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NOTES & COMMENTS

PROVING DISCRIMINATORY INTENT FROM A FACIALLY NEUTRAL DECISION WITH A DISPROPORTIONATE IMPACT

The equal protection clause of the fourteenth amendment[1] is often employed by individuals[2] to curtail governmental action[3] which discriminates against persons for illegitimate reasons.[4] Governmental actors have frequently attempted to discriminate against people through classification of those people,[5] or through facially neutral decisions[6] with disproportionate impacts.[7] Whether a decision creating a classification[8] actually

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[1] U.S. CONST. amend. XIV, § 1.

[2] Plaintiffs employing the equal protection clause to remedy discriminatory state action are usually members of minority groups. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican-Americans); Washington v. Davis, 426 U.S. 229 (1976) (blacks); *In re* Griffiths, 413 U.S. 717 (1973) (aliens). A substantial amount of recent litigation, however, has involved white male plaintiffs. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978); Wright Farms Constr. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977); Associated Gen. Contr. of Cal. v. Secretary of Commerce, 441 F. Supp. 955 (N.D. Cal. 1977), *vacated*, 98 S. Ct. 3132 (1978). A minority plaintiff can rely on the equal protection clause when denied equal treatment or equal status because of his historically disadvantaged position in society. A denial of equal treatment occurs when similarly situated individuals are treated differently without substantial reasons. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1941). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 992-93 (1978) [hereinafter cited as TRIBE]; Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L. J. 317 (1976) [hereinafter cited as *De Facto/De Jure]*. A minority group member is denied equal status when he is treated as whites are treated, when he should be given an advantage. *See* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2798-806 (Marshall, J., dissenting). White plaintiffs, as members of the dominant class in society, may only challenge the denial of equal treatment.

[3] The fourteenth amendment limits only state action and not private action. Civil Rights Cases, 109 U.S. 3, 11 (1883).

[4] *See* note 9 *infra.*

[5] *See* note 8 *infra.*

[6] A facially neutral decision appears neutral on its face if it neither creates a "suspect classification" nor infringes on a "fundamental right." *See* note 8 *infra.* To be constitutionally recompensible, however, the facially neutral decision must have a disproportionate impact. *See* Washington v. Davis, 426 U.S. 229, 240-46 (1976); note 7 *infra.*

[7] A decision results in a disproportionate impact when the adverse effects of the decision fall more heavily on a minority group than on whites. *See* Hunter v. Erickson, 393 U.S. 385, 391 (1969). In the context of employment, for example, a disproportionate impact results when more minority group members than whites are disqualified for employment by an examination or job qualification. *See* Washington v. Davis, 426 U.S. 229, 237 (1976); note 83 *infra.*

[8] State and federal governments commonly employ three methods to classify individuals. The first, suspect classifications, is constitutionally impermissible because such classifications are based on criteria inappropriate for governmental consideration. *See In re* Griffiths, 413 U.S. 717, 721 (1973). In the past, suspect classifications were limited to discrete and insular minorities who would not be protected by the regular operation of the political process. United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938). This implies that a suspect

violates the equal protection clause depends upon the government's justification for that decision.[9] A facially neutral decision, however, necessitates

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classification would not include a group with considerable political power. The Court has rejected this approach, however, in its most recent pronouncement in the area. *See* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2747-48 (1978). Significantly, the Supreme Court has not yet defined the components of a suspect classification. Recent commentators have detailed the characteristics to include the direction of the classification toward a recognized minority, the tainting of the affected minority as inferior, and the attribution of the features upon which the classification is based to the members of the minority. Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause,* 26 STAN. L. REV. 155, 161-63 (1973); Note, *VASAP: A Rehabilitation Alternative to Traditional DWI Penalties,* 35 WASH. & LEE L. REV. 673, 686 n. 102 (1978). Suspect classifications have been held to include alienage, *see In re* Griffiths, 413 U.S. 717, 721 (1973); Graham v. Richardson, 403 U.S. 365, 371-72 (1971); race, *see* Loving v. Virginia, 388 U.S. 1, 9 (1967), and national origin or ancestry. *See* Oyama v. California, 332 U.S. 633, 644-46 (1948).

Another impermissible governmental classification is one that infringes on a constitutionally protected "fundamental interest." Shapiro v. Thompson, 394 U.S. 618, 638 (1969). Such an interest has been defined as any right "explicitly or implicitly guaranteed by the constitution." San Antonio Ind. School Dist. v. Rodriguez, 441 U.S. 1, 33-34 (1973). The Supreme Court decisions reflect on ad hoc decision making procedure, however, and have offered little guidance in identifying the presence of fundamental interests. *See* Shapiro v. Thompson, 394 U.S. at 662 (Harlan, J., dissenting). Judicially defined fundamental interests include interstate travel or migration, *see* Memorial Hosp. v. Naricopa County, 415 U.S. 250, 254 (1974), voting rights, *see* Dunn v. Blumstein, 405 U.S. 330, 336 (1972), access to the courts for criminal appeal, *see* Griffin v. Illinois, 351 U.S. 12, 18 (1956), and procreation. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942). However, public employment, *see* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976), education, *see* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 34-35 (1973), welfare benefits, *see* Jefferson v. Hackney, 406 U.S. 535, 548 (1972), and housing, *see* Lindsey v. Normet, 405 U.S. 56, 73-74 (1972), have been denied the status of fundamental interests.

Other governmental decisions often create classifications but do not create suspect classifications or infringe on fundamental interests. *See, e.g.,* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (age); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 54 (1973) (wealth). The government's use of such classifications violates no constitutional rights.

[9] The standard of review employed to examine the governmental creation of a suspect classification or infringement of a fundamental interest is strict scrutiny. *See* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2747 (1978). In these situations, the presumption of validity afforded most state enactments is abandoned, McGowan v. Maryland, 366 U.S. 420, 426-27 (1961), and the burden shifts to the governmental actor to prove that the action furthers a "*compelling* governmental interest", Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original), and that no available alternatives are less detrimental to the interests of the plaintiff. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974). The traditional standard of review of a suspect classification may have been changed in Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978). In *Bakke,* the Supreme Court stated that the state must show only that the classification is "necessary . . . to the accomplishment of its purpose or the safeguards of its interests." *Id.* at 2756-57; *see In re* Griffiths, 413 U.S. 717, 722-23 (1973). The state also must justify action that infringes on a fundamental interest by showing a compelling state interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); *see* Dunn v. Blumstein, 405 U.S. 330, 337 (1972). If the governmental action does not create a suspect classification or infringe on a fundamental interest, the action will be upheld as long as the action bears a rational relationship to a legitimate governmental purpose. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971). Governmental enactments have usually been upheld under this test if any conceivable set of facts will suffice to justify the decision. McGowan v. Maryland, 366 U.S. 420, 426 (1961); *see* Goesaert v. Cleary, 335 U.S. 464, 466 (1948). Therefore, under this test the govern-

a different approach. In *Washington v. Davis*[10] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[11] the Supreme Court held that a facially neutral decision with a disproportionate impact on a judicially defined minority group[12] violates the fourteenth amendment only if the governmental actor has the intent or purpose to discriminate.[13] Although *Washington* and *Arlington Heights* overruled a substantial body of case law developed by the lower federal courts,[14] the Supreme Court did

ment's burden of proof appears to be negligible, since any legitimate end may serve to support the decision.

As a result of the rigid application of this two-tiered analysis by the Supreme Court, *see* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW 914 (4th ed. 1977); Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther], the outcome of a case involving equal protection hinged on the Court's decision to employ strict scrutiny or a rational basis standard of review. If strict scrutiny was employed, the plaintiff invariably won, whereas under a rational basis examination the government usually prevailed. *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969) (strict scrutiny) *with* Dandridge v. Williams, 397 U.S. 471 (1970) (rational basis). There has developed, however, a middle tier between the strict scrutiny and rational basis review. Gunther, *supra* at 18-19; *see* Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. F. 961 [hereinafter cited as Schwemm]. The Court has employed the middle tier of review when the classification is based on sex or illegitimacy. *See* Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (sex). While these classifications do not infringe upon a fundamental right and are not suspect, the government must assert more than a rational basis to sustain their existence. *See* Trimble v. Gordon, 430 U.S. at 772; Craig v. Boren, 429 U.S. at 200.

[10] 426 U.S. 229 (1976).

[11] 429 U.S. 252 (1977).

[12] The adverse effects of a facially neutral decision must rest upon a judicially defined minority group. 426 U.S. at 248. Otherwise governmental classifications such as a graduated income tax or welfare plan, which benefits or burdens unequally, would violate the fourteenth amendment. *Id. See also* Beauchamp v. Davis, 550 F.2d 959, 961 (4th Cir. 1977). In United Jewish Organ. v. Carey, 430 U.S. 144 (1977), the Court held that a purposeful use of racial criteria by the legislature restructuring voting districts is constitutionally permissible only when done to preserve black majorities in particular districts. *Id.* at 161. The adverse effects of the decision in *Carey* fell on whites, not members of a racial minority. Therefore, no judicially defined minority group had demonstrated a constitutional injury. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 724 (1974). *But see* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

[13] 426 U.S. at 239. The *Washington* Court addressed only those decisions which are neutral on their face. *See* text accompanying notes 20-35 *infra*. Therefore, the intent requirement of *Washington* would not be relevant to a statute that creates a suspect classification or infringes upon a fundamental right. After some uncertainty in this area, *see* Note, *The* Village of Arlington Heights: *Equal Protection in the Suburban Zone*, 14 HASTINGS CONST. L. Q. 361 (1977), the Court established that intent in these situations is to be inferred from the actual establishment of a suspect classification or by the infringement upon a fundamental right. In Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978), the Court stated that "[t]he University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate impact. In that situation, plaintiffs must establish an intent to discriminate . . ." *Id.* at 2748 n. 27.

[14] The majority of federal courts had reasoned that disproportionate impact alone was enough to establish a fourteenth amendment violation. *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (1972); Kennedy Park

not address the question of what constitutes discriminatory intent, and what evidence a fact-finder should consider in making such a determination. Due to the Court's ambiguity before *Washington*,[15] the lower federal courts employed myriad approaches in reaching conclusions regarding intent.[16]

Whether an actor has the intent to discriminate depends on many factors. The approach most often used by the lower federal courts to parse these factors and to determine intent has been to apply a "foreseeable consequences" test[17] or an objective standard of intent.[18] However, thoughtful analysis of the facts, language and rationale of *Washington* and *Arlington Heights* leads to the conclusion that a more exacting measure of intent was required by the Court. Only intentional action violates the equal protection clause of the fourteenth amendment. The governmental decision-maker must specifically intend to discriminate or have the intent necessary to commit an intentional tort[19] before a court may find that the actor acted with a discriminatory intent or purpose.[20] The Supreme Court's mandate under the fourteenth amendment[21] and its related areas[22] could

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Homes Assn. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968).

[15] *Compare* Wright v. Council of Emporia, 407 U.S. 451 (1971) (intent not necessary for constitutional violation) *and* Palmer v. Thompson, 403 U.S. 217 (1971) (intent not necessary) *with* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (intent necessary) *and* Strauder v. West Virginia, 100 U.S. 303 (1879) (intent necessary).

[16] *See* notes 72-74 *infra*.

[17] *See, e.g.*, United States v. Board of School Comm'rs, 573 F.2d 400, 413 (7th Cir. 1978); Armstrong v. O'Connell, 451 F. Supp. 817, 823 (E.D. Wis. 1978); *see* text accompanying notes 60 & 65 *infra*.

[18] *See* text accompanying note 60 *infra*.

[19] *See id.*

[20] *See* Washington v. Davis, 426 U.S. 229, 244-45 (1976).

[21] Although *Washington* established the requirement of intent before concluding that a facially neutral decision violates the equal protection clause, the first decision dealing with the fourteenth amendment established this precept in the context of jury exclusion. Strauder v. West Virginia, 100 U.S. 303 (1879); *see* Alexander v. Louisiana, 405 U.S. 625 (1972); Carter v. Jury Comm'n., 396 U.S. 320 (1970). The prerequisite of intent under the fourteenth amendment applies to other areas of equal protection, including racial gerrymanding of reapportionment statutes, Wright v. Rockefeller, 376 U.S. 52 (1964), and school desegregation. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). "[A] current condition of segregation resulting from intentional state action . . ." *id.* at 205, must occur before desegregation is accomplished through the fourteenth amendment. Such segregation is commonly known as de jure segregation. *Id.* at 208; *see* Swann v. Board of Educ., 402 U.S. 1, 17-18 (1971). De facto segregation is defined as all other types of segregation and results from zoning practices, residential housing patterns, and "freedom of choice school systems" in which each child picks his particular school. Keyes v. School Dist. No. 1, 413 U.S. 189, 211-12 (1973).

[22] Closely related to the fourteenth amendment are 42 U.S.C. §§1981 and 1983 (1976). Section 1983 states:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

be particularly damaging to plaintiffs, as all school desegregation cases and the vast majority of cases that allege infringement of personal liberties are brought under the equal protection clause.

The Supreme Court reestablished the intent requirement in fourteenth amendment litigation in *Washington v. Davis.*[23] In *Washington,* two unsuccessful black candidates[24] for positions in the District of Columbia Metropolitan Police Department challenged the Department's recruitment procedures.[25] The plaintiffs, who failed to obtain jobs with the Police Department, claimed that the procedures resulted in a harmful and dispro-

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Since § 1983 is based on the fourteenth amendment, several lower federal courts have held that a violation of § 1983 requires intent. *See, e.g.,* Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 963 (D. Md. 1977); Guardians Ass'n of N.Y. City v. Civil Serv. Comm'n, 431 F. Supp. 526, 534 (S.D.N.Y. 1977).

In addition, the intent requirement has been employed in cases decided under the thirteenth amendment. Section 1981, which states that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

is based on the thirteenth amendment rather than the fourteenth amendment. Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 964 (D. Md. 1977). Some courts have held that discrimination under § 1981 also requires proof of intent. *See, e.g., id.* at 963; Johnson v. Hoffman, 424 F. Supp. 490, 494 (E.D. Mo. 1977), *aff'd,* 572 F.2d 1219 (8th Cir. 1978). *But see* Note, *Racially Disproportionate Impact of Facially Neutral Practices—What Approach Under 42* U.S.C. *Sections 1981 and 1982?* 1977 DUKE L. J. 1267.

Certain statutory provisions including the Fair Housing Act, 42 U.S.C. §§ 3601-3603 (1976) and Title VII, 42 U.S.C. § 2000 (1976) do not require proof of discriminatory intent. *See* Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F. 2d 1283 (1977), *cert. denied,* 434 U.S. 1025 (1978) (housing); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment). To establish a prima facia case of racial discrimination under Title VII, a plaintiff must prove that he belongs to a racial minority, that he applied and was qualified for a job in which the employer was seeking applicants, and that he was rejected despite his qualifications, after his rejection, the position remained open and the employer continued to seek applications from persons with the plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To establish a violation of the Fair Housing Act, a plaintiff must prove that there is strong evidence of discriminatory effect, that there is some quantum of evidence of discriminatory intent, although not as much intent as required under *Washington,* and that the plaintiff is seeking to compel the defendant to provide housing for minority group members or otherwise restrain the defendant from interfering with private individuals who desire to provide such housing. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d, 1283, 1290 (7th Cir. 1977).

[23] 426 U.S. 229 (1976).

[24] In *Washington,* the complaint was originally filed by black police officers against the Commissioner of the District of Columbia, the Chief of the Metropolitan Police Department and the Commissioners of the United States Civil Service Commission challenging the Department's promotion practices. *Id.* at 232. The unsuccessful applicants intervened as plaintiffs pursuant to FED. R. CIV. P. 24. 426 U.S. at 232.

[25] The Department's disputed recruitment procedure required employees to pass the same competitive civil service examination that is used throughout the federal system. 426 U.S. at 234. The Civil Service Commission developed the examination, known as "Test 21", to test the applicant's verbal ability, working vocabulary, and reading and writing skills. Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972).

portionate impact on blacks[26] sufficient to establish a violation of the equal protection clause implicit in the fifth amendment.[27] The plaintiffs did not allege discriminatory intent on the part of the Police Department or attempt to prove that the Police Department intended to discriminate.[28] The Court held, however, that a facially neutral statute or decision[29] is not subject to attack under the equal protection clause simply because the decision has a disproportionate impact on a minority group.[30]

The *Washington* decision increased the burden of proof for plaintiffs advancing claims under the fourteenth amendment, clearly establishing the proposition that plaintiffs must prove that a governmental decision-maker acted with the intent or purpose to discriminate before a facially neutral statute violates the equal protection clause.[31] The Court did not, however, provide any guidelines to identify what actions would establish such a discriminatory intent or purpose, or whether the fact-finder should

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[26] The examination developed by the Civil Service Commission eliminated four times as many blacks as whites. 426 U.S. at 237. A generally accepted theory of educators maintains that whites will perform better than blacks on a standardized test, since these tests are usually developed by whites whose subconscious racial biases are reflected in the examinations. *See* Hobson v. Hansen, 269 F. Supp. 401, 448 (D.D.C. 1967), *aff'd en banc sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classifications,* 121 U. PA. L. REV. 705, 769-70 (1973); Note, *Segregation of Poor and Minority Children into Classes for the Mentally Retarded by the Use of IQ Tests,* 71 MICH. L. REV. 1212, 1213 (1973).

[27] U.S. CONST. amend V. The due process clause of the fifth amendment contains an equal protection component. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). The plaintiffs in *Washington* were required to bring their claims under the fifth amendment since the fourteenth amendment does not apply to the federal government. Shelley v. Kraemer, 334 U.S. 1, 8 (1948).

[28] The plaintiffs apparently proceeded on the theory that intent was unnecessary to establish a constitutional violation. In addition, no claim was advanced under Title VII, 42 U.S.C. § 2000e (1976), which was inapplicable to federal government employment at the time the complaint was filed. Title VII has been subsequently amended to apply to the federal government and the District of Columbia. *See* 42 U.S.C. § 2000e-16 (1976).

The district court granted summary judgment to the defendants on both constitutional and statutory grounds, Davis v. Washington, 348 F. Supp. 15, 18 (D.D.C. 1972), holding that the Department's procedures were directly related to the requirements of the recruit training program. *Id.* at 17. In fact, the district court believed that Test 21 was accomplishing its purpose by disqualifying those individuals who could not communicate effectively enough to be policemen. *Id.* The circuit court reversed stating that the case should be decided under Title VII standards. Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), *rev'd,* 426 U.S. 229 (1976). The court reasoned that discriminatory intent was not controlling and the determinative factor was the disproportionate impact of the Department's recruiting procedures. *Id.* at 958; *see* notes 21-22 *supra.*

[29] *See* note 6 *supra.*

[30] 426 U.S. at 242. The Court expressed concern that a large number of governmental decisions would be invalidated because they impinged more heavily on one race than another. *Id.* Almost any activity which parcels out the government's finite resources burdens or benefits one group more than another. The Court listed taxes, welfare, public services, and regulatory and licensing statutes as governmental enactments that would be invalidated if constitutional violations could arise without a prior finding of discriminatory intent. *Id.*

[31] *See* note 21 *supra.*

consider objective manifestations of intent[32] or subjective motivations[33] of the individual decision-maker. Nevertheless, the majority consistently used the word "purpose" rather than "motive" when discussing the plaintiff's burden of proof.[34] This careful choice of language differed from earlier cases dealing with intent.[35] Discussion of a law's purpose implies that objective facts are the relevant considerations, whereas a consideration of motive requires that the incentives of the individual decision-makers be scrutinized.[36] As a result, the Court implicitly emphasized objective factors rather than subjective elements of intent. This objective facts approach offered few guidelines in proving a fourteenth amendment claim to a plaintiff who must satisfy the intent requirement.

The Court attempted to promulgate much needed guidelines and clarify its position on the intent requirement in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[37] In *Arlington Heights,* the Metropolitan Housing Development Corporation [MHDC] planned to build federally subsidized,[38] low income housing in Arlington Heights, Illinois. MHDC could not build the racially integrated housing project[39] unless Arlington Heights rezoned the proposed site to permit construction of multi-family dwellings.[40] When the Village refused to rezone the site,

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[32] *See* note 53 *infra.*

[33] *See* note 60 *infra.*

[34] 426 U.S. at 242-44, 247. The purpose of a statute might be those goals a decision-maker wants to obtain "by the operation of the statute," whereas the "act of his vote" may be motivated by other objectives. Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L. J. 1205, 1218 (1970) [hereinafter cited as Ely]. *See generally* Schwemm, *supra* note 9, at 1004.

[35] In Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), the Court used the words "intentional", "deliberate", and "purpose" when speaking of the governmental actor's necessary frame of mind before finding a constitutional violation. *Id.* at 198, 210, 213. In Palmer v. Thompson, 403 U.S. 217, 224-25 (1971), the words "motivation" and "purpose" were employed, while in Evans v. Abney, 396 U.S. 435, 445 (1970), "motivation" and "intent" were discussed. *See* Ely, *supra* note 34 at 1213-14.

[36] *See* Schwemm, *supra* note 9, at 1004.

[37] 429 U.S. 252 (1977). In *Washington,* the majority opinion expressed its "disagreement" with the circuit court's holding in Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), to the extent that discriminatory purpose was unnecessary for proof of a fourteenth amendment violation. 426 U.S. at 245. Therefore, the Court had effectively overruled *Arlington Heights* before the case was actually considered.

[38] MHDC's proposed housing project was to be subsidized under § 236 of the National Housing Act, 12 U.S.C. § 17152-1 (1970 ed. Supp. V.). New subsidies under § 236 were terminated by the government in 1973. However, those eligible under § 236 became eligible for aid under § 8 of the United States Housing Act of 1932. 42 U.S.C. § 1437f (1970 ed. Supp. V.).

[39] 429 U.S. at 257. A housing project must be racially intergrated to qualify for a housing subsidy under § 236. *Id.*

[40] *Id.* The basic zoning plan of Arlington Heights applied single-family classifications to all unused land. Schwemm, *supra* note 9, at 1028. As specific applications for rezoning were presented, the Village decided whether to rezone an area from the single-family to the multi-family category. *Id.* In the years before MHDC's petition for rezoning, the Village approved sixty rezoning petitions, representing over 5200 market-rent apartments. *Id.* at 1020. Upon consideration of MHDC's petition, the Village Plan Commission held public meetings which

MHDC and three black residents of Arlington Heights sued to compel the Village to rezone.[41] The Supreme Court held that a discriminatory purpose had to be a "motivating factor"[42] behind the action of the governmental

allowed various citizens to express their opinions on the proposed zoning change. 429 U.S. at 257-58. However, the Court was pursuaded by the fact that the zoning change would further Arlington Heights' official zoning policy of using multiple-family areas as buffers between single-family areas and commercial or manufacturing districts. *Id.* at 270. The Court viewed the official zoning policy as a legitimate goal of the Village. *Id.* Thus, discriminatory decisions could be justified as a means to accomplish a legitimate end. *See* note 43 *infra.*

[41] 429 U.S. at 271. The plaintiffs alleged a violation of the equal protection clause of the fourteenth amendment in addition to a violation of the Fair Housing Act. 42 U.S.C. §§ 3601-3603 (1976). In a procedure later termed "unorthodox" by the United States Supreme Court, however, the circuit court decided only the constitutional issue and did not address the statutory question. 429 U.S. at 271; *see* note 44 *infra.*

The district court concluded that the village had a legitimate interest in preserving the zoning plan and that the Village's desire to protect property values should be respected. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974). Although the district court judge did not decide the issue of intent, he stated that the decision to deny rezoning was not "arbitrary or capricious." *Id.* If the defendants acted with the "legitimate desire to protect property values and the integrity of the Village zoning plan," *id.*, they could not have had the intent to discriminate. The circuit court reversed, reasoning that the Village's decision should be analyzed by taking into account the context of the situation existing in Arlington Heights and the cumulative effect of the decision on minorities in the area. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413 (7th Cir. 1975). After considering all relevant factors, the court concluded that the disproportionate impact of the Village's decision was a violation of the fourteenth amendment. *Id.* The fact that the Village had rezoned from single-family to multi-family areas on sixty different occasions from 1959 to 1970 for market-rent apartments was crucial to the court's decision. *Id.* at 412.

[42] 429 U.S. at 265-66. Discriminatory intent must be one of the factors influencing a decision before a constitutional violation occurs. However, such intent need not be the sole motivation of the decision-maker. *Id.* at 265. The Court recognized that numerous considerations often coalesce before a decision is reached, especially in the legislative or administrative process. *Id.*; *see* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119.

[43] 429 U.S. at 270 n. 21. After discriminatory purpose has been established, the government may prove that the same action would have been taken without involving the discriminatory purpose. Thus, the defendant must introduce evidence of other possible justifications for the decision. The defendant tries to prove that his intent was irrelevant, rather than the absence of discriminatory intent. This concept emphasizes the reluctance of the Court to remedy situations other than those exclusively caused by intentionally discriminatory state action. *See* Milliken v. Bradley, 418 U.S. 717 (1974); note 21 *supra.* If the situation were not specifically caused by discriminatory governmental action, the fourteenth amendment can not be used to justify a federal court's interference with the operation of a state's government. 429 U.S. at 270 n. 21.

The Court followed this reasoning in a first amendment context in Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). In *Mt. Healthy,* a school teacher was not rehired when he exercised a constitutionally protected right. After receiving a memorandum from his principal concerning the establishment of a dress code for teachers, the plaintiff informed a local disc jockey who promptly announced the adoption of the dress code as a news item. *Id.* at 282. One of the reasons for not rehiring Doyle was that the disclosure violated school policy. *Id.* at 282-83. Both the district and circuit courts agreed that Doyle had a constitutionally protected right to disclose the adoption of the new dress code and that the refusal to rehire him constituted a violation of the first amendment. Doyle was reinstated with back pay and

decision-maker. After a finding that discriminatory purpose motivated the governmental actor, the burden then shifts to the defendant to demonstrate that the same decision would have been reached even if the impermissible purpose had not been considered.[43] The plaintiffs in *Arlington Heights,* however, failed to prove that discriminatory intent was a motivating factor in the government's decision,[44] and therefore failed to establish a violation of the equal protection clause.

In *Arlington Heights,* the Court affirmed the intent requirement in fourteenth amendment adjudication. The importance of the opinion can be discerned from the Court's attempt to specify the types of evidence a fact-finder should consider when deciding whether a governmental actor has acted with discriminatory intent. The categories of evidence delineated by the Court as probative of the motivation of a decision-maker are the impact,[45] the historical background,[46] the specific sequence of events,[47] any

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damages. *Id.* at 283. The Supreme Court agreed that the disclosure was the exercise of a first amendment right, but disagreed with the lower courts on whether Doyle was necessarily entitled to relief. *Id.* at 285. The Court remanded the case to afford the school board the opportunity to introduce proof that it would not have rehired Doyle, who had severe discipline problems in the classroom and several disagreements with the principal, regardless of the telephone call. *Id.* at 287. This method of analysis insures that the court is correcting only those adverse effects of a constitutional violation that are detrimental to the plaintiff.

[44] 429 U.S. at 270. The *Arlington Heights* Court remanded the case for consideration of the statutory issue ignored by the circuit court. 429 U.S. at 271. On remand, the Seventh Circuit held that the discriminatory intent requirement of *Washington* was not necessary to establish a violation of the Fair Housing Act, 42 U.S.C. §§3601-3603 (1976) and that the disproportionate impact of the Village's refusal to rezone constituted a statutory violation. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289-90 (7th Cir. 1977). This is essentially the same standard the Supreme Court has employed to decide cases under Title VII. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971); United States v. City of Chicago, 549 F.2d 415, 435 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); note 19 *supra.* Consequently, a situation now exists in which opposite results may be obtained from the same set of facts. While the Fair Housing Act was enacted to prevent discrimination in the building, sale or rental of housing, 42 U.S.C. § 3604 (1976), the Act is based on the thirteenth amendment. United States v. Nintzes, 304 F. Supp. 1305, 1313 (D. Md. 1969). Some courts specifically have held that 42 U.S.C. § 1981, which is also based on the thirteenth amendment, requires that the actor have the intent to discriminate. Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 963 (D. Md. 1977); Guardians Ass'n of N.Y. City v. Civil Serv. Comm'n, 431 F. Supp. 526, 534 (S.D.N.Y. 1977). Therefore, in a seemingly inconsistent interpretation, some statutes based on the thirteenth amendment require intent, while others do not.

[45] 429 U.S. at 266. Whether an action's adverse effects burden one race more than another constitutes the threshold issue when analyzing a facially neutral statute challenged under the equal protection clause. *Id.* at 266. If the action does not have a disproportionate impact on a judicially defined minority group, *see* note 12 *supra,* no equal protection violation exists. *Id.* The Court did not, however, indicate what the threshold level of disproportionate impact would be. In *Washington,* four times as many blacks as whites failed the recruitment exam. 426 U.S. at 237; *see* note 26 *supra.* In *Arlington Heights,* the denial of rezoning resulted in a disproportionate impact since more minority group members were affected than whites. 429 U.S. at 269.

[46] 429 U.S. at 267. The historical background of the *Arlington Heights* decision revealed that the property in question had been zoned for single-family residences since 1959 when Arlington Heights initiated its zoning procedures. *Id.* at 269; *see* note 40 *supra.* In

departure from normal procedures,[48] and the legislative or administrative history.[49] The majority opinion, however, offered no guidelines for weighing such evidence. Moreover, the Court did not indicate what inferences should be drawn from any particular fact pattern. This is particularly troublesome since the evidence upon which a plaintiff must rely often consists of commonplace occurrences. Therefore, an inference of discriminatory or non-discriminatory intent may be drawn from any particular piece of evidence.[50] The crucial question virtually ignored by the Court in *Arlington Heights* involves the type of intent a plaintiff is required to prove. A defendant might have had the specific intent to discriminate against a plaintiff,[51] or he may have merely realized the foreseeable consequences of his actions.[52] This determination has become the critical question in litigation involving a facially neutral statute with a disproportionate impact.

The determination of intent has emerged as the starting point in equal protection litigation. However, intent is an amorphous concept. In a negligence context, intent refers to the performance of an act.[53] An actor does not desire to accomplish a specific purpose when he is negligent, but merely intends to perform the act which he in fact performs. His intent is to act, not to accomplish a result. He is negligent because the law assumes that he realized the foreseeable consequences of his action.[54] Such objective proof of intent requires evidence which demonstrates the actor's knowledge of the reasonably foreseeable consequences of his actions.[55] If a court ac-

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Washington, the facts indicated that the recruitment test was not developed by the Police Department, but was a general test given throughout the federal civil service system. 426 U.S. at 234.

[47] 429 U.S. at 267.

[48] *Id.*

[49] *Id.* at 268. The legislative or administrative history of the decision is particularly important if the decision has been made recently. Examples of such history deemed important by the Court are contemporary statements by members of the decision making body, minutes of the meetings, and reports or testimony of the members of the decisionmaking body. *Id.*

[50] *See* text accompanying notes 106-14 *infra.*

[51] *See* text accompanying notes 60-70 *infra.*

[52] *See* text accompanying notes 56-59 *infra.*

[53] The actor need not intend to bring about a particular result to be negligent. He needs only to intend to act in the manner in which he in fact acted. The performance of an act is sufficient to constitute negligence because the standard to which the actor must conform is that of the reasonable man. *See* W. PROSSER, LAW OF TORTS § 32 (4th ed. 1971) [hereinafter cited as PROSSER]. The objective facts approach looks to the physical acts, and not the moral turpitude of a particular actor because society does not inquire about the subjective motivations of the individual actor.

If a reasonable man would have recognized the consequences of the action, the law assumes that the particular actor also should have recognized these consequences. *See* Terry, *Negligence,* 29 HARV. L. REV. 40, 40 (1915). If the actor voluntarily performed the act, he is negligent. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965) [hereinafter cited as RESTATEMENT].

[54] *See* PROSSER, *supra* note 53, at § 32.

[55] *See, e.g.,* Feeney v. Commonwealth, 451 F. Supp. 143 (D. Mass.), *review granted,* 97 S. Ct. 345 (1978); Armstrong v. O'Connell, 451 F. Supp. 817 (E.D. Wis. 1978).

cepts this standard in deciding fourteenth amendment cases, proof of a disproportionate impact would also prove discriminatory intent, since in most conceivable situations the consequences of an act are known.[56] In continuing to act after foreseeing the consequences of his action, the governmental actor's intent would be inferred from the performance of the act. Therefore, the plaintiff needs only to prove that the particular act was voluntary. Even if the consequences of an action are not known at the time of the action, the effects would be known soon thereafter, and the disproportionate impact would continue if the actor did not correct the original decision. Thus, if an actor allowed a decision to stand and knew that the decision had a disproportionate impact, the actor would be deemed to have the requisite discriminatory intent under the foreseeable consequences approach.[57] Therefore, the plaintiff would need only to prove that the actor's decision to refrain from correcting his former action was voluntary. Moreover, if courts adopt the foreseeable consequences or negligence standard of intent, there would be no significant barrier to plaintiffs alleging fourteenth amendment violations.[58] The plaintiff would be able to prove his case by proving that the act in fact occurred. In reality, this approach is equivalent to the impact test that was specifically rejected by the Supreme Court in *Washington* and *Arlington Heights*.[59]

Since disproportionate impact alone will not prove that a facially neutral statute violates the fourteenth amendment, a plaintiff must prove that a governmental decision-maker had the specific intent to discriminate.[60]

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[56] *See* note 53 *supra*. In *Arlington Heights*, the foreseeable consequences of the failure to rezone were apparent to all parties. If the Village did not rezone, there would be no housing project. Yet, the Court did not find that the Village intended to discriminate. 429 U.S. at 270.

[57] Once a determination is made that the decision-maker had a duty to act, the failure to act may constitute a constitutional violation. *See* Bolden v. City of Mobile, 571 F.2d 238, 246 (5th Cir. 1978). In *Washington*, the Police Department knew that four times as many blacks as whites failed the recruiting examination. *See* note 26 *supra*. The foreseeable consequences approach would dictate that since the consequences of a failure to act differently were foreseeable, the defendant was guilty of a constitutional violation. The Court, however, made no finding of discriminatory intent. 426 U.S. at 248.

[58] Some commentators assert that *Washington* and *Arlington Heights* might have created an insurmountable burden to equal protection plaintiffs, *see* TRIBE, *supra* note 2, at 1031; Note, *Constitutional Significance of Racially Disproportionate Impact*, 90 HARV. L. REV. 114, 120 (1976) [hereinafter cited as *Significance*]; Note, *Proof of Discriminatory Intent*, 91 HARV. L. REV. 163, 172 (1977) [hereinafter cited as *Proof*], because proof of a subjective standard of intent is virtually impossible. Therefore, most plaintiffs would be precluded from relying on the fourteenth amendment to rectify equal protection violations. *But see* text accompanying notes 53-56 *supra* & 132-39 *infra*.

[59] *See Proof*, *supra* note 58, at 166; note 45 *supra*.

[60] In the context of an intentional tort, specific intent refers to the desire to accomplish a particular result. *See* PROSSER, *supra* note 53, at § 8. If *A* and *B* are hunting and *A* sees the bushes move and immediately fires, striking *B*, *A* is negligent in his conduct. If *A* aims directly at *B*, however, intending that the bullet hit *B*, *A* has committed an intentional tort against *B*. While the physical act of pulling the trigger is identical in both instances, the difference involves *A*'s state of mind. *A* does not have to be absolutely certain that the bullet will strike *B* or that *B* will be harmed, but he must be "substantially certain" of the result. RESTATEMENT, *supra* note 53, at § 8A, comment B; *see* Edgerton, *Negligence, Inadvertance,*

Although the *Arlington Heights* Court never specifically stated such a requirement, this conclusion is unmistakable. The foreseeable consequences of both action and inaction were obvious,[61] but the Court found no constitutional violation in either *Arlington Heights*[62] or *Washington.*[63] In listing the types of evidence[64] a fact-finder should consider when determining intent, the Court impliedly rejected the foreseeable consequences approach. The evidence viewed as important by the Court does not prove the foreseeability of the consequences, since the majority in *Arlington Heights* directed the fact-finder's attention to those elements that motivated the actor.[65] The Court was not concerned with what the actor should have known, but rather the considerations that prompted his decision. Finally, the Court used the words purpose and intent interchangeably[66] in holding that discriminatory intent had to be a "motivating factor"[67] in the government's decision. This choice of words implies that a fact-finder must consider the actual motives or "specific intent" of the governmental actor.[68] Therefore, proof of the specific intent to discriminate requires that the plaintiff prove more than the discriminatory impact of the action.[69] In contrast, the plaintiff would not need to prove discriminatory intent if courts adopt the foreseeable consequences approach.[70]

Following *Washington* and *Arlington Heights,* plaintiffs realized that they had to prove a governmental decision-maker's subjective intent or specific purpose to bring about a discriminatory result before seeking the invalidation of a facially neutral statute on fourteenth amendment grounds.[71] Although numerous federal courts have considered the guidelines and requirements of *Washington* and *Arlington Heights,* they have exhibited confusion in their application.[72] Some courts merely have found

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and Indifference: The Relation of Mental State to Negligence, 39 HARV. L. REV. 849, 860 (1926); Seavey, *Negligence,* 41 HARV. L. REV. 1, 17 (1927); *Proof, supra* note 58, at 166-67.

[61] *See* notes 56-57 *supra.*

[62] 429 U.S. 252 (1977).

[63] 426 U.S. 229 (1976).

[64] *See* text accompanying notes 45-49 *supra.*

[65] The historical background, the specific sequence of events, and the legislative and administrative history of the decision all indicate that a court should focus on each actor and the facts of each situation, rather than a general inquiry about what the actor might have known. 429 U.S. at 267-68.

[66] 429 U.S. at 265; *see* Schwemm, *supra* note 9, at 1021.

[67] 429 U.S. at 265-66, 270.

[68] *See* note 60 *supra.*

[69] *See* notes 53-58 *supra.*

[70] Since *Washington* and *Arlington Heights,* the Court has been quick to reject cases employing the foreseeable consequences approach, remanding them for reconsideration in light of *Washington* and *Arlington Heights. See* Brennan v. Armstrong, 433 U.S. 672 (1977); Austin Ind. School Dist. v. United States, 429 U.S. 990 (1977). *See also Proof, supra* note 58, at 166.

[71] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[72] *See, e.g.,* N.A.A.C.P. v. Lansing Bd. of Educ., 559 F.2d 1042, 1046-47 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977); Socialist Workers Party v. Chicago Bd. of Election, 433 F. Supp. 11, 14 (N.D. Ill. 1977).

the existence or non-existence of discriminatory intent without discussing the evidence used to reach such a conclusion,[73] while other courts have commented on the inferences drawn from each of the *Arlington Heights* categories of evidence.[74]

The courts must determine intent on a case-by-case basis due to the different fact situations of each controversy. The starting point for such analysis under the Supreme Court's guidelines involves the impact of the governmental action.[75] If the outcome of the facially neutral decision does not have a disproportionate impact on some identifiable minority group, no further fourteenth amendment analysis is necessary.[76] The only manageable way to measure the disproportionate impact of a facially neutral statute has been through the use of statistical analysis.[77] Until the plaintiff has affirmatively demonstrated that his particular minority group has been affected adversely, the plaintiff is not deemed to have suffered a constitutional injury.[78] The situation reflected by a particular set of statistics, however, is often controversial.[79] Obvious disproportionate impact to a plaintiff may not always be apparent to a fact-finder.[80] Since the fact-

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[73] *See, e.g.,* Dawson v. Pastrick, 441 F. Supp. 133 (N.D. Ind. 1977); Bannerman v. Department of Youth Auth., 436 F. Supp. 1273 (N.D. Cal. 1977).

[74] *See, e.g.,* Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978); United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd,* 98 S. Ct. 756 (1978).

[75] *See* note 45 *supra.*

[76] *See* Inmates of Neb. Penal v. Greenholtz, 567 F.2d 1368 (8th Cir. 1977); Cave v. Beame, 433 F. Supp. 172 (E.D. N.Y. 1977). The plaintiff must plead disproportionate impact as well as discriminatory intent to state a cause of action. *See* Philadelphia Council of Neighb. Organs. v. Coleman, 437 F. Supp. 1341 (E.D. Pa. 1977), *aff'd,* 578 F.2d 1375 (3d Cir. 1978); Johnson v. Hoffman, 424 F. Supp. 490 (E.D. Mo. 1977), *aff'd sub nom.* 572 F.2d 1219 (8th Cir. 1978); Hammons v. Scott, 423 F. Supp. 618 (N.D. Cal. 1976).

[77] *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977). Statistical studies have been significant in proving disproportionate impact and discrimination in a wide range of cases. *Id.* Statistics are significant as evidence due to the number of people involved and the length of time over which an equal protection violation is commonly alleged. *See, e.g.,* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (eleven years); United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd,* 98 S. Ct. 756 (1978) (thirty years).

[78] *See, e.g.,* Inmates of Neb. Penal v. Greenholtz, 567 F.2d 1368 (8th Cir. 1977); Cave v. Beame, 433 F. Supp. 172 (E.D.N.Y. 1977).

[79] Disputes arise over the use of statistics when the parties cannot agree on the figures on which the study should be based or the time span to be considered. For example, in Castaneda v. Partida, 430 U.S. 482 (1977), the plaintiff wanted to look at grand jury selection figures for an eleven year period, while the defendant wanted to use a two and one-half year period. The shorter period demonstrated less of a disproportionate impact than the longer period. *Id.* at 496.

[80] Since a perfect statistical norm is rarely obtained in non-laboratory situations, an important consideration involves how much disparity from the norm should be allowed before a disproportionate impact is found. In *Washington,* the fact that four times as many blacks as whites failed Test 21 evidenced a disproportionate impact. 426 U.S. at 237. In *Arlington Heights,* the refusal to rezone affected more blacks than whites, thereby causing a disproportionate impact. 429 U.S. at 269. In the case of a rigidly structured, easily-analyzed statistical pattern, the Supreme Court has determined that a difference of more than two standard deviations from the norm demonstrates a disproportionate impact. Castaneda v. Partida, 430 U.S. 482, 497 (1977); *see, e.g.,* Inmates of Neb. Penal v. Greenholtz, 567 F.2d 1368, 1377 (8th

finder must make the determination of disproportionate impact on a case-by-case basis,[81] the court must insure that the procedures used to make this decision are both flexible and capable of working substantial justice.

Another type of evidence probative of intent involves the historical background of the governmental decision.[82] This evidence becomes significant when the challenged decision was not made with an apparent discriminatory purpose, yet a clear disproportionate impact results. Since the discriminatory system has been maintained, plaintiffs allege that the former decision has not been corrected as a result of discriminatory purposes.[83] *Bolden v. City of Mobile*[84] illustrates this type of situation. In *Bolden*, the plaintiffs claimed that a 1909 statute[85] seriously diluted[86] the voting strength of blacks in the city of Mobile, Alabama.[87] The historical background demonstrated that the 1909 decision was "race proof"[88] since the Alabama constitution effectively disenfranchised blacks in 1901.[89]

Cir. 1977). *But see* Berry v. Cooper, 577 F.2d 322, 326 (5th Cir. 1978) (two standard deviation approach not a rigid rule).

[81] Although the Court in *Washington* and *Arlington Heights* stated that impact alone does not prove a fourteenth amendment violation, 426 U.S. at 239; 429 U.S. at 264-65, jury selection cases have provided an exception to that broad rule. In *Washington*, the Court specifically noted the jury selection cases as an example of a total exclusion of a minority group which could not be explained on any ground other than racial discrimination. 426 U.S. at 242. The Court followed this reasoning in Castaneda v. Partida, 430 U.S. 482 (1977), in which a large disproportionate impact could not be justified by any legitimate reason. Disproportionate impact will prove discriminatory intent in a limited number of situations because of the severe statistical disparity in the cases cited in *Washington*. *See, e.g.*, Akins v. Texas, 325 U.S. 398 (1945); Smith v. Texas, 311 U.S. 128 (1940); Yick Wo v. Hopkins, 118 U.S. 356 (1886). When intent is not required, as under the Fair Housing Act and Title VII, disproportionate impact alone remains a sufficient test. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

[82] *See* note 46 *supra*.

[83] *See* Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978) (voter dilution); Blacks United for Lasting Leadership v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978) (voter dilution); Thomasville Branch of the N.A.A.C.P. v. Thomas County, 571 F.2d 257 (5th Cir. 1978) (voter dilution); Feeney v. Commonwealth, 451 F. Supp. 143 (D.Mass. 1978) (discrimination against women under a veterans preference statute).

[84] 571 F.2d 238 (5th Cir. 1978).

[85] The plaintiffs in *Bolden* alleged that Alabama Code title 37, § 426 (Cum. Supp. 1973), was enacted and maintained for discriminatory reasons. The statute allows the at-large election of city aldermen in certain situations.

[86] The Fifth Circuit set the standards for judging voter dilution in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) *(en banc), aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). These standards involve the group's accessibility to political processes, the responsiveness of representatives to the needs of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the electoral participation of the group. 485 F.2d at 1305. Facts which may enhance the underlying dilution include the size of the district, the segment of the vote necessary for election if the positions are not individually contested, the number of candidates an elector must vote for, and whether candidates must reside in sub-districts. *Id.*

[87] In the Mobile area, 35.4% of the voting population was black. 571 F.2d at 243.

[88] *Id.* at 245.

[89] *Id.*

Therefore, since the legislators could not have been concerned about blacks voting, dilution of those votes would not have been a consideration in passing the statute.[90] The court rejected the proposition that *Washington* and *Arlington Heights* required discriminatory intent only at the time of the enactment of the governmental decision[91] and held unconstitutional a plan that devalued black votes if maintained specifically for discriminatory purposes, even though the plan was instituted without discriminatory intent.[92] This rationale impliedly recognizes an affirmative duty on the part of the appropriate governmental officials to act when they realize the reasonably foreseeable consequences of their inaction. The proper focus of a court, however, should not be whether the consequences of inaction are foreseeable, but whether the inaction is motivated by the specific desire to discriminate.[93] Recognition of the consequences of such inaction is not a constitutional violation,[94] yet the foreseeability of the consequences may be a factor leading to the finding of intentional discrimination.[95]

Instances in which there is direct evidence of intent are rare.[96] Therefore, a fact-finder must draw inferences from the presentation of circumstantial evidence. Three types of such evidence recognized by the Court in *Arlington Heights* include the specific sequence of events leading to the decision,[97] the procedural or substantive departures from the norm in connection with the decision,[98] and the legislative or administrative history of the decision.[99] Since the Court gave these three categories little independent consideration, they may be considered together as the "totality of the circumstances." Consideration of all three types of evidence under one grouping facilitates the understanding of their importance. The categories are so interrelated that a departure from the normal sequence of events is often part of the legislative history, as well as one of the specific events leading to the decision. The totality of the circumstances is most probative of intent when the decision-making process involves the repetition of an established pattern.[100] Where similar decisions have previously been made,

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[90] *See id.*

[91] *Id.* The Fifth Circuit had held that discriminatory motive was a prerequisite to claims under the fifteenth and fourteenth amendments. Nevett v. Sides, 571 F.2d 209, 220 (5th Cir. 1978).

[92] 571 F.2d at 246.

[93] The *Bolden* court concluded that the defendant had the requisite discriminatory intent because the "legislature was acutely conscious of the racial consequences of its districting policies." *Id.*

[94] *See* text accompanying notes 54-59 *supra.*

[95] *See* text accompanying notes 52-57 *supra.*

[96] *See, e.g.,* Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964). In *Prince Edward County,* the president of the school board specifically stated that the County would not operate integrated schools. *Id.* at 222.

[97] 429 U.S. at 267.

[98] *Id.*

[99] *Id.* at 268.

[100] In *Arlington Heights,* the Village had considered many petitions for rezoning from 1959 to 1970. Each petition had been dealt with in the same manner. 429 U.S. at 269. The Plan Commission attempted to accommodate MHDC by scheduling two extra meetings to

thought processes are more apparent, and prior responses to those situations are a matter of record. By comparing these prior responses to the current response, the fact-finder can determine the actor's actual intent.[101] The totality of the circumstances approach also is probative of intent when the governmental actor has a choice between two alternative plans, one less discriminatory than the other.[102] If the actor chooses the more discriminatory alternative, the choice itself can be considered one of the specific events demonstrative of intent, and in most situations the choice will represent a departure from the norm.[103] In *Arthur v. Nyquist,*[104] the city of Buffalo, New York adopted the concept of a "neighborhood school sys-

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allow MHDC to present its case fully. *Id.* at 269-70. These meetings were important since they were open to the public. The Commission's procedures and rationales for decision were publically scrutinized and were later reviewed by a court. When a decision-making process is hidden from the public eye, however, such as in the jury selection process, there can be no judicial examination of procedures. Thus, if the plaintiff fails to introduce evidence concerning the totality of the circumstances due to the secretive nature of the defendant's procedures, the defendant should have discriminatory inferences drawn against him. *See* Castanada v. Partida, 430 U.S. 482 (1977).

[101] Under the foreseeable consequences approach, the outcome of prior responses could be viewed as determinative of an intent in the present situation. *See* note 57 *supra.* If the outcome of a prior decision is reached again, the result of the second decision would be considered "foreseeable" under the foreseeable consequences test. Therefore the decision-maker would be deemed to have acted with discriminatory intent. While the foreseeability of the outcome is not irrelevant, a court should look to the actual motivation of the decision-maker. *See* note 60 *supra.* Only if his motives are discriminatory has he committed an equal protection violation. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229 (1976); notes 60 & 70 *supra.*

The totality of the circumstances approach is more beneficial when dealing in an administrative setting, since legislative enactments are often isolated occurrences and offer no substantial means of comparison. Since the foreseeable consequences approach is so easily manipulated, many courts have used it in evaluating legislative enactments. *See, e.g.,* Feeney v. Commonwealth, 451 F. Supp. 143 (D. Mass. 1978).

[102] The fact that an actor chooses one alternative over another is not alone significant when the decision is facially neutral. *See De Facto/De Jure, supra* note 2, at 337. The choice of one alternative over another, however, is determinative of intent only if the actor's choice was motivated by discriminatory concerns. *Id.* Legitimate considerations may always motivate such a choice. *See* note 40 *supra.*

[103] In *Arlington Heights,* the decision by the Village Plan Commission to deny rezoning represented a departure from the norm since the vast majority of previous petitions had been approved. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 412 (7th Cir. 1975). In certain situations a mechanical application of established procedures and rationales may be as probative of intent as deviations from those procedures. If the situation mandates that standard operating procedures should not be followed, strict adherence to past practices would be discriminatory. Therefore, a deviation from the established pattern would be required to correct a disproportionate impact. *See De Facto/De Jure, supra* note 2, at 337. *But see* United States v. School Dist. of Omaha, 521 F.2d 530, 543 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975). For example, where a school board has adopted a neighborhood school policy, *see* note 105 *infra,* a break in this policy should not be immediately viewed as discriminatory, especially if portions of the school district contain racially segregated housing. Strict adherence to the policy, which would insure segregated schools, would be more probative of discriminatory intent than a departure from normal procedures. *See De Facto/De Jure, supra* note 2, at 337.

[104] 573 F.2d 134 (2d Cir. 1978).

tem."[105] A deviation from normal procedures arose from a decision to permit white students to transfer from their neighborhood schools if such schools did not offer instruction in a particular foreign language.[106] Other events that may fall within the category of the totality of the circumstances because they are probative of the intent of the decision-maker include sudden changes in attendance zones,[107] operation of optional areas,[108] admission policies to regular and vocational schools,[109] the recruiting and assignment of staff members,[110] intact busing,[111] the failure to utilize available land for school placement,[112] rating or ranking only minority teachers,[113] and sudden zoning changes in the face of proposed integrated housing.[114] In each of these situations, the outcome is probably foreseeable. Nevertheless, focusing on the outcome of the decision rather than the motivation behind the decision ignores the intent requirement of *Washington* and *Arlington Heights*. Although the totality of the circumstances and the foreseeable consequences tests are useful aids in determining the intent of a governmental actor, in proving a fourteenth amendment violation the plaintiff must show that the defendant had the specific intent to discriminate.[115]

Specific application of the intent requirement often leads to conflicting results. Recently, a United States District Court employed a novel but questionable approach to the intent requirement by invalidating a facially neutral statute with a disproportionate impact on women. In *Feeney v.*

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[105] *Id.* at 144. The rationale behind a neighorhood school policy envisions that a child attend his local or neighborhood school. In theory, this increases parental interest in the school, lowers the cost of transportation for both the parent and the school system, and enhances student morale. Northcross v. Board of Educ., 466 F.2d 890, 896 (6th Cir. 1972), (Weick, J., dissenting). The neighborhood school system may be indicative of intent if the system has been employed with the intent to discriminate. *See* Swann v. Board of Educ., 402 U.S. 1 (1971); Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978).

[106] 573 F.2d at 144. In some instances the school board used different standards for black student "language transfers" than for whites. *Id.* White students transferred at will, while blacks often had to meet stringent requirements. *Id.*

[107] *Id. See also* Brinkman v. Gilligan, 583 F.2d 243, 253-54 (6th Cir. 1978); Penick v. Columbus Bd. of Educ., 583 F.2d 787, 795 (6th Cir. 1978); Armstrong v. O'Connell, 451 F. Supp. 817, 861 (E.D. Wis. 1978).

[108] *See* 573 F.2d at 144; Penick v. Columbus Bd. of Educ., 583 F.2d at 795.

[109] 573 F.2d at 144.

[110] *Id.*; Brinkman v. Gilligan, 583 F.2d at 253; Penick v. Columbus Bd. of Educ., 583 F.2d at 795.

[111] Reed v. Rhodes, 422 F. Supp. 708, 783 (N.D. Ohio 1976). Intact busing occurs when all the students in a particular school grade are bused from an all-black school to an all-white school, or vice versa, and kept together for the entire school day. Armstrong v. O'Connell, 451 F. Supp. 817, 853 (E.D. Wis. 1978).

[112] *See* Brinkman v. Gilligan, 583 F.2d 243, 255 (6th Cir. 1978); Armstrong v. O'Connell, 451 F. Supp. at 861; Reed v. Rhodes, 422 F. Supp. at 708.

[113] Harkless v. Sweeny Ind. School Dist., 554 F.2d 1353 (5th Cir.), *cert. denied,* 434 U.S. 966 (1977).

[114] Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (2d Cir. 1977), *cert. denied,* 434 U.S. 1074 (1978).

[115] *See* notes 60, 65 & 70 *supra.*

Commonwealth,[116] a court reviewed a veterans' preference statute[117] which gave veterans an absolute preference[118] over non-veterans in the appointment of civil service jobs. The woman plaintiff, a non-veteran personnel coordinator,[119] applied for a higher level civil service job and was ranked behind several veteran applicants in order of preference.[120] Since most of these veterans obtained lower scores than she on the same civil service examination, the plaintiff challenged the ranking system of the veterans' preference statute on equal protection grounds.[121] The district court, in a pre-*Washington* decision,[122] held that discriminatory intent was not necessary to establish a fourteenth amendment violation.[123] On remand from the Supreme Court for reconsideration in light of *Washington*, the majority held that *Washington* was not controlling and that the veterans' preference statute violated the fourteenth amendment.[124] The court employed the foreseeable consequences approach,[125] stating that the requisite intent was determined by disproportionate impact,[126] the lack of job relatedness,[127] and the failure of Massachusetts officials to recruit qualified female employees for civil service positions.[128] In addition, the majority concluded that the statute was not facially neutral,[129] since it advanced a policy slanted in favor of men which had more than an incidental effect on hiring opportunities for women.[130] The court reasoned that the legislature was aware that the total number of female veterans comprised only two percent of the entire military population.[131] Therefore, the veterans' preference statute was not facially neutral, but constituted a classification based on sex.[132] The court, however, mistakenly used evidence normally employed to determine the intent of a facially neutral statute to conclude that the Massachusetts legislature had intended to maintain[133] a classifi-

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[116] 451 F. Supp. 143 (D. Mass.), *review granted*, 97 S. Ct. 345 (1978).

[117] MASS. GEN. LAWS, ANN. ch. 31, § 23 (West 1971).

[118] *Id.* Under the Massachusetts statute, applicants who passed the civil service exam were placed on an "eligibles list." The list of eligibles was then ranked in order of composite scores by disabled veterans, other veterans, widows, and widowed mothers of veterans and all other eligible applicants. *Id.*

[119] Anthony v. Commonwealth, 415 F. Supp. 485, 492 (D. Mass. 1976), *vacated and remanded per curiam sub nom.* Massachusetts v. Feeney, 434 U.S. 884 (1977).

[120] *Id.*

[121] The complaint in *Feeney* was filed pursuant to 42 U.S.C. § 1983 (1976). Since a violation of § 1983 also requires intent, the court applied constitutional standards. *See* note 22 *supra*.

[122] Anthony v. Commonwealth, 415 F. Supp. 485 (D. Mass. 1976).

[123] *Id.* at 497.

[124] Feeney v. Commonwealth, 451 F. Supp. 143, 144 (D. Mass. 1978).

[125] *Id.* at 147; *see* notes 53-57 *supra.*

[126] 451 F. Supp. at 148.

[127] *Id.*

[128] *Id.* at 149.

[129] *Id.* at 147.

[130] *Id., citing* Anthony v. Commonwealth, 415 F. Supp. 485, 495 (D. Mass. 1976).

[131] 451 F. Supp. at 148.

[132] *Id.* at 147; *see* notes 8-9 *supra.*

[133] The original veterans' preference statute was passed in 1895. 451 F. Supp. at 148.

cation based on sex.[134] Once a court determines that a statute is non-neutral, intent is to be inferred from the establishment of a suspect classification.[135] The reasoning employed by the court in *Feeney* is directly contrary to the reasoning of other federal courts that have considered veterans' preference statutes.[136] In applying "strict scrutiny"[137] to a facially neutral statute with a disproportionate impact, the court allowed the plaintiff virtually to circumvent the intent requirement of *Washington*, and utilized the foreseeable consequences approach in a unique fashion. The *Feeney* court, by applying the foreseeable consequences approach, transformed a facially neutral statute[138] which did not differentiate between men and women, into a statute which supposedly created a suspect classification. Strict scrutiny is an inappropriate standard of review in such a situation because of the procedure outlined by the Supreme Court in *Arlington Heights*.[139] In using evidence of intent to infer the existence of a suspect classification, the *Feeney* court misapplied the *Washington* and *Arlington Heights* standards by focusing on the standard of review rather than the existence of discriminatory intent.[140] If followed, the *Feeney* approach could lead to the invalidation of every state's veterans preference statute.[141]

The discriminatory intent requirement of *Washington v. Davis*[142] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[143] will bar numerous plaintiffs from proving constitutional violations, especially if intent is necessary for proof of a thirteenth or fifteenth amendment claim.[144] The foreseeable consequences approach[145] and the *Feeney* rationale,[146] however, reduce the plaintiff's burden of proof by eliminating the requirement of presenting direct evidence of purposeful dis-

Since there were virtually no women in the military in 1895, the enactment could not have been passed with discriminatory intent. The violation resulted when the statute was maintained despite the addition of women into the military. *Id.* This approach specifically imposes an affirmative duty on the part of the legislature to act. *See* text accompanying notes 88-93 *supra*.

[134] *See* notes 8-9 *supra*.

[135] *See* note 13 *supra*.

[136] *See, e.g.*, Rios v. Dillman, 499 F.2d 329 (5th Cir. 1974); Branch v. DuBois, 418 F. Supp. 1128 (N.D. Ill. 1976); Wisconsin Nat'l Organ. for Women v. Wisconsin, 417 F. Supp. 978 (W.D. Wis. 1976). *See also* Note, *Veterans Public Employment Preference as Sex Discrimination:* Anthony v. Massachusetts *and* Branch v. Dubois, 90 HARV. L. REV. 805 (1977); Note, *Constitutional Law*, 23 WAYNE L. REV. 1435 (1977).

[137] *See* notes 8-9 *supra*.

[138] MASS. GEN. LAWS, ANN. ch. 31 § 23 (West 1971); *see* note 118 *supra*.

[139] 429 U.S. at 270; *see* text accompanying note 43 *supra*.

[140] *See* note 9 *supra*.

[141] Only Hawaii, Iowa, and New Hampshire do not have veterans preference statutes of some type. As of January 25, 1977 there were 29,607,000 veterans in the United States. Fleming & Shanor, *Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination?*, 26 EMORY L. J. 13, 13 (1977).

[142] 426 U.S. 229 (1976).

[143] 429 U.S. 252 (1977).

[144] *See* note 22 *supra*.

[145] *See* notes 52-57 *supra*.

[146] *See* text accompanying notes 125-141 *supra*.

criminatory intent.[147] Notwithstanding the foreseeable consequences approach and the *Feeney* rationale, the Court's recent requirement[148] will lead to the increasing use of Title VII[149] and the Fair Housing Act,[150] which do not require proof of discriminatory intent.[151] The major impact of the intent requirement will be in the area of school desegregation, since these plaintiffs depend on the fourteenth amendment for relief and cannot utilize any statutory enactment that does not require intent.[152] Only through close scrutiny of a decision-maker's past practices and motivations will a plaintiff be able to prove that a facially neutral decision with a disproportionate impact violates the equal protection clause of the fourteenth amendment. Therefore, plaintiffs may find an insurmountable burden awaiting them because of the inherent difficulties surrounding the proof of specific discriminatory intent.[153]

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[147] *See* text accompanying notes 56-59 & 133-141 *supra.*

[148] *See* text accompanying notes 10-13 *supra.*

[149] 42 U.S.C. § 2000e-16 (1976).

[150] 42 U.S.C. §§ 3601-03 (1976).

[151] *See* note 22 *supra.*

[152] Neither Title VII nor the Fair Housing Act are aimed at the particular discriminatory practice which causes segregated schools. *See* note 22 *supra.*

[153] *See* Comment, *Intent in the Criminal Law: The Legal Tower of Babel,* 8 CATH. U. L. REV. 31 (1959).