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Constitutional Law-Civil Rights-Standard for Relief in Racial Discrimination Cases Requires a Showing of Discriminatory Intent

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RECENT DECISIONS

Constitutional Law—Civil Rights—STANDARD FOR RELIEF IN RACIAL DISCRIMINATION CASES REQUIRES A SHOWING OF DISCRIMINATORY INTENT —*Washington v. Davis*, 96 S. Ct. 2040 (1976).

When Congress passed Title VII of the Civil Rights Act of 1964,[1] it did not extend the coverage of the Act to public employers.[2] Consequently, the *Griggs v. Duke Power Co.*[3] decision in 1971 created the anomolous situation that private employers were held to a tougher standard of scrutiny with respect to racial considerations in their hiring procedures under Title VII than were public employers under the Constitution.[4] This curious development in the relationship between public employment and Title VII caused many courts to alter their standards for equal protection violations in the early 1970's.[5] In the realm of public employment, these courts began to permit a showing of the disparate impact of an employment test on a minority group to shift the burden to the state of showing that the test was job related.[6] Since this analysis had been used in the context of the consti-

1. 42 U.S.C.A. § 2000e *et seq.* (1974).

2. For a general discussion of the legislative history of Title VII and its subsequent amendments see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

3. 401 U.S. 424 (1971).

4. The statutory standard as interpreted in *Griggs* permitted the burden of proving job-relatedness to shift to the employer upon a showing of disproportionate racial impact in the employer's hiring procedures. "Congress directed the thrust of the Act [Title VII] to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id.* at 432 (emphasis in original). The source of the congressional power to create such a standard for employers is the commerce clause. U.S. CONST. art. I, § 8. *See also* 10 U. RICH. L. REV. 387 n.1 (1976).

This is a de facto rather than a de jure determination. The traditional fourteenth amendment standard (de jure) for equal protection requires the plaintiff to prove that the alleged act of discrimination was intentional. The *Griggs* standard (de facto) removes the necessity of proving that an act was intentional and permits the plaintiff to win merely by showing that the effect of the act is discriminatory regardless of the intention. *See* Washington v. Davis, 96 S. Ct. 2040, 2047-49 (1976).

5. See cases cited in Washington v. Davis, 96 S. Ct. 2040, 2050 n.12 (1976). *See also* note 50 *infra*.

6. Several of the cases cited by the Supreme Court in Washington v. Davis, 96 S. Ct. 2040, 2050 n.12 (1976), exemplify this type of analysis. These cases created a third tier of scrutiny by shifting the burden to the state to establish job-relatedness, a Title VII standard, rather than a compelling state interest or a rational relation. The burden was shifted upon a showing that the state's employment test had a disproportionate impact on minorities. *See, e.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1335 (2d Cir.

tutional standard for equal protection violations, these decisions abandoned the traditional de jure test[7] in favor of a de facto test which required only a showing of impact without inquiry into the state's intent.[8]

Congress remedied the initial problem in 1972 with an amendment which extended Title VII coverage to public employers.[9] However, interim court decisions which had grafted *Griggs'* de facto standard onto the fourteenth amendment in public employment discrimination suits[10] had also affected equal protection analysis in lower courts' dealing with areas other than employment.[11] *Washington v. Davis*,[12] involving public employment discrimination, is one of the cases which evolved during this era.[13]

1973) (whites passed at 3½ times the rate of blacks); Castro v. Beecher, 459 F.2d 725, 735 (1st Cir. 1972) (25% of black applicants passed; 10% Spanish-surnamed applicants passed; 65% of remainder passed); Chance v. Board of Examn'rs, 458 F.2d 1167, 1171-72 (2d Cir. 1972)(whites passed at 1½ times the rate of blacks and Puerto Ricans). *See also* Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 VAND. L. REV. 1183, 1184-86 (1972); Zimmer, *Beyond DeFunis: Disproportionate Impact Analysis and Mandated "Preferences" in Law School Admissions*, 54 N.C.L. REV. 317, 342-46 (1976) [hereinafter cited as Zimmer].

7. Traditional equal protection analysis requires the state to treat people equally, permitting only those differentiations necessary for furthering a legitimate governmental purpose. The Supreme Court has generally applied a two-tiered analysis to legislative classifications. Ordinarily, the Court requires only that a statute have some rational basis; but if legislation deprives some people of a "fundamental interest," or employs a "suspect classification," then the Court will invoke a strict standard of review and require proof of a compelling state interest as justification. Racial classifications are recognized as suspect. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Equal Protection*]; Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

8. *See* note 4 *supra*.

9. Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103, *codified at* 42 U.S.C.A. § 2000e(a)(1974). *See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 847-50 (1972).

10. Typical of the language used by the courts in finding the public employer liable is that found in Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). After acknowledging the Title VII standard as interpreted by *Griggs*, the Court stated:

> We cannot conceive that the words of the Fourteenth Amendment, as it has been applied in racial cases, demand anything less.

Id. at 733 (footnote omitted).

11. See cases cited at Washington v. Davis, 96 S. Ct. 2040, 2050 n.12 (1976).

12. 96 S. Ct. 2040 (1976).

13. The Supreme Court appeared to give its stamp of approval to the application of a Title VII standard to public employment cases when it cited two of them, Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), and Chance v. Board of Examn'rs, 458 F.2d 1167 (2d Cir. 1972), with respect to the job-relatedness test in McDonnell Douglas v. Green, 411 U.S. 792, 802 n.14 (1973). While this citation was only directed at the statement concerning job-relatedness, at least one circuit court relied on *Green* as an affirmation of the applicability of Title VII

The employment test administered by the defendants in *Washington*, the District of Columbia Metropolitan Police Department, had a disparate impact on black applicants. A black applicant was four times as likely to fail the test as a white applicant.[14] The plaintiffs in *Washington* were individual blacks who had failed the employment test.[15] They asserted that the mere showing of the disparate impact caused by the test was sufficient to establish a prima facie case of discrimination in violation of the fifth amendment,[16] and shift the burden to the city to demonstrate that its test was job-related. The plaintiffs' motion for summary judgment was based solely on constitutional grounds.

The district court denied the plaintiffs' motion and instead granted the defendants' statutory and constitutional motion for summary judgment to dismiss the case.[17] While it did not question the application of *Griggs* to a public employer,[18] the district court felt that the defendants met the burden of proving job-relatedness.[19] By showing a good faith effort to recruit blacks and a high correlation of the results on the employment test with the performance during the seventeen-week training period, the defendants overcame the prima facie case of discrimination.[20] Reversing the district court decision, the circuit court found that the defendants had failed to meet their "heavy burden" of proving job-relatedness.[21] The circuit court disagreed that the training program validation fulfilled the business necessity requirement of *Griggs*.[22] Both parties briefed and argued the case before the Supreme Court on the premise that the issue involved was

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standards in equal protection analysis. *See* Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973).

14. Davis v. Washington, 512 F.2d 956, 958-59 (D.C. Cir. 1975). *Compare* the impact on blacks in *Washington with* the impact on minorities which triggered a burden-shifting in the cases cited in note 6 *supra*.

15. Originally, the plaintiffs had intervened in a class action brought by black police officers claiming discrimination in the denial of promotions. These officers did not appeal the district court decision. Davis v. Washington, 512 F.2d 956, 957 n.1 (D.C. Cir. 1975).

16. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.")

17. 96 S. Ct. 2040, 2052 (1976); 348 F. Supp. 15 (D.D.C. 1972) (*semble*).

18. 348 F. Supp. 15, 17 (D.D.C. 1972) ("Thus the issue boils down to the merits of plaintiff's contention that that Test is not related to job performance . . . .").

19. *Id.* ("[T]he undisputable facts prove the test to be reasonable and directly related to the requirements of the police recruit training program . . . .").

20. *Id.* at 16-17.

21. 512 F.2d 956 (D.C. Cir. 1975).

22. *Id.* at 963-64.

whether the business necessity test could be met by showing that an employment test predicted performance in the job training program.[23]

Instead of deciding the case on this issue, the Supreme Court invoked the "plain error" doctrine,[24] and found that the application of Title VII standards in the constitutional area was misplaced. The Court's decision is important for two reasons. First, it reaffirmed the principle that a de jure finding is necessary for a violation of the equal protection clause. Second, the case is important because the Court offered an opinion on the requirements for meeting the business necessity test through training program validation, although the effect of this opinion on Title VII litigation is unclear.

In *Keyes v. School District No. 1*,[25] the Court had earlier restated the constitutional standard for racial discrimination and carefully affirmed the de jure-de facto distinction.[26] The Court's foremost objective in

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23. *See* notes 63-71 *infra* and accompanying text.

24. The Court's stated authority for going outside the issue presented in this case is Revised Rules of the Supreme Court of the United States, 28 U.S.C.A., rule 40(1)(d)(2)(1968):

> The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

Four of the five cases cited by the Court as authority for invoking "plain error" were criminal cases. Washington v. Davis, 96 S. Ct. at 2047 n.9. The fifth, Sibbach v. Wilson & Co., 312 U.S. 1 (1941), involved the power of courts in procedural matters; but the confinement of the plaintiff for contempt was the issue which prompted the Court to invoke the "plain error." *Id.* at 16. In light of the past history of "plain error," its use in *Washington* seems rather unusual. Compounding this oddity is the fact that Metropolitan Housing Devel. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir.), *cert. granted*, 423 U.S. 1030 (1975), was also briefed and argued during this term since *Arlington Heights* presented the Court with many of the constitutional issues on which *Washington* was decided. *Arlington Heights* was one of the cases cited disapprovingly by the majority in *Washington* at 2050 n.12. *See* note 49 *infra* and accompanying text.

25. 413 U.S. 189 (1973).

26. "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.* at 208 (emphasis in original). Justice Powell wrote a separate opinion in *Keyes* arguing for the breakdown of the de jure—de facto distinction in favor of "constitutional principles of national rather than merely regional application." *Id.* at 219. In *Washington*, Powell joined the majority opinion, possibly having abandoned his former position that the requirement of intent is unnecessary in some instances.

Since Strauder v. West Virginia, 100 U.S. 303 (1879), the de facto — de jure distinction has been the basis by which the Supreme Court determines whether a given state activity violates the equal protection clause. *See* note 7 *supra*. There is heavy reliance in *Washington* on the numerous jury selection cases which stress the need for an intent to discriminate before there is a violation. 96 S. Ct. at 2047-48. Maintaining the distinction between de facto and de jure has not always been easy, however. While the Court has never expressly announced

Washington was to distinguish this constitutional standard for establishing a violation of the equal protection clause from the statutory standard for establishing employment discrimination under Title VII. Clearly, the majority views de jure discrimination essentially in terms of discriminatory intent, coupled with any resultant disparate impact upon a minority group.[27] While the main thrust of the opinion is aimed at defining the role of disproportionate impact evidence, both elements for establishing a constitutional violation are reviewed. A major problem for the Court in *Washington* was to outline methods for proving discriminatory intent and defining precisely what constitutes such intent.

In defining the method for establishing discriminatory intent the Court, citing *James v. Valtierra*[28] and *Jefferson v. Hackney*,[29] favored a stricter constitutional standard of proof of intent. These cases reject the notion that discriminatory intent may be established merely based on probable impact.[30] By emphasizing the analysis in these cases,[31] the Court makes it

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any other standard, the implication from some decisions was that intent was not necessarily an element. Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Palmer v. Thompson, 403 U.S. 217 (1971). *See also* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 283-98 (1972).

27. The central purpose of the equal protection clause of the fourteenth amendment is the prevention of official conduct discriminating on the basis of race. . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminating purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

96 S. Ct. at 2047 (emphasis in original).

28. 402 U.S. 137 (1971).

29. 406 U.S. 535 (1972).

30. *Valtierra* and *Hackney* both presented the Court with an opportunity to extend equal protection analysis to cover instances where the natural consequences of the state's act served to place a burden on minority citizens even though the state did not knowingly intend to make racial classifications.

These two cases are strong statements by the Court that the intent required is actual subjective knowledge on the part of the state that it is making a racial classification. This does not mean that the intent must be an evil intent, but that the standard of intent that obtains in tort law is not enough. That is, a plaintiff cannot be successful by merely showing that the natural and reasonably foreseeable consequences of the state's act would produce a racial classification. However, three circuits appear to have adopted the tort standard of intent for their equal protection analyses, at least with respect to their school cases. United States v. School Dist., 521 F.2d 530, 535 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); Hart v. Community School Bd. of Educ., 512 F.2d 37, 50-51 (2d Cir. 1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 181-82 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

The intent requirement and the method of proving this intent are interrelated. Since they require that the racial classification be a knowing one, the next logical step for *Valtierra* and *Hackney* is to prevent the method of establishing intent from being inferred through circumstantial evidence.

31. 96 S. Ct. at 2048.

very difficult for a plaintiff to show that a statute or rule, neutral on its face, is motivated by racial animus.[32] Despite the difficulty of this burden, the Court said that this does not mean that a showing of disproportionate impact is irrelevant or that a statute must be unconstitutional on its face.[33] Then it cited examples from its earlier cases of how a plaintiff might establish that a statute is racially discriminatory.

Unfortunately for potential plaintiffs, the examples which the Court chose are from a time when the discriminators did not exercise the subtle distinctions which are prevalent in more recent cases. The methods of proving discrimination cited by the Court are based on cases such as *Yick Wo v. Hopkins*[34] and *Hill v. Texas*.[35] While these cases do present models of unconstitutional behavior, it is unlikely that many plaintiffs today will encounter such pervasive exclusion.[36] In the jury selection cases of the

32. *Compare* James v. Valtierra, 402 U.S. 137 (1971), *with* Hunter v. Erickson, 393 U.S. 385 (1969) *and* Reitman v. Mulkey, 387 U.S. 369 (1967).

33. 96 S. Ct. at 2048-49.

34. 118 U.S. 356 (1886).

35. 316 U.S. 400 (1942).

36. The decision in *Yick Wo* established the proposition that a statute neutral on its face can be applied in such a manner as to invidiously discriminate on the basis of race. 118 U.S. 356, 373-74 (1886). This is one of the two means suggested by the Court for future plaintiffs trying to establish racial discrimination when a statute does not make a racial classification on its face. 96 S. Ct. at 2048. In *Yick Wo*, a San Francisco ordinance prohibited the maintenance of a wooden laundry within the city limits without a license. Since over two hundred Chinese persons were denied a license for a laundry while only one white person was so denied, the Court struck the ordinance down because it was only a pretext for discrimination. The statistics in *Yick Wo* are so overwhelming that the only logical explanation for the result is that the state was excluding people on the basis of race. It is unclear whether future plaintiffs must have a substantial statistical case this persuasive before they can establish discrimination through disparate impact evidence. *But see* Tyler v. Vickery, 517 F.2d 1089, 1092 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 2660 (1976) (upholding Georgia bar examination in the face of 100% and 50% failure of black examinees in 1972 and 1973 respectively).

The second example which the Court suggested as illustrative of the proper use of disproportionate impact evidence is found in the jury selection cases involving systematic exclusion. The Court relied exclusively upon jury cases to illustrate this second method of proving de jure discrimination with evidence of disparate impact. 96 S. Ct. at 2048. Jury cases are somewhat unique, however, since jurors are supposedly selected on a random basis. Therefore statistical disparities between the percentage of blacks in a community and the percentage of blacks selected for jury duty over a period of time should be more persuasive than similar disparities in other areas such as housing, employment, schools, etc. where the selection is not random. *See* Patton v. Mississippi, 332 U.S. 463 (1947) (almost 33 1/3% of county was black and at least 25 blacks were qualified, but no black had been selected for venire in over 30 years); Hill v. Texas, 316 U.S. 400 (1942) (continuous exclusion of blacks for 16 years); Smith v. Texas, 311 U.S. 128 (1940) (blacks constituted 10% of poll tax payers, but between 1931 and 1938 only 5 of 384 grand jurors were black); Pierre v. Louisiana, 306 U.S. 354 (1939) (50% of parish population was black, but no blacks had served on grand or petit juries for 20 years).

1930's and 1940's, the Court found strong language that a plaintiff must prove that the discrimination was motivated by an intent to segregate. The methods of proving intent established by these cases are difficult ones for a plaintiff to meet[37] unless there are enormous statistical disparities.

Another method of proving discriminatory intent is through the introduction of direct evidence. Citing *Palmer v. Thompson*,[38] the Court suggested that this opinion may have misled the circuit courts into overemphasizing effect evidence.[39] In *Palmer* the plaintiffs challenged a city ordinance which was neutral on its face by introducing evidence that the ordinance was racially motivated. The Court rejected the use of such evidence.[40] The obvious impact of such a decision, as *Washington* recognizes,[41]

While these cases displayed enormous statistical disparities, the Court still looked for further evidence (as in *Smith* that the white jury commissioners were selecting their friends) before stating that the plaintiffs had established a prima facie case. Later cases upholding challenges to jury selection have relied upon racially biased selection procedures rather than upon disparate impact. Alexander v. Louisiana, 405 U.S. 625 (1972) (jury commission asked race of citizen on its questionnaire); Whitus v. Georgia, 385 U.S. 545 (1967) (jury commission made selections from segregated tax records); Avery v. Georgia, 345 U.S. 559 (1953) (separately colored tickets used in "random" selection from jury box).

Thus, plaintiffs who cannot show racial classification on the face of a statute and need to use disproportionate impact analysis are left with only two alternative methods: "invidious application" and "systematic exclusion." This will certainly not open a floodgate of equal protection cases.

Perhaps the observation of Justice Stevens in his concurrence more accurately reflects the situation which plaintiffs will face in trying to establish discriminatory intent.

> [T]he extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.
>
> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. . . .
>
> My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume.

96 S. Ct. at 2054 (Stevens, J., concurring).

37. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

38. 403 U.S. 217 (1971).

39. 96 S. Ct. at 2049.

40. The situation in *Palmer* involved a desegregation order placed on the city of Jackson, Mississippi, to integrate all of its municipal services. The city integrated all other services but decided to close the swimming pools rather than comply with the court order. Since the impact of the closing order fell equally on all races, the Court declined to find an equal protection violation. In refusing to consider plaintiff's evidence concerning the city's motivation, the Court said "no case in this Court has held that a legislative act may violate equal protection solely because of the motivation of the men who voted for it." 403 U.S. at 224. See the discussion of motive inquiry at note 48 *infra*.

41. 96 S. Ct. at 2049.

is to place greater emphasis on effect evidence. In footnote 11 of *Washington*[42] there is an indication that motive inquiry is permissible in certain circumstances. *Lemon v. Kurtzman*[43] is cited as an example of when such inquiry is proper. In citing *Lemon* the Court passed over another establishment clause[44] case, *Epperson v. Arkansas*,[45] which was a clear example of the Court scanning the motives of the legislature. The Court's reference to *Lemon* still casts doubt upon the strong statements which the Court used in *Palmer* regarding motive inquiry.[46] The area of equal protection has not been completely free from motive inquiry,[47] and in view of the treatment it received in *Washington*, this issue may still be open.[48]

Having reemphasized the correctness of the de jure rule and stated the proper perspective for effect evidence in the constitutional standard, the Court then cited sixteen district and circuit court cases which misapplied the constitutional standard by permitting a de facto showing to trigger a burden shifting to the defendants.[49] These cases cover a range of areas in which the standard was misapplied: employment, housing, zoning and municipal services.[50] There was a notable absence of school cases in the list.[51] Many, but not all, of these cases evolved from the twisted logic which

42. 96 S. Ct. at 2050 n.11.

43. 403 U.S. 602 (1971), *cited at* 96 S. Ct. at 2050 n.11.

44. U.S. CONST. amend. I reads in part "Congress shall make no law respecting an establishment of a religion . . . ."

45. 393 U.S. 97 (1968).

46. *See* note 40 *supra*.

47. *See* Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

48. Since *Washington* has restricted the ability of disproportionate effect evidence to establish a constitutional violation, the use of motive inquiry may be necessary to avoid a "catch-22" situation for future plaintiffs trying to establish racial discrimination. The "catch-22" situation which would exist is that a plaintiff must establish discriminatory effect and intent, but he cannot prove discriminatory intent through direct evidence (motive inquiry) nor through indirect evidence (effect evidence of disparate impact). Absent a racial classification on the face of the statute or a blatant act by the State as in *Gomillion*, the plaintiff's burden would be almost insurmountable. Therefore, motive inquiry may become necessary in some instances. For a discussion of motive inquiry see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970); *Equal Protection, supra* note 7.

49. 96 S. Ct. at 2050 n.12.

50. *Id.* The cases cited by the Court in footnote 12 are not overruled in their entirety but only insofar as they apply a disproportionate impact test to establish a prima facie case of unconstitutional discrimination.

51. While there were many other cases which could have been cited by the Court as

the equal employment standards forced upon the courts in 1971.[52] The common theme of these cases is that a showing of disparate impact alone can shift the burden to the state. Underlying each decision is the premise that the state must insure that minority groups receive the same benefits as whites regardless of the state's intention.[53] The decision in *Washington* makes clear that not only is this de facto standard not constitutionally mandated, but to permit such a standard to overturn innocent state action would "perhaps invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[54]

The second important aspect of *Washington* is the recognition that an employment test which accurately predicts performance in a training program may be a valid means by which an employer can meet the business necessity test. Upholding the district court's summary judgment for the Police Department, the Court found that not only had these defendants met the constitutional requirements, but their employment test satisfied

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containing the ill begotten language, the failure to cite any school cases seems odd. At least two circuits have adopted a de facto test in school cases. Pride v. Community School Bd., 482 F.2d 257, 265-66 (2d Cir. 1973); Ciscernes v. Corpus Christi Ind. School Dist., 467 F.2d 142, 148-49 (5th Cir. 1972) (en banc), *cert. denied*, 413 U.S. 920 (1973).

52. Norwalk CORE v. Norwalk Redevel. Agency, 395 F.2d 920, 931 (2d Cir. 1968), and some of the other housing and zoning cases developed a de facto test before the employment cases began using it. Judge Skelly Wright's statement in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd as modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969)(en banc), influenced this early move towards de facto.

> Whatever the law was once, it is a testimony to our maturing concept of equality that, with the help of the Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

269 F. Supp. at 497.

53. Among the cases in footnote 12, the Court cites only one, Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 2660 (1976), with apparent approval. In *Tyler* the circuit court refused to apply Title VII standards to the Georgia bar examination. 517 F.2d at 1095-99.

54. 96 S. Ct. at 2051-52, *citing* Goodman, *De Facto School Segregation: Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300 (1972), *and* Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 VAND. L. REV. 1183 (1972).

The Court is correct that disproportionate impact analysis would create equal protection problems for many of the state tax and licensing statutes that we take for granted. This is true, however, only if the Court maintains a strict, two-tiered approach to equal protection in which the shifting of the burden is fatal. Disproportionate impact analysis would not necessarily create confusion among the states if the Court adopted a less rigid standard of judicial review. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

the job-relatedness test required to overcome the statutory burden.[55] *Griggs*[56] and *Albermarle Paper Co. v. Moody*[57] established the business necessity doctrine which is applicable to cases brought under Title VII. The business necessity test shifts the burden to an employer whose employment test is shown to have a disparate impact on minorities and requires the employer to prove the job-relatedness of his test.[58] *Albermarle* states that the Court will defer to the guidelines published by the Equal Employment Opportunity Commission in determining whether the business necessity test has been met.[59]

While an understanding of the business necessity test developed under Title VII law is important in *Washington*, there is no Title VII question involved in the case.[60] However, the same standards with respect to job-relatedness have generally been held applicable in section 1981 cases,[61] although the standards for D.C. Code section 1-320 are governed by the Civil Service Commission.[62] In order to prove that their test was job-related, the Police Department established a relationship between the original test score and the performance of successful applicants during the

55. The plaintiffs' motion for summary judgment contained no statutory grounds for relief but was based solely on fifth amendment grounds. 96 S. Ct. at 2045. The defendants' motion for summary judgment asserted that the plaintiffs had no statutory or constitutional grounds for relief. The statutory grounds asserted by the defendants were 42 U.S.C. § 1981 (1970) and D.C. CODE § 1-320. The Court determined that the statutory as well as the constitutional burden had been met by the defendants, and it affirmed the district court's grant of their motion for summary judgment rather than remanding the case for further determination. 96 S. Ct. at 2052.

56. 401 U.S. 424, 433-36 (1971).

57. 422 U.S. 405, 425-35 (1975).

58. The EEOC defines "test" to include not only the traditional pencil and paper examination but also any type of "performance measure used as a basis for any employment decision." 29 C.F.R. § 1607.2 (1975).

For further discussion of the business necessity test see Bernhardt, *Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 TEXAS L. REV. 901 (1972); Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972).

59. 422 U.S. at 430-35.

60. 96 S. Ct. at 2046. Title VII standards may be applicable through 42 U.S.C. § 1981 (1970).

For discussions of the relationship between Title VII and section 1981 see Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662, 664-67 & n.19 (1975); Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 56 (1972); Comment, *Title VII and 42 U.S.C. § 1981: Two Independent Solutions*, 10 U. RICH. L. REV. 339 (1976).

61. Larson, *supra* note 60, at 94-96.

62. 96 S. Ct. at 2053 & n.16.

seventeen-week training program. The test showed a high predictability rate for training period performance which, the defendants argued, established the job-relatedness of their test.[63] Since every successful applicant who entered the training program eventually passed,[64] and since the performance in the training program was measured by tests similar to the initial employment exam,[65] the plaintiffs argued that merely establishing a relationship between the initial exam and training period performance did not establish job-relatedness.[66] The only cases prior to *Washington* which permitted training program validation involved unusual circumstances such as very complex training or an especially lengthy training period.[67]

The Court declined to say whether the Civil Service Commission or Equal Employment Opportunity Commission guidelines should apply in this instance. Instead of choosing, it stated that training program validation was permitted by the Civil Service Commission guidelines and that it was not forbidden by *Griggs'* and *Albermarle's* application of the EEOC guidelines.[68] As the dissent pointed out,[69] this is a very tenuous basis for a holding that the statutory requirements have been met because the Civil

63. *See* Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd mem.*, 476 F.2d 1287 (5th Cir. 1973); Spurlock v. United Airlines, Inc., 330 F. Supp. 228 (D. Colo. 1971), *aff'd*, 475 F.2d 216 (10th Cir. 1972). See note 67 *infra*.

64. Davis v. Washington, 512 F.2d 956, 963 (D.C. Cir. 1975).

65. *Id.* at 962.

66. *See* Officers for Justice v. Civil Serv. Comm'n, 371 F. Supp. 1328, 1337-38 (N.D. Cal. 1973); Smith v. City of East Cleveland, 363 F. Supp. 1131, 1148-49 (N.D. Ohio 1973); Harper v. Mayor, 359 F. Supp. 1187, 1202-03 (D. Md.), *modified and aff'd sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1090-91 (E.D. Pa. 1972). *See also* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1649 (1969); Zimmer, *supra* note 6, at 375 & n.248.

67. There were two cases which the defendants relied upon for the proposition that training program validation was permissible. *See* note 63 *supra*.

Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd mem.*, 476 F.2d 1287 (5th Cir. 1973), held that qualifications for job admission could be validated against performance in a four-year apprenticeship program rather than against subsequent performance in the craft jobs. The length of time involved in *Buckner's* apprenticeship program certainly blurs the distinction between job and training.

Spurlock v. United Airlines, Inc., 330 F. Supp. 228 (D. Colo. 1971), *aff'd*, 475 F.2d 216 (10th Cir. 1972), involved the challenge of an airline's college degree prerequisite to becoming a flight officer. The district court found that, despite the miniscule percentage of black flight officers, the "direct and substantial correlation between successful completion of the training program and a college degree" met the burden of job-relatedness. *Id.* at 235.

68. 96 S. Ct. at 2053. The defendants were held to have satisfied the requirements set out by the Civil Service Commission, reported at 37 Fed. Reg. 21557 (Oct. 12, 1972). The Court did not make clear, however, whether the Title VII guidelines established by the EEOC (29 C.F.R. § 1607.5(b)(3)(1975)) had been met.

69. 96 S. Ct. at 2056 & n.2 (Brennan, J., dissenting).

Service Commission was a defendant in this case and its guidelines were introduced only to show that they complied with the *Griggs* standards. In a statement which may have implications for the Title VII standard of job-relatedness, the Court stated that regardless of administrative guidelines, training program validation was the "much more sensible construction of the job-relatedness requirement."[70] This language is just dicta with respect to the application of training program validation in future Title VII cases, but it serves as a warning that the Court may be willing to relax the job-relatedness test in all areas. The failure of the Court to require the defendants to establish some nexus between the training program and post-training job performance indicates a reevaluation of the stricter standards of *Griggs*.[71]

It is apparent that the Court is retreating from its earlier position as a leader in the field of civil rights.[72] This trend indicates a desire on the part of the Court to withhold any further extentions of civil rights remedies absent some directive from another branch of government.[73] By stiffening the standards for proving unconstitutional activity and emphasizing the availability of statutory remedies, the Court has shifted the burden to the executive or legislative branch to provide the impetus for the future. Finally, while *Washington* makes it clear that the Constitution does not place an affirmative duty on the state to remedy instances of de facto segregation, the question as to whether the Constitution will permit the state to assume such a duty is left open.[74]

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70. *Id.* at 2053.

71. *Id.* at 2053-54.

72. *See* Lau v. Nichols, 414 U.S. 563-66 (1974). In *Lau* the Court refused to reach the equal protection arguments advanced, relying solely upon the Civil Rights Act of 1964 to place a heavy burden on the state to justify its school program for Chinese-speaking students.

73. *Id.*

74. *But cf.* DeFunis v. Odegaard, 416 U.S. 312 (1974). The Court did not address the issue of whether the Constitution would permit a state to adopt an affirmative action program, but the decision in *Washington* indicates that the Constitution may be colorblind. In McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976), the Court interpreted section 1981 and Title VII in a colorblind manner. These cases may be a foreshadowing of the result which the Court would reach if faced with an affirmative action case in the constitutional area.