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Racial Discrimination Under the Constitution and Title VII - More Deference to the Reasonable Practices of Lawmakers and Employers

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support. Practicality may demand that one spouse be the manager of community assets, but fairness demands the manager not be given unfair advantages at the expense of the other spouse. Alternatively, the legislature should clarify the article to reflect its Spanish heritage by specifically making alimentary obligations separate. The primary purposes of community property are to provide for the expenses of the common life and to provide that the spouses share equally in the growth and acquisition of assets produced by their common labor and industry. Without the consent of the other spouse, neither spouse should be able to jeopardize the assets properly belonging to the other in pursuance of his own affairs. By treating alimentary obligations as separate such jeopardy would be avoided consistently with the purposes of community property. Fairness and clarity demand one alternative or the other, but as few persons would like the idea of supporting a spouse's former spouse, in addition to the other reasons set forth, the proposal that the obligations be made separate is more plausible.

Phillip L. McIntosh

RACIAL DISCRIMINATION UNDER THE CONSTITUTION AND TITLE VII—MORE DEFERENCE TO THE REASONABLE PRACTICES OF LAWMAKERS AND EMPLOYERS

Alleging racial discrimination in effect, though not in purpose, claimants asserted that a personnel test given by the District of Columbia police, resulting in the rejection of their job applications, was unrelated to job performance and thus violated the due process clause of the fifth amendment as well as certain federal statutes.[1] Following a district court dismissal,[2] the court of appeals[3] found a constitutional violation, based upon the

criticized. See *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Persons,* 37 LA. L. REV. 305, 310-11 (1977).

1. Claimants, intervenors in a class action challenging D.C. police force recruiting policies, asserted violations of 42 U.S.C. § 1981 (1970) and D.C. Code § 1-320 (1973 & Supp. 1975) requiring that police force appointments be made in conformity with federal Civil Service provisions. The instant case dealt only with a motion for summary judgment regarding the validity of a written Civil Service personnel exam.

2. 348 F. Supp. 15 (D.C. 1972) (granting federal parties' motion for summary judgment based on constitutional and statutory grounds and denying claimants' motion based solely on the Constitution).

3. 512 F.2d 956 (D.C. Cir. 1975).

disproportionate impact on blacks and the lack of job relatedness. Reversing, the Supreme Court *held* that absent proof of a discriminatory purpose, a practice is not unconstitutional solely because of a disproportionate racial impact, and that tests given job applicants satisfy statutory standards similar to those under Title VII[4] if they are directly related to the requirements of valid training programs, even if not directly related to job performance. *Washington v. Davis*, 426 U.S. 229 (1976).

While the fifth amendment contains no equal protection clause, the requirements of due process imposed upon the federal government embody standards quite similar to those applicable to the states under the fourteenth amendment.[5] Traditionally, the equal protection standard for determining the permissibility of statutory classifications has been that the disparate treatment be rationally related to the purpose of the legislation.[6] Cases involving suspect classes[7] or fundamental interests,[8] however, generally precipitate the more stringent standard of strict scrutiny. In such instances, the government must bear the very heavy burden of showing a compelling interest in treating persons unequally.[9] One explanation for this stringent test where race is involved is that "the effects of racial discrimination are so unacceptable that only a countervailing interest of

4. The Civil Rights Act of 1964, Title VII—Equal Employment Opportunity, 42 U.S.C. § 2000e *et seq.* (1970 & Supp. II 1972). Title VII was inapplicable to the federal government when the complaint was filed; although coverage was extended prior to judgment, the complaint was not amended to state a Title VII claim.

5. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 (1975) (unjustifiable discrimination is violative of due process); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The fifth amendment states that "No person shall be . . . deprived of life, liberty, or property, without due process of the law," while the fourteenth amendment states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

6. *E.g.*, United States Dep't. of Agric. v. Moreno, 413 U.S. 528, 533 (1973); Frontiero v. Richardson, 411 U.S. 677, 683 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971). *See* Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-87 (1969).

7. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Korematsu v. United States, 323 U.S. 214 (1944) (race). *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973) (sex); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy).

8. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (vote); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal appeals).

9. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (must show substantial and compelling reasons for burdening travel and voting); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (racial classification invalid absent overriding statutory purpose).

extraordinary weight, achievable in no other way, is enough to justify them."[10]

Although the case law is settled with regard to applying strict scrutiny to intentional racial discrimination, courts have not been consistent in cases involving adventitious inequality. In a 1973 school desegregation case, *Keyes v. School District No. 1*,[11] the Supreme Court, following earlier decisions in other contexts,[12] emphasized the need for a finding of a discriminatory purpose before abandoning the rationality test for that of stringent review.[13] The meaning of "purpose" has not been clear: the Court sometimes uses the term interchangeably with motive. Consequently language in decisions admonishing against investigation of legislative motive and emphasizing statutory effect lends support for the proposition that the operative impact of a law rather than its purpose is the controlling factor. For example, the Supreme Court in *Palmer v. Thompson*[14] upheld the closing of Jackson, Mississippi, public swimming pools, despite evidence that the closure was "motivated by a desire to avoid integration"[15] since the effect of the action was the same upon blacks and whites. While acknowledging that some of its decisions suggested that legislative motive or purpose is germane to constitutionality, the Court indicated that those decisions rested upon the actual effect of the law.[16] In other contexts, several courts of appeals, believing de facto disadvantage to be as harmful as a willful scheme, have demanded demonstration of compelling govern-

10. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 317 (1972).

11. 413 U.S. 189 (1973).

12. *E.g.*, Jefferson v. Hackney, 406 U.S. 535 (1972) (welfare benefits); James v. Valtierra, 402 U.S. 137 (1971) (housing referendums); Wright v. Rockefeller, 376 U.S. 52 (1964) (political districting).

13. The Court did not actually employ the term "strict scrutiny" in determining that the de facto - de jure distinction vanishes upon a finding of a racially discriminatory purpose. 413 U.S. at 208. As reflected in decisions dating from the early 1970's, the Court has been seeking new articulations of equal protection standards of review. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12-18 (1972).

14. 403 U.S. 217 (1971) (Douglas, White, Marshall, & Brennan, JJ., dissenting).

15. *Id.* at 224. The refusal of the Court to examine motivation was criticized in Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971).

16. *Id.* at 225. The Court distinguished the situation in *Palmer* from that in *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Griffin*, the state was perpetuating a segregated school system by financing segregated private academies; and in *Gomillion* the gerrymander of the boundaries of Tuskegee, Alabama, excluded virtually all blacks from voting in town elections.

mental interest in cases involving rules which disproportionately harm racial minorities—regardless of intent.[17]

Title VII of the Civil Rights Act of 1964,[18] providing statutory guidance for employers, decrees that any action with a disproportionate impact upon protected persons is unlawful if attributable to race, color, religion, sex, or national origin.[19] Although Title VII permits the use of employment tests, the Equal Employment Opportunity Commission's (EEOC) guidelines demand that whenever a test adversely affects protected individuals, the employer must satisfy EEOC validation procedures. A test, to be valid, must be significantly related to job performance.[20] The Supreme Court endorsed this job relatedness requirement in the 1971 decision, *Griggs v. Duke Power Co.*,[21] refusing to allow an employer to use tests which disadvantaged blacks and which did not measure success on the job. The Court held that lack of discriminatory intent does not redeem employment tests "that are fair in form, but discriminatory in operation" and which are unrelated to measuring job capability.[22] The Court recently reaffirmed *Griggs*, in *Albemarle Paper Co. v. Moody*,[23] endorsing specific guidelines which require test correlation with actual work operations.

17. *E.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286, 1288 (5th Cir. 1971) (municipal services); Kennedy Park Homes Ass'n., Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970) (zoning); Hobson v. Hansen, 269 F. Supp. 401 (D.C. 1967), *aff'd*, 408 F.2d 175 (D.C. Cir. 1969) (school segregation).

18. Title VII—Equal Employment Opportunity, 42 U.S.C. § 2000e *et seq.* (1970 & Supp. I 1972).

19. *Id.* § 2000e-2(a)(2). But section 2000e-2(e) provides that it is not an unlawful employment practice to base employment decisions on religion, sex, or national origin (but not race) when these factors would be a bona fide occupational qualification reasonably necessary to the normal operation of a business.

20. *Id.* § 2000e-2(h). This section permits the use of "professionally developed ability tests." The meaning of this term has been greatly debated. For a detailed discussion see Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1649-54 (1969); Comment, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1123-26 (1971). The EEOC guidelines on testing are published in 29 C.F.R. § 1607.1 *et seq.* (1975). Sections 1607.4-.5 provide validation requirements. The guidelines demand that the employer demonstrate through empirical evidence that his tests are predictive of or significantly correlated with important elements of work behavior as gauged by criteria which are fully described and fairly assessed. Data must also be generated for minority and nonminority groups whenever technically feasible. Other proofs of validity are appropriate where criterion-related validity is not feasible.

21. 401 U.S. 424 (1971).

22. *Id.* at 431-32.

23. 422 U.S. 405, 431 (1975). The current guidelines, inapplicable in *Griggs*, 401

The authority of the EEOC guidelines is enhanced by numerous supportive court of appeals decisions[24] and by the fact that Congress neither disapproved nor altered them while extensively amending Title VII in 1972.[25] Against the backdrop of substantial support for the Title VII and EEOC standards and special concern for racial discrimination, various courts of appeals have determined that these standards are applicable to the adjudication of complaints of racial discrimination under the Constitution.[26]

In the instant case, the Supreme Court upheld the District of Columbia police force's use of a Civil Service test despite proof of a black failure rate four times greater than the failure rate of whites.[27] Deciding the fifth amendment issue first, the Court acknowledged that under Title VII tests with adverse impacts are discriminatory and must meet stringent validation requirements; nevertheless, the Court explained, the statutory standard is not the constitutional rule. In constitutional adjudications mere disproportionate impact is not sufficient cause for subjecting a practice which is nondiscriminatory on its face to the harshness of strict scrutiny.[28] Applying the traditional standard, the Court found the examination to be rationally related to a legitimate governmental purpose.[29] After disposing of the constitutional issue, the majority addressed the statutory question of job relatedness. The test satisfied the job relatedness requirement because it was predictive of successful performance in the police training course even though there was no direct correlation between the test and actual elements of police work.[30]

U.S. at 433 n.9 (1971), specify the methods of proving job relatedness. Mr. Justice Blackmun protested in *Albemarle* that too rigid an application of the guidelines would force employers to choose between complex and costly validation studies or subjective quota systems of hiring. 422 U.S. at 449 (concurring in judgment). *See Employment Discrimination and Title VII, supra* note 20, at 1130.

24. *E.g.*, Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Vulcan Soc'y. v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

25. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111 (codified at 42 U.S.C. § 2000e *et seq.* (1970 & Supp. II 1972)). *See* H.R. REP. NO. 298, 92d Cong., 1st Sess. 20-22, *reprinted* in [1972] U.S. CODE CONG. & AD. NEWS 2137, 2155-57.

26. *E.g.*, Jones v. New York City Human Resources Adm'n., 528 F.2d 696, 698 (2d Cir. 1976); Castro v. Beecher, 459 F.2d 725, 735 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315, 320, 322 (8th Cir. 1971).

27. 426 U.S. 229, 237 (1976).

28. *Id.* at 242.

29. *Id.* at 246.

30. *Id.* at 250. The willingness of the Court to forego proof of correlation with

The Court's declaration that the statutory standard of Title VII is not applicable to constitutional adjudication of employment discrimination cases is of minor significance. Since only small employers are now exempt from coverage under Title VII,[31] most litigants can rely directly on the statutory provisions which, as the Court explains, are more demanding than those of the Constitution.[32] The importance of the case derives from the Court's statements on elements of proof in constitutional litigation and the effect of these pronouncements in areas other than employment.

Washington v. Davis resolves the conflict concerning whether purpose or impact is the paramount factor in determining when a law containing no explicit racial classification[33] is to be considered constitutionally suspect. Standing alone, disproportionate impact is insufficient to establish racial discrimination, and without proof of a discriminatory purpose the Court will not subject neutral enactments to the strict scrutiny normally applied to racial classifications. Realization that a law subjected only to a demand for rational justification is unlikely to be found constitutionally infirm[34] emphasizes the significance of the majority's clarification regarding the constitutional standard. The Court in a case decided only weeks after *Washington* indicated clearly that it will accord great deference to legislative judgments under the rationality test. In *City of New Orleans v. Dukes*,[35] the Court expressly overruled *Morey v. Doud*,[36] the only case in recent years invalidating an economic regulation under the rationality test, as an erroneous departure from the proper equal protection analysis[37] and warned that the Court will not sit as a "superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."[38] The Court presumed such legislative provisions to be constitutional and stated that they need only be rationally related to a legitimate state interest.

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important elements of the employment at issue rests upon the conclusion that recruit training is legitimate and essential to successful performance as a police officer.

31. Private employers and state and local governmental units with fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year are covered by the Act. 42 U.S.C. § 2000e (b) (Supp. II 1972). Coverage also extends to the federal government. *Id.* § 2000e-16.

32. 426 U.S. at 247.

33. See the text at note 51, *infra*.

34. *See Equal Protection, supra* note 6, at 1077-87.

35. 96 S.Ct. 2513 (1976).

36. 354 U.S. 457 (1957).

37. 96 S.Ct. at 2518 (1976) (per curiam).

38. *Id.* at 2517.

In *Washington*, the Court recognized the merit in the arguments of those who attack the de facto - de jure distinction yet disapproved the impact approach.[39] Conceding that disproportionate racial impact is not irrelevant, the Court cited cases in various contexts spanning nearly one hundred years in which a greater showing was required to prove invidious discrimination.[40] The attitude of the Court is best reflected in the 1972 decision of *Jefferson v. Hackney*[41] in which the Court upheld a Texas statute allocating welfare benefits against an attack of disproportionate racial impact. The Court determined that the acceptance of this constitutional theory would "render suspect each difference in treatment . . . however lacking in racial motivation and however otherwise rational the treatment might be."[42]

Although not clearly stating which factors it will consider in ascertaining a purpose to discriminate, the Court did provide a broad outline of the nature of the analysis. The Court, without lengthy explanation, stated that an impermissible racial purpose can be proved by discriminatory administration of an impartial law; the totality of relevant facts, including disproportionate racial impact; and in jury selection contexts, by a total or disproportionate exclusion of blacks or use of non-neutral selection procedures.[43] Also, under certain circumstances the Court may infer a racially discriminatory purpose on the basis of impact, but only where the unbalanced effect is very difficult to explain on non-racial grounds.[44]

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39. 426 U.S. at 244-45. The Court expressed disagreement with court of appeals decisions in various contexts in which the appeals courts found racial discrimination on the basis of impact alone, and demanded justification going substantially beyond rationality.

40. *Id.* at 239-41. Cases ranged from *Strauder v. West Virginia*, 100 U.S. 303 (1879) (jury selection) to *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (school segregation).

41. 406 U.S. 535 (1972).

42. *Id.* at 548. *Cf.* Dandridge v. Williams, 397 U.S. 471(1970) (upholding AFDC program imposing a maximum grant of $250 per month regardless of family size). In *Washington* the Court also expressed concern that the impact approach would call into question a whole range of statutes that might be more burdensome to the poor and to the average black. 426 U.S. at 248.

43. 426 U.S. at 241-42.

44. *Id.* at 242. The majority does not elaborate on this point, but Justice Stevens in his concurrence suggests that the line between effect and purpose is indistinguishable when the disproportionate impact is as dramatic as in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (irrational gerrymander of city limits fencing out virtually all black voters) or *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (permits to operate laundries in wooden buildings issued to all but one of the non-Chinese applicants but to none of about 200 Chinese applicants). *Id.* at 254. The majority opinion, in citing jury cases as reflecting situations in which discriminatory purpose

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[45] the Court (applying the rule of *Washington* to a refusal to rezone a tract of land to permit construction of multi-family, integrated housing) furnished a more exact but nonexhaustive summary of factors probative of an intent to discriminate.[46] But more importantly the Court explained that if a racially discriminatory purpose even partially motivates a legislative decision the enactment is no longer deserving of deferential treatment.[47] This lack of deference does not mean that the Court will automatically subject illicitly impelled laws to strict scrutiny, rather, as the Court specified in dictum,[48] whenever a decision is motivated in part by a racial purpose, the burden shifts to the government to come forth with proof that the same determination would have resulted had the impermissible purpose not been considered. If this showing is made, judicial interference with the challenged decision is unwarranted.[49]

The Court is willing to invalidate only those laws propelled to passage by an overriding intent to achieve a discriminatory objective. Presumably instances will be few in which a discriminatory goal will be the *sine qua non* of a legislative decision.[50] Since in most cases the Court

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was appropriately found and in which it can also be inferred from impact, lends support to the observation of Justice Stevens.

45. 45 U.S.L.W. 4073 (Jan. 11, 1977).

46. *Id.* at 4077-78. In addition to the factors provided in *Washington*, the Court listed as relevant the historical background, especially if it reveals official bias; the specific sequence of antecedent events; departures from the normal procedural sequence; and substantive departures in decisionmaking where factors usually considered important strongly favor a contrary decision. The Court stated that legislative or administrative history is highly relevant, particularly where there are contemporary statements by decisionmakers, minutes of meetings, or reports.

47. *Id.* at 4078. The Court cites Brest, *supra* note 15, at 116-18 for a scholarly discussion of legislative motivation. Professor Brest suggests that the act of adoption, prompted by illicit motives, is itself an official insult independent of adverse effect. *Id.* at 116 n.109. While adverse effect may be benign, a collective legislative judgment decisively premised upon a desire to achieve such an effect is not.

48. Since the complainants did not establish that a discriminatory purpose was a motivating factor in the zoning decision, the Court's further explanation was unnecessary. 45 U.S.L.W. at 4078.

49. *Id.* at 4078 n.21. It seems just that the decisionmaker must come forth with proof that legitimate factors were actually considered and that these factors determined the outcome. To accept the argument that reasonable factors *could have* supported the decision would not dispel the repugnancy of the biased action.

50. Even if a racially discriminatory purpose played a decisive role in the judgment, decisionmakers will most likely disguise their true intentions. United States v. Texas Educ. Agency, 532 F.2d 380, 388 (5th Cir. 1976); *cf.* United States v. O'Brien, 391 U.S. 367, 383 (1968) (discreet lawmakers will stress only acceptable justifications). It is conceivable that a useful law could be invalidated under the

will only demand proof that racial animus was not determinative of passage, the rule of *Washington* serves primarily to insure that laws with an adverse racial impact do not also inflict less palpable harms.

Even though the facts in *Washington* limited the complaint to racial discrimination, the holding should logically extend to other classifications the Court has deemed suspect;[51] however, the Court should not apply the rule to those situations in which the demand for compelling justification rests upon the fundamental nature of the right affected[52] rather than upon the stigmatizing character of the classification. For example, in *Dunn v. Blumstein*,[53] the Court subjected Tennessee's durational requirement for voting to strict scrutiny, not because of the character of the disadvantaged group (new residents) but because the state cannot burden certain interests (voting and travel) except for compelling reasons. Because of the importance of certain rights, even legitimately motivated restrictions are unreasonable, and discriminatory intent should not be germane to the constitutionality of impingements on these interests.[54] Nevertheless, where intent is determinative, the Court will not apply strict scrutiny to impartial laws faulted only for disproportionate racial impact, and the import of the ruling in *Washington* is strengthened by the silence of the dissenters on the constitutional issue.

The holding on the question of job relatedness contains implications for Title VII, even though the Supreme Court, unlike the district court and court of appeals, decided the issue under other statutes.[55] But since the Court deemed the standard it applied to be similar to Title VII requirements,[56] the acceptance of validation for training course performance rather than actual job performance has significance for Title VII litigation. The dissenters perceived the result as inconsistent with *Griggs* and *Albemarle*[57] and contrary to the EEOC guidelines which the Court has previously endorsed.[58] The dissenters argued that if the Court permits

rule, but in such situations it is unlikely that there would be urgent reasons sufficient to justify lawful repassage until the stigmatizing effect of the previous enactment had dissipated.

51. See the cases cited in note 7, *supra*.

52. See the fundamental interest cases cited at note 8, *supra*.

53. 405 U.S. 330 (1971).

54. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

55. The Supreme Court decision was based on Civil Service provisions made applicable by D.C. Code § 1-320 (1973 & Supp. 1975).

56. 426 U.S. at 249.

57. *Griggs* and *Albemarle* are discussed in the text at notes 21-23, *supra*.

58. 426 U.S. at 259 (Brennan & Marshall, JJ., dissenting). The EEOC guidelines specify that noncriterion-related validity is appropriate only where criterion-related validation is not technically feasible. 29 C.F.R. § 1607.5 (1975).

validation of written qualification tests through correlation with scores on written training course exams, people who have good verbal skills will achieve high scores on both tests regardless of actual job-specific ability.[59] The majority, viewing a minimum level of communicative skill as practically essential to police work and accepting the legitimate need for recruit training, determined that a positive relationship between test scores and training course performance was sufficient validation. The Court found this approach a "much more sensible construction" of job relatedness and "not foreclosed" by *Griggs* or *Albemarle*.[60] However, the Court's willingness to forego proof that the test was predictive of actual job performance was based upon judicial cognizance[61] of the necessity of police training programs. This understanding may be lacking in other contexts.

Washington v. Davis is a pivotal case in the areas of equal protection and employment discrimination as defined by federal statutes. In evaluating future claims of unconstitutional racial discrimination, courts will no longer reason backwards from adverse impact to illicit purpose—nor will they avoid finding a discriminatory purpose by characterizing purpose as irrelevant. The decision also creates doubt whether the Court shares the EEOC's views on acceptable methods of test validation although the Court's brief treatment of the issue leaves few concrete impressions.

Robert G. Nida

ENFORCEMENT OF JUDGMENTS AGAINST GOVERNMENTAL ENTITIES: THE NEW SOVEREIGN IMMUNITY

A successful tort plaintiff sought to satisfy his judgment against a police jury by causing eighty acres owned by that entity but leased for agricultural purposes to be seized and sold after informal negotiations and numerous pleas for payment proved unfruitful. The Third Circuit Court of

59. 426 U.S. at 270.

60. *Id.* at 250-51. This "sensibleness" construction resembles the concept of construct validity which is demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance. *Id.* at 247 n.13. The court of appeals labeled this common sense theory as equivalent to a finding of construct validity. Davis v. Washington, 512 F.2d 956, 965, (D.C. Cir. 1975).

61. 426 U.S. at 250 (stating that the need for the program seems conceded; usefulness of minimum verbal skill apparent).