts increased in the early 1970's because instances of blatant, overt discrimination declined, but facially neutral requirements that had the effect of hurting blacks more than whites continued to frustrate efforts of minorities to achieve full social and economic equality. In 1971, the Supreme Court endorsed an effect test for the federal employment discrimination law in *Griggs v. Duke Power Co.*, but the issue was not directly presented in an equal protection context, and the Court's opinions in such diverse cases as *Palmer v. Thompson* and *Keyes v. School District No. 1* continued to give conflicting signals. Moreover, even as the Court failed to provide any definitive guidance on how to judge claims of official racial discrimination, it indirectly contributed to the number of these claims and therefore to the importance of this question by refusing to extend the strict scrutiny standard to state actions discriminating against the poor or affecting important interests in housing, employment, and education. Thus, in addition to hearing the more traditional equal protection claims involving schools, jury selection, and voting rights, the lower courts in the early 1970's were also called upon to decide a variety of employment and housing discrimination cases based on the theory that the challenged state action was unconstitutional because its impact was felt more by blacks than by whites.

Because the Supreme Court's precedents did not dictate what the appropriate judicial response to the effect theory should be, policy considerations were determinative: the Court in *Davis* rejected the theory because it believed it would jeopardize a host of legitimate laws, from sales taxes to bridge tolls, that clearly should not be subject to attack on racial discrimination grounds. Thus, the Court chose to focus on discriminatory purpose not so much because of the inherent merits of this standard—indeed, earlier opinions had criticized judicial review of legislative purpose on a number of grounds—but because the alternative was seen as unacceptable.[450]

The fears expressed in *Davis* of the implications of an effect test, however, were greatly exaggerated. The Court itself had applied an effect standard in employment discrimination cases under Title VII with substantial flexibility and without encouraging attacks against equal pay practices on any "disproportionate racial impact" theory. In the equal protection context, recent decisions involving sex discrimination also showed that the Court could relax the traditional two-tier method of analysis to deal more realistically with new types of discrimination claims. Furthermore, the numerous lower courts that adopted an effect test in cases of racial discrimination often followed this lead by judging the government's justification for an action with a discriminatory effect by a standard less rigorous than the traditional compelling state interest analysis required, such as whether the employment test under review was "job related." By ignoring these possibilities in *Davis*, the Supreme Court not only failed to make equal protection analysis more rational, it also left the impression that its choice of purpose over effect as a standard for judging cases of official racial discrimination was based on a rather transparent and unpersuasive "straw man" argument.

The *Davis* opinion emphasized the drawbacks of an effect standard, but ignored the problems of a test that focused on discriminatory purpose, although the Court itself had recognized these problems in a number of earlier decisions. The primary difficulty, of course, is that improper purpose is hard to prove, and *Davis*, *Arlington Heights*, and *Castaneda* all demonstrate that an equal protection claimant will be hard pressed to establish the necessary discriminatory racial purpose. The effect, if not the actual purpose, of these decisions will be to reduce the number of meritorious civil rights claims that can be successfully brought under the equal pro-

450. Ironically, the Court had earlier used a similar "elimination" technique to reach the opposite result. *See* Palmer v. Thompson, 403 U.S. 217 (1971).

tection clause. Victims of official racial discrimination will no doubt shift their reliance from the equal protection clause to specific civil right laws, such as Title VII and Title VIII, which do prohibit employment and housing practices that have a discriminatory effect.[451] Judicial interpretation of these statutes will take on even greater importance, and civil rights litigants may lobby Congress to "review" these decisions and also to consider whether the effect standard should be extended legislatively to protect other human rights.

Criticism of the *Davis* rationale for the discriminatory purpose standard is of academic interest only now, because *Arlington Heights* and *Castaneda* affirmed the Supreme Court's commitment to a requirement of purposeful discrimination for constitutional claims. The Court's articulation of this standard did vary in *Davis, Arlington Heights*, and *Castaneda*, however, and its use of different methods to examine the records in these cases for evidence of discriminatory purpose raises a variety of questions. Should the Court decide the discriminatory purpose issue primarily by objective evidence or should it also consider testimony concerning the responsible officials' subjective motives? What will be required to establish a prima facie case of purposeful discrimination, will this vary in different contexts, and what response by the government will be sufficient to rebut such a case? Is discriminatory purpose a question of fact or of law, and how much deference will the appellate courts pay to the trial judge's determination of the question?

One thing is clear. Each case must be decided on the basis of the particular evidence actually produced by the parties, and, in practice if not in theory, the burden on an equal protection claimant will be heavy indeed. Taken together, *Davis, Arlington Heights*, and *Castaneda* indicate that proving discriminatory purpose will be difficult in all but the most egregious cases. These decisions do suggest, however, that the chance of success will increase to the extent that the claimant can prove a substantial discriminatory effect and to the extent that the challenged state action does not appear to advance the legitimate purposes claimed for it. The evidence available to prove these factors will vary, of course, but, everything else being equal, evidence will be easier to produce when the decision under review is one of a series of similar decisions as opposed to an isolated

451. *See* note 413 *supra*; United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977). The *Arlington Heights* opinion, which suggested that lower courts faced with a claim based on both a civil rights statute and the equal protection clause should ordinarily decide the statutory question first, will probably reinforce this trend. *See* 429 U.S. at 271.

act or policy, when the decision is essentially active rather than passive, and when the decision does not involve judgments which the courts have traditionally recognized as subject to wide discretion on the part of the responsible state officials. Possibly, the chance of a successful claim will also vary with the extent of judicial experience with the particular type of claim being made (compare *Davis* and *Arlington Heights* with *Castaneda*) and with the Court's perception of the importance of the right asserted and the appropriateness of the remedy requested (compare *Palmer* with *Castaneda*). One final prediction is also safe. Civil rights litigants and courts alike will have to grapple with these and other issues raised by the discriminatory purpose requirement for years to come.