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# Discriminatory Purpose: What It Means under the Equal Protection Clause - Washington v. Davis

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# DISCRIMINATORY PURPOSE: WHAT IT MEANS UNDER THE EQUAL PROTECTION CLAUSE—*WASHINGTON V. DAVIS*

Although claims of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment have been the subject of a sizeable amount of litigation, there has been some confusion among the federal district and circuit courts as to the elements of proof required to establish unconstitutional discrimination. An increasing number of courts have found statistical evidence showing the racially disproportionate impact of a particular law or administrative practice sufficiently compelling to justify holding that a violation of the Equal Protection Clause has occurred. Many courts have done so regardless of the actual or subjective purpose behind the law or practice.[1] Recognizing the far-reaching impact of that trend, the United States Supreme Court reversed it in *Washington v. Davis*[2] by holding that proof of disproportionate impact does not on its own suffice to establish a violation of the Equal Protection Clause; proof of a discriminatory purpose behind the particular law or practice in question is also required.[3]

This decision is significant in that it makes the task of those claiming racial discrimination far more difficult. Proving disproportionate impact is relatively simple with the aid of statistical evidence, but establishing that a discriminatory purpose lies behind a law or practice is a formidable undertaking. This Note will explore the potential impact of the *Davis* decision by comparing it to pre-existing case law. It also will suggest some problems that may arise from the *Davis* opinion as a result of the Court's failure to specify both the degree of purpose that must be shown and the factors that may be considered in determining whether a discriminatory purpose exists.

## FACTS OF *Davis*

*Washington v. Davis* involved a challenge to recruiting procedures[4] followed by the District of Columbia police department. The respondents claimed racial discrimination in violation of the Equal Protection

1. *See* notes 17 & 18 *infra*.

2. 426 U.S. 229 (1976).

3. *Id.* at 242, 245.

4. Promotion policies also were challenged but were not included in the motions for summary judgment before the district court, 348 F. Supp. 15, 16, 18 (D.D.C. 1972), or in the court of appeals, 512 F.2d 956, 957 n.1 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

Clause and of Title VII of the Civil Rights Act of 1964[5] which prohibits employment discrimination on the basis of race, sex, or national origin.[6] The complaint focused on a written personnel examination[7] designed to test applicants' communicative skills. This test allegedly excluded a disproportionate number of black applicants.[8] The United States District Court for the District of Columbia held that a sufficient showing of discriminatory impact shifts the burden of proof to the governmental defendants.[9] However, the court denied the applicants relief under both Title VII and the Equal Protection Clause because of the police department's affirmative efforts to recruit more blacks, the increasing number of blacks on the force, and the apparent effectiveness of the test in predicting success in the police training school program.[10]

The applicants appealed only on the constitutional issue of whether the test invidiously discriminated against blacks and denied them equal protection of the law in violation of the Fifth Amendment.[11] The court

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5. *See* Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972).

6. *See* Civil Rights Act of 1964, 42 U.S.C. §2000e-2000e-15 (1970), *as amended*, 42 U.S.C. § 2000e-2000e-17 (Supp. IV, 1974).

7. According to the district court, this test, known as test 21, "is an examination that is used generally throughout the federal service. It was developed by the Civil Service Commission, not the Police Department, and is designed to test verbal ability, vocabulary, reading and comprehension." 348 F. Supp. at 16.

8. The passing rate for whites was four times greater than the passing rate for blacks. 512 F.2d at 959.

9. 348 F. Supp. at 16. The district court's finding that the burden of proof should be shifted to defendants was based on three conclusions drawn from the applicants' evidence: (a) the number of black police officers, while substantial, is not proportionate to the population mix of the city; (b) a higher percentage of blacks fail the test than whites; (c) the test has not been validated to establish its reliability for measuring subsequent job performance. *Id.*

10. The district court's refusal to grant relief rested on several factors. Between August 1969 when the current police chief took office and 1972 when the case came to trial, 44% of new recruits accepted for the police force were black. The black population in the 20-29 age group in the recruiting area also was approximately 44%. The court found no proof that the test was the sole factor limiting black recruitment. It noted that hundreds of blacks had passed the test but failed to report for duty for other reasons. It also noted undisputed proof that there had been a "vigorous, systematic, and persistent affirmative effort" to enroll blacks which may have resulted in the relatively higher percentage of black test failures by encouraging poorly educated applicants to apply. The district court found no reason to believe that the test was culturally slanted to favor whites and was satisfied that the test was reasonably and directly related to the requirements of the police recruit training program. 348 F. Supp. at 16-17.

11. The Supreme Court noted that "the Due Process clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." 426 U.S. at 239, *citing* Bolling v. Sharpe, 347 U.S. 497 (1954).

of appeals held that the Title VII statutory standards established by the Supreme Court in *Griggs v. Duke Power Co.*[12] would govern the constitutional issue in *Davis*.[13]

The Supreme Court reversed the court of appeals' application of Title VII standards to the constitutional issue.[14] The majority of the Court held that Title VII standards and equal protection standards in the public employment context are separate and distinct; although impact often suffices to establish a prima facie case under Title VII, discriminatory purpose must be demonstrated to establish a violation of the Equal Protection Clause. Only after such purpose has been shown may the courts apply strict scrutiny and require defendants to demonstrate a compelling state interest justifying the law or practice.[15]

## IMPACT OF *Davis*

The Supreme Court decision overruled a significant body of case law "to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation . . . ."[16] The cases invalidated by the Court fall

12. 401 U.S. 424 (1971). *See* text accompanying notes 29-39 *infra*.

13. 512 F.2d 956, 959 (D.C. Cir. 1975). The court then concluded that the substantially disproportionate impact of the test alone, regardless of whether a discriminatory purpose existed on the part of the government, was sufficient to establish a constitutional violation. *Id.* at 961. That conclusion could have been overcome only by a showing that the test bore a demonstrable relationship to successful performance as a police officer. *Id.* In contrast to the district court, 348 F. Supp. at 17, the court of appeals held that only proof of the relationship between test results and success in actual job performance could overcome the presumption of racial discrimination triggered by the statistics showing racially disproportionate impact. The relationship between test results and success in the training program was held to be irrelevant. 512 F.2d at 962-65.

14. The Supreme Court also disagreed with the court of appeals holding that the Title VII standards laid out in *Griggs* requiring proof of "job-relatedness" were not satisfied. In Part III of the opinion, the Supreme Court confirmed the district court's finding that test 21 was directly related to success in the police training program and that a positive relationship between the test and the program was sufficient to validate the test. The Court saw no need to inquire further as to whether there was a direct relationship between the test and actual performance as a police officer. 426 U.S. at 249-50.

The propriety of the Court's treatment of the statutory issue is questionable since the appeal "rested on purely constitutional grounds." 426 U.S. at 236. However, regardless of its timeliness, the Court's statement regarding the statutory standard may have a far-reaching effect if it is extended to Title VII cases. It would mean that no direct relationship between the exam and specific job performance need be shown if a relationship exists merely between the exam and the job training program. *See* 426 U.S. at 270 (Brennan, J., dissenting).

15. 426 U.S. at 239, 242.

16. *Id.* at 245.

within two major categories: those dealing with public employment,[17] the context in which *Davis* arose, and those dealing with equal protection in other contexts, such as jury selection, school desegregation, municipal services, and zoning.[18]

*Impact on Public Employment Cases*

In dealing with public employment, the *Davis* decision emphasized that the Fourteenth Amendment requires a showing of discriminatory purpose in spite of the fact that under Title VII of the Civil Rights Act of 1964,[19] the employer's purpose is irrelevant. The Court thereby dispelled the confusion in those lower federal courts that wrongly equated Title VII standards with equal protection standards. Prior to *Davis*, several federal courts were presented with equal protection cases[20] in which an employment practice,[21] although neutral on its face, produced a racially disproportionate impact.[22] For the most part, the approaches

17. The public employment cases overruled in *Davis*, 426 U.S. at 244-45, 245 n.12, were Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Arnold v. Ballard, 390 F. Supp. 723 (N.D. Ohio 1975); United States v. City of Chicago, 385 F. Supp. 543 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126 (N.D. Miss. 1974); Harper v. Mayor of Baltimore, 359 F. Supp. 1187 (D. Md.), *aff'd in pertinent part sub nom.*, Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972), *rev'd on other grounds*, 498 F.2d 143 (8th Cir. 1974).

18. The other equal protection cases disapproved of in *Davis*, 426 U.S. at 244-45, 245 n.12, were Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 97 S. Ct. 555 (1977) (zoning); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) (public housing); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing*, 461 F.2d 1171 (5th Cir. 1972) (municipal services); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir.), *cert. denied*, 401 U.S. 1010 (1971) (zoning); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970) (zoning); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968) (urban renewal); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (public housing). For a detailed discussion of *Hawkins v. Town of Shaw*, see Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 441 (1971).

19. 42 U.S.C. §2000e-2000e-15 (1970), *as amended*, 42 U.S.C. §2000e-2000e-17 (Supp. IV, 1974).

20. Discussion in this Note will focus on those cases specifically criticized by the Supreme Court. *See* cases cited in notes 17 & 18 *supra*.

21. All of the cases cited in note 17 *supra* involved examinations administered by employers as preconditions to either hiring or promotion. In some cases, minimum height and high school diploma requirements, background investigations, and efficiency ratings were challenged in addition to the exams.

22. Prior to 1972, Title VII contained a clause specifically exempting "the United

taken by those lower federal courts were consistent. All followed a two part method of analysis similar to a Title VII analysis. First, if the plaintiff submitted statistics demonstrating that a particular rule or practice had a substantial racially disproportionate impact,[23] the courts

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States, a corporation wholly owned by the Government of the United States . . ., or a State or political subdivision thereof." Civil Rights Act of 1964, 42 U.S.C. §2000e(b)(1) (1970). Congress deleted that government exemption in the Equal Employment Opportunities Act of 1972, 42 U.S.C. §2000e-16 (Supp. IV 1974). Of the cases cited in note 17 *supra*, *Chance*, *Castro*, *Bridgeport*, *Harper*, *Douglas*, and *Wade*, as well as *Davis*, were filed prior to the 1972 amendments. The amendments did not have retroactive effect. *See* text accompanying note 36 *infra*.

Failure to meet the extensive procedural requirements under Title VII covering both pre-suit administrative enforcement and judicial review may also preclude application of Title VII. It was suggested by government counsel that Title VII did not apply in *Davis* for that reason. 426 U.S. at 238 n.10. The procedural provisions of Title VII are found in 42 U.S.C. §§2000e-5, 2000e-6, 2000e-9, 2000e-10 (1970). For a summary of the procedural requirements of Title VII, see M. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 208-30 (1976).

23. The type of statistics considered meaningful and the manner of interpretation varied from court to court. Some courts simply compared the percentage of blacks in the community as a whole to the percentage of blacks currently employed by the employer in question. *See* Arnold v. Ballard, 390 F. Supp. 723, 730 (N.D. Ohio 1975); United States v. City of Chicago, 385 F. Supp. 543, 548 (N.D. Ill. 1974); Fowler v. Schwarzwalder, 351 F. Supp. 721, 723 (D. Minn. 1972). One court considered population comparisons to be meaningless because they ignore the fact that not all segments of the population will be equally qualified for the positions in question and that not all groups within society will have the same level of desire for a particular position. Also, if population statistics are controlling, the courts would be forced to order that employment statistics be brought into line with population statistics in order to avoid a continuing prima facie violation. Such a remedy is unacceptable since no constitutional provision guarantees that the percentage of minorities employed will reflect the racial composition of the community. *See* Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1193, 1193 n.5 (D. Md. 1973). Some courts relied on population statistics simply to corroborate their finding of discriminatory impact. *See* Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972).

Most of the cases considered the passing rates for whites and blacks on the personnel exams to be meaningful and, if sufficiently disproportionate, adequate to establish a prima facie case. *See* Davis v. Washington, 512 F.2d 956, 958-59 (D.C. Cir. 1975); Douglas v. Hampton, 512 F.2d 976, 982 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, *supra* at 1335; Castro v. Beecher, *supra* at 730-31; Chance v. Board of Examiners, *supra* at 1171; Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126, 135 (N.D. Miss. 1974).

Two of the cases also compared the percentage of minorities employed in the police department or school system of the city in question to the percentages in other cities not administering the same type of exam. *See* Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, *supra* at 1335; Chance v. Board of Examiners, *supra* at 1172.

The degree of racial disparity establishing a prima facie violation varied from case to case. *See, e.g.*, Davis v. Washington, *supra* at 958-59 (whites passed at 4 times the rate

held that a prima facie case had been established. Then the defendant employer was required to prove that the rule or practice bore a demonstrable relationship to successful performance on the job.[24] If defendants failed to show job-relatedness to the satisfaction of the court, plaintiffs prevailed on the basis of the discriminatory impact alone,[25] regardless of any good faith intentions on the part of the employer.[26] However, if such job-relatedness was demonstrated, the rule or practice was sustained despite its disproportionate impact.[27]

In applying this two step impact/job-relatedness analysis to equal protection claims against public employers, federal courts relied on *Griggs v. Duke Power Co.*,[28] a Title VII case involving a private employer. In *Griggs*, the Supreme Court held that an employment practice which excludes a disproportionate number of blacks is prohibited by Title VII unless the employer can show a direct relationship between the practice and job performance.[29] The Court emphasized that lack of discriminatory intent is irrelevant in determining whether there has been

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for blacks); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, *supra* at 1335 (whites passed at 3.5 times the rate for blacks); Castro v. Beecher, *supra* at 729 (whites passed at 2.6 times the rate for blacks); Chance v. Board of Examiners, *supra* at 1171 (whites passed at 1.5 times the rate for blacks and Puerto Ricans); United States v. City of Chicago, *supra* at 550 (whites passed at 2 times the rate for blacks).

24. *See* Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975); Davis v. Washington, 512 F.2d 956, 960-61 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1335, 1337 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972); Arnold v. Ballard, 390 F. Supp. 723, 736, 737 (N.D. Ohio 1975); United States v. City of Chicago, 385 F. Supp. 543, 550 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126, 140, 142 (N.D. Miss. 1974); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1201, 1204-05 (D. Md. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (D. Minn. 1972).

25. Davis v. Washington, 512 F.2d 956, 961-65 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1177 (2d Cir. 1972); United States v. City of Chicago, 385 F. Supp. 543, 561 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126, 143 (N.D. Miss. 1974); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1201 (D. Md. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (D. Minn. 1972).

26. Davis v. Washington, 512 F.2d 956, 960-61 (D.C. Cir. 1975).

27. Arnold v. Ballard, 390 F. Supp. 723, 733 (N.D. Ohio 1975).

28. 401 U.S. 424 (1971).

29. *Id.* at 431. The Court described the essence of that relationship as "business necessity." Business necessity has been interpreted as requiring the defendant to show that (a) a manifest relationship exists between the rule or practice and the job; (b) the reasons for the practice outweigh its impact; (c) the rule is the least discriminatory alternative that serves the employer's otherwise valid purpose. *See* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

a violation of Title VII; consequences are the crucial factor.[30] Nowhere in the opinion, however, did the Supreme Court indicate that the *Griggs* standards should be applied to non-Title VII claims. Therefore, the question arises as to how the courts in the equal protection cases justified their reliance on *Griggs* and the impact/job-relatedness analysis.[31]

There were two rather weak justifications given for reliance on *Griggs*. Several of the courts looked to the 1972 amendments to Title VII[32] as justification.[33] Those amendments expanded the scope of Title VII to prohibit discrimination by public as well as private employers and clearly expressed Congress' intent to assure public employees the same substantive rights as those already granted private employees.[34] In fact, Title VII and the Equal Protection Clause shared a common goal: prevention of official conduct that discriminates on the basis of race.

Because the amendments had no retroactive effect,[35] direct relief for public employees was unavailable under Title VII in suits filed prior to the 1972 amendments to the Act.[36] The courts reacted to this anomalous situation by virtually incorporating Title VII standards into the Fourteenth Amendment.[37] Apparently, the judiciary could not accept the fact that the Equal Protection Clause should require any less of public

30. 401 U.S. at 432.

31. Some courts made no effort to justify their reliance on *Griggs* and Title VII standards. They simply cited prior cases, none of them Supreme Court cases, that had made no distinction between constitutional and statutory standards. *See* Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973); United States v. City of Chicago, 385 F. Supp. 543, 548 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126, 143 (N.D. Miss. 1974).

32. Equal Employment Opportunities Act of 1972, 42 U.S.C. §2000e-16 (Supp. IV 1974), *amending* Civil Rights Act of 1964, 42 U.S.C. §2000e(b)(1) (1970). *See* note 22 *supra*.

33. Davis v. Washington, 512 F.2d 956, 957 n.2 (D.C. Cir. 1975); Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975); Castro v. Beecher, 459 F.2d 725, 733 n.9 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1176-77 (2d Cir. 1972); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1196 (D. Md. 1973).

34. *See* Douglas v. Hampton, 512 F.2d 976, 981, 981 n.33 (D.C. Cir. 1975). For a discussion of Congress' intent in enacting the 1972 amendments, see Comment, *Layoffs and Title VII: The Conflict Between Seniority and Equal Employment Opportunities*, 1975 WIS. L. REV. 791, 834-35.

35. Only the Circuit Court of Appeals for the District of Columbia which heard both *Douglas* and *Davis* believes the amendments have retroactive effect. Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975); Davis v. Washington, 512 F.2d 956, 957-58 n.2 (D.C. Cir. 1975).

36. Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1334 (2d Cir. 1973); United States v. City of Chicago, 385 F. Supp. 543, 548 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126, 143 (N.D. Miss. 1974).

37. *See* Tyler v. Vickery, 517 F.2d 1089, 1096-97 (5th Cir. 1975).

employers than was required of private employers under Title VII, especially since the only factor blocking relief under Title VII was the timing of the filing of the complaints.[38]

A strong similarity to the facts in *Griggs*[39] furnished a second justification, even weaker than the first, for reliance on the *Griggs* holding. In several cases, as in *Griggs*, an examination admittedly prepared without any specific job in mind denied employment opportunities to a substantially higher percentage of blacks than whites.[40] There were no allegations that any of the employers administered the exams in order to achieve a discriminatory purpose. As in *Griggs*, one employer had made an affirmative and at least partially successful effort to improve the standing of blacks within the police department.[41] The lower courts apparently found the fact situations sufficiently comparable to *Griggs* to justify overlooking the fundamental differences in scope and application between a Title VII and an equal protection claim.[42]

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38. *See* cases cited in note 22 *supra*.

39. 401 U.S. 424 (1971). In *Griggs*, the private employer required as a precondition to promotion either a high school diploma or a passing score on two standardized intelligence tests. Neither of these was designed or intended to measure the ability to learn to perform a particular job or category of jobs. Statistics showed a substantial disparity in the percentage of blacks holding high school diplomas and passing the tests as compared to whites. Statistics from the 1960 Census in North Carolina showed that 34% of white males had a high school diploma compared with 12% of black males. The same tests as those used by the power company resulted in 58% of whites passing the test as against 6% of the blacks. *Id.* at 430, 430 n.6. No one seriously questioned, however, the power company's motive which was simply to upgrade the quality of employees. The company's lack of discriminatory intent was evidenced by its special efforts to help finance undereducated employees through high school training. *Id.* at 432.

40. The court in Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972), noted such strong similarities to the facts in *Griggs* that it adopted the *Griggs* reasoning. The circuit court in *Davis*, 512 F.2d 956, 959 (D.C. Cir. 1975), and a district court in Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (D. Minn. 1974), relied on *Griggs* for apparently similar reasons although this was not explicitly stated.

41. Davis v. Washington, 512 F.2d 956, 960 (D.C. Cir. 1975).

42. It is significant to note that none of the courts cited in note 17 *supra* came to grips with the differences in scope and application between Title VII and the Equal Protection Clause. None mentioned the fact that while Title VII is limited to the context of employment discrimination, the Equal Protection Clause applies to an unlimited number of contexts where discrimination might occur. The Supreme Court pointed out the significance of that difference in scope in discussing the inadequacy of impact alone as a constitutional standard:

> 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 statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

*Impact Beyond Public Employment*

The *Davis* decision will have an impact reaching far beyond public employment cases. The Court's requirement of discriminatory purpose to establish a violation of equal protection overrules lower court decisions in equal protection cases in contexts other than public employment, such as urban renewal, zoning, public housing, and municipal services.[43] Even without a statute such as Title VII covering the same or similar situations, the lower federal courts have tended to give more weight to the consequences of a law or practice than to the purpose behind it.[44] However, while none of these courts required direct proof of purpose,[45] it would be inaccurate to say that statistics were considered conclusive as in the public employment cases modeled after Title VII. Statistical impact alone did not suffice to establish a prima facie case of invidious discrimination unless surrounding circumstances added perspective to the bare figures.[46]

Most commonly, the courts looked to see if the disproportionate impact resulted from the governmental defendant's failure to fulfill its responsibility not to place "its black citizens under a severe disadvantage which it cannot justify."[47] Responsibilities which the courts concluded the local governments did not fulfill included providing comparable sewer facilities for blacks,[48] guaranteeing relocated blacks equal access to decent housing,[49] furthering the national policy of balanced

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> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

Washington v. Davis, 426 U.S. 229, 248 (1976).

The lower courts also failed to recognize that the elaborate procedural safeguards and methods for validation of tests required under Title VII would seem to allow for more stringent judicial scrutiny than under the Equal Protection Clause which does not carry with it mandatory methods of investigating the existence of discrimination. *See* note 22 *supra*.

43. 426 U.S. at 244-45, 245 n.12.

44. This Note focuses on those cases specifically criticized by the Supreme Court in *Davis*. *See* cases cited in notes 17 and 18 *supra*.

45. *See* cases cited in note 18 *supra*. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 295 (9th Cir. 1970); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 931 (2d Cir. 1968); Crow v. Brown, 332 F. Supp. 382, 391 (N.D. Ga. 1971).

46. Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413 (7th Cir. 1975). The Seventh Circuit was the only court to specifically address this point.

47. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970).

48. *Id.*

49. Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d

and dispersed housing,[50] and not "allowing itself" to become an almost entirely white community.[51] The courts held the defendants liable for their failure to fulfill those responsibilities, even though the failure might have been attributable to thoughtlessness rather than a purposeful scheme[52] or even if the defendants had actually been acting in good faith.[53] Some courts also looked at statistics showing disproportionate impact in conjunction with a long history of racial segregation. If the challenged law or practice served to perpetuate that segregation, and no other action was being taken by the defendants to alleviate the segregation problem, the courts were strongly inclined to require defendants to bear the consequences of liability for denial of equal protection.[54]

None of these courts found any subjective proof of intent to discriminate on the part of the governmental defendants. In each case, however, the courts seemed to apply an objective test to the defendants' conduct. They concluded on the basis of the statistics, the defendants' duties as governmental bodies, and the historical context of their conduct that the defendants should be held responsible for their deliberate actions,[55]

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291, 295 (9th Cir. 1970) (dictum); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 929 (2d Cir. 1968).

50. Crow v. Brown, 332 F. Supp. 382, 390 (N.D. Ga. 1971); Gautreaux v. Romney, 448 F.2d 731, 738 (7th Cir. 1971).

51. Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975).

52. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 931 (2d Cir. 1968).

53. Gautreaux v. Romney, 448 F.2d 731, 738 (7th Cir. 1971).

54. Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413 (7th Cir. 1975); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 112 (2d Cir. 1970); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 931 (2d Cir. 1968); Crow v. Brown, 332 F. Supp. 382, 392 (N.D. Ga. 1971).

55. Most of the courts actually used language indicating a belief that the existence of discriminatory purpose on the part of the defendant was the only reasonable conclusion to be drawn from the disproportionate statistics and surrounding circumstances. In *Norwalk CORE v. Norwalk Redev. Agency*, the court stated:

> [T]he local defendants did not assure, or even attempt to assure, relocation for Negro and Puerto Rican displacees in compliance with the Contract to the same extent as they did for whites; indeed, they *intended* through the combination of the Project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the City of Norwalk.

395 F.2d 920, 930-31 (2d Cir. 1968) (emphasis added). The Second Circuit stated in *Kennedy Park Homes Ass'n v. City of Lackawanna*:

> With reference to the sewerage problem, the record shows that the sewer system is and has been for years grossly deficient; still Lackawanna has done nothing about it. On the contrary, it had *deliberately* permitted the problem to worsen.

unless those actions could be justified by a compelling state interest.[56] *Davis* makes it clear that these equal protection cases outside the public employment context are no longer valid law, since they fail to place sufficient stress on the requirement of a discriminatory purpose.

### QUESTIONS UNANSWERED BY *Davis*

Two significant questions remain unanswered by *Davis*. First, it is unclear whether racial discrimination must be the only purpose or simply one of several purposes behind the challenged law or practice. Justice Stevens, concurring in *Davis*, points out that purpose, in the sense of "actual subjective intent of the decisionmaker,"[57] may be difficult or impossible to determine. This is particularly true "in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation."[58] To require proof from a plaintiff that racial discrimination was the sole purpose involved

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Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970) (emphasis added). The Seventh Circuit noted:

> Arlington Heights has been ignoring what is essentially the same basic problem [segregated housing pattern]. Indeed, it has been *exploiting* the problem by allowing itself to become an almost one hundred per cent white community.

Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975) (emphasis added).

In *Gautreaux v. Romney*, the court held that even though further pressure by defendant HUD on the Chicago Housing Authority would have meant cutting off funds and halting construction of badly needed new housing, "still the basis of the 'dilemma' boils down to community and local governmental *resistance* to . . . the only constitutionally permissible state policy. . . ." 448 F.2d 731, 738 (7th Cir. 1971) (emphasis added). In *Crow v. Brown*, the district court ruled:

> Taken together and viewed in their historical context, the actions of the County in *resisting* attempts designed to achieve the national housing policy of balanced and dispersed public housing and failing to assist such attempts violate the Equal Protection Clause of the Fourteenth Amendment.

332 F. Supp. 382, 392 (N.D. Ga. 1971) (emphasis added). In *Hawkins v. Town of Shaw*, the Fifth Circuit held:

> Moreover, in our judgment the facts before us squarely and certainly support the reasonable and logical inference that there was here neglect involving clear overtones of racial discrimination in the administration of governmental affairs of the town of Shaw resulting in the same evils which characterize an intentional and purposeful *disregard* of the principle of equal protection of the laws.

461 F.2d 1171, 1173 (5th Cir. 1972) (emphasis added).

56. Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 415 (7th Cir. 1975); Hawkins v. Town of Shaw, 437 F.2d 1286, 1292 (5th Cir. 1971); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir.); Crow v. Brown, 332 F. Supp. 382, 391 (N.D. Ga. 1971).

57. 426 U.S. at 253 (Stevens, J., concurring).

58. *Id.*

would be harsh and unrealistic when the only means available to him could well be to rule out all permissible motives leaving the discriminatory intent as the only reasonable conclusion.[59] On the other hand, "to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process"[60] would be equally unrealistic. There must be a middle ground.

The Court recognized this weakness in its position and tried to articulate the middle ground in a later decision, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[61] The majority opinion in that case stated that "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes."[62] A discriminatory purpose need only be "a motivating factor"[63] in the decision to enact the law or practice.

The second problem arising from the *Davis* decision concerns what factors a court may consider in determining whether discriminatory purpose exists. The Court in *Arlington Heights*[64] made some effort to offer guidelines regarding factors to be considered. It suggested that relevant factors might include the historical background, "particularly if it reveals a series of official actions taken for invidious purposes,"[65] and the "specific sequence of events leading up to the challenged decision."[66] Also suggested as possibly enlightening factors were departures

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59. *See* Note, *Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof*, 72 YALE L.J. 1041, 1058-59 (1963).

60. Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring).

61. 97 S. Ct. 555 (1977). *Arlington Heights* arose after the Metropolitan Housing Development Corporation (MHDC) had contracted to buy land in Arlington Heights on which to build racially integrated low and moderate income housing. MHDC applied to the village for rezoning from a single-family to a multiple-family classification, but its request was denied. Several arguments against rezoning had been raised at public meetings including the fact that the new housing would probably be integrated, the area had always been zoned single-family, and village policy allowed for multiple-family zoning primarily as a buffer between single-family and commercial or manufacturing areas. After denial of the rezoning, MHDC filed suit claiming racial discrimination in violation of the Equal Protection Clause and the Fair Housing Act of 1968. The district court found no racial discrimination but rather a desire on the part of the village to protect property values and maintain its zoning plan. The court of appeals reversed on the basis that the "ultimate effect" of the rezoning denial was a disproportionate impact on blacks and racial discrimination. The Supreme Court reversed the court of appeals' finding that there was no discriminatory purpose, as required by *Davis*, to support finding a violation of the Equal Protection Clause. The statutory question whether there was a violation of the Fair Housing Act of 1968 was remanded.

62. *Id.* at 563.

63. *Id.*

64. 97 S. Ct. 555 (1977).

65. *Id.* at 564.

66. *Id.*

from normal policy and procedure,[67] particularly if the factors usually considered by the decisionmaker strongly point to a contrary result.[68] Finally, the Court recognized the importance of the legislative or administrative history, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[69]

While undoubtedly helpful, this list does not purport to be exhaustive. Unfortunately, however, it fails to offer any standard for determining what other factors should be included or excluded from the list. Most obviously, it fails to clarify two points. First, it is unclear whether objective good faith on the part of the public defendant automatically negates any inference of discriminatory purpose or whether the trial court may look further to see if that alleged good faith has had positive results in avoiding or alleviating racial segregation. Second, it remains unanswered whether the courts will require active discrimination or whether they will consider the defendants' inaction in light of the government's duty not to place any minority group under an unjustifiable disadvantage.

*Arlington Heights* goes a step beyond *Davis* by endorsing the use of circumstantial evidence to determine whether discriminatory purpose exists. In *Arlington Heights*, the Court said, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[70] *Davis* only acknowledged that the discriminatory purpose need not be "express or appear on the face of the statute"[71] and cited several Supreme Court cases[72] in which a violation of equal

67. *Id.*

68. *Id.*

69. *Id.* at 565.

70. *Id.* at 564.

71. 426 U.S. at 241.

72. Alexander v. Louisiana, 405 U.S. 625 (1972) ("purpose" found when racial identifications were visible on the forms used to select jury members, although there was no evidence that the jury commissioners actually selected on the basis of race); Turner v. Fouche, 396 U.S. 346 (1970) ("purpose" found on the basis of appellant's evidence demonstrating that a substantial disparity between the percentage of blacks in the community and the percentage of blacks on a particular jury originated at least in part at the point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria); Atkins v. Texas, 325 U.S. 398, 403-04 (1945) ("systematic exclusion" of eligible black jurymen or "unequal application of the law to such an extent as to show intentional discrimination" was sufficient to prove "purpose"); Hill v. Texas, 316 U.S. 400 (1942) (absence of blacks on a particular jury combined with the failure of the jury commissioners to inform themselves of eligible blacks in the community com-

protection was found even though the statute or practice was neutral on its face. In each of those cases, despite the lack of direct evidence of intent, the Supreme Court found the defendant to be in a position to have caused the discriminatory impact. Therefore, these decisions must have been based on circumstantial evidence.

Not only did the Court in *Davis* fail to specify what factors should be considered in determining discriminatory purpose, it compounded the problem by not sufficiently distinguishing between those cases it approved of and those it overruled. A comparison of those two groups of cases indicates that the factors considered in each did not differ significantly.[73] For example, the Court found fault with the Second Circuit's conclusion in *Norwalk CORE v. Norwalk Redevelopment Agency*[74] that the defendant had impermissibly discriminated by failing to assure adequate housing for displaced blacks and Puerto Ricans to the extent it did for whites. Yet in *Hill v. Texas*, cited with approval in *Davis*, the Supreme Court itself held that the absence of blacks on juries combined with the failure of the jury commissioners to seek out eligible blacks in the community comprised proof of purpose.[75] In both *Norwalk* and *Hill*, the focus was on the governmental defendant's failure to act affirmatively to fulfill its responsibility. Another example of the apparent lack of a meaningful difference between the reasoning used by the lower courts and that used by the Supreme Court arises in a comparison of *Hawkins v. Town of Shaw*,[76] criticized in *Davis*, and *Turner v. Fouche*,[77] endorsed by the *Davis* Court. In *Hawkins*, blacks alleged that white residential areas were given preference in acquiring municipal services, such as sewer facilities and street paving.[78] The Fifth Circuit inferred, despite the lack of any direct evidence, that municipal services in the town of Shaw had been neglectfully administered in a manner "involving clear overtones of racial discrimination . . . resulting in the same evils which characterize an intentional and purposeful disregard of the principle of equal protection of the laws."[79] This reasoning hardly seems distinguishable from the Supreme Court's logic in *Turner v.*

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prised proof of "purpose"); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (permits to operate laundries in wooden buildings were issued to all but one of the non-Chinese applicants, but to none of about two hundred Chinese applicants).

73. *See* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 56, 92-93 (1972).

74. 395 F.2d 920, 930-31 (2d Cir. 1968).

75. 316 U.S. 400 (1942).

76. 461 F.2d 1171 (5th Cir. 1972).

77. 396 U.S. 346 (1970).

78. 303 F. Supp. 1162 (N.D. Miss. 1969).

79. Hawkins v. Town of Shaw, 461 F.2d 1171, 1173 (5th Cir. 1972).

*Fouche* in which the Court relied solely on circumstantial evidence to trace the origin of the disproportionately small percentage of blacks on a particular jury to the point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria.[80] In these cases, the *Hawkins* court and the Supreme Court both focused on the governmental defendant's failure to exercise its discretion equally in favor of blacks and whites. Yet, as in *Norwalk*, the *Davis* Court found the *Hawkins* court's reasoning faulty, but gave no explanation for its disagreement.[81]

If the Supreme Court saw real differences between its own prior analyses and the analyses of the lower courts it reversed in *Davis*, it should have spelled out those differences more clearly. After all, that initial inquiry into the existence of "purpose" will form the crux of the final disposition of each case, for if no discriminatory "purpose" is found, only minimum scrutiny will be applied and the claim almost certainly will fail. If the Court does infer the existence of discriminatory "purpose," however, the defendant will take on the heavy burden of overcoming that inference by showing a "compelling state interest" in the challenged law or practice; the claim of invidious discrimination probably will succeed.[82]

Perhaps most damaging to the clarity of the *Davis* decision is its mass reversal of lower court holdings[83] — what Justice Brennan termed a "laundry list of lower court decisions."[84] The Court should not have summarily criticized the courts which failed to make an express finding of discriminatory purpose without first considering whether circumstances in each case justified requiring the governmental defendants to prove that their actions were not racially motivated. Where the government's motives were obviously valid and where racial disparity was being successfully reduced, as in *Davis*, clearly no violation of equal protection existed. But where the government's motives were not so obvious, and where racial disparity was severe, the Supreme Court should have given more deference to the factual determinations of the lower courts.[85]

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80. 396 U.S. 346, 353-61 (1970).

81. *See* 426 U.S. at 244-45, 245 n.12.

82. For a discussion of equal protection standards as they have developed, see Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

83. 426 U.S. at 244-45, 245 n.12.

84. *Id.* at 257-58 n.1 (Brennan, J., dissenting).

85. *Id.* at 255-56 (Stevens, J., concurring).

## CONCLUSION

Since the *Davis* decision, there no longer can be any doubt that a law neutral on its face and serving otherwise valid governmental ends does not violate the Equal Protection Clause solely because it affects a greater proportion of one race than another. Something more is required. The Supreme Court chose to label that something more "purpose." This Note has suggested, however, that the word "purpose" as a label for that additional requirement may be misleading because it is so open to interpretation. The Supreme Court did not articulate sufficiently its intended meaning in *Davis*, but has since stated that it did not mean to require proof of actual subjective intent.[86] The law as it now stands requires circumstantial evidence which, when considered in tandem with a substantially disproportionate racial impact, would lead one reasonably to believe that the defendants actually acted in furtherance of a discriminatory purpose. The question remains, however, as to what types of circumstantial evidence will be considered persuasive by the Supreme Court. Judging by the current lack of comprehensive guidelines, a significant amount of future litigation concerning the problem of what constitutes sufficiently weighty circumstantial evidence seems inevitable.

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86. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S. Ct. 555, 564 (1977).