Title VI and the Intent/Impact Debate: A Critical Look at "Coextensiveness"

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Introduction

Title VI of the Civil Rights Act of 1964[1] was enacted as part of a larger package of federal legislation aimed at redressing the wrongs of past discrimination and at preventing future transgressions against members of identified groups—most notably racial minorities.[2] This title of the Act—prohibiting discrimination based upon race, color, or national origin in federally assisted programs or activities—has been relied upon by private individuals[3] and administrative agencies[4] to

1. 42 U.S.C. §§ 2000d to 2000d-4 (1976) [hereinafter cited as Title VI]. Section 2000d states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

2. Other parts of the Act prohibit discrimination in voting, § 1971 (Title I); public accommodations, § 2000a (Title II); public facilities, § 2000b (Title III); public education, § 2000c (Title IV); and employment, § 2000e (Title VII). Titles II, III, and IV prohibit discrimination on the grounds of religion—and Title VII on the grounds of religion and sex—in addition to race, color, and national origin.

3. While Title VI does not expressly create a private right of action, a majority of the lower federal courts have either recognized an implied right of action or failed to address the issue and permitted the litigation to proceed. One of the earliest cases to recognize such a right was Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 851-52 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967), in which the court recognized plaintiffs' right both under Title VI and as third party beneficiaries to "contractual assurances" given in writing by the school district to the Department of Health, Education and Welfare (HEW). The Supreme Court later relied upon this theory in Lau v. Nichols, 414 U.S. 563 (1974), as did the Fifth Circuit in United States v. Marion County School Dist., 625 F.2d 607 (5th Cir. 1980) (court upheld right of HEW to sue based upon breach of contractual assurances made by district). Two more recent opinions of the Supreme Court indicate that this issue still awaits final resolution. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), the Court failed to resolve this issue, although four Justices were of the view that such a private cause of action exists under Title VI, *id.* at 408 (Stevens, J., concurring in part and dissenting in part), and four Justices assumed it for purposes of this case, *id.* at 269 (Powell, J.), 324 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Justice White, however, in a separate opinion, stated that an implied private right of action under Title VI would violate the legislative intent of the Act. *Id.* at 380-81. The issue has been confused further by the Court's opinion in Cannon v. University of Chicago, 441 U.S. 677 (1979), in which the Court recognized such a right under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1981). In *Cannon*, the Court based its conclusion upon the

remedy discrimination in education,[5] employment,[6] housing,[7] and more recently in health care and other municipal services.[8] As a discrimination statute, Title VI draws its congressional enactment authority from section 5 of the Fourteenth Amendment.[9] As this is a statute conditioning receipt of federal funds upon compliance with federal statutory and administrative directives, congressional power is derived from Article I, section 8 of the Constitution, commonly known as the

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fact that Title IX had been modeled after Title VI, with such a right having been recognized under Title VI in *Bakke*. The lower courts subsequently have interpreted *Cannon* as having placed the Court's final seal of recognition on the private right of action under Title VI. *See* Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980) (Sifton, J., concurring), *cert. granted*, 454 U.S. 1140 (1982); NAACP v. Wilmington Medical Center, Inc., 599 F.2d 1247, 1257 (3d Cir. 1979); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1264 (D. Conn. 1979); Salomone, *Enforcing Educational Rights Through Private Actions: One Step Beyond* Bakke, 8 NOLPE SCH. L.J. 76 (1978); Note, *An Implied Private Right of Action Under Title VI*, 37 WASH. & LEE L. REV. 297 (1980); Comment, *Civil Rights: Title VI—Is a Private Right of Action Intended?*, 19 WASHBURN L.J. 565 (1980).

4. Title VI grants rulemaking and enforcement powers to federal administrative agencies empowered to extend financial assistance to any program or activity. Section 2000d-1 provides in pertinent part: "Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law . . . ."

5. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Lau v. Nichols, 414 U.S. 563 (1974); United States v. Marion County School Dist., 625 F.2d 607 (5th Cir. 1980); Lora v. Board of Educ., 623 F.2d 248 (2d Cir. 1980); Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979); Serna v. Portales, 499 F.2d 1147 (10th Cir. 1974); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1964), *cert. denied*, 388 U.S. 911 (1967); Valadez v. Graham, 474 F. Supp. 149 (M.D. Fla. 1979).

6. *See, e.g.*, Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979); Otero v. Mesa County Valley School Dist., 586 F.2d 1312 (10th Cir. 1977); Board of Educ. v. Califano, 584 F.2d 576 (2d Cir. 1978), *aff'd sub nom.* Board of Educ. v. Harris, 444 U.S. 130 (1979); Wade v. Mississippi Corp. Extension Serv., 528 F.2d 508 (5th Cir. 1976); Harris v. White, 479 F. Supp. 996 (D. Mass. 1979).

7. *See, e.g.*, Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969).

8. *See, e.g.*, NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981); Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980); Jackson v. Conway, 476 F. Supp. 896 (E.D. Mo. 1979); Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978).

9. The 14th Amendment was adopted at the close of the Civil War and was designed, as were the 13th and 15th Amendments, to protect the newly acquired freedom of the black population. Ratified in 1868, the Amendment defines citizenship, provides that no state may abridge privileges and immunities of citizens, and forbids states to take life, liberty, or property without due process of law or to deny anyone the equal protection of the laws. Sections one and five are the most relevant to the present discussion.

Section one provides, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section five provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.

"Spending Clause," which provides that "Congress shall have Power . . . to pay the Debts and provide for the common Defense and general Welfare of the United States . . . ."[10]

A recent split of judicial authority resulting from the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*[11] has placed the broad-based utility of Title VI in serious question. In *Bakke*, five of the Justices held that Title VI is "coterminous" with the Fourteenth Amendment,[12] that is, that Title VI proscribes only those racial classifications that are proscribed by the Constitution. This so-called "doctrine of coextensiveness" has left the lower courts to grapple with the issue of whether Title VI mandates the constitutional standard of proof of discriminatory *intent* as enunciated by the Court in *Washington v. Davis*,[13] or merely that of disproportionate *impact* as utilized by the courts in employment discrimination cases brought under Title VII.[14] Prior to *Bakke*, the leading precedent on the standard of proof in Title VI cases was *Lau v. Nichols*,[15] in which the Court applied an effects standard. The question now remaining is whether *Bakke* overruled *Lau*, that is, whether discriminatory intent rather than mere disproportionate impact is required to establish a prima facie Title VI case based upon a facially neutral policy having a disparate racial impact.

The positions taken by the federal appellate courts over the past several years as to the "doctrine of coextensiveness" and its implications for the governing standard of review under Title VI offer noteworthy insights as to possible interpretations. This article will discuss the intent and impact (effects) standards as they have been developed by the courts under the Constitution and Title VII—including the evidentiary and policy considerations of each standard—as well as the use of the prima facie case concept in Title VII litigation and its applicability to Title VI. It will further analyze the leading Supreme Court decisions related to the issue, and the standards established by several of the circuits as to Title VI interpretation. Finally, based upon principles

10. The power of Congress to place conditions upon receipt of federal funds as an inducement to local governments to cooperate with federal civil rights policy is well-settled in the case law. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); Board of Educ. v. Harris, 444 U.S. 130 (1979); Lau v. Nichols, 414 U.S. 561 (1974). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 247-50 (1978).

11. 438 U.S. 265 (1978).

12. *Id.* at 325. These five Justices were Powell, White, Marshall, Blackmun, and the Chief Justice.

13. 426 U.S. 229 (1976).

14. 42 U.S.C. §§ 2000e to 2000e-17 (1976) [hereinafter cited as Title VII].

15. 414 U.S. 563, 568 (1974).

of statutory construction and policy considerations, it will be suggested that a general impact standard be applied in Title VI cases. The article will further suggest the use in Title VI cases of Title VII prima facie criteria, and will outline a model of proof allocation that preserves the underlying legislative purpose: to assure that federal funds are not used to promote discrimination while allowing limited deference to local decisionmaking.

The practical implications of the issue must be underscored. Title VI is a broad-based civil rights statute barring discrimination not only in the area of education but in any program or activity receiving federal financial assistance. An intent standard applied in the narrowest sense would foreclose a substantial group of aggrieved individuals already denied constitutional relief from obtaining redress in the courts.[16] In addition, the language and enforcement procedures for Title VI have served as the model for subsequent legislation prohibiting sex[17] and handicap[18] discrimination. Court interpretation of these statutes on certain issues has hinged upon judicial interpretation and the

16. In the field of education, the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703, does provide an alternative avenue of relief. The statute prohibits a state from denying equal educational opportunity to an individual on account of race, color, sex, or national origin in any of six specified ways. Designed essentially as antibusing legislation, the first five prohibitions are concerned with desegregation and the assignment and transportation of students. The sixth prohibition, however, was designed to codify into law the Supreme Court's decision that same year in Lau v. Nichols, 414 U.S. 563 (1974), with respect to the educational rights of linguistic minority students. Subsection (f) of § 1703 prohibits an educational agency from failing "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program."

Several courts have imputed an effects standard to the statute. *See, e.g.*, United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd on other grounds*, 680 F.2d 356 (5th Cir. 1982); Rios v. Reed, 480 F. Supp. 14 (E.D.N.Y. 1978); Martin Luther King Junior Elementary School v. Ann Arbor, 473 F. Supp. 1371 (E.D. Mich. 1979); Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57 (E.D.N.Y. 1978). Nevertheless, the limited scope of the statute as compared to that of Title VI is apparent on its face. Coverage under § 1703(f) is restricted to litigants claiming "language barriers," while Title VI covers all educational services denied on the basis of race, color, or national origin. Section 1703(f) is further limited to the educational sector and to state action, while Title VI covers discrimination by a broad range of institutions and organizations, provided they are deemed recipients of federal funds.

17. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1981). Section 1681 states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

18. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1981). The Act states: "No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

legislative history of Title VI,[19] which may serve as the interpretive basis of subsequent cases as to standards of proof required under these statutes.[20] Finally, Title VI and its subsequent analogues reach not only discrimination in public institutions and agencies, but also in private organizations receiving federal financial assistance. These statutes thereby serve as significant vehicles for preventing and eliminating discrimination beyond the scope of state action, and, as such, expand the protections mandated by the Fourteenth Amendment Equal Protection Clause.

I. Judicial Interpretation: Prior Cases

A. The Disproportionate Impact Standard Under Title VII

The Civil Rights Act of 1964, and most notably Title VII of that Act, was designed to assure the right to equal treatment.[21] However, as litigants took their grievances to the courts, it became apparent to the judiciary that equal treatment alone would not suffice to remedy the effects of past discrimination, and so the principle of equal status or equal results came to be applied with increasing frequency.[22] As a result, Title VII cases developed along two strands of discrimination the-

19. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979) (private right to sue under Title IX). *But see* North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (1982) (employment discrimination covered under Title IX even though not covered under Title VI). In *North Haven*, the Court defined certain limits on the use of Title VI in interpreting subsequent statutes. The Court stated: "It is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX. The meaning and applicability of Title VI are useful guides in construing Title IX . . . only to the extent that the language and history of Title IX do not suggest a contrary interpretation." *Id.* at 1922.

20. In Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 454 U.S. 1128 (1981), the plaintiff alleged a Title IX violation in the rejection of her application for admission to the defendant medical school. The Seventh Circuit noted the Supreme Court's directive in an earlier decision in the same case as to the private right to sue, *i.e.*, that the courts should look to Title VI for guidance regarding the proper interpretation of Title IX. *See Cannon*, 441 U.S. at 694-96. Basing its discussion upon the Supreme Court decision in *Bakke* as well as subsequent rulings in Fullilove v. Klutznick, 448 U.S. 448 (1980), and Board of Educ. v. Harris, 444 U.S. 130 (1979), the Seventh Circuit concluded that a majority of the Justices of the Supreme Court would hold that a violation of Title VI requires an intentional discriminatory act, and therefore adopted that standard under Title IX.

21. 110 CONG. REC. 1519 (1964) (remarks of Rep. Celler). *Accord id.* at 12,614 (remarks of Sen. Muskie) ("Every American citizen has the right to equal treatment—not favored treatment, not complete individual equality—just equal treatment.").

22. "Equal treatment" and "equal status" are concepts developed in Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 113-14 & n.8 (1976), and further elaborated upon in Miller, *Proof of Racially Discriminatory Purpose under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy *and* Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725, 727-30 (1977). Equal treatment has also been referred to as "equality of opportunity" and equal status as "equal achievement" or "equality of results."

ory—disparate treatment and disparate impact—corresponding to the equal treatment/equal status values. Within the framework of this dichotomy, the federal courts have applied prima facie case analysis, *i.e.*, a three-stage analytic approach to the evidentiary showings required of plaintiff and defendant in Title VII litigation.[23]

The most common type of discrimination involves disparate treatment, whereby an employer subjects an individual to overtly different treatment based solely upon race, color, sex, religion, or national origin.[24] While this category of Title VII analysis is not directly applicable to the Title VI issue at hand, the development of the case law is worthy of discussion by way of contrast. In the leading disparate treatment case, *McDonnell Douglas Corp. v. Green*,[25] the Court established the four general requirements of the plaintiff's prima facie case: (1) membership in a protected class; (2) application and qualification for the job; (3) rejection by the employer despite qualification; and (4) the existence of a vacancy for the position and continued efforts by the employer, after rejection of the plaintiff, to fill the vacancy with another person with the complainant's qualifications.

After the plaintiff has established the prima facie case, the burden shifts to the defendant employer to "articulate some legitimate non-

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See also Comment, *The Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power*, 1980 B.Y.U. L. REV. 295, 296-303.

23. Prima facie is a Latin term meaning "on its face." In the context of discrimination law, the term denotes statistical or other evidence of objective facts that, if accepted, removes the element of factual inequality from mere speculation and raises the conclusion of discrimination to the level of inference. *See* Comment, *Applying the Title VII Prima Facie Case to Title VII Litigation*, 11 HARV. C.R.-C.L. L. REV. 129 (1976). The prima facie case is procedurally useful to plaintiffs in avoiding a summary judgment and shifting the burden to the defendant to produce evidence in rebuttal of the presumption of discrimination. *See* MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 336, 338 (2d ed. 1972).

24. A third theory based upon "pattern or practice" is actually a variant of the disparate treatment theory. In order to establish the prima facie case, the plaintiff must prove that the employer has systematically treated the group of which plaintiff is a member less fairly than others on the basis of an impermissible consideration. For example, proof that the employer has regularly hired only men to specific positions over the years despite equally qualified female applicants may create the rebuttable presumption that individual women have been subjected to unlawful discrimination. During congressional debates on Title VII, Senator Humphrey defined pattern-or-practice discrimination as having occurred "if a company repeatedly and regularly engaged in acts prohibited by statute . . . . [S]ingle, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice . . . ." 110 CONG. REC. 14,270 (1964).

25. 411 U.S. 792, 802 (1973). The plaintiff Green was a mechanic and long-time civil rights activist who had been laid off as part of a reduction in the defendant corporation's workforce. To protest his discharge, Green participated in an illegal "stall-in." Several weeks later, he responded to a company advertisement for qualified mechanics and was denied employment based upon his participation in the illegal activities.

discriminatory reason for the employee's rejection."[26] It should be noted that no requirement of proof of intent is placed initially upon the plaintiff. However, once the defendant's burden of proof is satisfied, the plaintiff must prove by a preponderance of the evidence that defendant's purportedly nondiscriminatory explanation is merely a pretext shielding a true discriminatory purpose. The plaintiff raises the inference of discrimination by proving the four elements of the prima facie case, the defendant rebuts the presumption with a nondiscriminatory justification, and the plaintiff must then offer evidence leading to an inference of intentional discrimination. So, while direct proof of intent is not part of a plaintiff's prima facie case, the burden of indirectly proving intentional discrimination is placed upon plaintiff in the third evidentiary stage.

Four years after *McDonnell Douglas*, in *International Brotherhood of Teamsters v. United States*, the Court refined the liability theory by noting that in disparate treatment cases, "[p]roof of discriminatory motive is critical."[27] The intent element as required by the Court, however, was not that of direct proof of the employer's subjective discriminatory intent, but merely an inference to be drawn from the plaintiff's proof that defendant's justification for the treatment was not legitimate. The following year, in *Furnco Construction Corp. v. Waters*, the Court reaffirmed the presumption that, in the absence of legitimate explanations to the contrary, acts of disparate treatment "are more likely than not based on the consideration of impermissible factors."[28]

The precise nature of the burden placed upon defendant to "articulate some nondiscriminatory reason" as enunciated by the Court in *McDonnell Douglas* was given further clarification in *Texas Department of Community Affairs v. Burdine*.[29] In that case, the Court limited the defendant's burden to merely producing evidence that legitimate, nondiscriminatory reasons existed for the challenged employment action. The defendant did not need to persuade the Court that the rejection was actually motivated by the proffered justifications, but was merely required to set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.[30] As a result of *Burdine*, it is now clear that since the burden of proof in a Title VII disparate treatment case rests on the plaintiff employee, the defendant employer

26. *Id.*
27. 431 U.S. 324, 335 n.15 (1977).
28. 438 U.S. 567, 577 (1978).
29. 450 U.S. 248 (1981).
30. *Id.* at 254.

will prevail unless the plaintiff conclusively establishes that discrimination was the basis for the employment decision.[31]

Returning to the equal treatment/equal status dichotomy, the equal treatment principle is "process-oriented," emphasizing the "purification of the decision process."[32] Equal treatment is further based upon the philosophical concept of liberty, as compared with the second theory upon which the Court has decided a smaller group of Title VII cases—that of disparate impact, which is based upon the concept of equality.

Disparate impact theory looks toward equal status as the goal of discrimination law. It is concerned with group and not individual rights, is "result-oriented," and aims at achieving substantive as opposed to procedural equality through the elimination of the effects of past societal discrimination. Disparate (disproportionate) impact theory recognizes that policies neutral on their face may still deny persons equal opportunity where adverse effects fall disproportionately on members of a protected class.[33] Disparate impact theory, with its operational framework of evidentiary burdens developed by the Court in the past decade, may best serve as the proper analytic model for Title VI cases.[34]

The Court's first definitive interpretation of Title VII came in *Griggs v. Duke Power Co.*,[35] in which the Court rejected the equal treatment approach of the lower courts and applied that of equal status.

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31. Upon remand, the Fifth Circuit reversed its earlier decision and held that, based upon the Supreme Court's interpretation of Title VII, the plaintiff had failed to prove employment discrimination. 647 F.2d 513 (1981).

32. Fiss, *The Fate of an Idea Whose Time Has Yet to Come: Antidiscrimination Law in the Second Decade After* Brown v. Board of Educ., 41 U. CHI. L. REV. 742, 764 (1974).

33. *Id. See also* Fiss, *supra* note 22; Comment, *supra* note 23, at 297.

34. In the typical case brought under Title VI, the policies and practices of the defendant school board or state/municipal officials are neutral on their face and therefore evidence a record clear of discriminatory intent, yet show disproportionately burdensome effects on racial minorities. A common example in the educational setting is the segregation of students by race, for purposes of providing remedial or special services, and therefore facially based upon an educational justification. In the case of municipal services, the most common cases have been those of hospital closings in minority neighborhoods based upon reduced financial resources or decreasing clientele resulting in administrative inefficiency.

35. 401 U.S. 424 (1971). The case was brought under § 703(a) and (h) of Title VII, 42 U.S.C. § 2000e-2. Section 703(a) declares it an unlawful employment practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." Section 703(h) further states: "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that

Holding that "good intent or absence of discriminatory intent" was essentially irrelevant inasmuch as "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation,"[36] the Court developed a two-part test of liability to be applied in Title VII disparate impact cases. First, the plaintiff must establish a prima facie case by proving that the challenged practice has had a disproportionate impact on a minority group of which the plaintiff is a member. Then, the burden shifts to the defendant employer to show that "any given requirement has a manifest relationship to the employment in question."[37]

In *Griggs*, the Court also enunciated the "business necessity" rule whereby an employment practice is prohibited if it operates to exclude racial minorities and cannot be shown to be job-related.[38] The Court looked to the legislative history of Title VII and to the guidelines issued by the Equal Employment Opportunities Commission, which interpret section 703(h) and permit only the use of job-related tests. Affording deference to the administrative interpretation of the Act by the enforcing agency, and finding the legislative history and the Commission's construction in accord, the Court treated the "job-relatedness" guidelines as an expression of congressional intent.[39]

The Court looked further to the legislative history of the Act and found the overall legislative intent in enacting Title VII to have been the achievement of equality of employment opportunities and the removal of "barriers that have operated in the past to favor an identifiable group of white employees over other employees."[40] This objective—to remedy the effects of prior societal discrimination, with an emphasis upon group as opposed to individual rights—fits the Court's decision in *Griggs* neatly into the "equal status" paradigm, as contrasted with a process-oriented approach.[41]

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such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin."

The plaintiff alleged that the defendant employer's requirement—that all applicants for employment or transfer either present evidence of completion of high school or pass a standardized general intelligence test—impacted disproportionately upon racial minorities, and thereby constituted a Title VII violation. At trial, the employer failed to prove that either standard was related sufficiently to successful job performance.

36. 401 U.S. at 432.

37. *Id.*

38. *Id.* at 431.

39. *Id.* at 434-36 & n.10.

40. *Id.* at 430.

41. See Comment, *supra* note 22, at 331, in which the author draws a distinction between the interpretive approach taken by the Court in equal treatment as compared with equal status cases. While the language and structure of the statute itself is foremost in the

The Court further refined the two-part theory of Title VII liability as enunciated in *Griggs* by adding a third step in *Albemarle Paper Co. v. Moody*.[42] In the event that the defendant meets his burden of showing "job-relatedness" or "business necessity," the plaintiff may prove by a preponderance of the evidence the availability of alternative means that would have served the employer's legitimate interest while avoiding undesirable racial effects.[43] Although the Court in *Griggs* merely placed on the defendant the burden of "showing" job relatedness, in *Albemarle* the Court expanded that burden to "proving."[44] This terminology was later used in the 1977 case of *Dothard v. Rawlinson*.[45] Both *Albemarle* and *Dothard* represent a more exacting standard imposed by the Court on the defendant in disparate impact cases. The burden of persuasion as to job-relatedness is thus heavier in impact cases than it is in disparate treatment cases, in which the defendant must merely come forward with some credible evidence of a nondiscriminatory justification for its action.[46] It therefore appears that in disparate impact cases, once the plaintiff raises the inference of discrimination by proof of disproportionate impact, the burden of proof, and not merely the burden of production, shifts to the defendant.

It has also been suggested that the element of intent is not completely irrelevant to disproportionate impact actions. By proving the existence of an alternative and less discriminatory policy, the plaintiff raises the inference that the defendant's reliance on the means used was merely a pretext for discrimination, similar to the intent-oriented third element of proof in disparate treatment cases.[47] This analogy demands clarification. It should be noted that in a disparate treatment case, the plaintiff *must* prove intent; that is, the plaintiff must show that the reasons proffered by the defendant are a mere pretext for intent to discriminate. In a disparate impact case, on the other hand, plaintiff will

analysis of equal treatment cases, with a decided deference to the intentions of the original drafters, such postenactment developments as (a) administrative interpretations and reenactment after contemporaneous interpretation, (b) legislative silence implying approval of contemporaneous interpretations, and (c) interpretation by reference to related statutes, are the distinctive features of the interpretive approach utilized in disparate impact cases.

42. 422 U.S. 405 (1975).

43. *Id.* at 425.

44. *Id.*

45. 433 U.S. 321, 329 (1977).

46. In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 n.5 (1981), the Court noted the distinction made in prior cases as to burdens of proof in disparate treatment as opposed to disparate impact cases, limiting by implication its ruling in that case to the category of disparate treatment.

47. *See* Friedman, *The Burger Court and The Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 3 (1979).

prevail merely by proving the existence of alternative means absent any direct or indirect proof of intent. The possibility that such proof *may* raise the inference of discriminatory intent is merely of academic interest and totally irrelevant to the burdens of proof and the nature of the evidence required. As the next section points out, the factors that the Court has declared to bear upon the issue of intent place a considerably more onerous burden upon plaintiff than does a requirement of mere proof of the existence of alternative and less discriminatory means available to the defendant.

B. The Intent Standard Under the Fourteenth Amendment

Over the course of the 1960's and 1970's, as the Supreme Court incrementally developed rules of law as to the standard of review to be applied in Title VII cases, the Court engaged in a rather confused and conflicting interpretation of cases brought under the Equal Protection Clause of the Fourteenth Amendment.[48] Before examining the Court's interpretation of discriminatory intent and disproportionate impact, however, it is necessary to examine the scope and overall structure of equal protection doctrine that has served to protect "discrete and insular minorities."[49]

The Equal Protection Clause was born out of a history of blatantly race-conscious treatment of blacks. It was initially directed at eradicating the vestiges of slavery. During the early years of judicial interpretation, a distinction was drawn between "political" equality, which was to be protected under the Fourteenth Amendment, and "civil" or social equality, which was merely a matter of taste or mores.[50] Between its adoption in 1868 and the Court's decision in *Brown v. Board of Education*[51] in 1954, the Equal Protection Clause played a minimal role in constitutional adjudication.[52]

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48. U.S. CONST. amend. XIV, § 1. *See supra* note 9.

49. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

50. *See* Gates, *The Supreme Court and The Debate Over Discriminatory Purpose and Disproportionate Impact*, 26 LOY. L. REV. 567 (1980). The Court in Strauder v. West Virginia, 100 U.S. 303 (1879), invalidated a West Virginia law excluding blacks from juries but failed to give similar protection to social equality in the Civil Rights Cases, 109 U.S. 3 (1883), in which it invalidated a federal statute forbidding discriminatory practices in places of "public accomodation." The now famous "separate but equal" doctrine enunciated in Plessy v. Ferguson, 163 U.S. 537 (1896), is a clear example of the Court's reluctance to adjudicate what it believed to be a matter of social custom outside the purview of the law.

51. 347 U.S. 483 (1954).

52. Justice Holmes called it "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927). *Cf.* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 380 (1949) ("Where the clause is held to govern, its application is halting, indecisive and unpredictable.").

Brown and its early progeny dismissed the political/social equality distinction drawn in the earlier cases, as the Court was presented with overt governmental acts of racial discrimination, discriminatory on their face, which it consistently invalidated without judicial explorations into purpose or motive.[53] Beginning in the 1960's, however, two significant developments occurred in equal protection analysis that caused the Fourteenth Amendment to become one of the most fertile sources of constitutional litigation. First, the Court began to address the problem of covert discrimination, that is, governmental practices that are facially neutral but that have a discriminatory effect on protected groups.[54] The practices in question were no longer so blatantly discriminatory as to provide prima facie evidence of discrimination. The issue became whether mere disproportionate impact on a protected group would be a sufficient standard for determining discriminatory classifications. If not, the Court would be forced to embark on the uncharted and traditionally avoided waters of judicial examination of governmental purpose.[55]

A second development in equal protection analysis in recent years has been a judicial broadening of the scope of protection beyond racial classifications, to include discrimination based upon alienage,[56] legiti-

53. In the several years immediately following *Brown*, the Court invalidated laws that expressly provided for segregated parks in New Orleans City Parks Improvement Ass'n v. Detiege, 358 U.S. 54 (1958); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Mayor & City Council v. Dawson, 350 U.S. 877 (1955) (beaches). The Court decided many of these early post-*Brown* segregation cases by per curiam orders without any inquiry into what were obviously discriminatory motives. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1293-94 n.265 (1970); Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961, 974.

54. *See* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2 (1976). As Professor Brest has noted: "The first order of business in the era following *Brown* was to halt the ongoing, pervasive, and often overt practices of discriminatory exclusion of blacks from schools, voting booths, jobs, restaurants, housing, and the like. . . . By the late 1960's, the civil rights enforcement effort had eliminated the most flagrant practices. Covert discrimination continued to flourish, however, and the very successes of the '60's dispelled any notions that blacks would quickly become integrated into the economic and social life of the nation." *Id.*

55. One commentator has noted that the choice between purpose and effect has been further complicated by the Court's failure to decide whether equality of treatment or equality of status should be the dominant equal protection value. A discriminatory purpose test is related to equal treatment and individual equality, for it proscribes explicit considerations of race, whereas a disproportionate impact test is related to equal group status. *See* Miller, *supra* note 22.

56. *See, e.g.*, Foley v. Connelie, 435 U.S. 291 (1978); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

macy,[57] and sex.[58] The civil rights movement of the 1960's and subsequent judicial and legislative intervention on behalf of racial minorities raised the social consciousness of the nation and prompted additional groups to lobby for protective legislation and to press their claims before the courts.

In this atmosphere of increasing judicial concern with covert discriminatory acts and a broadening of protected classes, the Supreme Court continued into its modern era of equal protection analysis begun with its 1944 decision in *Korematsu v. United States*.[59] In the past two decades, the Court has developed a "two-tier" doctrinal structure for reviewing classifications under the Equal Protection Clause and, more recently, a middle tier for newly included protected groups.[60] Under current doctrine, state action is subject to strict scrutiny if it impinges on a "fundamental right"[61] or discriminates against a "suspect class."[62] The state must then demonstrate that its action was necessary to advance a compelling state interest and that no less drastic means of achieving that interest were available to the decisionmaker.[63] If the state's action adversely affects neither a fundamental right nor a suspect class, "minimal scrutiny" is applied and the state merely must demonstrate that the classification is reasonably related to any legitimate governmental interest. Traditionally, the Court has afforded decisionmakers wide discretion as to the interest promoted under this lesser standard of review.

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57. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

58. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

59. 323 U.S. 214 (1944). As one commentator has noted, "the doctrine was later molded into an interventionist sword with which the Warren Court carved out its high ideals." Comment, *The Veterans' Preference Statutes: Do They Really Discriminate Against Women?*, 18 DUQ. L. REV. 653, 661 (1980). *See also* Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) ("Once loosed, the idea of Equality is not easily cabined.").

60. Middle-tier scrutiny originated in the Court's approach to gender-based classifications. *See supra* note 58. It has also been used in recent years with regard to legitimacy. *See* Trimble v. Gordon, 430 U.S. 762 (1977).

61. The Court has granted fundamental status to criminal defendants' rights. *See, e.g.*, Williams v. Illinois, 399 U.S. 235 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting rights); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

62. The word "suspect" is derived from Justice Black's majority opinion in *Korematsu*, 323 U.S. at 216.

63. *See* McLaughlin v. Florida, 379 U.S. 184 (1964).

The point of intersection between discriminatory purpose and disproportionate impact on the one hand, and suspect classifications on the other, is significant to the present discussion. The former tests are used by the courts in establishing whether a given law or public policy, overtly premised on a rational discernment between groups or individuals, is covertly premised on a suspect criterion despite its apparent neutrality. It is this suspect criterion that then triggers a heightened standard of review or "strict scrutiny." At this point, the standard of proof comes into play. Proof of discriminatory purpose carries a high probability that a racial classification will be held discriminatory, whereas disproportionate racial impact has traditionally played a minor role as proof of a prejudicial racial classification.

Prior to its 1976 decision in *Washington v. Davis*,[64] the Court vacillated between purpose and effect as the standard of proof to be applied in equal protection cases challenging facially neutral acts yielding discriminatory results. An examination of those early cases and of *Davis* and its progeny is essential to an understanding of the intent/impact debate.

1. Cases Prior to Washington v. Davis

The first major challenge of a facially neutral state law that clearly had been designed to maintain segregation came in *Gomillion v. Lightfoot.*[65] In that case, the Court invalidated an Alabama law that had changed the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure,"[66] excluding almost all of the city's four hundred black voters but none of its whites. Justice Frankfurter, speaking for the majority, noted that the "inevitable effect" of the law would be to deny the black voters of Tuskegee the right to vote in violation of the Fifteenth Amendment.[67] Nowhere did the Court mention discriminatory purpose per se. However, several commentators have noted that the majority's conclusion in that regard is clear.[68] Justice Frankfurter declared that "the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[69]

64. 426 U.S. 229 (1976).
65. 364 U.S. 339 (1960).
66. *Id.* at 340.
67. *Id.* at 342.
68. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 108 (1977); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 547 (1977).
69. 364 U.S. at 341.

Seven years later, in the context of desegregation, the Court invalidated Prince Edward County's decision to close its public schools and pay tuition grants to students attending private schools. In *Griffin v. County School Board*,[70] the Court ordered that the public schools be reopened because they had been closed "for one reason, and one reason only: to insure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school."[71] Because the plan "[was] created to accomplish . . . the perpetuation of racial segregation," Justice Black, in his majority opinion, concluded that it "works to deny colored students equal protection of the laws."[72] In contrast to *Gomillion*, the Court in *Griffin* was dealing not with a facially neutral law, but rather with one that was discriminatory on its face, given a prior history of state mandated segregation. The language of both cases further alludes to a mix of purpose and effect as the focus of judicial analysis.

In *Reitman v. Mulkey*,[73] the Court invalidated a California state constitutional amendment establishing the right of private persons to discriminate on racial grounds in real estate transactions. The Court viewed the amendment as an official authorization of racial discrimination that significantly involved the state in the discriminatory acts of private parties.[74] Writing for a five-member majority, Justice White examined the constitutionality of the amendment in terms of "its 'immediate objective,' its 'ultimate effect' and its 'historical context and conditions existing prior to its enactment.' "[75] The provision had been adopted shortly after state enactment of fair housing laws. The majority concluded that the "ultimate impact" and the only conceivable purpose of the amendment was to nullify these laws and to thereby authorize private racial discrimination in housing.[76] Again, the Court based its determination on a record of recent historical events and apparently applied a combined intent/impact standard.

Two years after *Reitman*, in *Hunter v. Erickson*,[77] the Court did not expressly refer to either purpose or effect, but rather examined historical events leading up to an amendment to the Akron city charter

70. 377 U.S. 218 (1964).

71. *Id.* at 231.

72. *Id.* at 232.

73. 387 U.S. 369 (1967).

74. *Id.* at 376-78, 380-81.

75. *Id.* at 373 (quoting Mulkey v. Reitman, 64 Cal. 2d 259, 413 P.2d 825, 50 Cal. Rptr. 881 (1966)).

76. 387 U.S. at 374-76, 381.

77. 393 U.S. 385 (1969).

that required the approval of fair housing ordinances by referendum. The Court invalidated the amendment, concluding that while the law was facially neutral as to race, "the reality is that the law's impact falls on the minority."[78]

At this point, the development of the case law as to intent versus impact standards in equal protection adjudication reaches the juncture between the Warren and Burger Courts. While the Warren Court had moved in the direction of establishing some loosely defined rules on intent plus impact, the Court had never expressly stated that proof of either alone would suffice, as the impact in such cases was readily discernible and intent could easily be inferred from the Court's examination of historical context. The cases brought before the Burger Court, however, represented more complex sets of facts, with records less readily indicative of prior discrimination. While the Warren Court had consistently granted relief to plaintiffs, the Burger Court decisions appear to have fashioned the standard according to the facts of the case affording plaintiffs the least probability of prevailing. The Court opened the 1970's applying a "purpose or effects" standard,[79] which ultimately evolved into the *Davis* standard of intent. The early 1970's proved to be a judicial turning point marked by the greatest inconsistency in a series of closely decided cases. In those cases in which the Court refused to consider official purpose, either the defendants prevailed as in *Palmer v. Thompson*[80] or the plaintiffs prevailed by a mere five-member majority as in *Wright v. Council of Emporia*.[81]

In *Dandridge v. Williams*, the Court upheld a Maryland welfare system that placed a dollar limit on AFDC grants regardless of family size or actual need. Writing for the majority, Justice Stewart noted the absence of any "contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect."[82] Here, the Court lowered the standard of proof from the "purpose plus effect" of the earlier cases and implied for the first time that proof of *either* purpose *or* effect would suffice. Whereas in prior cases, recent historical events could provide facts from which to infer discriminatory purpose and thereby fortify the plaintiff's case, in *Dandridge*, the Court failed to engage in any historical examination but merely reviewed the instant facts on their face.

78. *Id.* at 391.
79. Dandridge v. Williams, 397 U.S. 471 (1970).
80. 403 U.S. 217 (1971).
81. 407 U.S. 451 (1972).
82. 397 U.S. at 485 n.17.

The following year, Justice Black writing for a 5-4 majority in *Palmer*, maintained that in no prior case had the Court "held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[83] The Court upheld the decision of the Jackson, Mississippi city council to close rather than desegregate its public swimming pools. Unlike earlier decisions, in which the Court had afforded considerable weight to recent historical events, the decision in *Palmer* appeared to ignore the fact that the formerly segregated pools had been closed following a court order to desegregate public facilities.

In *Palmer*, the Court for the first time discussed the problem of "ascertainability" in cases of multiple motivations, as well as the "futility" in judicial attempts to invalidate laws based upon improper motives. As to the first problem, the Court maintained that "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."[84] As to "futility," the Court maintained that a law invalidated on the grounds of impermissible motives could presumably become valid as soon as the decisionmaking body repassed it for different and permissible reasons.[85] The Court further held that, while such cases as *Griffin* and *Gomillion* may suggest that motive or purpose is relevant in equal protection analysis, the focus of those cases was on the actual effect of the enactments and not on the motivation behind them. The concurring opinions of Chief Justice Burger and Justice Blackmun foreshadowed two points that would arise again in subsequent cases.[86] The Chief Justice suggested that, were the service that had been terminated deemed to be essential as compared to merely desirable, then perhaps judicial analysis might differ. Justice Blackmun further elaborated on this point and suggested that a higher degree of judicial scrutiny might be appropriate were essential services such as education involved. Both concurring opinions deferred to local officials in the case of merely desirable services and recognized the "growing burdens" and "shrinking revenues" of municipal and state governments, suggesting the potential financial

83. 403 U.S. at 224.

84. *Id.* at 225.

85. *Id.* For a discussion of problems inherent in judicial review of motivation, including ascertainability, futility, disutility (law passed for an illicit reason may in effect be a good law), and impropriety (undesirable intrusion into political process), see Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116; Ely, *supra* note 53, at 1212.

86. 403 U.S. at 227-28 (Burger, C.J., concurring); *See also id.* at 229 (Blackmun, J., concurring); Schwemm, *supra* note 53, at 982.

impact on the defendant might be of proper judicial consideration in equal protection analysis.[87]

A school desegregation issue did, in fact, present itself to the Court the following year in *Wright v. Council of Emporia*.[88] This case involved the city's withdrawal from a county school system following a court order to desegregate the county schools. Writing for a five to four majority, Justice Stewart relied upon the "effects" standard of *Palmer* and reversed the decision of the Fourth Circuit, which had applied a "dominant purpose" test.[89] The Court maintained that such a test "finds no precedent in our decisions" although "a demonstrated racial purpose may be taken into consideration in determining the weight to be given" a nonracial justification proffered by a school board.[90] The Court further stated that "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect."[91] Finally, the Court applied a "totality of the circumstances" test in weighing all the factors—historical, sociological, educational—to determine their effect upon the desegregation process. It is noteworthy that joining in the dissent written by Chief Justice Burger were Justices Blackmun, Powell, and Rehnquist, the latter two having replaced Justices Harlan and Black after the Court's decision in *Palmer* supporting the "effects" standard. This change in Court membership explains in part the inconsistency found in the decisions of the early 1970's and further marks a turning point in the Court's analysis of equal protection claims as to standards of proof.[92]

During the following term, the Court was faced with its first school desegregation case outside the South and with the issue of racial imbalance in a school system free from a history of officially mandated segregation. The plaintiffs in *Keyes v. School District No. 1*[93] alleged that the Denver school board's gerrymandering of attendance zones, selection of school sites, and adoption of a neighborhood school policy had resulted in a segregated system. The Court held that proof of deliberately segregative acts on the part of the school board in a substantial

87. *See* 403 U.S. at 228 (Burger, C.J.); *id.* at 229 (Blackmun, J.).

88. 407 U.S. 451 (1972).

89. Wright v. Council of Emporia, 442 F.2d 570 (4th Cir. 1971), *rev'g* Wright v. County School Bd., 309 F. Supp. 671 (E.D. Va. 1970).

90. 407 U.S. at 461.

91. *Id.* at 462.

92. In a strongly worded dissent echoing their concurring opinions in *Palmer*, Chief Justice Burger joined by Justice Blackmun supported the relevance of discriminatory purpose in school desegregation cases and further called for judicial restraint and deference to local control. *Id.* at 477-78, 482-83 (Burger, C.J., dissenting).

93. 413 U.S. 189 (1973).

portion of the system raised the rebuttable presumption of intentional segregation in the entire system. The Court further drew the distinction between *de jure* and *de facto* segregation based upon proof of intent, holding that "in the special context of school desegregation cases" and in the absence of a history of officially mandated segregation, a necessary element of an equal protection claim was "*purpose* or *intent* to segregate."[94]

It was not until three years later that the Court's position in *Keyes* was tested outside the realm of school desegregation and within the context of employment testing.[95] Although the cases prior to *Washington v. Davis* reflect a certain vacillation, inconsistency, and a fact-based approach, some common considerations in determining equal protection violations run through the decisions. Justice White wrote in *Davis* that prior cases 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."[96] In those cases in which an effects standard had been applied (*Gomillion*, *Dandridge*, *Wright*), the Court had either expressly or impliedly looked to the historical context and recent events in order to draw an inference of intent.[97]

Those cases decided on an intent standard (*Griffin*, *Keyes*) both concerned school desegregation issues. The first was an early case in which motive was expressly relied upon and could readily have been

94. *Id.* at 208. While Justice Powell had dissented from the majority opinion in *Wright*, which had applied an effects standard, his concurring opinion in *Keyes* maintains that an effects test would better insure the elimination of even subtle racial discrimination in the decisions of school board officials. *Id.* at 227 (Powell, J., concurring). He further notes that a test based on purpose would not only render equal protection claims difficult to prove, but would also lead to "fortuitous, unpredictable and even capricious" results. *Id.* at 233. This position appears to represent a change from that taken in the *Wright* dissent, and can only be explained by the difference in the facts that the two cases presented before the Court. *Wright* dealt with a city in Virginia in which schools had been segregated by law immediately prior to a court order to desegregate. While the majority focused upon effect, discriminatory intent could easily have been inferred from the historical context of the case. *Keyes* presented the Court with a novel and far more difficult problem. Unless the Court were to read the minds of the school board members to determine subjective intent or motive, inferences as to objective intent would be difficult to draw from the decisions made by officials in formulating traditionally benign organizational policies, absent any history of legally mandated segregation. Justice Powell's shift in position between *Wright* and *Keyes* reflects a more pervasive "result-oriented" approach taken by the Court in the cases preceding *Davis*. *See, e.g.*, Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

95. *See infra* text accompanying notes 98-105.

96. 426 U.S. 229, 239 (1976).

97. *Palmer* marked an exception in which the Court upheld official action based solely on the *absence* of a discriminatory effect. *See supra* text accompanying notes 83-87.

inferred from the blatantly discriminatory effects of official action. The second presented the Court with more subtle facts from which to draw inferences of discriminatory intent. Whether the Court was attempting to define the standard based upon the issues presented, with a finding of intent to be applied required only in education discrimination cases, is difficult to determine, particularly in view of the effects test applied in *Wright*. Perhaps the Court's pre-*Davis* inconsistency resulted from a variety of coalescing factors, including a transition from the Warren to the Burger Courts, a change in membership adding more judicially restrained Justices, a broadening of the issues brought before the Court, and a simultaneously developing body of case law recognizing an effects standard to be applied in Title VII litigation. It was in *Davis* that the Court was forced to take a position and distinguish between standards of proof required in cases brought under constitutional as opposed to statutory claims.

2. Davis *and Its Progeny*

Washington v. Davis[98] represents the Court's first review of a disproportionate impact case absent any claim of intentional discrimination. Plaintiffs alleged that the written verbal ability test required for employment by the District of Columbia Police Department bore no relationship to job performance and excluded a disproportionately high number of black applicants, in violation of the Due Process Clause of the Fifth Amendment.

The Court held that the court of appeals had erred in applying the *Griggs* effects standard to a constitutional case.[99] The Supreme Court not only laid down the intent standard to be applied in equal protection analysis, but further attempted to present at least some vague guidelines as to shifting burdens of proof and means for determining discriminatory intent. According to *Davis*, once the plaintiff establishes the prima facie case by proof of a discriminatory purpose, the burden shifts to the defendant to " 'rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' "[100] Intent may be inferred from the totality of the relevant facts—echoing the "historical context" considerations of earlier cases—or from a blatantly discriminatory impact. The Court, however, was quick to warn that disproportionate impact "is not the sole touchstone of an invidious ra-

98. 426 U.S. 229 (1976).
99. *Id.* at 238, *rev'g* 512 F.2d 956 (D.C. Cir. 1975).
100. 426 U.S. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

cial discrimination forbidden by the Constitution."[101]

The Court apparently recognized the necessity of distinguishing some of its prior impact decisions—particularly that of *Palmer*—from the present case. In a brief explanatory footnote, the Court stated that "[t]o the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary."[102] The Court stated its rationale for an intent standard in constitutional litigation as founded on judicial restraint. A disproportionate impact standard could render invalid a "whole range of tax, welfare, public service, regulatory, and licensing statutes."[103] Finally, the Court deferred to legislative action for any possible extension of the impact rule beyond the point to which it was already applicable by statute. While the point is never expressly stated, the majority opinion by Justice White assumes that the discriminatory purpose requirement calls for an objective assessment of the "totality of the circumstances," including the disproportionate impact of the official action, as opposed to the subjective analysis of official motivation. The opinion's consistent use of the word "purpose" stands in sharp contrast to the Court's earlier opinions, which often used "purpose," "intent," and "motive" as though the terms were synonymous.[104] Viewed in this perspective, the *Davis* opinion does not represent a radical departure from judicial concerns expressed and standards enunciated in earlier cases, but rather the culmination of an evolutionary line of development with minor digressions along the way.[105]

Further clarification of the *Davis* holding came the following term in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[106] The case was brought by a nonprofit developer and minority individuals, challenging the village's denial of the developer's application for rezoning a tract of land from a single to a multiple-family clas-

101. 426 U.S. at 242.

102. *Id.* at 244 n.11.

103. *Id.* at 248.

104. *See* Schwemm, *supra* note 53 at 972, 1004.

105. In fact, in his concurring opinion in *Davis*, Justice Stevens remarked that "[t]he requirement of purposeful discrimination is a common thread running through the [prior] cases . . . ." 426 U.S. at 253 (Stevens, J., concurring). Justice Stevens' understanding of intent rests upon "objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." *Id.* Echoing the Court's "purpose or effect" standard in *Dandridge*, he viewed the line between purpose and impact as "not nearly as bright, and perhaps not quite as critical" as one might assume. *Id.* at 254. He conceded that disproportionate impact alone is insufficient proof of an equal protection violation. However, the disproportion may be as dramatic as that in *Gomillion*, such that either an intent or an effect standard would yield the same result. *Id.*

106. 429 U.S. 252 (1977).

sification. Plaintiffs alleged the denial was racially discriminatory and violated the Equal Protection Clause.

Justice Powell, writing for the majority, maintained that "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes . . . or even that a particular purpose was the 'dominant' or 'primary' one."[107] Unlike the *Davis* opinion, which spoke exclusively in terms of "purpose," the opinion in *Arlington Heights* used the term "motivating factor." Yet this term was obviously not used in the sense of subjective motivation, requiring judicial examination of the minds of government officials, but rather in terms of objective evidence. For example, the Court presented five factors that might be considered in determining whether "invidious discriminatory purpose was a motivating factor." Included among these are: (1) the impact of the official action, that is, whether it bears more heavily upon one race; (2) a clear pattern of governmental discrimination unexplainable on grounds other than race; (3) the historical background of the decision, particularly the specific sequence of events leading up to the challenged decision; (4) departures from the normal procedural sequence; and (5) legislative or administrative history, particularly contemporary statements by members of the decisionmaking body.[108] While the Court in *Davis* clearly stated that disproportionate impact alone is not sufficient as proof of discriminatory purpose, the Court in *Arlington Heights* implied that, given a pattern of discrimination as stark as that in *Gomillion*, impact alone might be determinative.[109]

In summary, Justice Powell's articulation of the applicable legal standard in *Arlington Heights* proved to be a mixed bag of clarification in the form of nonexhaustive guideposts and continued judicial vacillation as to the role of impact alone. It appears that the Court was applying an objective test of purpose, calling for an examination of overt manifestations from which an inference of discrimintory purpose could reasonably be inferred, rather than an examination of motivation in the sense of racial or discriminatory "animus" on the part of officials. What the Court failed to clarify is the weight to be afforded any of the five evidentiary elements suggested as proper subjects of judicial inquiry. Nor did the Court expressly state that evidence of one of the

107. *Id.* at 265.

108. *Id.* at 265-68.

109. In discussing "discriminatory pattern" as one type of circumstantial or direct evidence bearing upon proof of discriminatory purpose, Justice Powell stated that "[a]bsent a pattern as stark as that in *Gomillion* . . . , impact alone is not determinative, and the Court must look to other evidence." *Id.* at 266 (footnotes omitted).

five, including impact, could be so blatant as to become determinative of purpose.[110] In fact, the Court treated the court of appeals' finding that the village's decision carried a discriminatory "ultimate effect" as "without independent constitutional significance."[111] Perhaps the greatest utility of *Arlington Heights*, then, was not its expansion on the *Davis* doctrine of purpose but, as one commentator has noted, its affirmation that the discriminatory purpose requirement of *Davis* applied to all types of racial discrimination claims under the Equal Protection Clause.[112]

Several months following its decision in *Arlington Heights*, the Court was called upon to test the *Davis* standard as applied to jury selection cases. *Castaneda v. Partida*[113] was initially brought into the federal district court as a habeas corpus proceeding by a Mexican-American convicted of a crime in the Texas District Court. Respondent alleged that the gross underrepresentation of Mexican-Americans on the county grand juries constituted a denial of due process and equal protection under the Fourteenth Amendment. The relevant evidence fell into three categories: (1) statistical evidence as to the disproportionately low representation of Mexican-Americans on grand jury lists; (2) the Texas grand jury selection system; and (3) the political dominance and control of the Mexican-American majority in the county.

Justice Blackmun, joined in the majority opinion by Justices Brennan, White, Marshall, and Stevens, found that the respondent had established a prima facie case of discrimination in grand jury selection and that the state had failed to present sufficient evidence to rebut the

110. Note, however, that Justice Powell's reference to the state pattern of discrimination evidenced in *Gomillion* certainly leads to such an inference.

111. 429 U.S. at 271.

112. Schwemm, *supra* note 53, at 1019. Schwemm justifiably criticizes the majority's short perspective on "historical background"—*i.e.*, the fact that the Court limits its examination to the sequence of events set in motion by the plaintiff developer's petition for rezoning—as compared with the broader approach taken in *Davis*, in which the Court considered not only the police department's use of the literacy test but also the overall results of the entire recruitment program. *Id.* at 1029. However, he interprets the Court's use of "motivating factor" literally and believes the focus to have been placed on the actual state of mind of the officials.

An alternative interpretation is worthy of consideration. While the Court defined the ultimate issue in equal protection cases as whether race was "a motivating factor," it also permitted inferences to be drawn from the overt actions of officials. As an evidentiary matter, the Court did not place upon plaintiffs the burden of presenting direct or circumstantial evidence of racial "animus" per se. On the other hand, a legal standard of discriminatory "motive," in the purest sense, as opposed to mere "purpose," would have required such evidence.

113. 430 U.S. 482 (1977).

presumption of intentional discrimination. The statistical underrepresentation was deemed sufficient to establish a prima facie case of discrimination, and the evidence of a highly subjective system of selecting grand jurors in Texas was merely used as supporting evidence to buttress that conclusion.[114] The Court cited *Arlington Heights* and its consideration of "a clear pattern" of discrimination emerging "from the effect of the state action"[115] as well as the application of the principle to jury selection cases as discussed in *Davis*.[116]

Justice Powell, joined in a dissenting opinion by Chief Justice Burger and Justice Rehnquist, took exception to the majority's sole reliance upon statistical disparities. Citing *Davis* as standing for the proposition that "[d]isproportionate impact is not irrelevant, but is not the sole touchstone of an invidious racial discrimination,"[117] and also citing the five evidentiary elements outlined in *Arlington Heights*,[118] the dissent concluded that statistical evidence showing underrepresentation alone is insufficient to establish a prima facie case of discrimination, but should be considered in light of "such [other] circumstantial and direct evidence of intent as may be available."[119]

As *Arlington Heights* had left open the question of whether impact could be so gross as to raise the inference of purposeful discrimination, so *Castaneda* left open the question as to the role of statistics in proving such a grossly disproportionate impact. The five to four majority in *Castaneda* apparently believed statistical evidence would suffice. While *Davis* seemed at first blush finally to establish a legal standard of intent or purpose, *Arlington Heights* and *Castaneda* created confusion as to the focus of judicial examination—objective officials acts from which intent may be inferred or direct proof of discriminatory motive—as well as to the weight to be afforded various types of evidence, including statistics.

Two years after *Castaneda*, in *Personnel Administrator v. Fee-*

114. *Id.* at 494.

115. *Id.* at 493.

116. As the Court had stated in *Davis*: "It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination . . . .' With a prima facie case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' " 426 U.S. at 241 (quoting Alexander v. Louisiana, 405 U.S. at 632).

117. 426 U.S. at 242.

118. *See supra* text accompanying note 108.

119. *Castaneda*, 430 U.S. at 514 (Powell, J., dissenting) (quoting Arlington Heights, 429 U.S. at 266).

ney,[120] the Court defined "discriminatory purpose" so narrowly that the evidentiary burden on the plaintiff could prove impossible to meet, absent, perhaps , an express declaration of discriminatory intent on the part of the official decisionmakers. In *Feeney*, the Court upheld the constitutionality of a state statute granting veterans a preference over nonveterans in the competition for civil service employment. The action was brought by a female nonveteran who had ranked below male veterans on eligibility lists for civil service positions, despite her higher scores on civil service examinations. She had never been certified or considered for any of the positions sought. The issue before the Court was whether such veterans' preference statutes create an impermissible gender classification in violation of the Equal Protection Clause of the Fourteenth Amendment.

Writing for the majority, Justice Stewart maintained that "[d]iscriminatory purpose" implied a conscious choice by the legislature of a particular course of action selected "because of" not "in spite of" its adverse impact on a particular group.[121] In arriving at its decision, the Court considered a variety of both subjective and objective evidence. The subjective evidence included the stated goals of the veterans' preference and the actual wording of the statute. The Court concluded that the statute promoted the legitimate goal of aiding veterans. The objective evidence included impact-related statistics, the statute's legislative history, and the historical context of the veterans' employment preference. While the Court found that the statute severely reduced the public employment opportunities of women, it subordinated the objective evidence of disproportionate impact to the subjective evidence of legislative purpose.[122]

In *Davis*, the Court had stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[123] However, the "because of" not "in spite of" rule enunciated

120. 442 U.S. 256 (1979).

121. *Id.* at 279.

122. One commentator has observed that this weighing process between the imposed classification and the governmental objective, with judicial determination of the legitimacy or "compelling" nature of that objective, has traditionally been placed at a later point within the traditional framework of equal protection analysis. It is only after the classification is identified as being based upon a discriminatory criterion and therefore "suspect" (through proof of intent), that strict scrutiny is triggered and the court balances the classification against the governmental interest promoted. If the intent test is not met, then strict scrutiny is not triggered and a mere "rational basis" suffices, based on any legitimate governmental purpose. It appears that in *Feeney* the Court collapsed the various steps in equal protection analysis, or perhaps confused the "classification segment" of the test with the "balancing segment." Comment, *supra* note 59, at 666.

123. 426 U.S. at 242.

by the Court in *Feeney* indicates that the relevant facts must add up to an inference of discriminatory "animus" or desire to harm on the part of the decisionmaker. This definition finds little support in prior case law. Furthermore, it is not clear how the *Feeney* rule affects the "single motivation" issue.[124] The Court repeatedly recognized that *Davis* does not require proof of discriminatory purpose as the sole or dominant motivating factor. The majority in *Feeney* permitted a legitimate legislative purpose to negate any inference of a discriminatory purpose. As Justice Marshall noted in his dissent in *Feeney*, this type of analysis is problematic when applied to the decisions of a multimember legislative body where the subjective intent of the individual legislators might differ dramatically from the expressed legislative intent of the statute. According to the dissent, discriminatory intent must be determined by weighing the "degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available."[125]

During the same term in which *Feeney* was decided, the Court, in *Columbus Board of Education v. Penick*, clearly stated that proof of disparate impact and foreseeable consequences is not a sufficient showing of discriminatory intent to satisfy *Davis*.[126] In *Columbus* and its companion case, *Dayton Board of Education v. Brinkman*,[127] the Court upheld the imposition of systemwide school desegregation plans based upon proof of discriminatory intent on the part of the two respective school districts.[128] The Court based its finding of intent upon an examination of all the relevant factors surrounding the operation of the school systems—including the history of past segregative conduct in the form of operating a dual system at the time of the *Brown* decision in 1954—and evidence that the discriminatory impact of such practices and policies was actually aggravated by subsequent official action or

124. *See, e.g.*, Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After* Feeney, 79 COLUM. L. REV. 1376, 1397 n.133 (1979). *See also* Brest, *supra* note 54, at 7 ("racial value judgments appear in forms besides 'racial antagonism'—for example in paternalistic assumptions of racial inferiority"), 14 ("Race-dependent decisions need not be race-conscious, but may reflect unconscious racially selective indifference.").

125. 442 U.S. at 283 (Marshall, J., dissenting). *See* Note, *Constitutional Law—A Challenge to Veterans' Preferences*—Personnel Administrator of Massachusetts v. Feeney, 28 U. KAN. L. REV. 520 (1980); Note, Personnel Administrator of Massachusetts v. Feeney, 11 SETON HALL L. REV. 86 (1980); Note, Personnel Administrator of Massachusetts v. Feeney, 48 U. CIN. L. REV. 1088 (1979).

126. 443 U.S. 444 (1979).

127. 443 U.S. 526 (1979).

128. More precisely, the Court endorsed the novel concept that, in school desegregation cases, proof of a pre-1954 intentional violation coupled with the failure of school officials to fulfill their continuous obligation to dismantle this dual system raises the presumption of present-day discriminatory intent. *Columbus Bd. of Educ.*, 443 U.S. at 444.

inaction.[129]

The issue of the role of foreseeable consequences in determining intent was laid to rest by the Court when it restated its position in *Feeney* that a showing of natural and foreseeable consequences is only one factor relevant to raising an inference of intent, and does not automatically create a prima facie case of purposeful racial discrimination.[130] The Court did imply, however, that proof of foreseeable consequences when combined with a prior history of purposeful discrimination may raise the inference of present-day discriminatory intent.[131]

As the discussion turns to the analysis of Title VI litigation, the role of intent must be viewed within the framework of *Columbus* and *Dayton* and not of *Feeney*. The typical veterans' preference case is limited in the types of evidence available and is based upon legislative action where motivation is difficult to determine. *Feeney*'s applicability to other types of litigation is therefore limited. The typical Title VI case, however, is similar to *Columbus* and *Dayton*, and deals with the policies and practices of smaller administrative bodies (*e.g.*, school boards or officials in education cases, and municipal governing bodies such as city councils in hospital closings) that are dramatically smaller in membership than state or federal legislative bodies. The small size of such bodies, combined with their proximity to the potential impact, render more relevant and realistic such *Arlington Heights* evidentiary considerations as foreseeability of consequences, historical context, and departures from normal procedures.[132]

The discussion of intent and impact standards as they relate to Title VI litigation must also be guided by Title VII analysis and the deference the Court has shown to congressional intent in that area, as well as the theoretical framework the Court has developed in Title VII adjudication. The following sections will analyze and examine Title VI in reference to its legislative history, Supreme Court rulings, and recent approaches taken by the circuit courts of appeals.

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129. *Id.* at 455, 461.

130. *Dayton Bd. of Educ.*, 443 U.S. at 536 n.9. The Court stated that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose, and it may itself show a failure to fulfill the duty to eradicate the consequences of prior purposefully discriminatory conduct." *Id.*

131. *Columbus Bd. of Educ.*, 443 U.S. at 464.

132. *Columbus* and *Dayton* suggest, then, that at least with regard to school discrimination type cases, *Feeney* was a judicial aberration, designed to meet the particular facts.

C. Title VI: From *Lau* to *Bakke* and Beyond

1. Legislative History

In enacting Title VI, Congress recognized a need for broad-based legislation applicable to every program involving federal financial assistance.[133] More specifically, the legislative history of the Act indicates an underlying dual congressional purpose: first, to end racial discrimination, and second, to assure that federal funds would not be used to support such discrimination.[134]

Congressional authority to enact legislation prohibiting race-conscious state action is generally founded on the Fourteenth Amendment.[135] However, remarks by Senator Humphrey, sponsor of the bill, indicate intentional Title VI coverage beyond the constitutional purview over state acts, including situations where federal funds support private, segregated institutions. Title VI was "designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation."[136] This condition on the receipt of funds by private as well as public institutions is rooted in the Article I, section 8 spending powers of Congress.[137] Through the use of such conditional appropriations, Congress has converted its enumerated power to tax and spend for the "general welfare" into the power to regulate in areas not expressly permitted through its other Article I, section 8 enumer-

133. Statements found in the legislative history in support of such broad legislation consistently make reference to several older statutes that, in effect, authorized the existence of "separate but equal" facilities and that were, therefore, of questionable constitutional validity after *Brown*. *See, e.g.*, 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey), 7062 (remarks of Sen. Pastore), 7102 (remarks of Sen. Ribicoff). The Hill-Burton Act of 1946, 42 U.S.C. §§ 291, 291*o*-1, authorized construction grants for public and nonpublic hospitals, including those providing separate facilities for separate population groups, on the condition that such facilities were of like quality and would be provided equitably on the basis of need. The Act was declared unconstitutional in Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 957 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). The Second Morrill Act of 1890 ch. 841, § 4, 26 Stat. 419, (codified as amended in 7 U.S.C. §§ 321-329 (1976)), provided annual grants to land-grant colleges, including those that were maintained separately for white and black students, provided funds were divided equitably between the two groups.

134. *See* 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey).

135. *See supra* note 48.

136. 110 CONG. REC. 6544 (1964).

137. *See supra* note 10 and accompanying text. The spending power is effectuated by the Necessary and Proper Clause, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers . . . ." U.S. CONST. art. I, § 8, cl. 18. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 247-48 (1978).

ated powers.[138]

138. The spending power has provided the constitutional basis for a system of federal grants that has increased dramatically—from 160 programs dispensing $8.3 billion in 1963, to more than 447 programs dispensing $82.9 billion in 1980 (representing a 900% increase). Note, *Federal Grants and the Tenth Amendment: "Things As They Are" and Fiscal Federalism*, 50 FORDHAM L. REV. 130, 135 n.15 (1981). This increase has transformed federal aid into an effective vehicle for implementing national policy. The aim of conditions attached to federal grants has also changed over the years, from insuring the primary objective of the grant, to realizing general policy goals that are merely secondary to the original purpose of the allocation. Title VI is a case in point, whereby the receipt of all federal funds, including educational aid for the economically and educationally disadvantaged, linguistic minorities, and handicapped students, as well as women's and desegregation programs, is conditioned upon the absence of racially discriminatory practices and policies within the recipient institution or school district.

Where recipients are state or local governmental agencies, a constitutional conflict emerges between the spending power and the Tenth Amendment, which states that "[t]he powers not delegated to the United States . . . , nor prohibited . . . to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In fact, the failure of the Constitution either to grant the power to establish a national system of education to the federal government, or to expressly prohibit such power from being exercised by the states, serves as the legal foundation for the states' voluntary assumption of the responsibility through state constitutional provisions. Such state education clauses typically guarantee, in varying terminology, a system of free public schools for all children within a given age range, and further grant to the state legislature the power to enact enabling legislation to enforce the constitutional guarantee. *See, e.g.*, DEL. CONST. art. 10, § 1 ("general and efficient" education); MD. CONST. art. 8, § 1, and N.J. CONST. art. 8, § 4, ¶ 1 ("thorough and efficient" education); WASH. CONST. art. 9, § 2, MINN. CONST. art. 13, § 1, and ARIZ. CONST. art. 11, § 1 ("general and uniform" education).

It can be argued that conditional federal grants for education force states to relinquish their plenary power to educate in exchange for federal aid. The courts have generally distinguished, however, between coercion and inducement, holding that federal grants that merely induce state compliance with their conditions are permissible, while those that coerce or mandate compliance inhibit state and local autonomy in contravention of the Tenth Amendment. The coercion-inducement distinction hinges upon the ability of the recipient to avoid the conditions merely by declining the grant. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 585-90 (1937) (grants are optional; conditions are attached to grants; therefore, conditions attached to grants are optional); *see also* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981) (acknowledging potential conflict between spending power and Tenth Amendment); Board of Educ. v. Harris, 444 U.S. 130 (1979) (acknowledging that authority of federal government to establish conditions bears close link to primary purpose of act in question relating to desegregation); Walker Field v. Adams, 606 F.2d 290, 297 (10th Cir. 1979) (ability of recipient to avoid conditions by declining grant brings conditions within constitutional limits of spending power to induce compliance).

For an updated discussion of the potential conflict between the spending power and the Tenth Amendment, and a reanalysis of the coercion-inducement test, see Note, *supra*. The author argues that the coercion-inducement distinction drawn in *Steward Machine* must be reconsidered in view of the increased dependence on federal aid to support essential local government services, as well as the nature of grant conditions that are merely peripheral to the primary purpose of the allocation. A clear example of such ancillary conditions placed upon the receipt of essential funds is the precondition of Title IX compliance (race discrimination prohibited in education programs receiving federal aid) placed upon the receipt of

The legislative history of Title VI indicates a marked failure of Congress to define "discrimination" as prohibited by the Act. The absence of such definition or guidelines goes to the heart of the present issue as to whether Title VI prohibits practices that lead to discriminatory effects or solely those based upon discriminatory intent.[139] The most commonly expressed concerns voiced by Title VI opponents were that the bill's failure expressly to define "discrimination"[140] would lead to a triggering of fund termination merely by "an 'express finding' of a failure to comply with an undefined prohibition against discrimination";[141] that the "concept of 'racial imbalance' would hover like a black cloud over every transaction, every loan, every grant, and every award or every assistance rendered under a Federal or federally financed program";[142] and finally, that a college which "[did] not accept a colored person because it [did] not have room for him, or . . . turn[ed] him down for some other good reason"[143] would be charged with a violation under the Act.

Proponents of the bill responded that the prohibition of discrimination under Title VI would be "no more than what our Constitution guarantees";[144] that "there [exists] a constitutional restriction in the use of Federal funds; and that Title VI simply spells out the procedure to be used in enforcing that restriction."[145] The language used by both proponents and opponents of the bill—*e.g.*, "treatment," "racial imbalance"—and the pervasiveness throughout congressional debate of statistics on segregated institutions, indicate a fundamental congressional understanding of an effects standard against which to measure alleged Title VI violations. Quoting from President Kennedy's message to Congress of June 19, 1963, Senator Humphrey stated more specifically: "Simple justice requires that public funds, to which all taxpayers of all

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federal funds to promote racial desegregation under the Emergency School Aid Act, 20 U.S.C. § 3191-3207 (Supp. IV 1980).

139. Senator Humphrey himself, sponsor of the bill, spoke of a "general requirement that the local authority refrain from racial discrimination in *treatment* of pupils and teachers." 110 CONG. REC. 6545 (1964) (remarks of Senator Humphrey) (emphasis added). He thus employed the same "treatment" language as used in congressional discussion of Title VII: "Fair treatment in employment is as important as any other area of civil rights." *Id.* at 6547. As shown above, the courts have repeatedly applied an effects standard when evaluating facially neutral statutes that result in disparate impact upon protected groups. *See supra* notes 35-47 and accompanying text.

140. 110 CONG. REC. at 5610 (remarks of Sen. Ervin).

141. *Id.* at 5251 (remarks of Sen. Talmadge).

142. *Id.* at 1619 (remarks of Sen. Abernethy).

143. *Id.* at 6052 (remarks of Sen. Johnston).

144. *Id.* at 6533 (remarks of Sen. Humphrey).

145. *Id.* at 13,333 (remarks of Sen. Ribicoff).

races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or *results* in racial discrimination."[146]

The bill that was ultimately enacted as Title VI began as House Resolution 7152,[147] an omnibus bill designed to eliminate racial discrimination in voting, federally assisted programs, and employment. Title VI of the bill gave the executive branch the power to withhold funds from program beneficiaries found to discriminate on the basis of race.[148] Only one set of fact-finding hearings on the bill was conducted, with the House adopting a considerably revised version.[149] The Senate held no hearings, did not consider the bill in committee,[150] and made few changes in Title VI as originally introduced.[151]

Both the House hearing record and the Judiciary Committee report shed light on the concerns expressed in Congress as to the Title VI definition of "discrimination." Two members present remarked that the word "discrimination" had no fixed meaning and had not been defined in the bill under consideration.[152] Several members, using the terminology of "racial imbalance" expressed concerns over the potential overbreadth of Title VI.[153] During cross-examination by Represen-

146. *Id.* at 6543 (remarks of Sen. Humphrey) (emphasis added).

147. *See Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 649-60 (1963) (quoting text of H.R. 7152) [hereinafter cited as *House Subcomm. Hearings*].

148. *Id.* at 659. The original text provided: "Sec. 601. Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin . . . ."

149. *House Subcomm. Hearings*, *supra* note 147 (condensing 2649 pages of transcribed material, including presentations by 101 witnesses and correspondents). *See also* HOUSE COMM. ON THE JUDICIARY, CIVIL RIGHTS ACT OF 1963, H.R. REP. NO. 194, 88th Cong., 1st Sess. 44, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2412 (additional views of Rep. Meader summarizing subcommittee action) [hereinafter cited as HOUSE JUDICIARY REPORT]. For a detailed discussion of the drafting of Title VI, see generally Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1 (1981).

150. The Senate held hearings only on public accommodations. *See Civil Rights Public Accommodations: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess. 686, *passim* (1963).

151. *See* BNA OPERATIONS MANUAL, THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY 289, 298 (1964) (explaining Sen. Humphrey's position that Senate had made no substantive changes in Title VI bill).

152. *See* HOUSE JUDICIARY REPORT, *supra* note 149, at 106, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS at 2473 (minority views of Reps. Poff and Cramer).

153. *See House Subcomm. Hearings*, *supra* note 147, at 1424 (remarks of Rep. Cramer); *id.* at 1580 (remarks of Rep. Meader).

tative Cramer, HEW Secretary Celebrezze seemed to endorse an effects standard for determining discrimination under Title VI, suggesting racial balance as the goal of the Act.[154] Under further questioning by Representative Meader, Secretary Celebrezze posited that steps would be taken under Title VI if HEW found that racial imbalance in a particular school system caused the same problems as traditional segregation.[155]

Debates on the floor of Congress, as well as the House hearings and Judiciary Committee report, therefore indicate confusion and concern as to the definition of "discrimination" under Title VI. Considerable legislative rhetoric was expended in endorsing an effects standard while at the same time reaffirming the constitutional underpinnings of the Act. The issue, however, was never expressly brought to closure at the congressional level. Congress, on the other hand, expressly authorized and mandated the executive departments and agencies awarding federal aid to adopt their own regulations against which to measure compliance and to effectuate enforcement proceedings.[156] The regulations promulgated by HEW pursuant to such statutory authority expressly provide for an effects standard.[157] If Congress was avoiding the

154. *See id.* at 1514 (remarks of Secretary Celebrezze) (funds could be terminated for schools rejecting federal "assistance" to end imbalance if Title VI passed).

155. *Id.* at 1519 (remarks of Secretary Celebrezze).

156. Section 602 of the Act, 42 U.S.C. § 2000d-1, provides: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." *See* Abernathy, *supra* note 149, at 28, for support of the proposition that the regulatory mandate of Title VI grew out of a subcommittee compromise on the definition of discrimination under the statute, delegating to each agency the authority to define the term within the context of the agency's programs and scope of power.

157. 34 C.F.R. § 100.3(b)(1) (1980) provides: "A recipient under any program to which this part applies may not directly or through contractual or other arrangements, on ground of race, color, or national origin: (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program."

The foregoing regulation as pertains to education was contained in 45 C.F.R. § 80.3(b)(ii), (iv) prior to May 9, 1980. Prior to that date, Title VI as applied to education programs was administered within the Department of Health, Education and Welfare. With the dismantling of that department and the creation of a separate Department of Education, rulemaking and enforcement powers under Title VI as to education programs were transferred to the latter. See Margulies, *Bilingual Education, Remedial Language Instruction, Title VI and Proof of Discriminatory Purpose: A Suggested Approach*, 17 COLUM. J.L. & SOC.

issue by passing it on to the administrative agencies, the solution was temporary. As the arm of Title VI began to reach beyond the geographic area of the South, where the intent/effects distinction was less relevant, and as the Court began to expand the group of protected classes under the Equal Protection Clause (while at the same time narrowing the range of facts under which judicial relief could be granted based upon proof of intent), the HEW effects standard became problematic and a fertile ground for litigation.

2. Judicial Confusion

The current split in judicial authority as to the controlling standard of review in Title VI cases derives from the difficulty met by lower courts in attempting to reconcile several leading Supreme Court opinions of the past decade. As the Court moved through the 1970's, it struggled to define the contours of Title VII and equal protection guarantees as well as the power of Congress to enact remedial legislation. During that same period, the Court was forced to define the scope of Title VI in a series of cases challenging a diverse set of policies, practices, and legislative enactments. As the distinction between the discriminatory impact standard of Title VII and the discriminatory intent standard of equal protection analysis evolved, the Court attempted to find a place for Title VI analysis in a broader matrix of judicial review.

The first case to reach the Court was *Lau v. Nichols*,[158] a class action suit brought by non-English-speaking Chinese students against the San Francisco public school system. Plaintiffs alleged that the system had violated Title VI as well as HEW's implementing regulations in its failure to provide such students with equal educational opportunities.[159] The plaintiffs did not claim that school officials had intended to harm Chinese-speaking children but merely that those officials' failure to provide meaningful education resulted in a harm unique to such students. Presenting evidence of acts of neglectful omission rather than of intentional commission, the plaintiffs bolstered their argument on statutory and regulatory violations with interpretive guidelines pub-

PROBS. 99 (1982), for a detailed discussion of the Title VI statute and regulations and a suggested intent model of analysis as applied to the educational rights of linguistic minority children.

158. 414 U.S. 563 (1974).

159. The case was also brought on Fourteenth Amendment equal protection grounds. The Ninth Circuit had denied relief, affirming the opinion of the lower court that there was no violation of the Equal Protection Clause or Title VI. Following the principle that constitutional issues should not be reached if there exist narrower grounds for a decision, the Court relied solely upon statutory grounds and reversed the decision below. *Id.* at 566.

lished by HEW subsequent to promulgation of formal regulations. In addition to general regulations promulgated pursuant to statutory authority[160] that implied an effects standard,[161] HEW had issued a 1968 guideline[162] stating that "[s]chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system."[163] Two years later, in a memorandum to school districts, HEW made this guideline more specific as to linguistic minority students.[164]

Basing its decision upon the foregoing regulations and guidelines, the Court in *Lau* deferred to the administrative determination of an effects standard under Title VI and held that "[d]iscrimination is barred which has that *effect* even though no purposeful design is present."[165] The Court further reaffirmed the power of the federal government to establish the terms on which its funds are allocated to the states. As a precondition to its receipt of federal funds for a variety of instructional programs, the defendant school district had signed con-

160. *See supra* note 156.

161. *See supra* note 157.

162. It should be noted that administrative guidelines do not bear the force of law as do formal regulations. The latter are published pursuant to statutory authority that requires the publication of proposed regulations in the *Federal Register*, a minimum 60 day period for public comment, and a 45 day period of "laying before" Congress the final regulations prior to their taking effect. Administrative Procedure Act, 5 U.S.C. § 553 (1981). The issue raised in *Lau* as to the weight to be afforded administrative guidelines that interpret formal regulations that, in turn, interpret legislative enactments has yet to be decided with respect to the rights guaranteed linguistic minority students under Title VI. The Court in *Lau* failed to order a specific remedy, but merely defined the educational rights of students under Title VI in terms of "equality of treatment," and further defined equality in terms of "meaningful education." 414 U.S. at 566.

During the closing days of the Carter administration, the newly formed Department of Education published proposed regulations as to the rights of linguistic minority students pursuant to Title VI. 45 Fed. Reg. 52,052 (1980). These proposed rules mandated specific entrance and exit criteria, instructional services, and staffing requirements within the context of bilingual education. Opponents of bilingual education viewed the regulations as overly intrusive into local decisionmaking. Proponents of the concept opposed the regulations as well, but on the grounds that the federal government had not gone far enough in mandating services for identified students. The proposed regulations were withdrawn by the Department of Education in the early days of the Reagan administration, leaving Title VI interpretation on the rights of linguistic minority students subject to the confusion wrought by the *Lau* decision.

163. 33 Fed. Reg. 4956 (1968).

164. 35 Fed. Reg. 11,595 (1970). The guidelines stated: "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." *Id.*

165. 414 U.S. at 568.

tractual assurances of compliance with Title VI and " 'all requirements imposed by or pursuant to the Regulation . . . issued pursuant to that title . . . ,' " and further agreed to immediately "take any measures necessary to effectuate this agreement."[166] Plaintiff students could therefore sue the school district as third party beneficiaries of those assurances.

In his concurring opinion, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, cited judicial precedent for the proposition that the validity of a regulation promulgated pursuant to a statutory provision such as section 602 of Title VI " 'will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." ' "[167] The guidelines in question were deemed to meet that test. Citing additional precedent for the great weight to be afforded departmental regulations and consistent administrative construction,[168] Justice Stewart concurred with the majority in upholding an effects standard under Title VI.[169]

In *Lau*, the Court deferred to administrative interpretation, reaffirmed federal authority to establish conditions upon the receipt of funds, and espoused the "contractual agreement" argument. Thus, it reasonably can be inferred that, in enacting Title VI with its broad delegation of rulemaking and enforcement powers to administrative agencies, Congress legislated broader protections than those afforded under the Equal Protection Clause of the Fourteenth Amendment.

In *Regents of the University of California v. Bakke*,[170] however, the Court cast serious doubt upon the implicit holding of *Lau*. In *Bakke*, the Court reasoned in dicta that the contours of Title VI protection are determined by the Equal Protection Clause of the Fourteenth Amendment. This "doctrine of coextensiveness," as it has come to be called, was enunciated by a severely fragmented Court[171] which left several

166. *Id.* at 568-69.

167. *Id.* at 571 (Stewart, J., concurring) (quoting Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973) (citing Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 280-81 (1969))).

168. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424 , 433-34 (1971); Udall v. Tallman, 380 U.S. 1 (1965).

169. 414 U.S. at 571 (Stewart, J., concurring).

170. 438 U.S. 265 (1978). The case was brought by Allan Bakke, a white 37 year-old mechanical engineer who had twice been denied admission to the defendant University of California at Davis Medical School. The plaintiff contended that the defendant's special admissions program, which reserved 16 of the 100 seats each year for minority students (a race-specific preference), resulted in his exclusion in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI.

171. The nine Justices authored six separate opinions with no more than four Justices concurring in the reasoning on any one point. Five agreed that the particular program

issues unresolved, one of them being the standard of review applicable in Title VI cases.[172]

Justice Powell announced the judgment of the Court in *Bakke* and wrote a separate opinion in which he concluded that, in view of the clear legislative intent, "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[173] Citing statements made by sponsors of the bill in the House[174] and in the Senate,[175] Justice Powell concluded that Title VI embodied constitutional principles.[176] This view was shared by four additional members of the Court who joined in an opinion written by Justice Brennan, which was confined "to the case before us."[177] Based upon an extensive analysis of the legislative history of Title VI,[178] these Justices concluded that the purpose of the statute was not to expand the concept of discrimination, but merely to extend "the constraints of the Fourteenth Amendment to private parties who receive federal funds."[179] The Brennan group cited statements made during Senate debate of the bill to support their conclusion that Congress had intended to preserve flexibility in defining Title VI prohibitions. They believed the statute's standard "was that of the Constitution and one that could and should be administratively and judicially applied."[180]

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under review was impermissible, as the university could have adopted less discriminatory means to achieve its goal of student diversity, and that Bakke should be ordered admitted. *See* 438 U.S. at 271 (Powell, J.); *id.* at 408 (Stevens, J., concurring in part and dissenting in part). A different group of five agreed that a university may constitutionally consider race in its admissions procedures in order to overcome substantial, chronic minority underrepresentation in the medical profession. *See id.* at 269 (Powell, J.); *id.* at 324 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

172. Following Court practice, all six opinions set aside the constitutional question and proceeded directly to the statutory claim under Title VI. The threshold issue was whether the plaintiff had a private right to sue under Title VI. The Court failed to resolve this issue. For a general discussion of the private right to sue under Title VI, see *supra* note 3.

173. 438 U.S. at 287 (Powell, J.).

174. *Id.* at 286 n.21.

175. *Id.* at n.22.

176. For a discussion of the legislative history of Title VI with regard to the constitutional scope of the statute and the failure of Congress expressly to define the "discrimination" to be prohibited, see *supra* notes 139-57 and accompanying text.

177. 438 U.S. at 325 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Justice Stevens, joined in a separate opinion by the Chief Justice and Justices Stewart and Rehnquist, stated that neither the language of Title VI nor prior interpretation suggests that it is simply a constitutional appendage. *Id.* at 418 (Stevens, J., concurring in part and dissenting in part).

178. *Id.* at 329-35 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

179. *Id.* at 327.

180. *Id.* at 338.

According to the Brennan opinion, both the failure of Congress expressly to define "discrimination" under the law, and the congressional debate surrounding that issue, reflect an awareness of the evolutionary change that constitutional law regarding racial discrimination was undergoing in 1963 and 1964.[181] The five Justices summed up their discussion of the issue by stating:

> Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution.[182]

The doctrine set forth in *Lau* stated that impact alone is in some contexts sufficient to establish a prima facie violation under Title VI. Justice Brennan and his colleagues were well aware that their views concerning Title VI's definition of racial discrimination as absolutely coextensive with that of the Constitution, when read in light of the Court's enunciation in *Washington v. Davis*[183] that an intent standard should be applied in equal protection adjudication, seriously undercut this doctrine. Thus, while the Brennan opinion does not expressly seek to overrule *Lau*, it casts "serious doubts concerning the correctness of what appears to be the premise of that decision."[184]

Equating the Title VI standard of discrimination with that of the Constitution raises several problems. In support of their argument that Congress intended the Title VI standard to evolve with the Constitution, Justice Brennan and his colleagues cited testimony of Attorney General Robert Kennedy in hearings before the Senate Committee on the Judiciary, and stated that:

> [R]egulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts. This determination to preserve flexibility in the administration of Title VI was shared by the legislation's supporters.[185]

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181. *Id.* at 339-40.

182. *Id.* at 340.

183. 426 U.S. 229 (1976).

184. 438 U.S. at 352 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

185. *Id.* at 339 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) (footnotes omitted).

If the congressional objective as stated above was to permit the meaning of discrimination to be determined by administrative regulations based upon differences among programs—that is, to preserve administrative flexibility—then an evolving constitutional standard applicable to all situations at a given time and varying only at different points in time would undercut that objective. Furthermore, if Congress intended that agencies might formulate regulations merely within evolving constitutional limits, then the Court's opinion in *Bakke* would invalidate the HEW regulation establishing an effects standard as upheld in *Lau*.[186] However, both the Powell[187] and Brennan[188] opinions mention this regulation with approval, the latter clearly stating that such regulations are entitled to considerable deference in construing Title VI. Finally, although members of Congress in debating what was to become the Civil Rights Act of 1964 often made reference to the entire Act as enforcing constitutional rights,[189] the Court in *Griggs v. Duke Power Co.*[190] and subsequent cases has interpreted Title VII of the Act independently of the constitutional standard even in post-*Davis* opinions.

It can also be argued that *Bakke* did not overrule *Lau* as to the governing standard of review. In fact, a distinction can be drawn between the significant issues of each case. In *Lau*, the question under review was whether the effects standard as enunciated in HEW's regulations to Title VI was in accord with the statute, whereas in *Bakke* the applicable standard of proof was not considered by the Court since the university's intent to discriminate was undisputed. Finally, it is suggested that the real issue in *Bakke* was whether Title VI prohibits all facially discriminatory policies per se or, like the Equal Protection Clause, only those racial classifications that do not promote a compelling state interest. Perhaps the "doctrine of coextensiveness" goes to the *level* of review, *i.e.*, rational basis versus strict scrutiny, to be applied in Title VI cases rather than to the *standard* of review, *i.e.*, intent versus impact.[191]

186. *See supra* note 157.

187. 438 U.S. at 303-04 (Powell, J.).

188. *Id.* at 341-42 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

189. *See* 110 CONG. REC. 1540 (1964) (remarks of Rep. Lindsay); *id.* at 1588 (remarks of Rep. Tuck); *id.* at 1593-94 (remarks of Rep. Farbstein); *id.* at 1600 (remarks of Rep. Daniels). *See also* Abernathy, *supra* note 149; Note, *Test Validation in the Schools*, 58 TEX. L. REV. 1123, 1128-30 (1980).

190. 401 U.S. 424 (1971). For a discussion of *Griggs*, see *supra* notes 35-47 and accompanying text.

191. *See* Note, *Title VI: The Impact/Intent Debate Enters the Municipal Services Arena*, 55 ST. JOHN'S L. REV. 124, 130 n.32, 141 (1980).

Two cases decided by the Court subsequent to *Bakke*, as well as a series of lower court opinions, provide additional insight into congressional intent as to the goals of Title VI and the underlying meaning of the *Bakke* opinions. In *Board of Education v. Harris*,[192] the Court was presented with the issue of whether Congress intended eligibility for assistance under the Emergency School Aid Act (ESAA)[193] to be gauged by a discriminatory impact or a discriminatory intent standard.

Justice Blackmun, writing for the majority, used the legislative history of ESAA to support the conclusion that a disparate impact standard governs teacher assignments under the Act. One item drawn from congressional debates and relied upon by the Court in *Harris* has particular significance with regard to Title VI interpretation. The Stennis Amendment, which later became incorporated into the final version of ESAA, contains two separate clauses providing for the uniform application of guidelines and criteria established pursuant to ESAA and pursuant to Title VI, respectively.[194] The dissenting Justices, in an opinion by Justice Stewart joined by Justices Powell and Rehnquist, held that since the amendment applies to Title VI as well as to ESAA, and since the Court in *Bakke* had enunciated an intent standard under Title VI, then a discriminatory intent standard must be construed to apply under ESAA.[195] The majority, however, held that it is not inconsistent with prior Court interpretation to find that the Stennis Amendment established different standards of review under ESAA and Title VI, as section 703(a) of the Act refers to ESAA while section 703(b)

192. 444 U.S. 130 (1979).

193. Emergency School Aid Act, 20 U.S.C. §§ 3191-3207 (1981). This law provides federal financial assistance "to meet the special needs incident to the elimination of minority group segregation . . . in elementary and secondary schools." *Id.* § 3192(b)(1). The Act further declares an educational agency ineligible for assistance if, after the date of the Act, it had in effect any practice "which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups" or "otherwise engage(s) in discrimination . . . in the hiring, promotion, or assignment of employees." *Id.* § 3196(c)(1)(B). The facts of the case are as follows: The plaintiff Board of Education of the City of New York applied for ESAA assistance but was denied by HEW based upon statistical evidence demonstrating a pattern of racially disproportionate assignments of minority teachers in relation to minority students enrolled at the respective schools. The Second Circuit affirmed the opinion of the lower court and rejected the school system's contention that HEW was required to establish that the statistical disparities had resulted from purposeful or intentional discrimination in the constitutional sense.

194. 20 U.S.C. § 3193 (1981) states: "(a) It is the policy of the United States that guidelines and criteria established pursuant to this subchapter shall be applied uniformly in all regions of the United States . . . . (b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 2000d-5 shall be applied uniformly in all regions of the United States . . . ."

195. 444 U.S. at 158-60 (Stewart, J., dissenting).

refers to Title VI. The majority refused to reach the issue as to the governing standard of review under Title VI, since there exists no indication in either the ESAA or Title VI legislation that the two Acts were intended to be coextensive. The Court, however, did suggest that Congress may have imposed a lower standard under ESAA, by which only ESAA funds are disallowed when a violation is found, than under Title VI, which carries the broader sanction of withdrawal of *all* federal funds from the recipient school district in the face of noncompliance.

In *Harris*, we find the Court again struggling to define the contours of prohibited discrimination based upon vague statutory language and ambiguous legislative history. The majority appears to be drawing a fine line distinction between ESAA and Title VI, based upon second-guessing of congressional policy considerations as to the reach of sanctions, in order to reconcile its present analysis with that of *Bakke*. The dissent, on the other hand, appears to be bootstrapping an intent standard under ESAA onto their interpretation of the plurality view in *Bakke*. One insightful piece of information, however, does emerge from the *Harris* case. At least two members of the present Court, Justices Powell and Rehnquist, believed that Title VI is governed by an intent standard.[196]

One year after *Harris*, in *Fullilove v. Klutznick*,[197] the Court shed an additional glimmer of light on Title VI interpretation. As in *Bakke*, the Court was faced with a constitutional challenge to a program that employed racial criteria in a remedial context. This time the issue was not university admissions but rather the minority business enterprise provision of the Public Works Employment Act of 1977.[198] Chief Justice Burger, in a plurality opinion joined by Justices White and Powell, cited *Lau* in support of the proposition that Congress may use racial or ethnic criteria as a condition for the receipt of federal funds. The opinion notes similarities between the program in question and the federal spending program reviewed in *Lau*:

> In *Lau*, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities . . . . It had not been shown that this had resulted from

196. For a detailed discussion of ESAA legislation and the *Harris* case, see Note, *Ineligibility Under the Emergency School Aid Act: A Disparate Impact Standard*, 59 NEB. L. REV. 1127 (1980).

197. 448 U.S. 448 (1980).

198. 42 U.S.C. § 6705(f)(2) (1982). The action was brought by associations of construction contractors and subcontractors seeking to prevent enforcement of the provision that state and local grantees must set aside a minimum of 10% of federal funds granted for public works projects to be used for procurement of services or supplies from businesses owned by minority group members.

> any discrimination, *purposeful or otherwise*, or from other unlawful acts. Nevertheless, we upheld the constitutionality of a federal regulation applicable to public school systems receiving federal funds that prohibited the utilization of "criteria or methods of administration *which have the effect* . . . of defeating . . . accomplishment of the [educational] program as respect individuals of a particular race, color, or national origin."
>
> . . . The MBE program, like the federal regulations reviewed in *Lau*, primarily regulates state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions.[199]

Within the context of the discussion, the "program approved in *Lau*" as cited by the Court undoubtedly refers to the federal program of conditioning receipt of federal funds under Title VI upon compliance with HEW regulations imposing an effects standard. The opinion, therefore, appears to imply an impact or effects standard for Title VI predicated upon contract principles: As a precondition to receipt of funds, Title VI grantees give contractual assurances that they will comply with the law and the implementing regulations of the appropriate agency. This contractual agreement argument is reminiscent of the majority opinion in *Lau*.[200]

Chief Justice Burger and his colleagues further noted that the MBE statutory provision in question did not violate Title VI.[201] The Burger group made this last notation absent any reference to the constitutional underpinnings of Title VI. Justice Powell [202] and Justice Marshall, however, joined by Justices Brennan and Blackmun[203] in two separate concurring opinions, upheld the provision in question under Title VI, couched within the "coextensiveness doctrine" of *Bakke*.

Careful analysis of the position of each individual Justice, and of the Court as a body, from *Lau* through *Bakke*, *Harris*, and *Fullilove* (with *Davis* intervening), offers some evidence of an evolving theory of Title VI analysis. The *Harris* opinions appear to represent some consensus on the issue, with three dissenting Justices—Stewart, Powell, and Rehnquist—expressly interpreting "coextensiveness" as signifying an intent standard under Title VI. The remaining six Justices joined in

199. 448 U.S. at 479 (some emphasis added).

200. *See supra* notes 164-66 and accompanying text.

201. 448 U.S. at 492 n.77.

202. "Because I believe that the set-aside is constitutional, I also conclude that the program does not violate Title VI." *Id.* at 517 n.15 (Powell, J., concurring).

203. "On the authority of *Bakke*, it is also clear to me that the set-aside provision does not violate Title VI . . . . In *Bakke*, five members of the Court were of the view that the prohibitions of Title VI . . . are coextensive with the equal protection clause of the Fourteenth Amendment." *Id.* at 517 n.1 (Marshall, J., concurring).

the majority opinion and, while refusing to address the issue directly, recognized certain policy considerations that may have led Congress to intend a higher standard of review under Title VI than under ESAA. The majority, however, makes no reference to "coextensiveness" and leaves the issue wide open for future consideration.

While *Harris* offers some hope of judicial resolution, *Fullilove* begins to muddy the waters again. Justices Powell, Brennan, Marshall, and Blackmun reaffirmed their *Bakke* doctrine of "coextensiveness" in *Fullilove*, but gave no insight as to its significance with regard to the standard of review under Title VI. Indeed, it is noteworthy that all five opinions in *Fullilove* proceed straight to the constitutional questions, with the Powell and Marshall opinions merely dismissing the Title VI claim in two footnotes respectively, and the other four opinions completely failing to discuss the statutory claim. Not only does this method of analysis represent a marked departure from Court policy, whereby constitutional claims are set aside where there exist narrower grounds for review,[204] but it further stands in sharp contrast to the Court's approach in *Bakke*, wherein the Title VI statutory claim was addressed at the outset. Perhaps this departure represents further evidence of a pervasive view within the Court that Title VI is completely coextensive with the Equal Protection Clause and therefore demands identical judicial analysis, thus obviating the necessity for superfluous statutory discussion.

The majority opinion in *Fullilove*, written by Chief Justice Burger and joined by Justices White and Powell, is particularly perplexing and inconsistent with those Justices' respective positions in prior cases. Both the Chief Justice and Justice White had joined in the *Harris* majority, which recognized the possibility of an intent standard under Title VI. Justice White had further espoused the "coextensiveness doctrine" in *Bakke*. On the other hand, Justice Powell's positions from *Bakke* to *Fullilove* offer the most consistency. In *Harris*, he joined with the dissent and interpreted "coextensiveness" under *Bakke* as imposing the constitutional standard of intent upon Title VI. In *Fullilove*, he joined in the Chief Justice's opinion but clarified his position on "coextensiveness" in a separate concurring opinion.

Alternatively, Justices Brennan, Marshall, and Blackmun appear to be moving toward an intent standard under Title VI, consistently espousing "coextensiveness" in *Bakke* and *Fullilove*, questioning the continued vitality of the *Lau* impact standard in *Bakke*, and directly

204. *See, e.g.*, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 272 (1977); Lau v. Nichols, 414 U.S. 563, 566 (1974).

implying an intent standard in *Harris*. The only evidence of Justice Stevens' position is his joining in the majority opinion in *Harris*, an indication that he may lean toward an intent standard. Justices Powell and Rehnquist are the most consistent of all on the issue, having joined in the *Harris* dissent expressly declaring an intent standard. The positions of the Chief Justice and Justice White are the most difficult to determine, however, as they leaned with the majority toward an intent standard in *Harris*, yet shifted one year later to an effects standard in *Fullilove*. Based upon the foregoing analysis, it seems reasonable to conclude that at least six members of the present Court would uphold an intent standard under Title VI, with the positions of the Chief Justice as well as Justices White and O'Connor left uncertain.

The foregoing analysis of Supreme Court decisions throughout the 1970's manifests a struggle within the Court to define the contours of constitutional and statutory protections prohibiting racial classifications, based upon established principles of statutory construction, an evolving equal protection doctrine, and present-day policy considerations. The early years of the decade witnessed a lack of consensus among the Court as to the standard of review applicable in Fourteenth Amendment cases. That standard finally established in *Davis*, the Court was faced with the task of reconciling the *Davis* decision with its pre-*Davis* statutory analysis under the Civil Rights Act of 1964. *Bakke*, presenting the Court with difficult political and social issues, served as a poor case in which to resolve complex legal issues as well. The discussion now turns to the confusion engendered by that decision among the lower courts.

II. A View From the Circuits

A. The Fifth, Sixth, and Seventh Circuits: An Intent Standard

In *Castaneda v. Picard*,[205] the Fifth Circuit was presented with a Title VI claim brought by Mexican-American children and their parents challenging the defendant school district's policy of ability grouping, alleging inadequacy in the district's bilingual education and

205. 648 F.2d 989 (5th Cir. 1981). Following a finding of noncompliance with Title VI in 1973 and the subsequent failure of the defendant school district to develop an acceptable compliance plan, HEW instituted formal administrative enforcement proceedings to terminate federal funding in 1976. The decision of an administrative law judge finding the defendant not in violation of Title VI on the administrative regulations or policies issued thereunder was affirmed in 1980 by a final decision of the Reviewing Authority of the Office for Civil Rights. During the pendency of such proceedings, the plaintiffs initiated this suit against the defendant school district. *Id.* at 992-93.

language remediation programs and charging the district with discrimination in the hiring and promotion of Mexican-American teachers.

A unanimous court affirmed the decision of the court below, entering judgment in favor of the defendants on the Title VI claim. Citing *Bakke* as dispositive of the plaintiffs' independent claim under Title VI, the court stated:

> In any event, since a majority of the Court has now taken the position that Title VI proscribes the same scope of classifications based on race as does the Equal Protection Clause . . . the question whether plaintiffs have an independent cause of action under that statute is not a significant one in this case.[206]

With regard to the faculty discrimination claim, the court cited *Feeney*,[207] *Arlington Heights*,[208] and *Davis*[209] as standing for the proposition that "[i]n order to assert a claim based upon unconstitutional racial discrimination a party must . . . assert and prove that the governmental actor . . . *intended* to treat similarly situated persons differently on the basis of race."[210] The court concluded that discriminatory intent as well as discriminatory impact must be proved in employment discrimination suits brought under Title VI.[211]

Plaintiffs had also claimed that the defendant's instructional program violated Title VI, based upon the requirements of the "*Lau* Guidelines" promulgated by HEW in 1975.[212] The court in *Castaneda*

206. *Id.* at 998 (citation omitted).
207. 442 U.S. 256 (1979).
208. 429 U.S. 252 (1977)..
209. 426 U.S. 229 (1976).
210. 648 F.2d at 1000 (emphasis in original).
211. *Id.*
212. Office for Civil Rights, U.S. Department of Health, Education and Welfare, Task Force Findings Specifying Remedies for Eliminating Past Educational Practices Ruled Unlawful under *Lau v. Nichols* (1975), *reprinted in* CENTER FOR LAW & EDUCATION, BILINGUAL-BICULTURAL EDUCATION: A HANDBOOK FOR ATTORNEYS AND CULTURAL WORKERS (Dec. 1975). The "Lau Guidelines" or "Lau Remedies" as they are commonly known, were the product of a task force established by HEW following the *Lau* decision. The guidelines were formulated as a suggested voluntary compliance plan to be implemented by school districts found in noncompliance with Title VI. In fact, they have been utilized by HEW as a benchmark against which to measure Title VI compliance. These guidelines were not developed through the usual administrative procedures nor have they been published in the *Federal Register*. Furthermore, the guidelines require bilingual education for identified groups of students, while the Court in *Lau* specifically noted that compliance with Title VI as to linguistic minority students might be met through bilingual education or any one of several other permissible courses of language remediation. 414 U.S. at 565.

Based upon the foregoing procedural and interpretive problems, the Fifth Circuit concluded that these guidelines were not to be given the deference customarily afforded administrative documents in determinations of statutory compliance. 648 F.2d at 1007. *See also supra* note 162 and accompanying text.

expressed serious concerns about the continuing vitality of *Lau* in view of the subsequent constitutional intent standard of *Davis* and the "co-extensiveness doctrine" of *Bakke*. The court read an intent standard into that doctrine, stating: "We understand the clear import of *Bakke* to be that Title VI, like the Equal Protection Clause, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races.[213]

An intent standard was arguably adopted by the Sixth Circuit in *Detroit Police Officers Association v. Young*,[214] a case involving a challenge to a voluntary, race-conscious, affirmative action plan. A careful reading of the opinion, however, reveals no discussion of the intent issue per se but an implied adoption of such a standard. The court recognized that, in view of *Bakke*, Title VI "forbids only that discrimination which offends the Constitution."[215]

The issue as to the standard of review governing Title VI was indirectly presented to the Seventh Circuit in *Cannon v. University of Chicago*.[216] The central issue on appeal in that case was whether Title IX[217] incorporates an intentional discrimination or a disparate impact test. Noting the Supreme Court's indication in *Cannon*[218] that lower

213. 648 F.2d at 1007. In a case decided prior to *Castaneda*, United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982), the district court rejected the argument advanced by the Justice Department that Title VI is coextensive with the Fourteenth Amendment in *Bakke*-type cases but not in *Lau*-type cases. The court held that the *Bakke* "majority's finding of coextensiveness, based upon overwhelming evidence of congressional intent, did not depend upon the details of each alleged act of discrimination." 506 F. Supp. at 430. The court concluded that "while *Bakke* does not expressly overrule *Lau*, it renders that decision obsolete, insofar as it found a violation of Title VI merely on proof of discriminatory impact without any showing of discriminatory intent, as required by *Washington v. Davis* and subsequent cases." *Id.* at 431. In its post-*Castaneda* decision, the Fifth Circuit limited its discussion to constitutional and statutory claims and did not discuss the lower court's ruling as to standards of review under Title VI.

214. 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

215. 608 F.2d at 691.

216. 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981). Following her denial of admission to the defendant medical school in 1975, plaintiff initiated litigation charging sex and age discrimination based upon constitutional and statutory grounds including Title IX. On this case's first round through the courts, the Supreme Court reversed the opinions of the lower courts and found an implied private right to sue under Title IX and remanded to the district court. 441 U.S. 677 (1979). The case subsequently came up to the Seventh Circuit twice, once on appeal from a denial of appellant's motion for preliminary injunction, which was affirmed, and in the present instance, on appeal from the district court's (1) granting of defendant's motion to dismiss based on the intent question, and (2) denial of appellant's cross-motions to strike.

217. *See supra* note 17.

218. This same case had been heard by the Supreme Court on the issue of a private right to sue. *See supra* note 20.

courts should look to Title VI for guidance regarding the proper interpretation of Title IX,[219] the court went through an extensive analysis of the relevant opinions in *Bakke*, *Harris*, and *Fullilove*, as well as subsequent interpretations by other lower courts, most notably the Second Circuit.[220] The Seventh Circuit in *Cannon* concluded that Title VI requires intentional discrimination, which compels a like standard to be adopted under Title IX.[221] The court further elaborated on the standard of proof as to intent, stating: " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . ,"[222] and " 'foreseeable result' . . . standing alone is not sufficient to establish the requisite discriminatory intent."[223] As stated by the Seventh Circuit, "An illegal intent to discriminate cannot be posited solely upon a mere failure to equalize an apparent disparate impact."[224]

B. The Third, Eighth, and Ninth Circuits: An Effects Standard

Shortly following the Supreme Court's decision in *Bakke*, the issue as to the standard of review under Title VI was presented before the Ninth Circuit in two cases, the first dealing with Title IX and the second dealing directly with Title VI. In *De La Cruz v. Tormey*,[225] plaintiffs brought suit against the defendant community college district, alleging that lack of campus child care facilities deprived them of equal educational opportunities under the Fourteenth Amendment Equal Protection Clause and Title IX.

In reversing the district court's dismissal of the action, the Ninth Circuit, with respect to the Title IX claim, noted that "[t]he Supreme Court has employed a standard less stringent than intentional discrimination, at least for the purpose of determining whether a prima facie case has been established, under statutes similar to Title IX."[226] In

219. 441 U.S. at 694-96.

220. Among the cases cited were Parents Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979) (school discrimination), and Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980) (school discrimination). *See also infra* notes 256-63 and accompanying text.

221. 648 F.2d at 1109.

222. *Id.* (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

223. 648 F.2d at 1109 (quoting Lora v. Board of Educ. 623 F.2d 248, 250 (6th Cir. 1981) (quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 462 (1979))).

224. 648 F.2d at 1110.

225. 582 F.2d 45 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).

226. 582 F.2d at 61.

support of this proposition, the court cited *Griggs v. Duke Power Co.*,[227] *Dothard v. Rawlinson*,[228] and *Nashville Gas Co. v. Satty*[229]—cases in which an effects standard was applied to Title VII. The court further cited *Lau* as reaffirming the power of the federal government to fix the terms on which federal funds are disbursed.[230] The court noted that "in exercising that power, Congress may impose conditions on administrative action stricter than those imposed by the Constitution."[231] Indeed, the court quoted directly from *Lau*, stating that under Title VI " '[d]iscrimination is barred which has that *effect* [*i.e.*, discrimination among students on account of race or national origin] even though no purposeful design is present.' "[232] The Ninth Circuit made no mention of the *Bakke* "coextensiveness doctrine" but appears to have relied solely upon the contractual principle argument of the majority opinion in *Lau*.[233]

The Ninth Circuit cited *De La Cruz* and its reliance upon the *Lau* effects standard several months later in *Guadalupe Organization, Inc. v. Tempe Elementary School District*.[234] This was an action brought by students of Mexican-American and Yaqui origin who sought to have bilingual-bicultural education recognized as a right guaranteed under Title VI.

The most thoughtful and extensive analysis regarding the implications of *Bakke* coextensiveness upon the standard of proof governing Title VI cases was carried out by the Third Circuit in *NAACP v. Medical Center, Inc.*[235] In that case, the Court rejected defendant's argument that the intent standard established in *Lau* had been overruled by *Bakke* and *Harris*. Citing Justice Powell's opinion as well as the opinion of Justice Brennan and his colleagues in *Bakke*, the majority in

227. 401 U.S. 424, 432 (1971). For a discussion of *Griggs*, see *supra* notes 35-41 and accompanying text.

228. 433 U.S. 321, 329 (1977).

229. 434 U.S. 136, 143 (1977).

230. 582 F.2d at 61 n.16.

231. *Id.*

232. *Id.* (quoting Lau v. Nichols, 414 U.S. 563, 568 (1974)).

233. This argument was later used by the Supreme Court in the majority opinion in *Fullilove*. *See supra* text accompanying notes 197-200.

234. 587 F.2d 1022, 1029 n.6 (9th Cir. 1978).

235. 657 F.2d 1322 (3d Cir. 1981). This case was brought by organizations and individuals representing minority, handicapped, and elderly persons residing in Wilmington, Delaware who alleged that the defendants' medical center and government officials had violated Title VI, as well as § 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794 (1981), and the Age Discrimination Act, 42 U.S.C. § 6101-07 (1981), by planning to relocate the medical facility from the city to an outlying suburban location. In district court, the case was entitled NAACP v. Wilmington Medical Center, Inc., 491 F. Supp. 290 (D. Del. 1980).

Medical Center drew a distinction between the types of discrimination challenged in *Lau* and in *Bakke* but stopped short of reaching the heart of that distinction. In *Lau*, plaintiffs challenged a neutral program that had a disparate impact. In *Bakke*, on the other hand, the charge was intentional discrimination in the nature of a governmental preference.[236] It was evident in *Bakke* that whatever the reach of Title VI, the intent to discriminate was clear. The question there facing the Court, according to Judge Weis, was "whether some forms of intentional discrimination were nevertheless permissible," and he found that "a majority of the Court concluded that those forms of intentional discrimination that would survive constitutional analysis were also exempt from Title VI."[237] The opinion goes on to state that it does not necessarily follow "that Congress also intended the constitutional standard to control every allegation of discrimination" and that it would be "consistent with Congress' expansive, remedial intent to interpret Title VI as prohibiting acts that have the effect of discrimination yet permitting patent preferences designed to remedy past discrimination."[238]

The passages from *Bakke* offered in support of the foregoing conclusion are of mixed interpretive validity. The Brennan group did preface their holding that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself" with the words "applied to the case before us,"[239] thereby limiting the holding to the facts in question and implying perhaps a different standard were the facts different. However, the merits of that implication are severely undercut by that opinion's expressed concern over the continued vitality of the *Lau* impact standard, which according to the majority runs "contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's."[240] Judge Weis also drew out of context from Justice Powell's opinion in *Bakke*, stating that Justice Powell had "used language that may be inconsistent with *Lau*" but that "went on to distinguish *Lau*, saying significantly, '[T]he "preference" approved [in *Lau*] did not result in the denial of the relevant benefit—meaningful opportunity to

236. 657 F.2d at 1329. It should be noted that the Court's only declaration of coextensiveness subsequent to *Bakke* came in *Fullilove*, also a case involving a challenge of a race-conscious preferential program. *See* 448 U.S. 448, 517 n.15 (1980) (Powell, J., concurring); *id.* at 517 n.1 (Marshall, J., concurring).

237. 657 F.2d at 1330 (Weis, J.).

238. *Id.*

239. *Id.* at 1329 (quoting *Lau*, 438 U.S. 265, 325 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part)).

240. 438 U.S. at 352.

participate in the educational program—to anyone else.' "[241] The foregoing distinction was drawn by Justice Powell in response to the defendant medical school's citation of *Lau* to support the proposition that remedial programs had been judicially approved in the past without the heightened level of scrutiny ordinarily afforded suspect classifications. The distinction was therefore drawn within the context of the appropriate standard of review in the sense of level of judicial scrutiny and means-end analysis, and not with respect to the standard of proof in the sense of intent versus impact.

Judge Weis's opinion goes on to reject the defendant's argument that *Harris* further overruled *Lau*, since the majority in *Harris* had "expressly disclaimed any necessity to pass on the standard applicable to Title VI."[242] The opinion concludes that an effects standard under Title VI is consistent with the legislative aim of eliminating discrimination, is in harmony with Title VII and Title VIII,[243] and parallels regulations adopted by HEW and other departments charged with enforcing the statute.[244] This final conclusion is based upon traditionally recognized indicia of legislative intent and undercuts the validity of the Supreme Court's interpretation of that intent in *Bakke*. However, setting aside established principles of statutory interpretation and the legal sufficiency or logical validity of the Court's reasoning in *Bakke*, the argument as to the appropriateness of an intent or effects standard may be irrelevant with respect to the underlying meaning of "coextensiveness" as espoused by five members of the Court in that case.[245]

241. 657 F.2d at 1329-30 (Weis, J.) (quoting *Lau*, 438 U.S. at 304 (Powell, J. concurring)).

242. 657 F.2d at 1330 (Weis, J.) (citing Board of Educ. v. Harris, 444 U.S. 130, 149 (1979)).

243. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1981).

244. 657 F.2d at 1331 (Weis, J.). The opinion lists Title VI regulations adopted by other departments. *See, e.g.*, 7 C.F.R. § 15.3 (1980) (Agriculture Dep't); 14 C.F.R. § 1250.103-1 (1981) (NASA); 18 C.F.R. § 1302.3 (1980) (Tennessee Valley Authority); 45 C.F.R. § 1010.10-2 (1980) (Community Services Admin.); 49 C.F.R. § 21.5 (1980) (Transportation Dep't) (cited in *Medical Center, Inc.*, 657 F.2d at 1331 n.8).

245. The concurring opinion of Judge Adams agreed with the foregoing distinction drawn between the *Bakke* challenge to the intentional use of racial criteria in the context of voluntary remedial actions and the *Lau* challenge to facially neutral acts resulting in disparate impacts. The opinion further found that the concern expressed in *Harris*—that the broad sanction of federal fund termination imposed by Title VI serves as a justification for an intent standard under Title VI—may not be appropriate in the present case where plaintiffs do not seek fund termination as a remedy, but rather an injunction to prevent future discrimination. *Medical Center, Inc.*, 657 F.2d at 1339 (Adams, J., concurring). This distinction may adequately respond to the issues raised in *Harris* but fails to contravene the clear positions taken by five Justices in *Bakke* and *Fullilove*. In a footnote to the opinion,

Assuming arguendo an impact standard under Title VI, the Third Circuit opinion in *Medical Center* includes some noteworthy discussion as to the elements of a prima facie case under the statute, as well as shifting burdens of production and persuasion in Title VI adjudication. According to the majority, the prima facie case under Title VI is governed by the test of reasonableness. The allegedly disproportionate impact must be measurable, definite, substantial (not de minimis), and greater than the impact on others absent the governmental action.[246] Applying the Title VII "business necessity" rule and citing *Griggs v. Duke Power Co.*[247] and *Albemarle Paper Co. v. Moody*,[248] the majority held that a prima facie case could be established under an impact theory, were the plaintiff to prove that a facially neutral policy disproportionately affected members of the protected class. The defendant must then present evidence that the policy in question was related to a business objective. It then remains open to the complaining party to show that other less discriminatory means were available that would serve the legitimate interest.[249]

In a separate opinion, Judge Gibbons maintained that, in a spending power statute such as Title VI, a greater burden must be placed on the defendant to justify the redistribution of federal benefits away from a protected class. Judge Gibbons drew a distinction between rebuttal and justification. As to the former, the defendant could rebut the evidence offered by plaintiffs by a mere showing that the impact complained of will not occur. As to the latter, the defendant could justify

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Judge Adams cited the broad spectrum of federally funded programs under which Title VI challenges have been brought as a possible explanation for the divergent resolutions reached among and within the circuits as to the intent versus impact question. *Id.* at n.3. This observation bears no relevance to "coextensiveness" per se, but is noteworthy with regard to congressional intent to preserve administrative flexibility in the enforcement of Title VI, and supports the argument that Congress intended the standard of review under the statute to be determined on a program by program basis.

246. 657 F.2d at 1332.

247. 401 U.S. 424 (1971).

248. 422 U.S. 405 (1975).

249. 657 F.2d at 1334. The majority in *Wilmington* rejected plaintiffs' argument that a distinction should be drawn between discriminatory intent and impact cases, with defendant shouldering the burden of persuasion and not merely the burden of production in the latter. Plaintiffs based this distinction upon the theory that, in countering a prima facie case of discriminatory impact, the defendant is presenting, in essence, an affirmative defense that requires bearing the burden of persuasion. The Third Circuit rejected this argument based upon the Supreme Court's analysis in Title VII effects cases (citing New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979)), policy considerations (illogical to impose heavier burden on defendant in an impact case than in one where charge is unlawful animus), and practical considerations (procedural distinction between impact and intent cases would cause unnecessary confusion in trial courts). 657 F.2d at 1335.

those impacts by a showing that there exist valid needs essential to defendant's business or service; that the challenged plan, policy, or practice meets those needs; and that there exist no available alternative means with a lesser impact on the protected classes.[250] This mode of analysis, affording broader protection to members of a statutorily protected class where the distribution of federal benefits is at stake, is based upon sound policy and is worthy of serious consideration within the context of a Title VI impact standard. At first blush, the burden of coming forward with proof of the absence of less discriminatory alternatives appears to place an undue onus upon the defendant, who, in effect, must produce evidence of a negative.[251] However, upon closer reflection, such a rule would force recipients of federal aid to engage in a more reasoned decisionmaking process when formulating policies or taking administrative action with potential impact upon racial minorities. Such decisionmaking by its nature must entail a thorough prior assessment of available alternatives. The defendant is then merely called upon to produce evidence that should have been gathered in the first place. Finally, as a matter of public policy and from the viewpoint of one asking who has the most ready access to the evidence, it follows that the risk of nonproduction on the issue of justification should be placed on the defendant in Title VI litigation. Plaintiffs in such cases are unlikely to enjoy privity to the decisionmaking process or to the competing considerations that should ultimately shape the defense of justification. Placing the burden of presenting available alternatives on the plaintiffs would "saddle them and their expert with the task of filling in the gaps in [the defendant's] own consideration of alternatives."[252]

250. 657 F.2d at 1350-51 (Gibbons, J., concurring in part and dissenting in part).

251. Note, *supra* note 191, at 151.

252. 657 F.2d at 1355 (Gibbons, J., concurring in part and dissenting in part). A similar burden of presenting alternatives as part of defendant's rebuttal was adopted by the Third Circuit as to housing discrimination in Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). In that case, the court found that discriminatory acts of officials and agencies in Philadelphia had hindered construction of a low-income housing project for blacks in violation of Title VIII of the Civil Rights Act of 1968. The court held that "a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." 564 F.2d at 149. The standard adopted by the Third Circuit in *Rizzo* was later applied by the district court in NAACP v. Wilmington Medical Center, Inc., 491 F. Supp. 290, 315-16 (D. Del. 1980), wherein the court noted a similarity between housing location decisions and hospital site determinations. In both *Rizzo* and *Medical Center, Inc.*, the appellate court narrowly construed the defendant's burden of presenting evidence of the absence of less discriminatory alternatives, and merely required a showing that the legiti-

C. The Second Circuit: A Struggle for Consensus

Within two months of the Supreme Court's decision in *Bakke*, the Second Circuit in *Board of Education v. Califano*[253] upheld an impact standard under the Emergency School Aid Act.[254] The court noted that employment discrimination under ESAA also violated Title VI, holding both to a disproportionate impact standard. Citing *Lau*, the Second Circuit analyzed the instant case as an exercise of congressional spending power, which "here in aid of the Fourteenth Amendment, is afforded considerable latitude."[255]

The following year, the Second Circuit was directly presented with the issue of the standard to be applied in Title VI adjudication, but this time within the context of a school desegregation suit. In *Parent Association of Andrew Jackson High School v. Ambach*,[256] the court held that "Title VI does not authorize federal judges to impose a school desegregation remedy where there is no *constitutional* transgression—*i.e.*, where a racial imbalance is merely *de facto*."[257] The court noted that Title IV of the Civil Rights Act of 1964,[258] which deals comprehensively with school desegregation, limits the power of the Attorney General to bring desegregation suits to no greater than " '*existing* powers . . . to enforce the Equal Protection Clause.' "[259] The court concluded that since the Attorney General and the federal judiciary lack the power to correct *de facto* racial imbalances under Title IV, it would have been illogical for Congress to have intended to grant broader powers to private litigants under Title VI in the same courts.

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mate nondiscriminatory interest justified the rejection of alternative sites. *Rizzo*, 564 F.2d at 149; *Medical Center, Inc.*, 657 F.2d at 1333.

253. 584 F.2d 576 (2d Cir. 1978), *aff'd sub nom.* Board of Educ. v. Harris, 444 U.S. 130 (1979). The school board of the City of New York sought to enjoin HEW from declaring it ineligible for federal assistance under ESAA.

254. 20 U.S.C. §§ 3191-3220 (Supp. IV 1980).

255. 584 F.2d at 588 n.38. "But in the exercise of its spending power Congress may be more protective of given minorities than the Equal Protection Clause itself requires, although the point at which given non-minorities or their members are themselves constitutionally prejudiced remains in doubt even after *Bakke*. Still, in the alleviation of discrimination, the effect of congressional findings is not insubstantial." *Id.*

The Supreme Court affirmed the Second Circuit opinion in *Harris*, upholding an impact standard under ESAA, but failed to determine the standard to be applied under Title VI. *See supra* notes 192-96 and accompanying text.

256. 598 F.2d 705 (2d Cir. 1979). *Parents Association* was a class action brought on behalf of high school students alleging that actions and inactions of defendant school officials had created a *de jure* segregated facility.

257. *Id.* at 715.

258. 42 U.S.C. §§ 2000c to 2000c-9 (1981).

259. 598 F.2d at 716 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17 (1971); 42 U.S.C. § 2000c-6 (1981)) (emphasis in original).

The court discussed the implications of the *Bakke* "doctrine of co-extensiveness" but declined to find that *Bakke* had expressly overruled *Lau*.[260] It also distinguished the 1978 Second Circuit opinion in *Califano* as having been based on an impact standard as to *employment discrimination* under Title VI. While a different panel in *Califano* had drawn an analogy in the context of teacher employment discrimination to the standards applicable under Title VII, the present panel believed the more appropriate analogy in the present school desegregation case to be Title IV,[261] for which a constitutional standard had been expressly established by statute.[262]

A careful reading of Title IV in its full text, however, casts serious doubt upon the validity of the Second Circuit's interpretation of the statute with regard to Title VI implications. The Act does not limit the Attorney General's authority to bring desegregation suits, but rather expressly declines to empower government officials such as the Attorney General or the federal judiciary to mandate busing in order to achieve racial balance or "otherwise to enlarge the *existing* power of the court to insure compliance with constitutional standards."[263]

It can reasonably be argued that at the time Title IV was enacted in 1964, Congress did not contemplate an intent standard under the Fourteenth Amendment, that standard having not yet been judicially established. Perhaps the language of Title IV as to "the existing power of the court," couched within the context of the preceding phrase as to limitations on busing to achieve racial balance, merely applies to their powers in fashioning desegregation remedies rather than to standards applicable in determining a violation in the first place. The counter-argument would follow that of Title VI interpretation—that the intent of Congress was to create a standard of review subject to evolving simultaneously with Court interpretation of the Fourteenth Amendment.[264] However, absent contradictory evidence as to legislative intent, the language of the Act as to "existing" judicial power clearly places the focus upon those constitutional standards applicable in 1964 at the time of the statute's enactment, and should be read, as mentioned above, to refer to the judicial power to fashion remedial decrees, rather than to the standard of review to be applied in determining a

260. 598 F.2d at 716.

261. *Id.*

262. *See supra* note 259.

263. 42 U.S.C. § 2000c-6(a) (emphasis added).

264. *See supra* text accompanying note 184.

violation.[265]

Even assuming arguendo that an intent standard governs Title IV, a clear distinction can be drawn between the legislative purposes of Titles IV and VI so as to contravene the Second Circuit's interpretation by analogy. The purpose of Title IV was to relieve the public of the financial costs of school desegregation litigation by permitting the Attorney General, upon receipt of a signed complaint, to institute legal action in order to desegregate public schools and colleges and to protect constitutional rights.[266] The purpose of Title VI, on the other hand, was to assure that federal funds would not be used to further discrimination on the basis of race, color, or national origin.[267] Again, it can be argued that Congress, under its spending power, can impose stricter standards for the use of federal monies than those required to establish constitutional violations in cases not involving federal financial assistance. Therefore, while Title IV requires an intent standard to be applied in school desegregation cases, that standard need not be applied under Title VI, but should operate independently of the Title VI standard in school desegregation litigation. If it is recognized that each title of the Civil Rights Act of 1964 has a specific purpose independent of the overall purpose of the Act to "assure equal access for all Americans to all areas of community life,"[268] it can be under-

265. It is important to note that the analysis of Title IV suggested herein directly contravenes that taken by the Supreme Court in *Swann*, in which the Court stated: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). Based upon its interpretation of the legislative history of the Act, the Court noted that there exists no intention to restrict those historically broad remedial powers. According to the Court, the underlying concern expressed by congressional members was that Title IV might be construed as creating a right of action under the Fourteenth Amendment in the case of "*de facto*" segregation, that is, "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." *Id.* at 17-18.

The Court in *Swann* failed to cite the text or content of statements made during congressional debates to support its interpretation of Title IV. But this interpretation provided the most effective argument to counter plaintiffs' argument that limitations were imposed on the equity powers of the courts by Title IV, and provided strong support for upholding the system-wide busing remedy imposed by the district court. The Court in *Swann* could have countered the plaintiffs' argument merely by interpreting Title IV as declining to grant such power to the courts by congressional fiat while not intending to withdraw those equitable powers traditionally exercised by the courts. In sum, had the Court in *Swann* interpreted Title IV as an exercise in congressional restraint, it could have countered the plaintiffs' arguments successfully without seeking alternative grounds in the *de facto/de jure* distinction.

266. 1964 U.S. CODE CONG. & AD. NEWS 2508.

267. *See supra* notes 133-37 and accompanying text.

268. 1964 U.S. CODE CONG. & AD. NEWS 2362-63.

stood that the Second Circuit was in error in attempting to analogize from one title to the other as to governing standards of judicial review.

The effect of such a dual standard for Title IV and Title VI desegregation suits is that were the Attorney General to bring an action under Title IV powers to enforce constitutional rights, an intent standard would govern and the court could exercise the full range of its equitable powers within the confines of the Constitution. On the other hand, were a desegregation action brought under Title VI against a recipient of federal funds, an impact standard would govern. A distinction drawn with respect to desegregation cases between governing standards of review as to *constitutional* violations on the one hand, and *statutory* violations on the other, is no more impractical than the same distinction that has been drawn with respect to other types of cases, *e.g.*, employment (Title VII) and housing (Title VIII). The underlying issues concern congressional purpose and overriding policy considerations.

The issue of desegregation was again presented before the Second Circuit the following year, this time compounded by claims of discrimination against the handicapped and denial of due process. *Lora v. Board of Education*[269] was a class action asserting that the procedures and facilities provided by the defendant school district for the education of emotionally disturbed students violated certain provisions of the federal Constitution and statutes—among them Title VI. Citing the overwhelming minority population among students assigned to special day schools for the emotionally handicapped (68% black, 27% Hispanic, and 5% other), plaintiffs alleged that such special schools served as segregated "dumping grounds" for minorities, and provided inadequate facilities without due process as compared with those afforded comparable white students in other settings. The district court, citing *Lau*, had found a Title VI violation based upon a racially discriminatory effect.[270]

The Second Circuit on appeal reversed the district court decision as to the Title VI claim, citing Justice Stewart's dissenting opinion in *Harris* as authority for an intent standard under the Act.[271] The majority opinion made no mention of *Bakke* or its "doctrine of coextensiveness." Judge Oakes, who had written the majority opinion in *Califano* upholding an effects standard as to Title VI employment

269. 623 F.2d 248 (2d Cir. 1980).

270. 456 F. Supp. 1211, 1277-78 (E.D.N.Y. 1978).

271. 623 F.2d at 250. A brief discussion of the Stewart opinion is set forth *supra* at text accompanying note 195.

claims, however, wrote a separate opinion in *Lora* in which he concurred in the result reached by the majority but dissented as to the standard governing Title VI review. Basing his view upon *Bakke*, the dictum in the *Harris* majority opinion, and Justice Stewart's dissenting opinion in that case, Judge Oakes was also inclined to apply an intent standard but declined to do so, awaiting further clarification from the Court.[272] It is worthy of note that neither the majority nor the concurring opinion made any mention of the intent exception as to desegregation cases carved out by a different panel of the circuit in *Andrew Jackson*.[273]

It could be argued that the language of *Lora* indicates a general leaning of the Second Circuit toward a broad Title VI standard of intent to be applied in all cases. One month after *Lora*, however, a panel comprised of different judges than those who had decided *Califano*, *Andrew Jackson*, and *Lora*, cast some doubt on this observation in a Title VI case outside the educational arena.

In *Bryan v. Koch*,[274] the district court had applied an intent-oriented standard for prima facie violations under Title VI, requiring at least some evidence of "a disparate impact probative of discriminatory motive."[275] On appeal, the Second Circuit declined to rule on the standard governing Title VI. However, in a detailed discussion, the court found that even under an effects test, the defendant had successfully countered the plaintiffs' prima facie case by coming forward with a legitimate justification—an increase in efficiency of the municipal hospital system—and evidence of the criteria applied in the selection of the site to be closed, which was found to be reasonably related to the proffered justification.[276]

As to the next step in the impact paradigm—consideration of alternative, less discriminatory means—the court limited judicial inquiry in the context of hospital relocations to an assessment of all the municipal hospitals in order to select one for closing. According to the Second Circuit, a sweeping judicial inquiry regarding alternative means to achieve operational efficiency beyond hospital closings would risk substituting the judgment of the court for that of the city's elected officials and appointed specialists. Such alternatives, the court felt, are "more

272. 623 F.2d at 251-52.

273. *See supra* notes 256-59 and accompanying text.

274. 492 F. Supp. 212 (S.D.N.Y.), *aff'd*, 627 F.2d 612 (2d Cir. 1980). Plaintiffs in this case sought a preliminary injunction, alleging that a disproportionate racial impact resulted from the closing of a municipal hospital.

275. 492 F. Supp. at 236.

276. 627 F.2d at 616-18.

appropriate for examination by administrative, legislative, and other political process."[277]

If the Second Circuit appeared to vacillate between an intent standard in *Lora* and an impact standard as suggested in *Koch*, a case decided by a panel again of a composition totally different from the panels in the preceding four cases, and just two weeks subsequent to *Koch*, merely serves to confuse the circuit's position even further. In *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*,[278] the district court had applied an effects standard under a Title VI employment discrimination claim, citing *Lau* as authority for upholding administrative regulations requiring an effects test. The regulations in this case were those promulgated by the Department of Labor pursuant to Title VI.[279]

The Second Circuit, on appeal, reversed the district court decision, citing *Bakke* as authority for an intent standard to be applied under Title VI, even in the context of employment discrimination. Although the court acknowledged the Second Circuit's previous decisions upholding an effects standard in cases involving administrative regulations[280] and observing that *Bakke* did not overrule *Lau*,[281] Judge

277. *Id.* at 619. The majority further posited several arguments indicating that it would support an impact standard were the issue directly before it. First, *Lau*, which applied an effects standard, had not been overruled and had been viewed as controlling by the Second Circuit in *Califano*, as well as by other circuit courts. Second, the present case could be distinguished from *Andrew Jackson* and *Lora*, which both involved court-ordered desegregation remedies for which Title IV provides the governing standard as to *de jure* segregation. Third, even if an intent standard governs Title VI actions in which fund termination is sought as a remedy, such a standard may not apply where, as in the present case, the parties seek an injunction. Fourth, the defendant had contractually bound itself to comply with administrative regulations that impose an effects test. *Id.* at 616.

278. 466 F. Supp. 1273 (S.D.N.Y. 1979), *rev'd*, 633 F.2d 232 (2d Cir. 1980), *cert. granted*, 454 U.S. 1140 (1982). The case was brought by black and Hispanic members of the New York City Police Department, alleging that layoffs carried out pursuant to the Department's "last-hired, first-fired" policy were discriminatory in that the Department's entry level examinations administered between 1968 and 1970 were discriminatory, and that, but for such discrimination, plaintiffs would have been hired earlier and would have accrued sufficient seniority to withstand being laid off.

279. 29 C.F.R. § 31.3(c)(1) (1981). The district court further presented a noteworthy interpretation of the *Bakke* "coextensiveness doctrine" as not indicating a view contrary to *Lau*. According to the court, the critical issue in *Bakke* was whether Title VI prohibits *all* racial classifications per se or, like the Equal Protection Clause, only those for which no compelling justification is proffered. Justice Powell had concluded that the two provisions were coextensive with respect to their prohibiting only unjustified racial classifications. This interpretation has no bearing upon the governing standard of review under Title VI. 466 F. Supp. at 1283-84. *See infra* notes 284-88 and accompanying text for a more detailed discussion of this interpretation of the doctrine of "coextensiveness."

280. 633 F.2d at 275 n.4 (Coffrin, J., concurring) (citing *Califano).*

281. *Id.* (citing *Andrew Jackson* and *Lora*).

Coffrin, enunciating the majority opinion on this issue, interpreted *Bakke* as having seriously undercut *Lau*.[282] This case is presently before the Supreme Court for review,[283] and represents the Court's first opportunity to resolve the intent/impact debate as to Title VI or any of its analogues.

D. Summary

The foregoing cases clearly indicate a post-*Bakke* sense of confusion and uneasiness among and within the circuits. This confusion is perhaps most evident in the Second Circuit, which has been faced with the largest number of cases and broadest range of issues. From this discord, however, can be extracted a set of approaches and arguments useful in the formulation of an overall model of judicial review under Title VI. The following section will draw from the legislative history of the Act, Supreme Court and lower court interpretations, judicially defined standards in similar statutory and constitutional adjudication, as well as from the discussion of the intent/impact debate among the legal community, in order to develop a model of Title VI review. The proposed model aims at maintaining the broad-based utility of the Act, while balancing the social interest in protecting the rights of historically disadvantaged groups against the political interest in respecting the integrity of decisionmaking at the implementation level.

III. A Proposed Model of Judicial Review

A. Interpretation of "Coextensiveness"

The Third Circuit opinion in *Medical Center*, although riddled with flaws, accepts the constitutional underpinnings of Title VI as relied upon by the Court in *Bakke* and as evidenced in the legislative history of the Act, and provides a starting point for reconciling *Lau* and *Bakke*, two cases that represent on their face irreconcilable Court interpretations of Title VI.[284] As one commentator has noted, the facts presented in *Bakke* placed the Court in a policy bind with respect to *Lau* and the remedial objectives of Title VI.[285] Recognition in *Bakke* of an impact standard under Title VI would have afforded the statute broader proscriptive reach than that of the Equal Protection Clause

282. 633 F.2d at 275 (Coffrin, J., concurring).

283. *See supra* note 278.

284. *See supra* notes 235-45 and accompanying text. *See also* Guardians Ass'n v. Civil Service Comm'n, 466 F. Supp. 1273 (S.D.N.Y. 1979).

285. Note, *Maintaining Health Care in the Inner City: Title VI and Hospital Relocations*, 55 N.Y.U. L. REV. 271, 290-91 (1980).

and would have led to the inevitable position that, while the clause may tolerate some benign racial preferences to combat the effects of past societal discrimination, such preferences would be barred by Title VI. The facts of *Lau*, however, had presented the Court with contravening policy considerations exerting pressure in the opposite direction. In an effort to protect the interests of racial minorities, the Court deferred to the power of Congress to enact broad-based remedial legislation and to implement social policy through its spending powers. Viewed in this perspective, *Bakke* represents an effort by the Court to protect the remedial objectives of Title VI. The "doctrine of coextensiveness" successfully achieved that end with regard to voluntary efforts to remedy past discrimination. The key issue in *Bakke* was not whether the medical school's practices were discriminatory, for they were clearly so on their face, but whether benign intentions could justify such discrimination. The Court's invocation of equal protection standards, on the other hand, sacrificed the utility of Title VI with regard to facially neutral practices that disproportionately burden a minority group. Therein lay the dilemma of the Court in *Bakke*.

The distinction drawn by the Third Circuit in *Medical Center* as to the type of racial classification at issue—remedial with a benign purpose, as opposed to facially neutral with a racially disproportionate impact—can be carried further to reach a novel yet plausible interpretation of *Bakke*. The Court's overriding concern in *Bakke* was with racial criteria, and the threshold question was whether benign racial classifications would be barred by Title VI.[286] It can be argued that by placing the Title VI proscription within the confines of the Fourteenth Amendment, the Court was merely subjecting all racial classifications, whether facially discriminatory but remedial in the *Bakke* sense or facially neutral but with disproportionate racial impact in the *Lau* sense, to a strict scrutiny analysis. According to this interpretation, the Court was stating that racial classifications in any sense are permissible only where the government can proffer a compelling objective, where the classification is strictly necessary to promote that objective, and where there exist no alternative less discriminatory means to achieve those ends.[287] The focus is thereby placed on a means-end

286. 438 U.S. 265, 304 (Powell, J.) (quoting Lau v. Nichols, 414 U.S. 563, 570-71 (Stewart, J., concurring in result)).

287. The doctrine of "strict scrutiny" has been developed through a line of cases since Korematsu v. United States, 323 U.S. 214 (1944). Notable cases include Sugarman v. Dougall, 414 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969); Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967); and Reitman v. Mulkey, 387 U.S. 369 (1967).

analysis to define the contours of justifiable classifications, and *Bakke* comes to signify that those contours are coterminous for Title VI and the Equal Protection Clause. In that sense, *Bakke* can be said to have overruled *Lau*. Proof of discriminatory effects would no longer suffice to establish a Title VI violation per se, but would merely raise the presumption of discrimination, shifting the burden of persuasion to the defendant to rebut that presumption with a compelling governmental interest. This test is consistent with the rule as applied in disparate impact cases under Title VII.[288] In education cases, the compelling governmental interest would translate into "educational necessity," similar to the "business necessity" rule of Title VII. Once the defendant comes forward with such rebuttal evidence, the plaintiff may offer evidence of alternative less discriminatory means that would meet such "necessity."

B. Establishing the Prima Facie Case

The legislative history of Title VI indicates a failure on the part of Congress to reach a consensus on the definition of "discrimination" under the Act,[289] and thereby offers inconclusive evidence on congressional intent as to whether Title VI prohibits merely those racial classifications resulting from intentional acts of fund recipients, or includes those resulting from facially neutral acts that bear a disproportionate racial impact. While there exists evidence of the intended constitutional underpinnings of the Act,[290] there is scant support for the argument that the standard of review under Title VI was intended to evolve with that of judicial interpretation of the Fourteenth Amendment.[291] Congressional debates surrounding passage of the Act, however, support the proposition that Title VI proscriptions would be defined by each agency within the context of the agency's programs and scope of power.[292] Given the effects standard as established by HEW regulations under Title VI,[293] and given a plausible interpretation of "coextensiveness" outside the framework of an intent standard, it is suggested that an effects standard be applied in Title VI disparate impact cases following the Title VII three-tier model of analysis, but with slight modification.

288. *See, e.g.*, *supra* notes 35-37 and accompanying text (discussion of Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

289. *See supra* note 139 and accompanying text.

290. *See supra* note 156 and accompanying text.

291. *See supra* text accompanying note 265.

292. *See supra* note 156 and accompanying text.

293. *See supra* note 157 and accompanying text.

Case law indicates two significant components of the prima facie case under Title VI. First, the racial disparity created by the challenged governmental action must be substantial and statistically verifiable,[294] as well as measurable, definite, and greater than the impact on others absent such action.[295] Second, the effect on the minority group must be sufficiently adverse. As to the first component, because Title VI covers a broad range of governmental policies and practices, it is suggested that a flexible standard regarding substantiality be applied on a case-by-case basis.[296] However, the "substantiality" requirement imposes a heavy burden upon the plaintiff of presenting evidence that is measurable and far more than de minimis. As to the requirement of "adversity," the plaintiff must not merely prove statistical disparity, but must further prove that the overall effect of the disproportionate impact is of considerable consequence to the protected group.

Several lower courts have applied a standard of "effective foreclosure," citing *Lau* for its holding that the failure of the San Francisco School District to provide Chinese-speaking students with an opportunity to acquire basic minimal skills effectively "foreclosed" those students from obtaining meaningful education.[297] This standard contains both an element of "adequacy" and of "appropriateness." Plaintiffs must prove that the challenged governmental actions would result, or have resulted, in the provision of services so inadequate or so inappropriate to their needs as to be meaningless, or the functional equivalent of no services at all.

The suggested emphasis upon the substantiality and adversity of the harm serves to protect fund recipients from an overbroad effects standard that might invalidate official actions that produce only minimally harmful results. In the educational arena, for example, decisions on the placement of teachers and students, site selections, school clos-

294. *See* Bryan v. Koch, 627 F.2d 612, 616-17 (2d Cir. 1980).

295. *See* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1332 (3d Cir. 1981).

296. See Note, *supra* note 191, at 143-44 nn.109-14, for a discussion of standards applied in Title VI cases.

297. *Lau*, 414 U.S. at 566. *See also* Larry P. v. Riles, 495 F. Supp. 926, 964-65 (N.D. Cal. 1979), *appeal docketed*, No. 80-4027 (9th Cir. Jan. 17, 1980) (court held that disproportionate placement of minority students in classes for educable mentally retarded constituted Title VI violation, as such a policy effectively foreclosed them from any meaningful education); Jackson v. Conway, 476 F. Supp. 896, 904 (E.D. Mo. 1979), *aff'd*, 620 F.2d 680 (8th Cir. 1980) (hospital closing case, in which court, citing *Lau*, denied plaintiffs' motion for preliminary injunction since plaintiffs failed to show that consolidation of certain services would effectively foreclose them from all hospital services). The *Lau* standard of "effective foreclosure" from "meaningful" education was further cited by the Ninth and Tenth Circuits respectively in Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022, 1029-30 (9th Cir. 1978), and Serna v. Portales Mun. Schools, 499 F.2d 1147, 1152-54 (10th Cir. 1974).

ings, course offerings, and provision of instructional services are all potential targets of Title VI claims. Such limits upon the scope of judicial review are necessary in order to preserve administrative efficiency.[298]

C. Burden of Justification

Under principles established by the Court in Title VII cases, once the plaintiff has proven the prima facie case, the burden shifts to the defendant, who may rebut with evidence that the employment practice is "job related" or otherwise dictated by "business necessity."[299] If the defendant meets this burden, the plaintiff must then prove the availability of alternative means that would have served the employer's legitimate interest while avoiding undesirable racial effects.[300] The model suggested here modifies this three-step operational framework in order to meet the broader purpose of Title VI, that is, to assure that the intended beneficiaries of federal funds have equal opportunity to enjoy program benefits.

Returning to the suggested interpretation of "coextensiveness": if read to be confined to the arena of equal protection means-end analysis, the doctrine merely prohibits those racial classifications that cannot be justified by a compelling interest or can be avoided by less discriminatory means. In conformity with this interpretation, the proposed model under Title VI would require that the defendant sustain its burden of justification with evidence of a compelling interest. This model superimposes Title VII analysis upon equal protection analysis. Translated into educational terminology, the justification of "business necessity" becomes "educational necessity" of the magnitude of a "compelling interest."[301] The standard of "compelling" places a heav-

298. Where the impact is so substantial and so directly the result of the challenged action, then a "strong inference" of discriminatory purpose attaches and the distinction between intent and effects is blurred. *See, e.g.*, Personnel Adm'r v. Feeney, 422 U.S. 256, 279 n.25 (1979). The suggested standards of "substantiality" and "adversity" fall short of this point.

299. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

300. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

301. *Cf.* United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (Eighth Circuit, in considering claim under Title VIII of Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (1981), developed three-part test of compelling interest. Defendant must show: (1) action advanced public interest; (2) interest is lawful and sufficiently substantial to outweigh harm to plaintiff; and (3) interest could not be served by less discriminatory means). *But see* Bryan v. Koch, 627 F.2d 618 (2d Cir. 1980) (court proposed merely a "rational relationship" test as to defendant's justification). The Eighth Circuit measured the justification as "compelling," using a balancing approach similar to that used in recent Supreme Court decisions under the Equal Protection Clause. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brink-

ier burden upon the defendant fund recipient in Title VI cases than upon the defendant employer under Title VII. This higher standard, as well as the required discussion of alternatives, is justifiable as a means of preventing the misuse of federal funds and of imposing upon recipients a higher standard of care in decisionmaking.

The final step in the proposed model is judicial consideration of alternatives. As suggested by the separate opinion of Judge Gibbons in *Medical Center*, a spending power statute such as Title VI must place a greater burden on the defendant to justify the redistribution of federal funds away from the intended beneficiaries.[302] Furthermore, as stated previously, such a rule would encourage federal fund recipients to weigh the potential racial impact of various alternatives prior to formulating and implementing educational policy, and would place the burden of presenting such alternatives upon the parties with greatest access to the information.[303]

Conclusion

Title VI of the Civil Rights Act of 1964 was designed to prevent the use of federal funds to promote discriminatory purposes, and to assure that such funds provide equal opportunity to the intended beneficiaries. In the past two decades, the Act has served as the basis for litigation involving employment, educational policies and practices, and hospital relocations. Perhaps the broadest range of issues brought before the courts under Title VI has concerned education—from segregative policies on teacher and student assignment, to school closings, the use of I.Q. tests, the placement of students in special education programs, and the adequacy of instructional services provided to linguistic minority students.

In recent years, the continued ability of Title VI to fulfill its legislative purposes has been placed in serious jeopardy, stemming from the Supreme Court's decision in *Bakke* and the resulting confusion in the

man, 443 U.S. 526 (1979). One commentator has proposed that the following factors be weighed by the court under a balancing test: the degree of disproportion in the impact; the efficiency of the challenged law; the availability of alternative means having less disproportionate impact; and the governmental objective sought to be advanced. *See* Perry, *supra* note 68, at 559-60. The order in which evidence is produced in the course of the litigation would necessitate that defendant show alternative, less discriminatory means together with evidence of justification in order for the court's balancing of all four factors to bear on the question of a "compelling" justification.

302. 657 F.2d 1322, 1353 (3d Cir. 1981) (Gibbons, J., concurring in part and dissenting in part).

303. *See supra* notes 250-52 and accompanying text.

circuit courts over the "doctrine of coextensiveness." This article has attempted to develop a model of Title VI analysis that is consistent with prior Court decisions as to the standard of review to be applied under the Act, with legislative history, with the reasoning of the Court in *Bakke* and subsequent decisions, and with sound policy considerations regarding the proper subjects of judicial inquiry and the preservation of reasoned decisionmaking at the implementation level.

The proposed model superimposes the three-tiered level of review developed by the Court in Title VII cases, upon the means-end analysis of equal protection adjudication. Utilizing the shifting burdens of production as developed under Title VII, plaintiff may establish the prima facie case under Title VI with proof of substantially disproportionate impact upon, as well as adverse harm to, members of the protected group. Defendant may offer rebuttal evidence of a compelling justification (*e.g.*, educational necessity), and the absence of alternative, less discriminatory means to promote the justification. This allocation of burdens of proof and production safeguards federal fund recipients from claims of minimal harm, while placing the burden of coming forward with the evidence on the parties with most ready access to the information.