THE VILLAGE OF ARLINGTON HEIGHTS: EQUAL PROTECTION IN THE SUBURBAN ZONE

*By Robert J. Lotero**

Municipal zoning practices in the United States have been characterized as one of the factors contributing to the pervasive racial and economic segregation between urban centers and their suburbs.[1] This characterization raises the question whether suburban zoning ordinances and their application sometimes violate the equal protection clause of the Fourteenth Amendment.[2] Although some state courts[3] and lower federal courts[4] have addressed this socially significant issue, not until 1977 did the United States Supreme Court consider the possibility that a zoning ordinance might be racially discriminatory.[5]

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* Member, second year class.

1. Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 TOL. L. REV. 65, 74-80 (1969); Branfman, Cohen & Trubeck, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483, 484-85 (1973) [hereinafter cited as Branfman]; *see* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) [hereinafter cited as Sager].

2. See Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*] for an oft-quoted discussion of equal protection doctrine.

3. *See, e.g.*, Town of Los Altos Hills v. Adobe Creek Properties, Inc., 32 Cal. App. 3d 488, 108 Cal. Rptr. 271 (1973); Malmar Assocs. v. Board of County Comm'rs, 260 Md. 292, 272 A.2d 6 (1971); Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied and appeal dismissed*, 423 U.S. 808 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975); *In re* Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

4. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Southern Alameda Spanish Speaking Organizations v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Ybarra v. Town of Los Altos Hills, 370 F. Supp. 742 (N.D. Cal.), *aff'd*, 503 F.2d 250 (9th Cir. 1974).

5. The landmark case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), involved a substantive due process challenge of zoning, as did Nectow v. City of Cambridge, 277 U.S. 183 (1928). In two later equal protection zoning challenges, the Supreme Court denied an alleged infringement of fundamental interests in one, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), and dismissed the other for lack of standing to sue, Warth v. Seldin, 422 U.S. 490 (1975).

The equal protection issue was squarely presented to the Supreme Court in the case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[6] This note, after discussing the decisions of the district court and court of appeals, analyzes the approach taken by the Supreme Court in rejecting this equal protection challenge. The Court's requirement that the plaintiff prove discriminatory purpose, the mechanics of determining purpose, and the Court's review of the evidence to determine if plaintiffs had met the requirements are discussed first. Next, the note presents alternatives less burdensome to plaintiffs than the requirement of proof of discriminatory purpose. The author concludes that the Court has unfortunately insulated zoning practices from strict scrutiny under equal protection analysis.

I. The District and Circuit Court Decisions: *Metropolitan Housing Development Corp. v. Village of Arlington Heights*

The Village of Arlington Heights is a Chicago suburb of over 60,000 residents of whom, as of 1970, twenty-seven were black.[7] Metropolitan Housing Development Corporation (MHDC), a nonprofit organization formed to construct low and moderate cost housing, obtained a purchase option on fifteen acres of land in the village on which it proposed to develop a federally subsidized town house project that would be racially integrated. Because the site, like the surrounding area, was zoned for single family dwellings, MHDC petitioned the village to have the property rezoned for the intended multiple family use.

When the village Board of Trustees followed the recommendation of the Plan Commission and denied the rezoning request, MHDC and minority group individuals as prospective tenants of the proposed project filed suit in federal district court. Their petition alleqed in separate counts that, first, the rezoning denial deprived MHDC of the right to use its property in a reasonable manner and, second, perpetuated racial segregation in violation of the Fourteenth Amendment, of plaintiffs' civil rights under sections 1981,[8]

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6. 97 S. Ct. 555 (1977).

7. 373 F. Supp. 208 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975). Facts set forth in this section are taken from the court of appeals' opinion, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 410-11 (7th Cir. 1975).

8. "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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981 (1970).

1982,[9] and 1983[10] of Title 42 of the United States Code, and of the federal Fair Housing Act.[11]

The district court characterized MHDC's property right claim as "the refusal of the Village to accommodate a landowner's desire to use his property as he sees fit."[12] Regarding the minority group plaintiffs' allegation that the rezoning denial perpetuated racial segregation, the court stated that the factual question was "whether the result of the defendant trustees' action caused racial discrimination."[13] While thus recognizing that plaintiffs' allegations raised both due process and equal protection issues, the district court's decision did not address the constitutional issues separately, nor did it clearly articulate the legal doctrine applicable to either issue. It appears that the trial court applied an identical level of review in resolving both constitutional challenges and therefore found it unnecessary to treat the due process and equal protection issues separately.

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9. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1970).

10. "Every 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." 42 U.S.C. § 1983 (1970).

11. Relevant portions are set out below:

"As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

"(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin." 42 U.S.C. § 3604 (Supp. V 1975).

"Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615 (1970).

"It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by sections 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action." 42 U.S.C. § 3617 (1970).

12. 373 F. Supp. at 209.

13. *Id.* at 210.

Against a due process challenge, zoning ordinances and actions are accorded a presumption of validity.[14] The burden is on the challenger to rebut this presumption[15] with what is generally regarded as an extraordinarily difficult proof.[16] As long as the zoning decision is reasonable and not arbitrary the courts will not interfere.[17] This due process standard comports with "traditional" equal protection doctrine:[18] that a governmental action will be upheld as long as it bears a "rational relationship" to a legitimate governmental purpose.[19] This standard of equal protection review has been called "minimal scrutiny." In contrast to this lenient standard, a rigorous standard of review is invoked if a governmental act is shown to affect "suspect classes"[20] or to infringe upon a "fundamental interest."[21] In such cases the presumption of validity is abandoned and the burden is placed on the defendant to prove that the action furthers a "*compelling* governmental

14. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); Rogers v. Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); R. ANDERSON, 1 AMERICAN LAW OF ZONING 104-08 (2d ed. 1976) [hereinafter cited as ANDERSON].

15. *See* National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577 (1970), *cert. denied*, 398 U.S. 946 (1968); Rosseau v. Building Inspector of Framingham, 349 Mass. 31, 206 N.E.2d 399 (1965); Town of Bedford v. Village of Mt. Kisco, 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973); ANDERSON, *supra* note 14, at 109-10.

16. *See* ANDERSON, *supra* note 14, at 111-12, and cases cited therein.

17. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926); ANDERSON, *supra* note 14, at 104-05.

18. *See* Sager, *supra* note 1.

19. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971).

20. Classes identified as "suspect" include race, Loving v. Virginia, 388 U.S. 1, 9 (1967); national origin or ancestry, Oyama v. California, 332 U.S. 633, 644-46 (1948); illegitimacy, *compare* Gomez v. Perez, 409 U.S. 535, 537-38 (1973) *with* Jiminez v. Weinberger, 417 U.S. 629 (1974); and alienage, Graham v. Richardson, 403 U.S. 365, 372, 376 (1971). However, alienage is only categorically suspect when state statutes involve such a classification. *Compare* Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (invalidating "state" statute, Puerto Rico being considered a state, 426 U.S. at 597) *with* Matthews v. Diaz, 426 U.S. 67 (1976) (upholding federal statute). *But see* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), which indicated that actions of federal agencies, as opposed to presidential or congressional acts, that discriminate against aliens may violate the Fifth Amendment. Whether sex has been recognized as a suspect classification appears to be doubtful. *Compare* Reed v. Reed, 404 U.S. 71 (1971) *with* Craig v. Boren, 97 S. Ct. 451 (1976).

21. Fundamental interests include voting rights, Dunn v. Blumstein, 405 U.S. 330, 336 (1972); right to interstate travel or migration, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); access to the courts, especially for criminal appeal, Griffin v. Illinois, 351 U.S. 12 (1956); and any right "explicitly or implicitly guaranteed by the constitution," San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). Specifically excluded from consideration as fundamental interests are housing, Lindsey v. Normet, 405 U.S. 56 (1972), and education, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

interest"[22] and that no means less detrimental to the interests of the plaintiff are available to further that interest.[23] This standard of review necessitates a court's strict scrutiny.[24]

The district court in *Arlington Heights* grappled with the equal protection issue, noting that the plaintiffs had claimed that the village's decision was "motivated at least in part by racial discrimination."[25] The district judge stated that "motives are irrelevant if the effect is illegal."[26] Finding that the village's refusal to rezone in order to permit low income housing did not affect racial minorities per se, the district judge concluded that "[p]laintiffs have failed to carry their burden of proving discrimination by defendants against racial minorities as distinguished from the under-privileged generally."[27] In regard to the motivation question, the trial court observed that opposition by segments of the village citizenry might have been directed at "minority or low-income groups . . . but the circumstantial evidence does not warrant the conclusion that this motivated the defendants."[28] Finding no suspect classification involved, the district court apparently applied the minimal scrutiny rational basis test, stating that the question was "whether defendants can be required to zone any real estate for multi-family dwellings if they have good faith reasons for not doing so."[29] The court found such reasons in the evidence showing that a multiple family development would damage surrounding property values, and that the rezoning denial adhered to the village's zoning plan, which limited multiple family residential use to "buffer zones" between different use districts. As all the land surrounding MHDC's parcel was a uniformly zoned single family dwelling district, there did not exist any distinct land use zones in the area between which MHDC's land could act as a buffer.[30] Thus, apparently dispensing with both the equal protection and due process challenges, the court concluded that "[t]he weight of the evidence proves that the defendants were motivated . . . by a legitimate desire to protect property values

22. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

23. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974).

24. This brief summary, although identifying the most widely accepted aspects of equal protection doctrine, is a simplification of a complex and still evolving area of constitutional law. Recent Supreme Court cases indicate the risk of oversimplification. For example, the opinions in Craig v. Boren, 97 S. Ct. 451 (1976), indicate that some members of the Court may be evolving a third standard of review between minimal and strict scrutiny for equal protection analysis (see Justice Powell's discussion in his concurring opinion, 97 S. Ct. at 463-64). Additionally, as indicated by United Jewish Organizations v. Carey, 97 S. Ct. 996 (1977), involving the deliberate creation of black majorities in legislative districts, deliberate racial classifications may be upheld in some contexts if created in order to remedy the effects of past discrimination.

25. 373 F. Supp. at 210.

26. *Id.*

27. *Id.*

28. *Id.* at 211.

29. *Id.*

30. *Id.*

and the integrity of the Village's zoning plan. This is not an arbitrary or capricious act in derogation of the plaintiffs' 14th Amendment rights."[31]

The Court of Appeals for the Seventh Circuit reversed.[32] By means of a relatively complex analytical approach, the appellate court arrived at a conclusion contrary to the district court's preliminary finding that the refusal to rezone was racially neutral. Relying on a recent decision of the Court of Appeals for the Second Circuit,[33] the court of appeals determined that the village's decision was properly judged by an analysis of its "historical context and ultimate effect."[34] The court took judicial notice of the historical fact of housing segregation in the Chicago area, the shift of employment opportunities from the central city to the suburbs, and the lack of adequate, affordable housing for minorities in the vicinity.[35] Although agreeing that no action directly attributable to the village had created the pattern of segregated housing, the court of appeals stated that the village could not ignore the situation, and noted that Arlington Heights had never assisted in developing low income housing and had no future plans to do so.[36] The court characterized the village's conduct as "exploiting the problem by allowing itself to become an almost one hundred percent white community,"[37] and held that the village was under an affirmative duty to alleviate segregation in the area.[38] Failure to meet this obligation provided the racially discriminatory effect that the district court did not find.

> Because the Village has so totally ignored its responsibilities in the past we are faced with evaluating the effects of governmental action that has rejected the only present hope of Arlington Heights making even a small contribution toward eliminating the pervasive problem of segregated housing. We therefore hold that under the facts of this case Arlington Heights' rejection of the [housing project] proposal has racially discriminatory effects.[39]

Finding that the village's decision involved the suspect classification of race, the court of appeals subjected the decision to strict scrutiny, stating that "[i]t could be upheld only if it were shown that a compelling public interest necessitated the decision."[40] The court had no difficulty in finding

31. *Id.*
32. 517 F.2d 409 (7th Cir. 1975).
33. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). In *Kennedy Park*, the rezoning of the proposed site of a low cost housing project as park land was found to violate the Fourteenth Amendment. However, in contrast to the characterization of the municipality's decision in *Arlington Heights*, the zoning decision in *Kennedy Park* was found to be racially motivated. 436 F.2d at 109.
34. 517 F.2d at 413.
35. *Id.* at 413-14 & nn.1 & 2.
36. *Id.* at 414.
37. *Id.*
38. *Id.*
39. *Id.* at 415.
40. *Id.*

that the asserted interests of maintaining the integrity of the zoning plan and protecting neighboring property values were not compelling interests.[41] Consequently the court held the village's refusal to grant the zoning change was a violation of the equal protection clause, and reversed the district court.[42] The village appealed and the Supreme Court granted certiorari.[43]

II. The Supreme Court Decision

A. The Requirement of Purposeful Discrimination

The Supreme Court approached the preliminary issue, a showing of racial discrimination, with a more sharply focused inquiry than the courts below. The Court stated that the first question (and, as a result of the answer it reached, the only question the Court considered in the case) was whether plaintiffs had proved discriminatory purpose on the part of the defendants.[44] The Court indicated that, although plaintiffs had erroneously proceeded on the theory that proof of discriminatory effect was sufficient, the courts below had nonetheless recognized the need to "examine the purpose underlying the [Village's] decision."[45] The district judge had determined that the evidence did not support a conclusion that racial discrimination had motivated the defendants, and the court of appeals had upheld the trial court's finding as being not "clearly erroneous."[46] The Supreme Court reversed the court of appeals because "[r]espondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."[47] According to the Court, proof of discriminatory purpose was a well-established principle in equal protection doctrine which the Court had "reaffirmed" during the previous term in *Washington v. Davis*.[48]

The plaintiffs in *Davis* had alleged that use of a written test by the District of Columbia as a portion of the selection procedure for police officers denied black applicants due process and equal protection of the law

41. *Id.*

42. Chief Judge Fairchild dissented. While agreeing with the majority that if the village's decision eliminated the possibility of low cost housing being constructed in Arlington Heights, the village would have unconstitutionally perpetuated segregation, Judge Fairchild did not find that this was the case. He noted that the Village had zoned other land for multiple family dwellings, and concluded that land was available to the plaintiffs and that the village had not, therefore, "rejected the only present hope" of introducing integrated housing into the Village. 517 F.2d at 415-16. On appeal, however, the Supreme Court specifically found that "no other R-5 [multiple family dwelling] parcels in the Village were available to MHDC at an economically feasible price." 97 S. Ct. at 560.

43. 423 U.S. 1030 (1975).

44. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 563 (1977).

45. *Id.* at 565.

46. 517 F.2d at 412.

47. 97 S. Ct. at 566.

48. 426 U.S. 229 (1976).

under the Fifth Amendment[49] because the test disqualified four times as many black applicants as white applicants. The Court of Appeals for the District of Columbia held that use of the test was unconstitutional, applying a Title VII standard,[50] which that court considered interchangeable with the proper equal protection standard.[51]

The Supreme Court distinguished the statutory standard and the constitutional standard, and applied the more lenient constitutional standard because the Court had "not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[52] Regardless of the statutory standard Congress may have adopted for employment discrimination, the Court was "not disposed" to adopt such a rigid standard as a test of constitutionality. Before triggering the "strict scrutiny" form of the equal protection test, a racial classification must be shown to be intentionally discriminatory.[53]

The Court warned of the potential consequences of leaving equal pro-

49. The complaint was based on the Fifth Amendment because a federal instrumentality was involved and at the time the complaint was filed Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-15 (1970), was not applicable to the federal government.

50. The court, citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), stated that "[o]nce it is shown that a particular selection procedure has an exclusionary effect on minority applicants, there is a heavy burden on the employer to show that discriminatory procedure 'bear[s] a demonstrable relationship to successful performance of the jobs for which they were used.'

". . . We reach the same conclusion [as the district court] on the basis of the racially disproportionate impact that Test 21 is shown to have. . . . [A]nd finding Test 21 not otherwise demonstrated to be job related, we hold that appellees have not met their burden." 512 F.2d at 959 (citations omitted).

51. Davis v. Washington, 512 F.2d 956, 957 n.2 (1975), *rev'd*, 426 U.S. 229 (1976). As interpreted in Griggs v. Duke Power Co., 401 U.S. 424 (1971), Title VII provides that use of any selection device having a racially disparate impact creates a prima facie case of discrimination. The employer using the device may only overcome the presumption of discrimination by going forward with proof that use of the device is a "business necessity," that is, that the device accurately distinguishes those who will perform the job well from those who will not, and that no other device having a less disparate effect is available. The analogy to "strict scrutiny" under equal protection analysis is apparent. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

52. 426 U.S. at 239 (emphasis in original). In support of its claim that discriminatory purpose was a long standing requirement, the Court cited jury selection cases including Akins v. Texas, 325 U.S. 398 (1945); Alexander v. Louisiana, 405 U.S. 625 (1972); and Neal v. Delaware, 103 U.S. 370 (1881). The Court also cited cases in "other contexts," *i.e.*, congressional reapportionment on racial lines, Wright v. Rockefeller, 376 U.S. 52 (1964); school desegregation, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); and challenges to a state system of distributing Social Security benefits, Jefferson v. Hackney, 406 U.S. 535 (1972). 426 U.S. at 239-41.

53. 426 U.S. at 242.

tection challenges unfettered by the intent requirement:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[54]

As proof that its concern in this regard was not idle, the Court cited and disapproved numerous lower court decisions (including *Arlington Heights*, then still awaiting oral argument before the Supreme Court) which failed to require a showing of purposeful discrimination.[55]

In accepting a demonstration of discriminatory impact as proof of impermissible discrimination, it can be argued that the lower courts recognized the intent requirement, but were applying a definition of intent analogous to the definition long recognized in tort law.[56] As Justice Stevens pointed out in his concurring opinion in *Davis*: "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than the evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."[57] In disapproving this approach, the majority in *Davis* apparently recognized that, in an equal protection case, use of such a definition of intent effectively begs the question. If the government is presumed to intend the natural or foreseeable consequences of its acts, evidence that a governmental act operates in a manner imposing a greater burden on one race than on another would at the same time indicate that the resulting discrimination was ipso facto intentional. This result would make a nullity of the discriminatory

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54. *Id.* at 248.

55. *Id.* at 244-45 & n.12.

56. "[W]here a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it." W. PROSSER, LAW OF TORTS 32 (4th ed. 1971). "Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result . . . ." RESTATEMENT (SECOND) OF TORTS, § 8A, comment b at 15.

57. 426 U.S. at 253. For cases applying the tort concept of intent, see Monroe v. Pape, 365 U.S. 167, 187 (1961) (applying tort concept to interpret "under color of law" in 42 U.S.C. § 1979 (1970)); Hart v. Community School Bd. of Educ., 512 F.2d 37, 50-51 (2d Cir. 1975) (equating de jure with tort concept of intent); and Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971), *vacated and remanded*, 500 F.2d 349 (9th Cir. 1974). See also United States v. Texas Educ. Agency, 532 F.2d 380, 388, 390 (5th Cir.), *vacated and remanded sub nom.* Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1976), where the court of appeals specifically found de jure segregation on the basis that it was foreseeable that segregation would result from application of a neighborhood school policy in an area of segregated housing. The Supreme Court remanded for reconsideration in light of *Davis*.

purpose requirement, since every governmental act carring a disparate racial effect would be automatically held intentionally discriminatory.

B. The Mechanics of Proving Discriminatory Purpose

Although stating a requirement that proof of discriminatory purpose be shown in order to sustain an equal protection challenge, the Court in *Davis* did not delineate what was required to make this showing.[58] In *Arlington Heights* the Court provided clearer guidance on the issue of discriminatory purpose. It indicated that it was a question of fact, outlined the operation of the burden of proof, and listed possible evidentiary factors appropriate to a determination of the issue.[59]

Perhaps considering it unnecessary to do so, the Court did not explicitly state whether inquiry into discriminatory purpose was to be resolved as a matter of law or as a question of fact. However, by its statement that purpose is determined by analysis of various evidentiary factors,[60] and its own review of the evidence adduced at trial in order to decide the issue,[61] the Court made it clear that the question of purpose is to be resolved by the trier of fact. In a footnote,[62] the Court stated that the burden is on the plaintiff to make a threshold showing that the defendant's purpose was in part discriminatory. If the plaintiff is successful the burden shifts to the defendant to establish that, despite the consideration of the impermissible purpose, the same decision would nonetheless have been reached. If the defendant successfully carries this burden, the court may not "interfere with the defendant's decision," since the plaintiff then could not "attribute the injury complained of to improper consideration of a discriminatory purpose."[63]

The Court listed a variety of evidentiary factors properly considered in determining the decisionmaker's purpose, stating that its list was not exhaustive.[64] The Court assigned no absolute weight to any single factor, impliedly leaving the outcome to an evaluation of all evidence adduced in a particular case. In its list the Court distinguished between circumstantial and direct evidence, the former including disproportionate impact as "an important

58. The Court intimated that invidiously discriminatory application, systematic exclusion, or an "absence of Negroes [combined] with racially non-neutral selection procedures" may suffice but the Court failed to define any of these terms, beyond citing the well known case of Yick Wo v. Hopkins, 118 U.S. 356 (1886), and providing a group of jury selection cases as examples, including Alexander v. Louisiana, 405 U.S. 625 (1972); Whitus v. Georgia, 385 U.S. 559 (1953); Akins v. Texas, 325 U.S. 398 (1945); Hill v. Texas, 316 U.S. 400 (1942); Pierre v. Louisiana, 306 U.S. 354 (1939); and Neal v. Delaware, 103 U.S. 370 (1881). 426 U.S. at 241.

59. See notes 66-71 and accompanying text *infra*.

60. 97 S. Ct. at 564-65.

61. See text accompanying notes 78-86 *infra*.

62. 97 S. Ct. at 566 n.21.

63. *Id.*

64. *Id.* at 564-65.

starting point," but, except in rare cases, not sufficient in and of itself to support a plaintiff's burden.[65] Other circumstantial evidence could include "a clear pattern, unexplainable on grounds other than race,"[66] the "historical background of the decision,"[67] the "specific sequence of events leading

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65. *Id.* at 564.

66. *Id.* As illustrations of "clear pattern" the Court cited Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); and Gomillion v. Lightfoot, 364 U.S. 339 (1960). *Yick Wo* involved the administration of a San Francisco ordinance requiring permits to operate laundries in wooden buildings. Under the ordinance 200 out of 200 Chinese applicants were denied permits, while 79 out of 80 white applicants were granted permits. 118 U.S. at 374. *Guinn* held a provision of the Oklahoma Constitution violative of the Fifteenth Amendment because it imposed a literacy test for voting, but exempted all persons and their lineal descendants who were entitled to vote on January 1, 1866, *i.e.*, prior to the adoption of the Fifteenth Amendment. The Court found the Oklahoma provision to be an attempt to circumvent the Fifteenth Amendment, the effect being to subject all blacks, but few, if any whites, to the literacy test requirements. *Wilson* involved an Oklahoma voter registration statute which automatically registered all persons who had voted in the general election of 1914 (held under the unconstitutional provision in *Guinn*) and required all others to register within a specified eleven day period or be forever disenfranchised. The "grandfather" provision and the short registration period were found to "operate unfairly" against blacks in violation of the Fifteenth Amendment. 307 U.S. at 277. *Gomillion* invalidated as violative of the Fourteenth and Fifteenth Amendments the gerrymandered adjustment of the city limits of Tuskegee, Alabama in a manner which placed all but four black voters outside the city limits, while affecting no white voters. For a recent case finding that statistical underrepresentation on juries created a prima facie case of racial discrimination, see Casteneda v. Partida, 45 U.S.L.W. 4302 (U.S. Mar. 22, 1977).

67. 97 S. Ct. at 564. As examples of "historical background" the Court cited Lane v. Wilson, 307 U.S. 268 (1939), discussed in note 66 *supra*; Griffin v. County School Bd., 377 U.S. 218 (1964) (following federal court desegregation order, closing of public schools, indirect grants and tax relief to all-white private schools held unconstitutional); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949); and Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). *Schnell* invalidated an amendment to the Alabama Constitution which required that only those who could "understand and explain" any article of the United States Constitution could be registered to vote. In the county in question, although the population was 64% white and 36% black, approximately 104 blacks and 2800 whites were registered to vote under the requirement. In regard to the history of the constitutional amendment, the Court noted that the campaign to adopt the amendment followed the decision in Smith v. Allwright, 321 U.S. 649 (1944), declaring that Democratic primaries could no longer be limited to white voters. The Alabama State Democratic Committee led the campaign for adoption "to make the Democratic Party in Alabama the 'White Man's Party.' " The state bar journal carried articles stating that the purpose of the amendment was "to give Registrars arbitrary power to exclude Negroes from voting," which purpose was openly declared in proponents' campaign literature. 81 F. Supp. at 876, 878, 880. *Keyes* held that intentional segregation of one portion of the school system through manipulation of attendance zones, for example, required the school district to prove that discriminatory intent did not motivate segregation in the remainder of the system. 413 U.S. at 207-13.

up to the challenged decision,"[68] "[d]epartures from the normal procedural sequence,"[69] or "[s]ubstantive departures . . ., particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."[70] Appropriate items of direct evidence include the legislative or administrative history, minutes of the body's meetings, reports, and "in some extraordinary instances" testimony by members of the decisionmaking body as witnesses at trial.[71]

Though listed as separate and distinct evidentiary categories, several of the factors relating to circumstantial evidence appear to be indistinguishable from one another. The Court cited one case, *Lane v. Wilson*,[72] to illustrate both "clear pattern," and "historical background," which indicates that the same facts may fit within either category. Historical background

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68. 97 S. Ct. at 564 & n.16. As examples of a "specific sequence of events" the Court cited Reitman v. Mulkey, 387 U.S. 369 (1967); Grosjean v. American Press, 297 U.S. 233 (1936); Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961); and Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). *Reitman* invalidated a California constitutional amendment intended to guarantee the right of any person "in his absolute discretion" to refuse to sell, lease, or rent property to any other person. The Court noted that the amendment nullified legislation passed in the prior five years that prohibited discrimination in housing, the most far reaching statute having been passed only the year before the amendment had been adopted as a referendum measure. 387 U.S. at 370-74. *Grosjean* invalidated a Louisiana tax of 2% of the gross receipts of any publisher of a periodical with a weekly circulation of more than 20,000. Against a First Amendment challenge, the tax was held to be an unconstitutional device to limit the circulation of information. The "events" cited in the opinion are the enactment of the English and Massachusetts newspaper Stamp Acts, and the adoption of the First Amendment. 297 U.S. at 245-49. *Progress Dev. Corp.* invalidated an action condemning the plaintiff's land for a park, the action being taken after the plaintiffs made known their intention to assure integration of their planned housing development. *Kennedy Park* declared unconstitutional the City of Lackawanna's declaration of a moratorium on new subdivisions and the rezoning of plaintiff's land as a park and recreational area. When the Archdiocese of Buffalo announced its sale of the property to plaintiff as a site for an integrated housing project in an all-white area, petitions signed by the mayor and city council were circulated opposing the sale. 436 F.2d at 110-11. After the Justice Department intervened, the moratorium and rezoning were rescinded, but the mayor refused to sign plaintiff's application for a sewer extension for the subdivision. 436 F.2d at 112.

69. 97 S. Ct. at 564. Apparently considering this factor to be self-explanatory, the Court offered no illustration or explanation of procedural departures.

70. *Id.* at 564 & n.17. The Court cited Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970), in which the city refused to rezone land from its former use as a public facility, a school, to a low density residential area to allow construction of a low income project. All the adjacent land was zoned high-density residential, and the former and present planning directors testified that there was no justification based on zoning considerations to refuse the rezoning. *Id.* at 1040.

71. 97 S. Ct. at 565. The Court recognized that testimony by members of the decisionmaking body may be barred by privilege.

72. 307 U.S. 268 (1939). See note 66 *supra*.

also appears to overlap considerably with "specific sequence of events."[73] The Court stated that historical background is particularly significant if it "reveals a series of official actions taken for invidious purposes."[74] Such a series of actions would as well constitute a sequence of events.

Further, to illustrate the concept of sequence of events, the Court in *Arlington Heights* cited *Grosjean v. American Press*.[75] *Grosjean* fails to elucidate any events leading to the Louisiana legislation in question in that case. Instead, it discussed the eighteenth century newspaper Stamp Acts in England and Massachusetts and the adoption of the First Amendment, which would more appropriately be considered historical background.[76]

Although the labels chosen by the Court in categorizing the appropriately considered evidence are subject to criticism, these labels are of secondary importance. Of primary importance is the Court's purpose in setting forth these evidentiary factors, which is to indicate the proper scope of the inquiry into the purpose underlying a challenged governmental action.[77]

C. The Court's Application of the Checklist to the Evidence Before It

Although its emphasis and analytical approach differed from that of the district court, the Supreme Court's review of the evidence led it to conclude that the trial court was correct in finding that the village's decision was not racially motivated. Of the factors the Court listed as appropriate for consideration, the only one found to support the plaintiffs' allegation was an "arguably" racially disproportionate impact in the village's refusal to rezone.[78] All the other factors considered by the Court militated against a finding of discriminatory purpose. The circumstantial evidence raised no inference of improper purpose. As to the "sequence of events," the land in question had been zoned for single family dwellings since the village first enacted a zoning ordinance.[79] No procedural departures were proved,[80] nor were any "substantive departures" found, as single family residences constituted the clearly dominant and preferred land use in the village,[81] no "novel criteria" were applied by the decisionmaker,[82] and the buffer zone

73. See notes 67-68 *supra*.
74. 97 S. Ct. at 564.
75. 297 U.S. 233 (1936). See note 68 *supra*.
76. See note 67 *supra*.
77. Of greater importance than the Court's somewhat arbitrary categorizations are the implications of the Court's choice of illustrations. In the cases chosen by the Court as illustrative, the evidence raised very strong inferences of discriminatory intent. The Court leaves unclear whether more subtle fact patterns could also raise judicially cognizable inferences of intent.
78. 97 S. Ct. at 565.
79. *Id.*
80. *Id.* at 566.
81. *Id.* at 565-66.
82. *Id.* at 566.

policy governing multiple family residences had been consistently applied.[83]

The direct evidence similarly raised no suspicion of discriminatory purpose. Statements by members of the Plan Commission and village Board contained in the minutes of their meetings reflected the local bodies' concentration on the zoning considerations involved,[84] not concern with the "social issue" which the Court phrased as "the desirability or undesirability of introducing . . . low and moderate income housing, housing that would probably be racially integrated."[85] Moreover, the testimony of the one Board member called as a witness in the trial raised no "inference of invidious purpose."[86]

From this consideration of the evidence, the Court concluded that the plaintiffs had failed to make a threshold showing that the defendants were motivated by discriminatory purpose, and the constitutional question was therefore answered: "This conclusion ends the constitutional inquiry. The court of appeals' further finding that the Village's decision carried a discriminatory 'ultimate effect' is without independant constitutional significance."[87] The Court remanded the case for the court of appeals' determination of the statutory claims left unanswered.[88]

Of the eight Justices participating in the case,[89] only Justice White, who wrote the opinion in *Davis*, dissented from the majority's analysis of the constitutional issue.[90] Justice Marshall, joined by Justice Brennan, concurred in the majority's opinion on the Fourteenth Amendment claim. They dissented only on the basis that the entire case, not just the statutory claims, should have been remanded to the court of appeals, because it required a factual determination.[91]

III. Analysis of the Supreme Court's Evidentiary Review

The *Davis* and *Arlington Heights* requirement of proof of discriminatory purpose stems from the distinction between de facto and de jure segregation, although the Court did not mention the familiar terms. As stated in *Keyes v. School District No. 1*,[92] "the differentiating factor between *de jure*

83. *Id.*
84. *Id.*
85. *Id.* at 559.
86. *Id.* at 566.
87. *Id.*
88. *Id.* See notes 8-11 and accompanying text *supra*. For a discussion of relief under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), against a denial of rezoning, see Annot., 12 A.L.R. FED. 964.
89. Justice Stevens, who was a member of the Court of Appeals for the Seventh Circuit when the case came before the court, took no part in the consideration or decision of the case.
90. 97 S. Ct. at 567.
91. *Id.* at 566-67.
92. 413 U.S. 189 (1973).

and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[93] Although purporting merely to reemphasize this distinction between permissible and impermissible segregation, the Court in *Arlington Heights* reformulated the intent or purpose requirement of equal protection doctrine. The Court phrased the issue as whether "discriminatory purpose has been a motivating factor" behind the governmental act.[94] The term "motivating factor" is an unfortunate choice, as it would appear to require determination of the decisionmaker's motive, not merely his purpose.

The proposition has long been recognized, if not invariably reiterated, that legislators' motives are beyond the purview of the courts.[95] If taken at face value, the *Arlington Heights* formula would require the plaintiffs to prove that the defendants were at least partially motivated by intent to discriminate. Defendants' burden would then be to prove that other motives would have led to the same decision, involving both parties in an exercise that the Supreme Court has long eschewed as too hazardous or dubious for the judiciary to undertake.[96]

Notwithstanding the language it used, however, the Court in *Arlington Heights* required no more than exploration of the decisionmaker's purpose. With one exception,[97] all the factors listed as appropriately considered are commonly applied in determining legislative purpose for statutory interpretation,[98] none of which requires direct inquiry into the decisionmaker's state

93. *Id.* at 208. Since its decision in *Keyes*, the Supreme Court has apparently avoided the use of the term "de facto," instead basing its discussion of cognizable segregation on the idea that "the scope of the remedy is determined by the nature and extent of the [constitutional] violation." Milliken v. Bradley, 418 U.S. 717, 744 (1974) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)). *See also* Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1976), discussed at note 57 *supra*. For a discussion of the relationship between the de facto/de jure distinction and the requirement of discriminatory purpose, see Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

94. 97 S. Ct. at 563, 566 & n.21.

95. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); *Developments*, *supra* note 2, at 1091-1101. The Court in *Arlington Heights* noted this prohibition. 97 S. Ct. at 565 n.18, 566 & n.20. However, while noting the prohibition on inquiry into motive, the Court in discussing the matter appears to contradict itself. First the Court suggests that direct evidence of purpose may be obtained by calling a decisionmaker as a witness at trial. 97 S. Ct. at 565. This would appear to be helpful only to inquire into the decisionmaker's subjective state of mind, *i.e.*, motivation. In footnote 18, however, the Court observes that because inquiry into motive is improper, "[p]lacing a decisionmaker on the stand is therefore 'usually to be avoided.' " Then, stating that the testimony of the one Village Board member called by MHDC as a witness raised "no inference of invidious purpose," the Court states in footnote 20 that the district court did not abuse its discretion in forbidding plaintiffs to question the members of the Board "about their motivation at the time they cast their votes."

96. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 617 (1960).

97. As indicated in note 95 *supra*, the Court's suggestion that the decisionmaker be called as a witness indicates a belief in the efficacy of inquiry into subjective motivation.

98. *See Developments*, *supra* note 2, at 1077-83.

of mind. Perhaps the Court's choice of words was intended to place additional emphasis on the principle that only willful discrimination is prohibited. Evenhanded application of legislation that is racially neutral on its face will not give rise to a constitutional challenge should an unforeseen or unintended racially disparate impact result. This being the case, "purposeful discrimination" would have been a less misleading phrase than "discriminatory purpose as a motivating factor."

Although its phrasing of the issue was too broad, the scope of the Court's inquiry into purpose in *Arlington Heights* was too restricted. Beyond the factors the Court included in its review of the evidence, three additional factors particularly appropriate in zoning cases ought also to have received attention: the reasonableness of the criteria applied by the decisionmakers, expressed community sentiment, and the historical background or context of the decision.[99]

The Court examined the "substantive" basis of the village's decision to the extent of finding that the criteria relied upon were not "novel."[100] The Court should have carried its examination further to determine if these criteria were "reasonable not arbitrary."[101] Here, a buffer policy restricting all multiple family residences to areas between single family residence zones and other zones, for example, industrial or commercial zones, was invoked to support the denial of rezoning. But the multiple family residences in question here were not high density apartments. The project would have consisted of twenty two-story buildings on fifteen acres of land, sixty percent of which was to be left as open space. Furthermore, provision was to be made for a screen of trees and shrubs for the benefit of neighboring houses.[102] Consequently, the effects of the proposed project on the population density and physical and aesthetic character of the area would appear to be substantially similar to the effects of constructing single family residences. The Court might have questioned whether application of the buffer policy to exclude such a development from an area of small lot single family residences bore any "rational relationship" to a legitimate governmental purpose.

By accepting application of the buffer policy as evidence refuting discriminatory purpose while at the same time leaving the reasonableness of the application unquestioned, the Court interposed due process and equal protection values. It is well settled that in a due process challenge the landowner's property rights may be appropriately subordinated to the local government's determination of what best furthers the public's general wel-

99. The Court listed historical background as a factor but made no mention of it in its review of the evidence. See text accompanying notes 112-19 *infra*.

100. See note 82 and accompanying text *supra*.

101. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 6 (1974).

102. See 97 S. Ct. at 559; 517 F.2d at 411.

fare.[103] Consequently, the judiciary appropriately refrains from second-guessing the local decisionmaker's choice of where to draw legislative lines in order to avoid having courts serve as zoning boards of appeals in due process challenges. But the Court in *Arlington Heights* recognized that "the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* [due process] test . . . Instead, it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment.[104] In an equal protection challenge courts must balance the asserted governmental interests against individual rights which the courts have held in a more solicitous regard than private economic or property interests.[105] This balance is unduly weighted in the government's favor by first presuming the validity of zoning policies or ordinances upon a showing of any conceivable relationship between the policy or ordinance and the broad concepts of the public health, safety, or general welfare, and then accepting application of the policy as evidence that the government acted without discriminatory purpose. The individual rights in question are thus overbalanced by even the most tangential furtherance of the public health, safety, or general welfare. Before the application of a policy purporting to preserve neighboring property values or the sanctity of single family residence zones is asserted to defeat claims of racially discriminatory purpose, courts should require a strong showing that the application of the policy in the particular case in question substantially furthers those asserted interests.

An additional factor the Supreme Court should have considered in determining the purpose behind the denial of rezoning is the basis of community opposition. Rezoning decisions are frequently reached through a process which has been called "trial by neighborism."[106] As stated by one commentator, "It is a rare municipal legislature that will reject what it believes to be the wishes of the neighbors."[107] Given this tendency of local zoning boards and town councils to abdicate to the local residents' views, these community sentiments should be considered in determining the decisionmaker's purpose.

In *Arlington Heights* the district judge surmised that strong opposition to the rezoning petition by large segments of the Village populace might have been motivated by "opposition to minority or low-income groups."[108]

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103. *See* Miller v. Schoene, 276 U.S. 272 (1928); notes 14-17 and accompanying text *supra*.

104. 97 S. Ct. at 562.

105. *Compare* Berman v. Parker, 348 U.S. 26, 32 (1954) *with* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 (1974).

106. R. BABCOCK, THE ZONING GAME 141 (1966) [hereinafter cited as BABCOCK].

107. *Id.*

108. 373 F. Supp. at 211.

Consequently, the members of the Plan Commission and Village Board must have been aware of the "social issue" raised,[109] even if they did not directly address it. Expressed community opposition based on racial antagonism should raise judicial suspicion of the decisionmaker's purpose in a zoning decision.[110] It may be argued that the connection between community sentiment and the decisionmaker's purpose is too speculative for judicial consideration. But community opposition has been considered in attributing purpose in other cases approved by the Supreme Court.[111] While perhaps not determinative in *Arlington Heights*, local racial opposition should at least have been included in the Court's analysis of the village's refusal to rezone.

The final evidentiary factor omitted by the Supreme Court is the historical context of the village's decision, a factor upon which the court of appeals placed heavy emphasis in its assessment of the refusal to rezone.[112] Despite listing historical background, which appears to be synonymous with the lower court's term,[113] as an appropriate factor, the Supreme Court made no mention of it in reviewing the evidence in *Arlington Heights*. This omission appears anomalous in view of prior Supreme Court reliance on historical background in other contexts. If the history of press censorship in England and the colonies is appropriate to consideration of a First Amendment challenge of a Louisiana publishing tax,[114] it would appear equally appropriate to take cognizance of the all-white complexion of the local municipality and the pervasive housing segregation in the metropolitan area in determining a Fourteenth Amendment challenge of a zoning decision.

The trend in some jurisdictions is to consider local zoning decisions from a regional perspective.[115] This trend takes into account the fact that land use and housing patterns in a metropolitan area are determined by the

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109. See note 85 and accompanying text *supra*.

110. *See generally* Branfman, *supra* note 1.

111. *See* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *cf.* Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949) (state-wide referendum).

112. See notes 34-36 and accompanying text *supra*.

113. See notes 34-36, 67, 72-76 and accompanying text *supra*.

114. *See* Grosjean v. American Press, 297 U.S. 233 (1936); see note 68 *supra*.

115. *E.g.*, Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied and appeal dismissed*, 423 U.S. 808 (1975); National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). *See generally* Feiler, *Metropolitanization and Land Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971); Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?*, 3 CONN. L. REV. 244 (1971); Note, *So You Want to Move to the Suburbs: Policy Formulation and the Constitutionality of Municipal Growth-Restricting Plans*, 3 HASTINGS CONST. L.Q. 803, 814-18 (1976); Note, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251 (1966).

practices of the conglomeration of municipalities comprising the region. If the parochial interests of each small community are allowed to determine the pattern, the general welfare of the region may be sacrificed.[116]

This regional perspective would have come before the Court in *Arlington Heights* had the Supreme Court considered the historical background of the village's decision to preclude the only present prospect of low cost, racially integrated housing becoming available within the village.[117] Viewed in isolation, the purpose of a municipal refusal to rezone for low income housing is more easily accepted as mere adherence to broad zoning policies. The purpose may appear to be quite different when the decision is considered in the context of a history of rapid population expansion from the central city to the suburbs in which the outward migration is restricted to relatively affluent whites.[118] Recognizing that zoning is the primary municipal tool for preserving what is called the character of the community, it seems an obvious question whether one of the purposes of a local decision precluding construction of integrated housing was to preserve the all-white complexion of the community. While the Supreme Court disapproved the court of appeals' use of historical context to determine the "ultimate effect" of the village's decision, that is, the finding that the local decision had the effect of continuing an historical pattern of housing segregation,[119] historical context is nonetheless relevant and necessary to provide a realistic perspective on the local decision. By failing to consider this factor in *Arlington Heights*, the purpose of the village's decision was viewed in a sociological and historical vacuum disadvantageous to plaintiffs.

IV. Analysis of the Purpose Requirement

The Supreme Court's adherence to a narrow focus in *Arlington Heights* reflects a concern with the potential reach of equal protection review. As it indicated in *Washington v. Davis*,[120] the Court is determined that equal protection doctrine should not become a vehicle for active intervention in a multiplicity of governmental activities, allowing the doctrine to become an unharnessed leveler of American society. The near unanimity of support for the formulation of the discriminatory purpose requirement in *Arlington Heights* indicates the pervasive effect of this concern on the present Court. Regardless of whether the Burger Court's concern in this regard is warranted, the means it chose to limit the reach of equal protection doctrine—increasing the burden on challengers—is indicative of a shift in values from the attitudes of the Warren Court.

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116. *See* BABCOCK, *supra* note 106, at 145-50, 174-79.

117. See note 39 and accompanying text *supra*.

118. *Cf.* S. KAPLAN, THE DREAM DEFERRED 16-17, 102-103 (1976); Siembeida, *Suburbanization of Ethnics of Color*, ANNALS 118, 119 (Nov. 1975).

119. 97 S. Ct. at 566.

120. 426 U.S. 229, 248 (1976). See note 54 and accompanying text *supra*.

As the doctrine of substantive equal protection[121] was developed during the previous decade it effectively presented an all or nothing choice to the courts. Because the judiciary is expected to exercise considerable imagination in construing a permissible purpose to legislation and official acts under minimal scrutiny, this form of the equal protection test effectively requires firm judicial deference to governmental action.[122] In contrast, governmental interests considered sufficiently "compelling" to sustain state action under strict scrutiny are extremely rare.[123] Consequently, under the mechanical formalism of substantive equal protection analysis, the crucial question is whether strict scrutiny is triggered by a finding that a suspect classification or fundamental interest is involved. As a result equal protection would theoretically invalidate a municipal action denying equal access to public parks on the basis of race,[124] while upholding a statute that denied decent housing, employment, and educational opportunities on the basis of wealth.[125]

Rather than address the problem as an overly rigid dichotomy of review, the Court in *Arlington Heights* left the two-tiered standard of review intact, adopting the expedient of placing a uniform hurdle to invocation of strict scrutiny. A showing that a governmental act classifies by race and, presumably, that it involves other suspect classifications or that it infringes a fundamental interest will not trigger strict scrutiny, regardless of the severity of the detriment involved, until the challenger proves the defendant acted with discriminatory purpose. Only if the defendant fails to prove other overriding purposes will strict scrutiny be applied.

Alternatives were available to the Court which might have limited the potential reach of equal protection review while raising less danger that the essential societal values represented by the equal protection clause would suffer diminution for lack of proof of transgressors' purposes. The Court could have abandoned the bifurcated standard altogether, adopting a "means-focused" flexible standard in its place. This was the approach suggested by Justice Marshall in his dissenting opinion in *San Antonio Independent School District v. Rodriguez*.[126] Under this approach the for-

121. See Winter, *The Changing Parameters of Substantive Equal Protection: From the Warren to the Burger Era*, 23 EMORY L.J. 657, 664, 665 n.27 (1974), for a justification of the term "substantive" equal protection as well as a condemnation of the doctrine as equivalent to substantive due process.

122. *See* Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

123. *Id.*

124. *Cf.* Watson v. City of Memphis, 373 U.S. 526 (1963) (requiring prompt desegregation of municipal parks).

125. *Cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Texas state school finance system did not discriminate against a suspect class nor did it infringe upon any fundamental interest).

126. 411 U.S. 1, 98-99 (1975) (Marshall, J., dissenting).

malistic automatic triggering of strict scrutiny in any case involving a suspect classification would be replaced with a more clearly enunciated balancing test than any the Court presently employs. The Court under this test would require a varying degree of substantiality of relationship between means and ends according to the degree to which a protected class or interest is affected.

For example, where the voting rights of blacks were shown to be adversely affected by a statute, the courts would refuse to use any imagination to find a justifying rationale for the law.[127] The state would have to show that the legislation directly furthers a governmental goal that cannot be fostered by alternative means. This is, in effect, strict scrutiny. But where an ordinance affects one race's recreational opportunities more adversely than another race's, the court could more readily construe the purpose to be economic or related to the public safety. Allowing weight to be given to the governmental interest and the substantiality of the relationship between that interest and the legislative means chosen, while simultaneously weighing the degree of detriment imposed on a protected class or interest, would undoubtedly uphold many of the tax, welfare, regulatory, and other statutes which the *Davis* Court feared might be invalidated under strict scrutiny.[128]

Although more cognizant of the spectrum of interests and values at issue in equal protection litigation, this approach suffers from the disadvantages of lack of predictability and guidance to potential litigants and lower courts while retaining too much potential for active judicial interference in an endless variety of governmental activities. To preserve present predictability of result while restricting the potential reach of equal protection doctrine, the Court could have emphasized purpose or intent without increasing the burden on plaintiffs. As was suggested in an article cited in the *Arlington Heights* opinion,[129] a much lower threshold showing of discriminatory purpose could have been required. Convincing proof that consideration of a discriminatory purpose may have affected the outcome of the decisionmaking process should invalidate the decision.[130] If the objective is only "suspect" the onus would be on the defendant to provide compelling justification.[131]

This approach arguably partakes too much of the rigidity of strict scrutiny. Perhaps the challenger should only be required to raise a reasonable suspicion of discriminatory purpose, shifting the burden of persuasion to the defendant to refute the suspicion. This approach comports with the fact that it is easier to prove one's own purposes than for another to prove

127. *See* United Jewish Organizations v. Carey, 97 S. Ct. 996 (1977).

128. 426 U.S. at 248 (1976). See note 54 and accompanying text *supra*.

129. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motives*, 1971 SUP. CT. REV. 95.

130. *Id.* at 130-31.

131. *Id.* at 131.

them, while simultaneously allowing the benefit of the doubt to governmental defendants in appropriate circumstances.

Arlington Heights indicates overwhelming concurrence among the members of the Court that the reach of strict scrutiny under the officially recognized two-tier equal protection standard must be restricted. Apparently unable to reach consensus on any comprehensive redefinition or redirection of equal protection doctrine, such as recognition of a median tier,[132] the Court has settled on the expendient of increasing the burden of proof on equal protection challengers in order to restrict the reach of activist judicial review. The danger inherent in this resolution of the Court's concern arises from its potential to debilitate the efficacy of equal protection doctrine as a judicial tool to protect groups and interests otherwise at the mercy of the majoritarian political process.[133]

While one may empathize with the Court's problem in channeling the evolution of equal protection, one may nonetheless question whether the Supreme Court's determination that only discriminatory purpose falls within the purview of the Fourteenth Amendment in and of itself requires the degree of proof the Court has placed on challengers as a result of the *Arlington Heights* decision. One would hope that while the Court struggles with redefining the nature of equal protection, subsequent decisions will result in an extension of the evidentiary factors considered, a decrease in the threshold showing required of plaintiffs, and the burden of persuasion more readily shifted to defendants under the *Arlington Heights* formula.

Conclusion

Whatever the ramifications of the *Arlington Heights* decision for equal protection doctrine, the decision's significance for suburan zoning is more readily ascertained. Whether or not suburban zoning practices are purposefully pursued to assure racial and economic segregation, it would seem unquestionable that these suburban practices at least tend to continue the present exclusively white middle class character of the suburbs. Yet only a deviation from the present policies and procedures, such as an application of "novel criteria," will provide the basis for bringing suburban zoning under active judicial review.

The impetus for active judicial review of municipal zoning stems from the perception that no viable means of political redress are available to the groups excluded by present zoning practices. Suburban decisionmakers naturally act in conformity with the desires of their suburban constituency. The same suburban residents who serve, or who select those who serve, on planning commissions and town councils claim majority representation in

132. *See* Craig v. Boren, 97 S. Ct. 451 (1976).

133. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

the state legislatures which delegate zoning authority to municipalities.[134] As non-residents, those excluded by municipal zoning practices have no voice in the councils which determine these practices and therefore have no influence in changing the patterns and practices which exclude them. Whatever the true purposes of suburban municipalities may be, it would be an extremely rare zoning ordinance or decision that is not couched in terms of fiscal concerns, property values, or sacrosanct zoning policies. The Supreme Court has determined that, before being accorded the only effective judicial review available under equal protection doctrine, anyone challenging zoning decisions must first prove that the decisive purpose of the decision was to discriminate on the basis of race. But, absent inconsistent application or deviation from present policies and procedures, such proof is unlikely to be available.

Under the formula developed in *Arlington Heights* the scales are weighted against the challenger. Absent an indiscrete remark by a planning commissioner or omission of the formality of a public hearing, a presumption of validity will be granted to municipal actions which tend to perpetuate segregation. Had the court of appeals' decision in *Arlington Heights* been affirmed, the consequences for metropolitan housing patterns, employment opportunities, and nationwide school integration would have been momentous. Presented with a case of potential social consequences at least as significant as the issue in *Brown v. Board of Education*,[135] the present Supreme Court chose instead to insulate the affluent white suburbs from the harsh spotlight of equal protection strict scrutiny, taking pains to instruct the lower courts on the proper approach in future cases. In placing the burden on challengers to make a difficult showing of discriminatory purpose, the Supreme Court apparently places different emphasis on equal protection than did the Court of Appeals for the Second Circuit which recently stated that "[t]he Fourteenth Amendment is not meant to assess blame but to prevent injustice."[136] As Justice Marshall stated in his dissenting opinion in *Jefferson v. Hackney*,[137] "[A]t some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant."[138] After *Arlington Heights* the question arises whether that point will ever be reached in zoning practices.

134. *See* Boyd, *Suburbia Provides the Balance of Power*, NAT'L CIVIC REV. 613 (Dec. 1965); Boyd, *Suburbia Takes Over*, NAT'L CIVIC REV. 294-98 (June 1965).

135. 347 U.S. 483 (1954).

136. Hart v. Community School Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975).

137. 406 U.S. 535 (1972).

138. *Id.* at 575-76 (Marshall, J., dissenting).