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Burden of Proof in Equal Protection Discriminatory Impact Cases: An Emerging Standard

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When action undertaken by a state is challenged as violative of the equal protection clause, judicial inquiry focuses on the existence of a proper legislative purpose and a demonstrable relationship between that purpose and the legislation or regulation enacted to effectuate it. Traditional equal protection cases have involved legislation creating explicit, purposeful classifications, with litigation centering on the constitutional propriety of singling out particular groups for special treatment. Looming in the background, but nevertheless proceeding vigorously, has been litigation involving facially neutral laws which allegedly discriminate indirectly by impact or effect but not by express legislative intent. The first question posed by these impact cases is whether unconstitutional action can exist absent a showing of an intent to discriminate. Prior to recent Supreme Court decisions which addressed this issue directly, some lower federal courts had been willing to find unconstitutional action even when intent had not been proved, as long as the impact on a particular group was sufficiently disproportionate.

The second question raised by these cases relates to the standard of review. To decide cases in the impact area, the lower federal courts have looked to the standards established by the Supreme Court in cases involving express legislative intent. Under the traditional rational basis or minimum scrutiny standard of review, the complaining party is faced with a presumption of statutory validity and has the burden of proving that the challenged statutory

3. See generally Tussman & tenBroek and Developments, supra note 2.
5. See notes 17-36 and accompanying text infra.
6. See, e.g., Developments, supra note 2, at 1076-87.
classification is arbitrary or capricious.\textsuperscript{7} The classification will not be invalidated if any reasonable factual basis may be found by the court to justify it.\textsuperscript{8} In essence, the standard now requires only that the challenged statutory distinction rationally further some articulated, legitimate state purpose\textsuperscript{9} or have some rational relationship to determinable legislative aims.\textsuperscript{10}

When a classification interferes with the exercise of a fundamental right\textsuperscript{11} or operates to the peculiar disadvantage of a protected class,\textsuperscript{12} the rational basis standard is displaced by a strict scrutiny standard of review. In such cases little deference is given to the legislature, since the statute carries a presumption of constitutional infirmity. The state then has the burden of demonstrating a compelling interest directly served by the challenged legislation.\textsuperscript{13} Should the court find that there is no compelling interest, or that there are alternate means available for achieving such an asserted interest which would not impinge as heavily on protected individual interests, the classification will be struck down.\textsuperscript{14}

Without clear guidelines from the Supreme Court, however, the lower federal courts have had some difficulty in ascertaining and establishing consistent principles of review in cases involving facially neutral statutes with an allegedly discriminatory impact. Their attempts to apply to impact cases the principles of equal protection analysis which were developed in cases in-

\textsuperscript{7} Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911).
\textsuperscript{13} See, e.g., Developments, supra note 2, at 1087-1131.
volving express legislative classifications have resulted in strained reasoning. This has been largely because the inquiry into discrimination takes on a different cast when there is no acknowledged legislative intent to create a classification.

This article will examine and assess two recent Supreme Court opinions in which the Court established that the threshold task in impact cases is the identification of a legislative intent to create a classification. The appropriate criteria for ascertaining legislative intent in the context of a facially neutral statute and the somewhat different standard of review for impact cases will be discussed.

I. THE USE OF DISCRIMINATORY IMPACT TO TRIGGER EQUAL PROTECTION ANALYSIS

An equal protection analysis involves two identifiable steps. The court must first determine whether the plaintiff has made a threshold showing of discrimination sufficient to justify judicial review of the challenged state action. A plaintiff's failure to show that the state has somehow singled out a particular group for special or different treatment would end the equal protection inquiry. Only when such state classification with consequent disparate impact is shown will the court advance to the second and final step: to determine if the classification has been justified under the governing standard of review, be it rational basis, compelling interest, or some intermediate standard.

The first analytical step is particularly critical in discriminatory impact cases since by definition they do not involve an express legislative classification. The plaintiff must show that an apparently benign statute, regulation, or administrative action effectively singles out for different treatment a class or group of which he is a member. Absent such a showing, the state's action would be reviewable only under due process standards, which entail a heavy presumption of statutory validity.

Several of the lower federal courts have considered evidence of disproportionate impact alone sufficient to trigger equal protection analysis. In Chance v. Board of Examiners a preliminary injunction was granted against

16. A court "must first ascertain whether the plaintiff has made such a threshold showing as to require a justification, must then identify the classification employed, and must finally determine whether the classification has been justified under governing standards." Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972).
17. 458 F.2d 1167 (2d Cir. 1972). See also Discriminatory Merit Systems: A Case
the use of examinations prescribed and administered by the city board of examiners. These tests were required of candidates seeking licenses for permanent appointment to city school system supervisory positions. The complainants submitted statistical evidence on the racial differences in overall pass rates for assistant principal examinations and on the magnifying effect of requiring candidates to pass the examinations seriatim. Moreover, they presented surveys showing the small percentage of minority school principals and assistant principals in New York City in comparison with other large city school systems that did not have comparable examination requirements.\textsuperscript{18} From the magnitude of this impact evidence alone, the court concluded that a prima facie case of invidious de facto discrimination had been shown.

Harsh racial impact, even if unintended, was sufficient to shift the burden of proof to the city school board, which was called upon to prove that the resulting racial classifications were justified by legitimate state considerations. Noting that invidious discrimination on the basis of race required the most rigid scrutiny, the court observed that the Supreme Court had not yet applied that stringent test to facially neutral regulations.\textsuperscript{19} The court found the school board's procedures for insuring the validity of the tests as indicators of job performance to have been inadequately implemented and, because the examinations did not measure what they purported to measure, deemed the board's procedures invalid under even a rational basis standard of review.\textsuperscript{20} The \textit{Chance} court, therefore, seemed willing to treat a case involving demonstrably harsh racial impact, proved on the basis of statistical evidence alone, as if it were a case of express legislative intent to discriminate on the basis of race for purposes of the first step of the equal protection analysis. The court apparently believed, however, that different treatment was warranted in the second step of the review process; a less rigid standard of review was deemed appropriate since express or implied intent had not been shown.\textsuperscript{21}

\textit{Castro v. Beecher}\textsuperscript{22} is illustrative of another circuit's view on both the sufficiency of evidence to prove discriminatory impact and the standard of review to be applied. Discrimination against black and Spanish-surnamed per-

\textsuperscript{18} Study of the Supervisory Examinations Administered by the New York Board of Examiners, 6 COLUM. J.L. & SOC. PROB. 374, 401-10 (1970).
\textsuperscript{19} 458 F.2d at 1176.
\textsuperscript{20} Id. at 1177.
\textsuperscript{21} Id.
\textsuperscript{22} 459 F.2d 725 (1st Cir. 1972).
sons in the recruiting and hiring of policemen was alleged. The court ob-
served that if plaintiffs' initial showing was merely that some class of plaintiffs
was excluded by the employment classification standards, a relaxed or ra-
tional basis standard of review would be appropriate if the classification were
reasonably related to the permissible goal of selecting qualified persons for
public employment.\textsuperscript{23} However, if the classification had a racially discrimi-

\textit{Applying this analysis to the facts in Castro, the court found that the plain-
tiffs had shown no statistical evidence of discriminatory racial impact result-
ing from minimum height and the swim test requirements.\textsuperscript{28}} As to the civil
service examination, statistical evidence did show a disproportionate failure
rate among the black and Spanish-surnamed applicants and the evidence as
a whole established a prima facie case of discrimination. Although the ex-
amination might pass a minimal standard of rationality, the circuit court was
in apparent agreement with the district court that a satisfactory showing of
job-relatedness had not been made by the state.\textsuperscript{29} A simple showing of a
disproportionate impact was therefore sufficient to trigger a modified comp-
pelling state interest standard in a racial discrimination case.

\begin{footnotes}
\item[23.] Id. at 732.
\item[24.] Id. The court derived this reasoning from Griggs v. Duke Power Co., 401 U.S.
\textbf{424} (1971). Noting that \textit{Griggs} was decided under Title VII of the Civil Rights Act
of 1964, 42 U.S.C. §§ 2000e–2000e-15 (1970), the \textit{Castro} court stated that the four-
teenth amendment demanded a similar standard in impact cases. 459 F.2d at 733.
\item[25.] See note 14 \textit{supra}.
\item[26.] 459 F.2d at 733. See text accompanying note 14 \textit{supra}.
\item[27.] 459 F.2d at 733.
\item[28.] Id. at 733-35.
\item[29.] Id. at 735-36. For other cases relying upon an impact analysis in public employ-
ment see Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975); Bridgeport Guard-
ians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973); Arnold
v. Ballard, 390 F. Supp. 723, 736, 737 (N.D. Ohio 1975); United States v. City of
Chicago, 385 F. Supp. 543, 553 (N.D. Ill. 1974); Wade v. Mississippi Coop. Extension
Serv., 372 F. Supp. 126, 143 (N.D. Miss. 1974); Harper v. Mayor of Baltimore, 359
F.2d 1134 (4th Cir. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (D. Minn.
1972), rev'd on other grounds, 498 F.2d 143 (8th Cir. 1974).
\end{footnotes}
This disparity of judicial standards among the circuits regarding impact cases is further exemplified by the strained effect analysis used in the Seventh Circuit’s opinion in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*. At issue was an allegedly unconstitutional refusal to rezone a parcel of land to permit the construction of a housing development for low and moderate income persons. The court initially commented that a racially discriminatory effect alone, if shown, would give rise to a strict scrutiny standard of review. It found, however, that the mere fact that a greater percentage of blacks than whites were affected by the city’s refusal to rezone the property did not amount to discriminatory effect for equal protection purposes. The court indicated that an extremely high percentage racial impact might present a prima facie case, but since blacks comprised only 40 percent of the eligible prospective tenants, the plaintiffs had not by effect alone cleared the threshold hurdle. This aspect of the opinion represents an approach to the first step in equal protection analysis markedly different from that employed in *Chance* and *Castro*, in which the precise degree of disproportionate impact was not focused on by the court.

The inquiry in *Arlington Heights* did not end there, however. The circuit court proceeded to make a broader based factual examination in which the impact was assessed in its historical context. The court found that the ultimate effect of the refusal to rezone would be to perpetuate the de facto segregated character of the village which was already over 99 percent white. The town argued that it had not intentionally created this situation of almost total racial segregation, but the court indicated that the village had an affirmative duty to alleviate the problem since it was apparently ignoring and even exploiting the situation. The court did not characterize this latter finding as proof of discriminatory intent, but held, in effect, that in light of this affirmative obligation, the disproportionate racial impact of the city’s refusal to rezone triggered the strict scrutiny equal protection analysis employed in

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30. 517 F.2d 409 (7th Cir. 1975), rev’d and remanded, 249 U.S. 252 (1977). The district court held that the village’s evidence established that it was motivated by legitimate interests. In addition, there was no evidence to prove discrimination against racial minorities as distinguished from the underprivileged generally. 373 F. Supp. 208 (N.D. Ill. 1974). The circuit court initially found that even though the city was not consistent in its application of its zoning policies, this did not necessitate a finding that the village administered its zoning policy in a discriminatory manner. 517 F.2d at 412.

31. 517 F.2d at 412-13.

32. *Id.* at 413. The court based this result on *James v. Valtierra*, 402 U.S. 137, 141 (1971). There the Court rejected a contention that a law seemingly neutral on its face was, in fact, directed at a racial minority and required strict scrutiny.

33. 517 F.2d at 413-14.

34. *Id.* at 414.
race cases. The village's asserted justifications of maintaining the integrity of its buffer zone policy and protecting neighboring property values were insufficient to withstand that test.\(^{35}\)

The complexity and confusion of equal protection impact analysis in these recent cases is apparent. The lower federal courts have taken differing views of the threshold showing of the discriminatory impact necessary to overcome the initial presumption of statutory validity. They also appear to apply varying standards of review once a prima facie case has been established, with some courts adopting the traditional equal protection compelling interest analysis evolved in express intent race cases and others assuming that a less rigid standard is appropriate when discriminatory intent has not been proved. Overshadowing these identifiable problem areas is an apparently varying sensitivity and receptivity among the circuits to the impact analysis approach to equal protection issues. One pattern of consistency, however, is evident: discriminatory impact alone, even absent a showing of discriminatory intent or purpose, has been considered sufficient to trigger equal protection review.\(^{36}\)

II. IMPACT ANALYSIS AS AN ELEMENT IN ESTABLISHING A DISCRIMINATORY PURPOSE

The lower federal courts cases just examined are notable for the absence of any judicial inquiry into actual legislative intent or purpose. The propriety of this approach was put to the ultimate test when the Supreme Court, at the end of its 1976 term, considered an equal protection case grounded solely

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35. Id. at 415. For cases relying upon an impact analysis in a variety of municipal activities see Gautreaux v. Romney, 448 F.2d 731, 738 (7th Cir. 1971) (dictum) (public housing); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), aff'd on reharing en banc, 461 F.2d 1171 (5th Cir. 1972) (municipal services); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (zoning); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 295 (9th Cir. 1970) (dictum) (zoning); Norwalk CORE v. Norwalk Redevelop. Agency, 395 F.2d 920 (2d Cir. 1968) (urban renewal); Crow v. Brown, 332 F. Supp. 382, 391 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972) (public housing).

on disproportionate impact. In *Washington v. Davis*\(^{37}\) the issue was the validity of a written personnel test used to ascertain whether prospective police recruits had acquired a particular level of verbal skill. The test was administered pursuant to a statute establishing facially neutral qualifications for public employment in the District of Columbia. Plaintiffs alleged that the test discriminated against black applicants on the basis of race because it excluded a disproportionately high number of blacks. The court of appeals in *Davis* had held that the lack of discriminatory intent in the use of the test was irrelevant, that the critical point was that four times as many blacks as whites failed the test, and that such a disproportionate impact was sufficient to establish a constitutional violation absent any proof that the test adequately measured job performance.\(^{38}\)

The Supreme Court reversed, stating that the invidious quality of a law alleged to be racially discriminatory must ultimately be traced to a racially discriminatory purpose in order to establish an equal protection violation.\(^ {39}\) The Court pointed to its prior decisions as setting forth the proper standard.\(^ {40}\) Discriminatory purpose was said to be the common thread running through cases involving exclusion of blacks from grand juries,\(^ {41}\) reapportionment,\(^ {42}\) school desegregation,\(^ {43}\) and alleged racial discrimination in various provisions of the Social Security Act.\(^ {44}\) Although there was no requirement that the discriminatory purpose be express or appear on the face of the statute, it could be inferred from the totality of the relevant facts, including demonstrated instances in which the law had had a disproportionate impact on one

\(^{37}\) 426 U.S. 229 (1976). The actual constitutional challenge was based upon the due process clause of the fifth amendment and its equal protection component prohibiting the federal government from invidiously discriminating against individuals and groups. The standard of review is substantially the same as that under the fourteenth amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).


\(^{39}\) 426 U.S. at 238-48.

\(^{40}\) *Id.* at 239-41.


\(^{43}\) *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205, 208 (1973). See also *id.* at 199, 211, 213.

race. Impact was considered to be a particularly cogent inquiry when discrimin- 
ination was difficult to explain on nonracial grounds or when there was 
a total or seriously disproportionate exclusion of one race from jury venires. 
In such cases the Court seemed willing to recognize that proof of impact alone 
might be sufficient to establish a prima facie case of unconstitutional dis- 

45 As a general rule, however, a facially neutral law, serving ends otherwise within the legitimate power of government to pursue, was not 

46 to be held invalid merely because it affected a greater proportion of one race 

47 than another. Thus, although not irrelevant, disproportionate racial impact 

48 alone could not generally trigger the use of a strict scrutiny analysis. To 

adopt such a simple impact rule would, according to the Court, operate to 

49 invalidate a broad range of essential and legitimate legislation.47 

Although the facts in Davis did not warrant any discussion on the point, 

50 the Court did briefly indicate what the state’s burden of proof would entail 

51 if a prima facie case of discriminatory purpose were proven. Citing the jury 

52 cases,48 the Court noted that once a prima facie case had been established 

53 a presumption of unconstitutional intent existed. To rebut this presumption, 

54 the state was required to show that the use of permissible racially neutral 

55 selection criteria and procedures would have produced the monochromatic re- 

56 sult.49 This alternative type of proof appears to be somewhat different from 

57 the compelling interest burden associated with legislation creating express 

58 classifications based on race. 

59 Davis put an end to the use of an expansive impact inquiry as a substitute 

60 for a finding of actual discriminatory intent.50 Since the Court indicated that 

45. 426 U.S. at 241-42. 
46. Id. at 242. 
47. 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 the average black than to the more affluent white. 

Id. at 248, citing Goodman, De Facto School Segregation: Constitutional and Empirical 

Analysis, 60 CALIF. L. REV. 275, 300 (1972); Silverman, Equal Protection, Economic 


49. 426 U.S. at 241.

50. For a post-Davis case involving alleged sexually discriminatory employment prac- 
tices, see Dothard v. Rawlinson, 97 S. Ct. 2720 (1977), aff’g in part, rev’g in part, and 
equal protection issue, the district court agreed with Ms. Mieth that minimum height 
and weight requirements for the position of state trooper discriminated against women. 
Citing Davis for the proposition that evidence of disproportionate impact was relevant.
disproportionate impact is "not the sole touchstone of an invidious racial discrimination forbidden by the Constitution," some other, unspecified types of proof were needed. Arguably, the greater the degree of disproportionate impact shown, the lesser the need for these unspecified types of proof, since the inference of discriminatory intent will then be strong. Mr. Justice Stevens, in his concurring opinion in *Davis*, suggested that in such cases "it really does not matter whether the standard is phrased in terms of purpose or effect" since the line between discriminatory purpose and effect is not as bright as the majority seemed to suggest.  

51. Id. at 254. He concluded that "when the disproportion is . . . dramatic . . . it really does not matter whether the standard is phrased in terms of purpose or effect." *Id.*

52. *Id.* at 253. He also argued that since the burden of proving a prima facie case involves differing evidentiary considerations, the degree of deference an appellate court gives a lower court's findings of fact, and even the extent to which the issue of purpose or intent is characterized as a question of fact or law, will vary from case to case. *Id.* at 253. Implicitly that a constitutional determination of intent should be based more on the particular facts of the case than on an individual court's view of them, he argued that objective evidence of intent rather than evidence of a subjective state of mind of the actor was a proper area of inquiry, particularly since an actor is normally presumed to have intended the natural consequences of his actions. As applied to government

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To the question of discriminatory intent, the court concluded that compelling statistical evidence of the exclusion of women, coupled with the testimony of the director of the state department of public safety that women should not be state troopers, provided sufficient evidence of intent to discriminate on the basis of sex. Thus, under the rational basis test, the burden shifted to the state to show that the minimum height and weight requirements were sufficiently job related to be a legitimate state interest. The court rejected the state's efforts to show such an interest. 418 F. Supp. at 1180-82, 1185. This constitutionally based aspect of *Mieth* was not appealed to the Supreme Court. *Dothard v. Rawlinson*, 97 S. Ct. 2720, 2724 n.4 (1977).

Also at issue in *Mieth* was whether statutorily based minimum height and weight requirements for prison guards were permitted under Title VII of the Civil Rights Act. The district court again found the violation on the basis of strong statistical evidence which tended to show a disproportionate impact upon women. Thus, the constitutional standard of discriminatory purpose was not reached. On appeal, the Supreme Court affirmed since these requirements were generally not shown to be job related, but reversed as to certain specific prison guard positions in all male prisons where a bona fide, sex-based, occupational qualification was found to exist under the Act. The Court did comment that even though the bona fide occupational exemption was meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex under the Act, "[i]n the case of a state employer, . . . [this] exception would have to be interpreted at the very least so as to conform to the Equal Protection Clause of the Fourteenth Amendment." 97 S. Ct. at 2729 n.20. See also *Branch v. Du Bois*, 418 F. Supp. 1128, 1132 (N.D. Ill. 1976), in which the court relied on *Davis* to uphold, against a sex-based equal protection challenge, a statute which awarded preference points to certain veterans on civil service examinations. *Accord*, *Ballou v. New Jersey Dept. of Civil Service*, 148 N.J. Super. 112, 372 A.2d 333 (1977).
III. CONSIDERATIONS FOR A PROPER INTENT OR PURPOSE INQUIRY

The Davis Court implied that the search for discriminatory purpose in facially neutral laws must look behind impact and into the legislative or administrative process itself, but it failed to suggest how this could be done. Some proper evidentiary considerations were subsequently established by the Supreme Court in Village of Arlington Heights v. Metropolitan Housing Development Corp. In this case the Court held that the racially disproportionate impact of the city's refusal to grant a zoning change for the construction of low income housing was not sufficient, absent evidence of racially discriminatory motivation, to prove an equal protection violation.

Observing that Davis meant that government action will not be held unconstitutional solely because it results in a racially disproportionate impact, the Court reemphasized that Davis did not require a plaintiff to prove that the actions of the governing body were based solely, or even primarily, on discriminatory purposes. Since racial discrimination is not a legitimate consideration in the legislative process, when the evidence shows that "a discriminatory purpose has been a motivating factor in the [legislative] decision . . . judicial deference is no longer justified." Determining that such a discriminatory motivating factor exists requires a judicial inquiry into any cir-

action, he suggested a balanced approach was needed. For "[i]t is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate [legislative] action simply because an improper motive affected the deliberation of a participant in the decisional process." Id. Thus, in Mr. Justice Stevens' view, personal motives of the members of a lawmaking body should not be considered but, rather, an objective determination of the collective views of the members should be made. See also notes 63-68 and accompanying text infra.

54. Id. at 265. The Court will not consider a hierarchy of importance of legislative purposes since they are difficult enough to ascertain without also having to determine the importance of each purpose during the legislative process. See McGinnis v. Royster, 410 U.S. 263, 276-77 (1973).
55. 429 U.S. at 265-66.

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Id.
cumstantial or direct evidence from which intent might be imputed or inferred.

The *Arlington Heights* Court proceeded to suggest a variety of ways by which impermissable intent could be shown. In addition to evidence of disproportionate impact, a history of other discriminatory action would be relevant, as would the factual circumstances surrounding the particular government action challenged. Evidence of procedural or substantive departures from established practices would be probative of intent, particularly if the action appeared to contravene the legitimate considerations usually employed by the governing body. The court's inquiry could be aided by examination of any available legislative or administrative history, deliberative statements of the members of the governmental body, reports, and minutes. Significantly, the Court suggested that in rare circumstances members of a lawmaking body could be called upon to testify as to the purpose of their action, though such testimony would still be limited by privilege.56

A successful showing of an improper legislative or administrative motivation by the use of these evidentiary factors will not necessarily warrant a decision for the plaintiff. This indirect proof of intent from objective factors serves only to establish a prima facie case. The *Arlington Heights* plaintiffs had failed to prove that a discriminatory purpose was a motivating factor in the governmental action; thus the constitutional inquiry was ended and the plaintiffs lost their case. However, the Court noted that, had a prima facie case been shown, the burden of proof would have shifted to the city to demonstrate that the result would have occurred even if the impermissible discriminatory purpose had not been present during the legislative process.57 Thus, the Court took a step toward answering the second major question raised in the impact cases: the identification of an appropriate standard of review.

IV. THE IMPACT OF *Arlington Heights*

After *Davis* and *Arlington Heights*, it is clear that the standard of proof necessary for a prima facie case has been augmented. Pre-*Davis* cases required a plaintiff to show only disproportionate racial impact of a facially neutral statute or regulation in order to shift the burden of proof to the government. Now such evidence of impact has become a part of the broader inquiry into discriminatory purpose. Proving unconstitutional intent is generally more difficult than showing disproportionate effect.

56. *Id.* at 268. See notes 64-68 and accompanying text infra.
57. 429 U.S. at 270-71 & n.21.
In facially nonneutral laws which create express classifications, ascertaining a legislative or administrative purpose is usually subordinate to determining if the express classifications so created can be justified under a rational basis, an invigorated rational basis, or a strict scrutiny analysis. In these cases the intent or purpose is usually clear from the face of the statute or is otherwise easily ascertainable, whereas in facially neutral laws, which do not directly create classifications, ascertaining the true purpose of the governing body has become the paramount inquiry. In these latter cases, a plaintiff must try to show there was an actual intent to create impermissible classifications when there was no apparent intent from the face of the statute to do so. Since those impermissible motivations which undoubtedly still persist in the legislative process are increasingly well disguised by governmental bodies sensitive to the possibility of subsequent judicial review, intent by inference has become the touchstone in discriminatory impact cases. The presumption of constitutional validity normally attached to legislative action will simply be harder to overcome when there is no express intent to discriminate or to create classifications which discriminate.

Although the intent or purpose burden of proof will probably discourage many constitutional challenges to facially neutral laws, the *Arlington Heights* opinion suggests some solutions to the practical problem of marshalling evidence to prove a prima facie case of impermissible intent. An impact analysis with its attendant statistical percentages may still be presented as part of an indirect proof of intent. In fact, proof of disproportionate impact, by statistical or by less sophisticated means, is presumably a *sine qua non* in the context of facially benign state action. Although in a rare case disproportionate impact alone will give rise to a necessary inference of improper motivation, as in a case in which the impact is egregious or seriously disproportionate, most plaintiffs will have to couple disproportionate impact with an independent showing of discriminatory intent. For these plaintiffs there are four key areas of evidentiary inquiry that may prove fruitful: an historical background of invidiously discriminatory official action; a sequence of events surrounding the challenged governmental action which strongly suggests a particular motivation; departures from usual legislative or administrative procedures; and, particularly in the context of administrative decisionmaking, the failure to apply established governing considerations or policies. It would appear that the greater the impermissible intent shown by a plaintiff in his prima facie case, the greater the state's burden of showing that the same result would have obtained even absent the improper motive.

58. *See* note 14, *supra*. 
A close look at these four areas of inquiry indicates that they are not so new; nor do they pose an impossible obstacle for all potential plaintiffs. The factual basis in Arlington Heights can be instructively compared to that in Kennedy Park Homes Association v. City of Lackawanna, another attempt to secure city approval of a low income housing project in which the plaintiff ultimately prevailed. While in Arlington Heights the Seventh Circuit rested its subsequently reversed finding of an equal protection violation on its conclusion that the refusal to rezone perpetuated the de facto segregated character of the city, the plaintiffs in Kennedy Park presented a veritable litany of evidence to prove their constitutional claim. Although Kennedy Park occurred before Davis or Arlington Heights, its analytical approach was a precursor to the totality of circumstances approach announced by the Supreme Court in the latter two cases. In Kennedy Park, the Second Circuit considered the immediate objective, the ultimate effect, and the existing conditions at the time of the city's action. Although the court did not couch its analysis in terms of unconstitutional purpose, after the Supreme Court's decision in Arlington Heights, it is evident that the discriminatory intent was amply demonstrated.

In Kennedy Park the court examined a number of city activities. A long-standing, manmade, physically segregated city ward existed. There was evidence of a protracted history of containment of almost all of the city's blacks in this ward, as well as ill-feeling in the community when the proposed new subdivision was announced publicly. The city planning board reversed its predecessor and recommended additional residential use of land in the nearly all black ward which had the highest residential density in the city. The city planning and zoning boards jointly recommended both a moratorium on new subdivisions and zoning of the proposed project site for park and open area use, contrary to the specific recommendation of a planning expert. The city council adopted these recommendations as city ordinances and imposed a sewer moratorium based on long-existing sewer inadequacies on which it had previously failed to act. The court concluded that the city had falsely justified its reasons for these actions. After Arlington Heights it is clear how a plaintiff could successfully argue these facts; such municipal actions taken together would not only establish a prima facie case but would make it

60. 436 F.2d at 113. This language was apparently derived from the Supreme Court's decision in Reitman v. Mulkey, 387 U.S. 369, 373 (1967) (approving the action of the California Supreme Court in striking down a section of the state constitution because it involved the state in racially discriminatory housing).
61. 436 F.2d at 113-14.
practically impossible for the city to meet its own burden of proof.\textsuperscript{62}

One further aspect of the guidelines set out in \textit{Arlington Heights} and available to a plaintiff to prove his case deserves special consideration. This involves the nature of the evidence by which a plaintiff might show discriminatory intent. The Supreme Court indicated that under rare circumstances members of a legislative body could be called to testify at trial as to the purpose of their official action.\textsuperscript{63} This would seem to suggest that the Court would permit an inquiry into the individual subjective motivations of at least some members of a legislative or administrative panel. Previous Supreme Court decisions have rejected such an inquiry on the basis of a legislative privilege existing under general notions of separation of powers since it amounts to an intrusion into the legislative or administrative process.\textsuperscript{64} However, it is probable that the Court did not actually intend such an inquiry. Placing “the members . . . [on] the stand at trial to testify concerning the purpose of the official action”\textsuperscript{65} suggests that an individual member might be permitted to testify to the collective purposes of the entire legislative body or the voting majority rather than to his own motives or the individual motives of his colleagues. Such an interpretation would be consistent with the other evidentiary considerations set forth in \textit{Arlington Heights}, which essentially point to various objectively determinable elements of legislative purpose.\textsuperscript{66} Thus, an inquiry into collective legislative purpose or intent would not include individual motives. Presumably, a legislative privilege could be invoked if the inquiry at trial even attempted to focus on the personal motivations of the testifying legislative member.\textsuperscript{67} Ascertaining collective legis-

\begin{itemize}
\item 63. 429 U.S. at 268.
\item 65. 429 U.S. at 268.
\item 66. \textit{Id.} at 266-67.
\item 67. Examining motives is said to involve an inquiry into the subjective reasons for legislative action; on the other hand, examining purposes involves an inquiry into what the legislature sought to achieve and not why. Purpose is derived from the terms of
ative intent by placing a legislative member on the stand should be permitted only as a last resort, in situations in which purpose cannot be determined otherwise. In this way, inhibition and infringement on the legislative or administrative process can be kept to a minimum.

An intent standard has its own inherent difficulties. A plaintiff will usually be confronted with inadequate or nonexistent administrative or legislative records, along with procedural difficulties in obtaining access to or copies of them when they do exist. Marshalling various kinds of evidence tending to show an impermissible intent is particularly difficult if the questioned governmental action took place at a time much earlier than the commencement of the suit. Proving a legislative intent different from that actually expressed is also expected to be difficult when a particular court has shown considerable deference to legislative or administrative bodies in the past. A plaintiff who has cleared all these hurdles, however, will still have only established a prima facie case.

Once the burden of proof shifted to the governmental body, the circuit courts in the pre-Davis impact cases utilized existing standards of review inconsistently. Davis and Arlington Heights both addressed the state's burden of proof only incidentally. In the latter case, the Court, in a footnote, did indicate that once the burden of proof had shifted, the governing body could show that the particular action complained of would have occurred even if an impermissible discriminatory purpose had not been present during the law-making process.

Insight into this apparently new standard of judicial review may be gleaned from the Court's earlier decisions in the school desegregation cases. When

the statute, its operation, and the legal and practical context in which it was enacted. To determine a legislative purpose, a court may properly consider the language of the statute, general public knowledge about the problem which the legislature was addressing, prior law, accompanying legislation, enacted statements of purpose, formal public pronouncements, and legislative history. Purpose is determined objectively and derived from the collective membership of the legislative body. In general, courts may inquire into purpose but not motive. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1413-16 (1958); Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1077, 1091-92 (1969). See also A. Bickel, The Least Dangerous Branch 208-21 (1962); Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95; Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Howell, Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute, 47 Va. L. Rev. 439, 440-44 (1961); Tussman & tenBroek, supra note 2 at 356-61.


69. 429 U.S. at 270, n.21.
the Court decided *Davis* it drew upon *Keyes v. School District No. 1*,\(^7^0\) among other cases, to show that proof of racially discriminatory intent or purpose was required to demonstrate a violation of the equal protection clause.\(^7^1\) In *Arlington Heights* the Court invoked *Davis* and *Keyes* for this same proposition.\(^7^2\) An examination of the Court's treatment of the school district's burden of proof in *Keyes* shows a clear parallel to the approach taken in *Arlington Heights*.

In *Keyes* the Court indicated that the essential element of de jure segregation is "a current condition of segregation resulting from intentional state action."\(^7^3\) The distinction between a constitutionally permissible, purely de facto segregated school system and a constitutionally impermissible, de jure system was said to be one of purpose or intent to segregate.\(^7^4\) Since there was no express statutory de jure system of education based on race,\(^7^5\) an unconstitutional purpose could be proven, if necessary, from the actions of the school board over a period of years. The Court used evidence of a prima facie case of intentional discrimination in one part of the school system to create a presumption that the remaining parts of the system under one school board were similarly segregated.\(^7^6\) The burden of proof then shifted to the school board, which had two ways to overcome this presumption. First, the board could attempt to prove that segregative intent was not among the factors motivating its actions.\(^7^7\) Second, if the board could not affirmatively disprove the presumption of segregative intent in the other parts of the school system, it could "rebut the prima facie case only by showing that its past acts did not create or contribute to the current segregated condition"\(^7^8\) in the remaining parts of the school system.

This latter burden of proof for the school board in *Keyes* is equivalent to that suggested in *Arlington Heights*, in which the city could have attempted

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\(^7^0\) 413 U.S. 189 (1973). *See*, e.g., *Note, Constitutional Duty to Desegregate De Facto Segregation*, 23 EMORY L.J. 293 (1974) (discussing *Keyes*). The Court's thinking on intent as the proper measure in the de facto school segregation race cases is also evident in *Milliken v. Bradley*, 418 U.S. 717, 721-22, 741 n.19, 755-56 (Stewart, J., concurring).

\(^7^1\) 426 U.S. at 240, 243-44.

\(^7^2\) 429 U.S. at 264-65.

\(^7^3\) 413 U.S. at 205.

\(^7^4\) *Id.* at 208. *See also id.* at 199, 211, 213.

\(^7^5\) *Id.* at 201.

\(^7^6\) *Id.* at 208.

\(^7^7\) *Id.* at 210, 213-14. The Court specifically indicated that the board could not overcome the presumption merely by asserting logical, permissible explanations for its actions. *Id.* at 210.

\(^7^8\) *Id.* at 211, 213-14.
to show, had the burden shifted to it, that the denial of the zoning change would have occurred even in the absence of an impermissible intent. This also appears to be operationally the same as the burden drawn from the jury cases in the *Davis* opinion.\(^7\) A prima facie case of discriminatory purpose to exclude blacks from juries could be met by a clear showing that permissible racially neutral selection criteria and procedures resulted in a total or near total absence of blacks from juries.

On the basis of the analysis in *Keyes*, it would appear that, as a general matter of proof, to rebut a prima facie case of intent, a governmental body should be permitted to present evidence that its actions did not amount to an intent to discriminate. However, such an appearance belies the unique factual situation in *Keyes*. There, because of the particular facts, that is, because plaintiff proved a prima facie case of de jure, intentional segregation in one part of the school system, the Court created in effect a rebuttable presumption that the same segregative intent proven in one part of the school system caused the segregative conditions in other parts of the system controlled by the same school board. Thus it was reasonable to allow the city to attempt to disprove actual intent in those parts of the school system under consideration. In *Arlington Heights*, on the other hand, the kinds of proof the Court was suggesting would have tended to raise an inference of intent, rather than the more mechanical presumption used in *Keyes*, and, to a certain extent, in the jury cases. In the *Arlington Heights* situation, it may be anomalous to suggest that the village could disprove intent once it was shown.

In a hypothetical case in which an impermissible intent has been shown to have played a part in the legislative or administrative process, the rule announced in the *Arlington Heights* footnote would apply. A prima facie case having been shown, the defendant could only prevail by demonstrating that the result would have occurred even if the discriminatory intent had not been present. In effect, it would have to demonstrate that permissible purposes, such as a desire to maintain nearby property values or maintain the integrity of the city zoning plan, were sufficient of themselves to dictate the result reached.\(^8\) The stronger the initial showing in the plaintiff’s prima

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79. See text accompanying notes 48-49 supra.

80. Further insights into the burden of proof placed on the state are contained in *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), a decision announced on the same day as *Arlington Heights*. An untenured teacher alleged that the board's refusal to renew his contract violated his right to free speech under the first and fourteenth amendments. Mr. Doyle communicated the contents of the principal's memorandum on teacher dress and appearance by telephone to a local radio station which announced it
facie case to the effect that the defendant had departed from its usual procedural or substantive considerations, the more difficult this burden would be to sustain.

While it was suggested earlier in this article that the burden upon a plaintiff to prove discriminatory intent is now greater than under a mere impact analysis approach, the state's burden to show that it acted in a constitutionally permissible manner appears to be less difficult than under a strict scrutiny standard of review. The Court is imposing a lower burden on the state legislative or administrative body in inferred intent cases, since the governmental body will be allowed to show that concurrent permissible reasons, which may often exist, would have dictated the same action. In the express classification cases, only a compelling justification would suffice; in the inferred intent cases, it appears that permissible motivations need only be independent and legitimate. On the other hand, although the justification itself need not be a compelling one, it must be shown to play a legitimately significant role in the legislative process.

The inferred intent cases add a new dimension to the state's burden of proof in equal protection analysis. If a plaintiff can produce evidence tending to show an actual intent to act to the detriment of a judicially recognized, constitutionally protected fundamental interest or any legitimate interest held by members of a judicially recognized, constitutionally protected suspect class, the legislative or administrative action is not ipso facto unconstitutional. In sharp contrast, there exists in effect a rebuttable presumption of constitutional infirmity in the express intent cases, which theoretically may be met by a compelling state interest. This burden, hardly ever met in practice, is appropriate since the impermissible purpose and the classification itself in these cases are nearly inseparable. In the inferred intent cases, the Court appears to have maintained the rebuttable presumption approach, but the state is permitted broader leverage to justify its actions by a showing of inde-
pendent legitimate justifications. It is most probably the Court’s traditional reluctance to interfere with the legislative and administrative process which explains the seemingly wider breadth afforded a governmental body in the inferred intent cases.

V. CONCLUSION

In a broadly conceptual context, the Supreme Court’s examination of previous equal protection cases has been to determine or to touch upon the constitutionality of legislative purposes. *Davis* and *Arlington Heights* have provided a fresh focus to previously muddled equal protection impact analysis. Purpose or intent is rather easily ascertainable from facially nonneutral statutes creating express classifications. Existing rational basis and strict scrutiny forms of equal protection analysis have generally permitted the courts to determine the actual purpose of the law directly from the statute or from a reasonable inference by the court itself. However, facially neutral statutes which may cause discriminatory effects pose a more difficult problem of ascertaining actual legislative intent or purpose. Such purposes are inferred from objective facts and the totality of the circumstances surrounding the enactment of a facially neutral law.

For inferred intent cases, there now exists a more balanced approach to equal protection analysis. A plaintiff must prove that his interests are constitutionally protected and, by inference or by some objectively identifiable “motivating factor,” that the governmental body intended to infringe upon this constitutionally protected right. At this point the burden shifts to the governmental body to prove, by what may arguably be construed as at least a preponderance of the evidence standard, that it acted with a wholly independent constitutionally permissible intent. This apparently new approach protects against a legislative or administrative body’s invasion of constitutionally protected rights without imposing upon the governing body the insurmountable burden of sustaining an action that it could and would have taken in any case.

*James D. Thomas*